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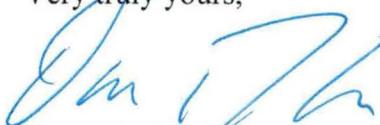
Ms. Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0012

**Re: *Application of the National Railroad Passenger Corporation under 49 U.S.C. § 24308(a) – Canadian National Railway Company (Docket No. FD 35743)***

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find the CN's Response to Amtrak's Reply to CN's Second Motion to Compel and Request for Leave to Respond.

Very truly yours,



David A. Hirsh

Counsel for Illinois Central Railroad Company and  
Grand Trunk Western Railroad Company

cc: All Parties of Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. FD 35743

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APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER  
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

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**CN'S RESPONSE TO  
AMTRAK'S REPLY TO CN'S SECOND MOTION TO COMPEL  
AND REQUEST FOR LEAVE TO RESPOND**

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May 19, 2014

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER  
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AMTRAK'S REPLY TO CN'S SECOND MOTION TO COMPEL  
AND REQUEST FOR LEAVE TO RESPOND**

**REQUEST FOR LEAVE TO RESPOND**

Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (together, “CN”)<sup>1</sup> respectfully request leave to file this brief response to Amtrak’s May 9, 2014 reply to CN’s second motion to compel responses (“MTC 2”). Amtrak’s reply raises new unfounded burden arguments and offers new “compromise” positions in light of which CN is willing to further narrow its requests. CN’s response will aid the Board by providing a more complete and accurate record and by narrowing the issues in dispute.<sup>2</sup>

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<sup>1</sup> CN herein adopts the same abbreviations and nomenclature referenced in footnote 1 of its second motion to compel.

<sup>2</sup> The Board has discretion to permit a reply to a reply, and it makes sense to do so when it narrows the issues. *See, e.g., Shell Oil Co. v. Bos. & Me. Corp.*, Docket No. 41670, 1997 STB Lexis 394, \*4 (STB served Dec. 15, 1997) (permitting a “reply to a reply” in support of a motion to compel where it “narrows, to a certain extent, the issues in dispute”). The Board also commonly permits replies to replies to create a more complete record. *See, e.g., Allied Erecting & Dismantling, Inc., & Allied Indus. Dev. Corp. – Pet. for Decl. Order – Rail Easements in Mahoning Cty., Ohio*, Docket No. 35316, 2013 STB Lexis 407, \*16 n.44 (STB served Dec. 20, 2013); *Ballard Term. R.R. – Acquisition & Operation Exemption – Woodinville Subdivision; BNSF Ry. – Abandonment Exemption – in King Cty., Wash. (Woodinville Subdivision)*, Docket No. 35731, 2013 STB Lexis 243, \*7 n.8 (STB served Aug. 1, 2013).

## RESPONSE

### I. Amtrak's New Burden Arguments

Amtrak claims that “[g]ranted this Second Motion to Compel would establish a troublesome discovery precedent that would open the door to a standard of relevance that would have no bounds and an outcome that would direct in the future the production of a vast amount of documents that have marginal, if any, relevance, without regard to burden or proportionality.” Amtrak Reply at 3-4. Not so. CN’s motion relied on conventional legal standards,<sup>3</sup> explained the relevance under those standards of the specific and limited classes of documents CN seeks,<sup>4</sup> and addressed potential burden concerns<sup>5</sup> as well as it could given Amtrak’s failure, in its objections and in several months since, to articulate them in other than boilerplate terms.

Amtrak attacks CN’s statement that in the *MTC 1 Decision* the Board “rejected Amtrak’s argument that its relationships with other Host Railroads are irrelevant.” Amtrak Reply at 5 (quoting MTC 2, at 9). But CN’s statement is true: that was Amtrak’s main argument against CN’s RFP 5, and it was rejected. Amtrak goes on to say that “[t]he Board did not state that any and all aspects of Amtrak’s commercial dealings with every other Host Railroad are relevant and discoverable.” *Id.* at 6. Of course it did not. Many aspects of those dealings may be irrelevant. That is why CN has sought only the three categories of documents most likely to affect the resolution of important issues in this proceeding: operating agreements, documents related to when and how Amtrak should contribute to infrastructure investment on host railroad lines, and

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<sup>3</sup> See MTC 2, at 6 (quoting Board discovery precedent).

