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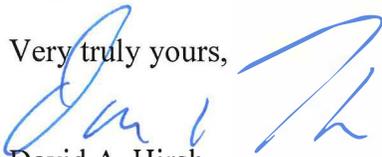
Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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 Confidential version of CN's Motion to Remove the Confidentiality Designation for Portions of Amtrak's Opening Submissions, which is being submitted under seal in accordance with the Protective Order entered by the Board in this proceeding on December 16, 2013, on behalf of Illinois Central Railroad Company and Grand Trunk Western Railroad Company, as well as a Public version of that Motion, to be filed on the public record of this proceeding.

Very truly yours,


David A. Hirsh

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

Enclosure

cc: Linda J. Morgan, Esquire
William H. Herrmann, Esquire

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**CN MOTION TO REMOVE THE CONFIDENTIALITY DESIGNATION
FOR PORTIONS OF AMTRAK'S OPENING SUBMISSIONS**

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October 28, 2015

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**CN MOTION TO REMOVE THE CONFIDENTIALITY DESIGNATION
FOR PORTIONS OF AMTRAK’S OPENING SUBMISSION**

Pursuant to paragraph 8 of the Board’s Protective Order served in this proceeding on December 16, 2013, Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, “CN”) hereby move for portions of Amtrak’s opening submissions to be re-designated as public.¹ In order to identify (a) the specific portions of those statements that CN contends should be made public (highlighted in yellow), and (b) the redactions by Amtrak that CN does not oppose (highlighted in green), attached to the confidential version of this motion as Exhibits A, B, and C, respectively, are copies of the body of Amtrak’s Opening Statement (“Amtrak Op. St.”), the body of the Verified Statement of Paul Vilter (“Vilter V.S.”), and the Verified Statement of Benjamin Sacks (“Sacks V.S.”).²

¹ As elaborated below, prior to filing this motion, CN counsel conferred with Amtrak counsel in an effort to resolve these issues.

² CN challenges all redactions in Attachments 4, 5, and 7 of Vilter V.S., but it does not challenge redactions in Attachment 1 to Amtrak’s Opening Statement or Attachments 1-3 and 6 of Vilter V.S. Since highlighting specific redactions for these attachments is not useful, they are not included in Exhibits A and B.

With no reasonable basis for doing so, Amtrak has designated large portions of its opening submission as confidential, including both information already in the public domain and the essential elements of Amtrak's proposed terms for an agreement under which it would operate over CN's lines. Amtrak's position as to what constitutes a "reasonable" operating agreement with a freight railroad host, and what it is asking the Board to order CN to do, should be public; CN should have the opportunity to respond publicly; and the Board should be free to publish a decision that fully describes and addresses the parties' proposals publicly so that its decision can have meaningful precedential effect in this area infused with broad public policy implications.

This motion goes to the heart of basic principles of open government. The Board's proceedings always have been, and must continue to be, open. There are certain categories of information that are properly protected by protective orders because of compelling private confidentiality interests. But absent such compelling interests, the substance of the Board's proceedings must be public. Parties filing before the Board should be accountable for their positions; opposing parties should not be subject to unnecessary gag orders; and the Board should be able to issue decisions identifying and addressing the positions and arguments of the parties so that it can generate precedents that can be understood and evaluated by the public.

Amtrak's redactions violate this basic principle. Amtrak seeks both prospective and retrospective compulsory relief against CN, but it has designated both the substance of what it seeks and much of its rationale as confidential, apparently for no other reason than its desire to conceal its proposal from other host railroads and the public. If that designation stands, the public will be denied timely access to information to which it is entitled regarding matters of public interest, Amtrak will evade accountability for its litigating positions, and the Board's

decision will be reduced to a secret precedent, inscrutable to all except the individuals participating in this proceeding.

The Board has never sanctioned such an approach. It certainly should not do so here, in a proceeding involving Amtrak. Amtrak is accountable to the public in a way that a purely private litigant is not, and its operations, including its relationships with the railroads that host most of its trains, are a matter of public interest. The Board should not allow its protective order to be used to shield from public scrutiny important information about the compensation and penalties Amtrak proposes for railroads compelled to host its trains.

BACKGROUND

Amtrak's Application and the Board's Protective Order

Amtrak initiated this proceeding with an application that petitioned the Board to prescribe new terms and compensation for the CN-Amtrak operating agreement pursuant to 49 U.S.C. § 24308(a)(2), and to have those new terms apply retroactively. On December 16, 2013, the Board entered a Protective Order for this proceeding, which is similar to the protective orders issued for other STB proceedings. It permits the parties to designate documents or information they produce or file as “confidential,” which it defines as follows:

“Confidential Information” means confidential freight traffic data, confidential financial and cost information, confidential personnel information, confidential agreements, and other confidential and proprietary information.

Protective Order ¶ 1(c). That definition is subject to an exception:

Information that is publicly available, or obtained outside of these Proceedings from a person with a right to disclose it publicly, shall not be subject to this Protective Order, even if the information constitutes Confidential Information.

Protective Order ¶ 18.

Once material is designated, the Protective Order imposes strict rules to prevent its publication and limit its use. Confidential information and documents:

- “may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has [signed] a confidentiality undertaking” (*id.* ¶ 5);
- “may not be used by any person, other than the person providing it, for any purposes, including without limitation any business, commercial, strategic, or competitive purpose, other than the preparation and presentation of evidence and argument in these Proceedings” (*id.* ¶ 9);
- must be destroyed, along with all notes reflecting it, “at the completion of these Proceedings” (*id.* ¶ 10);
- cannot be included “in any pleading, brief, or other document” submitted to the Board unless it is submitted under seal, and “[a]ll such pleadings and documents shall be kept confidential by the Board” (*id.* ¶ 11);
- must likewise be submitted under seal in any court proceedings (*id.* ¶ 12);
- cannot be discussed in Board hearings or arguments open to the public (*id.* ¶ 13);
- cannot be used in depositions unless attendance is restricted to individuals who have signed a confidentiality undertaking under ¶ 5 (*id.* ¶ 14); and
- cannot be disclosed as “required by law or order of a governmental or judicial body” without prior notice and opportunity for the designating party to object (*id.* ¶ 15).

Under the Protective Order, information or documents designated as confidential may become public, and cease to be subject to these restrictions, in two ways. First, the designating party may make public confidential information that is solely its own, thereby waiving the confidentiality of the information it discloses. *Id.* ¶ 17. Second, as CN is doing through this motion, any party “may challenge the designation by any other party . . . of information or documents as ‘CONFIDENTIAL’ . . . by filing a motion with the Board or with an

administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.” *Id.* ¶ 8.³

Amtrak’s Opening Submission and Redactions

Opening submissions of both parties were due on September 4, 2015. On that date, CN filed a public version and a version under seal, and Amtrak filed a version under seal. Amtrak filed its public version four days later.

Amtrak’s opening submission consists of three statements, plus exhibits and appendices. As illustrated in the following table, Amtrak heavily redacted in the public version each of the three statements and most of the attachments:

AMTRAK OPENING SUBMISSION REDACTIONS

	Amtrak Op. St.	Vilter V.S.	Sacks V.S.	Combined Total	Combined Percentage
TEXT					
Total Pages	19	19	23	61	100%
Redacted Pages	12	17	10	39	64%
Pages with 50%+ Redacted	8	11	8	27	44%
Pages with 90%+ Redacted	2	8	6	14	23%
ATTACHMENTS					
Number of Attachments	1	7	7	15	100%
Number of Attachments with 50% or More Redacted	1	5	4	10	67%
Number of Attachments with 90% or More Redacted	1	5	1	7	47%

³ This dispute is about the interpretation of the Board’s Protective Order and its application to substantive filings, which implicates important legal and policy issues, as well as the Board’s future ability to produce meaningful public precedents. It is not a discovery dispute and, therefore, is not subject to the delegation of authority that has been made to Judge Dring in this proceeding. *See* Order served April 30, 2015.