<sup>4</sup> See *id.* at 8-9, 10-13.

<sup>5</sup> See *id.* at 9, 10 n.11, 13-14 & n.12.

documents that address whether and when delays to Amtrak trains should be coded in a manner that attributes responsibility to a host railroad. Burden should of course also be considered.

Burden is an issue as to which the producing party has all the information: it knows what documents it has, how they are maintained, what electronic and/or human searches and review would be required, and what, if any limitations would be necessary to limit the burden of production. Accordingly, the law requires the party resisting discovery on grounds of burden to explain and substantiate the burdens involved.<sup>6</sup> Amtrak has not done so.

Amtrak asserts that “CN would have the Board believe that Amtrak is producing minimal documents of little value” when, according to Amtrak, it is “in the process of providing hundreds of thousands of documents that relate to the requests CN has made.” Amtrak Reply at 3. CN in fact said nothing about Amtrak’s production in response to CN’s other unrelated requests, and for good reason. That production is beside the point. The burden of producing unrelated documents does not speak to the burden of producing the documents at issue and, insofar as Amtrak has failed to show that other documents relate either to the relevance or need for the

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<sup>6</sup> See, e.g., *Myers v. Casino Queen, Inc.*, 2013 U.S. Dist. Lexis 91867, \*2-\*3 (E.D. Mo. July 1, 2013) (“The party resisting production bears the burden of establishing lack of relevancy or undue burden. The party must demonstrate to the court that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure. Further, the mere statement by a party that the interrogatory or request for production was overly broad, burdensome, oppressive and irrelevant is not adequate to voice a successful objection.”) (citations omitted); *Cartagena v. Centerpoint Nine, Inc.*, 2014 U.S. Dist. Lexis 32447, \*5-\*6 (D.D.C. Mar. 13, 2014) (“The party moving to compel production of documents bears the initial burden of explaining how the requested information is relevant. Once that showing is made, however, the burden shifts to the objecting party to explain why discovery should not be permitted.”) (citations omitted); *G.D. v. Monarch Plastic Surgery, P.A.*, 2007 U.S. Dist. Lexis 5509, \*8 (D. Kan. Jan. 22, 2007) (“In opposing discovery on the grounds of burdensomeness, a party has the burden to show facts justifying their objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail in terms of time, money and procedure required to produce the requested documents.”) (citations omitted).

information at issue, they are irrelevant to the present question before the Board. Nonetheless, since Amtrak raised the issue, the Board should understand that to date Amtrak has produced just 660 documents, and most of that production is of little or no value to CN because, as Amtrak knows, it consists of items that CN already has.

As to the requests at issue, Amtrak claims they call for a “massive number of additional documents” (Amtrak Reply at 3), or a “vast amount of documents” (*id.* at 4), or impose a “massive burden” (*id.* at 6 n.2, 9 n.3). But “massive” and “vast” are just conclusory adjectives, and add no substance to Amtrak’s boilerplate claim of “undue burden.”<sup>7</sup> Amtrak says nothing about what electronic or human searches would be needed to find responsive documents, where and how they are kept, or what number of sources or volume of documents is encompassed by each request and each aspect of each request, or about how it might propose to limit the requests to reduce the burden while providing a meaningful response. Its *ipse dixit* “fail[s] to demonstrate how” the discovery requested “would be unduly burdensome.”<sup>8</sup>

Amtrak cites a few supposed examples of burden, but these rely on overstatements of the scope of CN’s requests. Amtrak treats RFP 8 as an unlimited request for “documents relating to potential capital expenditures” and claims it “would involve every single communication about every single thought concerning any possible expenditure.” Amtrak Reply at 8. But CN

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<sup>7</sup> Such “boilerplate, generalized responses are not sufficient to satisfy a party’s discovery obligations.” *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, Docket No. WCC-104, slip op. at 8 (STB served Oct. 27, 2000).