While striking, the above quantitative measures do not convey the full significance of Amtrak's redactions. Amtrak has redacted most substantive and disputed points, while leaving unredacted less significant prefatory discussions of, for example, procedural history and the Board's statutory authority.⁴ Its redactions therefore conceal key aspects of the terms it asks the Board to impose on CN. For example, the following sections are almost entirely redacted:

- The two-and-a-half page section headed "The Penalty" (Amtrak Op. St. at 14-16) in the public version of Amtrak's opening statement, which addresses one of the principal changes to the CN-Amtrak operating agreement that Amtrak proposes;
- Pages 12-23 in the public version of the verified statement of Benjamin Sacks, which state both the "goal" and the specifics of Amtrak's proposal as to penalties and performance payments; and
- Pages 4-10 in the public version of the verified statement of Paul Vilter, which state Amtrak's criticisms of the current operating agreement, plus pages 12-14, which describe Amtrak's penalty proposal, plus Amtrak's statement at pages 14-15 of the purported advantages of its proposal over the current agreement.

Amtrak's over-redaction hides its proposal and its impacts from the public, and in combination with paragraphs 5 and 11 of the Protective Order creates a virtual gag order precluding CN from publicly discussing – in its rebuttal papers, with interested public officials, or with shareholders – the relief Amtrak requests. For example, given the complete redaction of Figure 10 on page 22 of the Sacks verified statement and related parts of Amtrak's opening submission, CN cannot disclose publicly that under Amtrak's proposal, if CN achieved the PRIIA standard set by Amtrak (with FRA) of 900 minutes of "Host-Responsible Delay" per 10,000 miles on all of the Amtrak services CN hosts, [REDACTED]

⁴ See, e.g., Amtrak Op. Stmt. at 1-3, 5-6.

[REDACTED]

[REDACTED]

[REDACTED]

Negotiations between Counsel

CN's counsel conferred with Amtrak's counsel and made diligent efforts to resolve this matter before filing this motion. Within two days of Amtrak's September 8 filing of the public version of its opening submissions, CN's counsel asked Amtrak's counsel to do what CN had already done for Amtrak: provide a version of the opening submissions redacting only information claimed as confidential by the filer (in this case, Amtrak), and not redacting information redacted in the public version based on the receiving party's (in this case, CN's) confidentiality rights. On September 14, CN's counsel reiterated this request in an email, and Amtrak's counsel responded that all of Amtrak's redactions are for material claimed as confidential by Amtrak, save for the CN emails referenced and attached in Amtrak's Opening Statement. On September 24, CN's counsel followed up, stating CN's position that Amtrak has over-designated its opening submissions as confidential, explaining CN's position, and attaching a detailed proposal as to what should be unredacted, including word-by-word markups of all three Amtrak statements and specific proposals regarding each of Amtrak's attachments. After various additional communications between counsel, Amtrak responded with a counter-proposal on October 13, the content of which Amtrak insisted, and CN agreed, is confidential. After further confidential discussions between counsel, CN concluded that further negotiations would not satisfactorily resolve this issue, and therefore filed this motion.

ARGUMENT

I. Based on Open Government Principles, the Board Does Not Permit Filing under Seal without Compelling Justifications, and the Parties' Proposals in Section 402 Cases Should Be Public.

A. Open Government Principles

Fundamental principles of open government enshrined in the common law and the First Amendment require that absent specific good cause, adjudicatory or quasi-adjudicatory proceedings before a judicial or quasi-judicial tribunal be open to the public, not sealed. *See, e.g., Nixon v. Warner Cmcs., Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public documents, including judicial records and documents.”); *Press-Enterprise Co. v. Superior Court of Calif.*, 464 U.S. 501 (1984) (granting trial defendant’s petition to compel public release of transcript). These principles apply to civil proceedings no less than to criminal proceedings, *see, e.g., Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 158, 161-62 (3d Cir. 1993); *Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), and to quasi-judicial regulatory proceedings no less than to court proceedings, *see, e.g., N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 302 n.12 (2d Cir. 2011) (describing “quasi-judicial administrative proceedings” as having an “analogously strong tradition of public access” as compared with court proceedings).

Sealed filings impose significant costs on litigants, judicial and regulatory processes, and the public interest. When filings are sealed, opposing litigants are constrained in their ability to receive assistance from and consult with similarly situated parties and others who may be able to help them respond; they are put to the burden of redacting the public version of their response to avoid allegations that they have breached the protective order; they are prevented from fully

explaining their position to the public and to interested government officials; and they are impeded in efforts to seek public, *amicus curiae*, or intervenor support. Simply put, broad redactions like Amtrak's unnecessarily and unfairly burden opposing litigants and deny interested parties and the public the information to which they are entitled regarding key matters in this proceeding, which are of broad public interest and significant precedential importance.

As courts have found, "the presumption that the public has a right to inspect and copy judicial records serves numerous salutary functions," *Leucadia*, 998 F.2d at 161, and, conversely, unnecessary redaction harms the judicial or regulatory process and the public interest. When a party's position and much of its rationale are concealed behind a protective order, as Amtrak's currently are, the decision-maker – here, the Board – cannot formulate a reasoned public explanation of whether, to what extent, and why it accepts that party's position. In other words, it cannot generate a useable public precedent. Nor can the public, or interested government officials, make an informed judgment as to whether the parties and/or the tribunal conducted themselves properly. As the Seventh Circuit has explained:

The public's right of access to court proceedings and documents is well-established. Public scrutiny over the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding.

Grove Fresh, 24 F.3d at 897.⁵

⁵ To similar effect, the Third Circuit has stated that:

The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.

Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988). As the reference to "other branches of government" reflects, this rationale equally applies to Board proceedings.

For these reasons, sealing and redaction of filings under protective orders must be the exception, not the rule, and requires affirmative justification:

The First Amendment presumes that there is a right of access to proceedings and documents which have “historically been open to the public” and where the disclosure of which would serve a significant role in the functioning of the process in question. This presumption is rebuttable upon demonstration that suppression “is essential to preserve higher values and is narrowly tailored to serve that interest.” The difficulties inherent in quantifying the First Amendment interests at issue require that we be firmly convinced that disclosure is inappropriate before arriving at a decision limiting access. Any doubts must be resolved in favor of disclosure.

Id. Therefore, “[t]he burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption.” *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986) (“*BANTSA*”).⁶ Consistent with this principle, as discussed below, in considering challenges to redactions, the Board has required the proponent of redaction to justify its confidentiality claim.

B. Board Precedent and Practice

The Board’s precedent and practice uphold these open government principles. Protective orders are often used in Board proceedings to facilitate discovery, and certain kinds of Board proceeding – for example, rate proceedings – involve confidential and competitively sensitive cost and individual shipper data which present a compelling case for redacting public filings.

⁶ See also *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (“Rule 26(c) places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.”).

However, even in those proceedings, the Board has been vigilant to prohibit over-designation. In *Ex Parte No. 638*, for example, the Board prohibited the practice of parties in rate cases “treat[ing] as confidential virtually their entire case.” *Procedures to Expedite Rail Rate Challenges to Be Considered under the Stand-Alone Cost Methodology, Ex Parte No. 638*, 2003 STB Lexis 162, *18 (STB served April 3, 2003). The Board explained that filing virtually the party’s entire case under seal is “contrary to our regulations, our practice in other types of proceedings, and the spirit of open government.” *Id.* (citations omitted). Similarly, in *CF Industries, Inc. v. Koch Pipeline Co., L.P.*, the Board issued two consecutive orders overruling the parties’ over-designation of their evidentiary submissions. The Board explained that doing so was necessary to ensure that “in making our decision, we would ‘not be inhibited by an overly protective designation,’ [since] we must be able to refer to and address the evidence in a meaningful way.” 4 S.T.B. 637, 638 n.3 (2000) (citation omitted).

Upholding “the spirit of open government,” and consistent with the judicial precedent that places the burden on the designating party to justify confidentiality designations, the Board has on several occasions required parties to re-designate challenged sections of substantive filings that they failed to affirmatively demonstrate merit confidential or highly confidential treatment. *See, e.g., Total Petrochems. USA, Inc. v. CSX Transp., Inc.*, No. NOR 42121, 2011 STB Lexis 341, *8 (STB served July 15, 2011) (ordering re-designation where the filer “has not explained why the content of the subject evidence . . . is properly designated as ‘Highly Confidential.’”); *Cent. Or. & Pac. R.R., Inc. – Abandonment & Discontinuance of Service – in Coos, Douglas & Lane Cties, Or.*, No. AB-515 (Sub-No. 2), slip op. at 4-5 (STB served Aug. 15, 2008) at 4-5 (ordering re-designation from highly confidential to confidential where filer “has not explained how this would put it at a competitive disadvantage,” notwithstanding movant’s

arguable failure to “articulate[] any compelling reason why re-designation is necessary”). In doing so, the Board has recognized that over-designation “imposes unnecessary costs on all interested parties using that information” even if they have access to it. *Id.* at 3 (citations omitted) (ordering re-designation as public of “materials that are not truly confidential”).