<sup>8</sup> See, e.g., *Canadian Pac. Ry. Co., et al. – Control – Dakota Minn. & E. R.R., et al.*, Docket No. FD 35081 (Sub. No. 2), 2014 STB Lexis 72, \*7 (STB served Mar. 26, 2014); see also *Ariz. Elec. Power Coop. v. Burlington N. & S.F. Ry.*, Docket No. 42058, 2002 STB Lexis 527, \*7 (STB served Sept. 11, 2002) (granting motion to compel BNSF to produce multi-state cost data where “BNSF’s objections relating to burden are conclusory and unpersuasive”); *Minn. Power, Inc. v., Duluth, Missabe & Iron Range Ry.*, Docket No. 42038, 4 S.T.B. 64, \*15-\*16 (STB served May 11, 1999) (granting motion to compel where respondent objecting on burden grounds “has not substantiated the alleged burden”).

previously offered to limit this aspect of RFP 8 to documents that “propose, analyze, approve, or disapprove” expenditures, in accordance with its own response to a similar Amtrak request.

MTC 2, Ex. 4. Similarly, with respect to Interrogatory 17(b), Amtrak notes that it runs 280 one-way trips per day on over twenty-five Host Railroads, and claims “[a]ll documents relating to those trains would be discoverable under CN's Motion to Compel.” Amtrak Reply at 11. But that claim ignores the text of RFP 17(b), which by its terms is limited to criticisms, complaints, assessments, and the like. It also ignores CN's statements to Amtrak regarding the information CN seeks (*see* MTC 2, at 13-14 and at Ex. 4, at 3).

## **II. Narrowed Issues For RFPs 8 and 14 and Interrogatory 17(b)**

In light of Amtrak’s new concessions discussed in this section, and in order to eliminate the main concerns asserted by Amtrak regarding burden, and thus narrow the issues in dispute, CN herein agrees to further limits on the scope of its requests, including making clear that the “guidance” it previously offered may be taken as a limitation.<sup>9</sup>

### **A. RFP 8 (infrastructure funding)**

Amtrak recites RFP 8 and says that it will “produce all such documents that pertain to CN for the time period from 2008 forward,” including agreeing for the first time that it will produce all documents relating to potential expenditures.<sup>10</sup> Amtrak Reply at 7. It also states for the first

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<sup>9</sup> With respect to RFPs 9-10 and Interrogatory 20, as to which Amtrak offers no meaningful burden argument and no concessions, for the reasons stated in CN’s motion, Amtrak should be compelled to respond fully.

<sup>10</sup> Amtrak claims that CN should have understood its new position on RFP 8 because “Search 5” of its April 23 draft electronic search terms (MTC 2, Ex. 6, at 2) is not limited to “actual” expenditures or contributions actually made by Amtrak (of which, as CN explained, there are none of substance). Amtrak Reply at 7. But Search 5 did not differ materially from Amtrak’s earlier Search 2, and Amtrak had twice affirmed in writing – once the day it forwarded Search 2 and once after – that it “would not agree to provide documents pertaining to ‘potential’ capital expenditures” (MTC 2, Ex. 3, at 1; MTC 2, Ex. 5). Moreover, Amtrak reaffirmed that same

time that for other host carriers it is willing to “provide CN with documents about capital expenditures Amtrak has actually made.” *Id.* That representation, however, would exclude “potential” capital investments on the lines of other host carriers, that is, the documents of the same nature that Amtrak has finally agreed to produce with respect to CN’s lines. This proposed exclusion is no more warranted with respect to other hosts than it was with respect to CN’s lines. Infrastructure investment is directly at issue in this proceeding, given the burdens placed on CN’s capacity by Amtrak’s service demands. Documents addressing that issue in similar contexts involving Amtrak and a host railroad, both when Amtrak has agreed to contribute and when it has refused, can assist the Board in resolving that issue.

Amtrak expresses concern that the concept of “potential” investments may be interpreted too broadly. CN already offered a compromise to address that and other concerns with respect to the scope of RFP 8 (*see* MTC 1, Ex. 4). Now, in order to meet Amtrak’s concern, CN is willing unilaterally to limit RFP 8 to documents that “propose, analyze, approve, or disapprove” of potential capital investments. Furthermore, CN reaffirms that it is not requesting, as Amtrak suggests, every document that ever considered any possible capital investment, but rather only those documents pertaining to capital investments that were made or proposed by or to Amtrak.

In addition, in order to further reduce Amtrak’s burden, with respect to other (non-CN) hosts, CN is willing to limit RFP 8 to the lines of the six other Class I carriers.

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position in its meetings with CN the day before it sent its revised search terms (*see* MTC 2 at 5), and it forwarded the revised search terms without noting any change in this position. In any event, search terms themselves provide only a review screen (*i.e.*, they are used to exclude documents from further review), and thus cannot provide a definitive understanding of the documents to be produced. Amtrak had ample opportunity to tell CN of its reversal of position prior to its response to the motion to compel, but it did not do so.

**B. RFP 14 and Interrogatory 17(b) (classification and coding of delays)**

Amtrak continues to resist production of documents under RFP 14 “relating to the classification or coding of delays to Amtrak trains . . . for purposes of [Amtrak’s] Operating Agreement[s]” with other host railroads, even though CN previously agreed to limit that request to the other six Class I railroads and to the period May 1, 2011 to October 31, 2013 (MTC 2, Ex. 1, at 3). In addition, as discussed in Section I, based on arguments that are inconsistent with the text of CN’s request and CN’s stated intentions, Amtrak resists production in response to Interrogatory 17(b) of information related to other host carriers or to any complaints and criticisms of its implementation of policies and practices related to delay coding.

On March 31, 2014, CN offered in the context of Interrogatory 17(b) specific “guidance” concerning the documents it seeks regarding the classification and coding of delays. Amtrak Reply at 10 n.4 (referencing CN’s prior “guidance” discussed at MTC 2, at 13-14). Amtrak could have offered a limited response in light of that guidance, but it chose not to do so.<sup>11</sup> Instead, it now complains that CN’s “guidance” was not a sufficiently certain limitation on its discovery.<sup>12</sup> Notwithstanding Amtrak’s disappointing failure to engage, CN is willing to address Amtrak’s purported burden concerns by formally limiting RFP 14 and Interrogatory 17(b) to:

[D]ocuments relating to criticisms and assessments of (i) the way Amtrak has interpreted and deployed its various delay codes, (ii) Amtrak’s internal processes for and inconsistencies in reviewing coding issues, and (iii) Amtrak decisions regarding reporting,

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<sup>11</sup> See MTC 2, Ex. 5 (Amtrak counsel stating “I am not in a position to agree to any change in Amtrak’s responses at this time.”).

<sup>12</sup> Amtrak also states that the limitations “in any event would not minimize” Amtrak’s burden of production. Amtrak Reply at 10 n.4. But that misses the point. (After all, eliminating discovery entirely would “minimize” Amtrak’s burden.) The point is that the limitations reduce Amtrak’s burden and reasonably balance it against CN’s discovery rights.

publication, or correction of delay coding (*e.g.*, imposing time limits on carriers seeking to identify coding errors).<sup>13</sup>

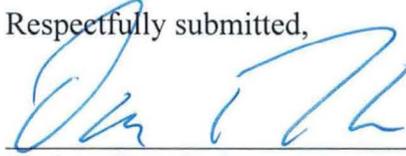
Moreover, in order to eliminate Amtrak's stated concern that Interrogatory 17(b) could require it to provide information regarding "twenty-five" other host railroads (Amtrak Reply at 11), with respect to the non-CN host carriers, CN agrees to limit Interrogatory 17(b) to the other six Class I carriers (as it does above for RFP 8 and did previously for RFP 14).

### CONCLUSION

CN respectfully requests that the Board permit this limited response and, in accordance with the limitations on CN's discovery set forth herein, asks the Board to order Amtrak to (1) produce the documents called for by RFPs 8, 9, 10, and 14, and (2) provide complete responses to CN's Interrogatories 17(b) and 20.

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Respectfully submitted,



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May 19, 2014

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<sup>13</sup> CN has stated clearly that it is not seeking documents that merely contain delay codes but do not explain or discuss them. Thus, Amtrak's On-Time Performance Monitoring System (*see* Amtrak Reply at 10), which contains, but does not discuss the assignment of, delay codes, is no substitute for the documents CN seeks.

**CERTIFICATE OF SERVICE**

I certify that I have this 19th day of May, 2014, caused a true copy of the foregoing CN'S Response to Amtrak's Reply to CN's Second Motion to Compel and Request for Leave to Respond, to be served by e-mail upon:

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