The case for openness is particularly compelling in the present context – a Section 402 proceeding between Amtrak and a host railroad. With few exceptions, this type of proceeding does not implicate the types of data generally deemed confidential in Board proceedings.⁷ More importantly, this is a dispute about how the commercial relationship between Amtrak and host railroads should properly be structured and according to what legal, public policy, and economic principles. These are matters of broad and important public policy, with implications that go far beyond the two parties directly involved. The parties, for example, have asked the Board to address general principles such as:

- whether the “incremental costs” Amtrak must pay a host railroad under 49 U.S.C. § 24308(a)(2)(B) include freight delay and interference costs caused by Amtrak, and, if so, how such costs are to be proven and quantified;
- whether and how inadequate and outdated schedules should be updated;
- whether performance payments and penalties should be determined on the basis of percentage on-time performance, taking into consideration agreed relief items and tolerances, or whether they should be determined based on levels of what Amtrak unilaterally categorizes as “Host-Responsible Delay” (“HRD”);

⁷ For example, only a small part of CN’s opening submissions, and none of Amtrak’s opening submissions, implicate the proprietary confidential data of third parties, such as shippers, or the proprietary confidential data of carriers relating to their confidential individual shipper relationships. Nor have the parties submitted much in the way of confidential cost data (since, to establish its incremental costs of hosting Amtrak recoverable under 49 U.S.C. § 24308(a)(2)(B), CN has generally relied on the public cost data it is required to file with the Board, in accordance with the historical practice of Amtrak, hosts and the Board in Section 402 cases).

- if the latter, at what level or levels of HRD performance payments and penalties, respectively, should apply, and on what basis performance payments and penalties should be calculated; and

- [REDACTED]

Because they involve issues of principle that recur both when Amtrak's operating agreements with the same host are due for renewal and when Amtrak gets into disputes regarding operating agreements with other hosts, Section 402 proceedings are inherently precedential. And as the National Cooperative Highway Research Program has explained, in a report published under the auspices of a panel that included Amtrak witness Paul Vilter among its members, the Board's precedents serve important public functions:

There is a significant case history of past decisions and other legal proceedings related to Amtrak service and the likely outcome of referring a dispute to the [National Arbitration Panel] or the STB is somewhat predictable. This predictability tends to simplify negotiations, and disputes can be resolved relatively easily.⁸

To provide that guidance, both the outcomes and the rationales of the Board's decisions must be public, which means that the parties' proposals must be public so that the Board can discuss them in its decision and order. That has consistently been the Board's practice (and before it, the ICC's) – and the practice of Amtrak and hosts – in Section 402 proceedings. *See, e.g., Application of Nat'l R.R. Passenger Corp. under 49 U.S.C. § 24308(a) – Springfield Term. Ry. Co., Boston & Me. Corp., & Portland Term. Co.*, 3 S.T.B. 157, 159, 164 (1998) (“*Guilford*”) (publicly disclosing the precise amount of two incremental cost line items Amtrak proposed to

⁸ National Cooperative Highway Research Program Report 657, *GUIDEBOOK FOR IMPLEMENTING PASSENGER RAIL SERVICE ON SHARED PASSENGER AND FREIGHT CORRIDORS*, at 60 (2010), available at <http://www.nap.edu/catalog/14376/guidebook-for-implementing-passenger-rail-service-on-shared-passenger-and-freight-corridors> (“NCHRP Report”); *see also id.* at B-4 – B-6 (describing Section 402 precedent).

pay its host); *id.* at 168 (publicly disclosing and adopting details of Amtrak’s penalties and incentives proposal); *Nat’l R.R. Passenger Corp. & Consolidated Rail Corp. – Application under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Compensation*, 10 I.C.C.2d 863, 868 (1995) (“*Conrail*”) (publicly detailing both parties’ proposals regarding maintenance of way compensation). The Board should adhere to that practice, and to the principles of open administration, in this proceeding, and not permit Amtrak to cast a cloak of secrecy over the parties’ and the Board’s discussion of Amtrak’s proposal and arguments.

II. Most of Amtrak’s Redactions, Including Its Redaction of Key Elements of Its Proposal, Are Unjustified

In the public version of its opening submissions, Amtrak has redacted key elements of its proposal, substantial discussion of facts that are already lawfully public, and discussion of non-commercially-sensitive facts in which it has no plausible claim of confidentiality. Amtrak appears to assume that it has *carte blanche* to conceal its proposal and arguments from the public. Amtrak’s approach is contrary to the law and to the Board’s practice, and should be rejected.

Broadly speaking, Amtrak’s opening submissions address three main topics:

- 1) the structure of the current operating agreement between Amtrak and CN, and Amtrak’s views thereon;
- 2) delays to Amtrak trains on routes hosted or partly hosted by CN, and Amtrak’s views on the causes of those delays; and
- 3) Amtrak’s proposals for a new operating agreement and for retroactive relief against CN.

Amtrak has heavily redacted its discussion of each of these topics. As CN’s markups in Exhibits A, B, and C reflect, CN believes that a small portion of Amtrak’s redactions are appropriate.⁹ But the remainder – the vast majority – of Amtrak’s redactions are unjustifiable.

⁹ Specifically, Amtrak has appropriately redacted: (i) specific and unique financial details – as opposed to general, common structural features – of the current operating agreement between the

A. Discussion of the Current Operating Agreement

This proceeding is about rival proposals to change the relationship that already exists between CN and Amtrak under their current operating agreement. It cannot be intelligently addressed without substantial discussion of the current agreement, [REDACTED]

[REDACTED].

That agreement contains no confidentiality provision. And the general structure of Amtrak's operating agreements, including its agreement with CN, is a matter of public knowledge, having evolved in the 1970s and through various ICC and Board decisions.¹⁰

parties which have not been made public (Amtrak Op. St. at 4 (incentive payments number), 7 (incentive payments numbers), 8 n.11 (last sentence); Vilter V.S. at 4 (incentive payments numbers), 4 n.6 (first sentence), 8 n.17, 10 n.19 (last sentence), 9 n.18, 18 (third sentence); Sacks V.S. at 22 [REDACTED]

[REDACTED]); (ii) confidential and sensitive internal corporate communications produced under a confidentiality designation in discovery (Amtrak Op. St. at 9, 11; Amtrak Op. St., Att. 1); and (iii) a confidential pre-litigation settlement negotiation document (Sacks V.S., Appx. G).

¹⁰ See, e.g., NCHRP Report at 60 (Amtrak-freight host operating agreements "have typically specified performance payments based on system-wide OTP" with a "bonus threshold"); *id.*, App. B at B-4 (in *Guilford* the Board "imposed the normal Amtrak provision that monthly incentives begin when trains are operated 80 percent on time and that penalties become payable in any month that trains are operated less than 70 percent on time. This provision is in effect with nearly every other railroad."); Federal Railroad Administration, METRICS AND STANDARDS FOR INTERCITY PASSENGER RAIL SERVICE, No. FRA-2009-0016, at 13-14, 16-21 (2009), available at <https://www.fra.dot.gov/eLib/Details/L02875> (discussing structural features and terms such as Endpoint OTP tolerances, pure run time, and recovery time); Federal Railroad Administration, AMTRAK CASCADES AND COAST STARLIGHT ROUTES; IMPLEMENTATION OF NEW METRICS AND STANDARDS IS KEY TO IMPROVING ON-TIME PERFORMANCE, Report No. CR-2010-117, at 16-17 (Sept. 23, 2010) (describing Amtrak's delay coding and contractual procedures for review of delay coding); Amtrak Inspector General, CSX ON-TIME PERFORMANCE INCENTIVES: INACCURATE INVOICES AND LACK OF AMTRAK MANAGEMENT REVIEW LEAD TO OVERPAYMENTS, Final Rep. No. 406-2005 (March 30, 2010), available at <https://www.amtrakoig.gov/sites/default/files/reports/Audit4062005CSXOTP3302010.pdf> (discussing the lookback provision and other structural features of Amtrak's operating agreement with CSX).

Because they are public, redacting references to basic structural features of Amtrak’s operating agreements is improper under paragraph 18 of the Protective Order.

Amtrak, however, has redacted in the public version of its opening submissions all discussion of such basic structural features as [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. *See* Amtrak Op. St. at 4-5 (excluding incentive payment number), 7-8, 9 (“*Second*” paragraph), 10, 15-16 (“[REDACTED]” paragraph); Vilter V.S. at 1, 2, 4-10, 11 n.20, 14, 15, 16-18.

Those redactions would have been improper in any circumstance. But they are now doubly improper since essentially the same structural substance of the current CN-Amtrak operating agreement was disclosed in the public version of CN’s opening submissions (filed four days before Amtrak’s). *See, e.g.*, Ladue/Kuxmann V.S. at 9, 15-16, 18, 19, 23-25 & 28-29, 30-37, 42, 44-45, 54-56, 60-63, 64; Willig V.S. at 6-7, 9. Under paragraph 18 of the Protective Order, the structural features of the current operating agreement have been made “publicly available” by “a person with a right to disclose [them] publicly.” CN has such a right because the CN-Amtrak operating agreement does not contain any provision requiring either party to treat its terms as confidential. [REDACTED]
[REDACTED]

B. Past Delays to Amtrak Trains

Amtrak trains run to serve the public. Amtrak publishes its schedules,¹¹ train status updates,¹² and (as mandated by Congress) detailed statistics on its trains' on-time performance and delays.¹³ Members of the public ride on Amtrak trains, and they know when they are delayed, and when they arrive late. In any event, there is nothing commercially sensitive or otherwise confidential about an individual delay to an Amtrak train.

Yet Amtrak has redacted many pages describing past train delays – including delays to individual trains more than two years ago -- from the public version of its opening submissions. *See Vilter V.S.* at 6-7, 8-9; *Vilter V.S.*, Atts. 4 & 5.

Amtrak's effort to conceal these delays – or its arguments regarding these delays – is particularly surprising given that in its Section 213 complaint against CN, Amtrak made public the details of several delayed trains. *Nat'l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry. Co.*, No. NOR 42134, Amtrak Am. Compl. at 4-5 (filed Aug. 29, 2014). Amtrak's public statement of its delay examples on that occasion caused no harm and furthered the statutory purpose of illuminating the causes of Amtrak delays (*see* 49 U.S.C. § 24308(f)(1)), as CN was able to respond in kind, publicly. *See* No. NOR 42134, CN Answer at 13-17 (filed Jan. 8, 2015). Amtrak should be required to state its case regarding train delays publicly in this proceeding as it did in that one.

¹¹ *See, e.g.*, City of New Orleans & Illini/Saluki schedules, *available at* <http://www.amtrak.com/ccurl/380/658/City-of-New-Orleans-Schedule-011215.pdf>.

¹² Amtrak makes current train status data available on its website. A member of the public has captured large volumes of Amtrak's public train status data for past trains and made them available on the internet. *See* <http://dixielandsoftware.net/Amtrak/status/StatusPages/>.

¹³ *See, e.g.*, <http://www.amtrak.com/ccurl/525/92/Amtrak-Monthly-Performance-Report-August-2015.pdf>.

C. Amtrak's Proposal

The most troubling aspect of Amtrak's redactions concerns its proposal –the principles and contractual terms it asks the Board to establish. The focus of Amtrak's proposal is a new and fundamentally different proposed system of penalties. That proposed system is described in very abstract terms in the public version of Amtrak's opening submissions (*see* Amtrak Op. St. at 12-13, 16-17; Vilter V.S. at 11-12, 14; Sacks V.S. ¶¶ 6, 34, 36(a), 38, 55), but its real substance is almost entirely redacted (*see* Amtrak Op. St. at 14-16; Vilter V.S. at 12-14, 14-15; Sacks V.S. ¶¶ 7, 33, 35, 36(b), 36(c), 37, 40-54, 56-57; Sacks V.S., Appxs. B-E).¹⁴

As discussed in Section I.B, above, the Board and the parties before it – including Amtrak – have until now proceeded on the basis that contested proposals to change operating agreement terms should be public, thus enabling the Board to produce a reasoned public order explaining its resolution of the controversy before it and establishing a precedent that is equally available to all future litigants to rely on or distinguish. There may be narrow exceptions to this principle where a party's unredacted proposal would reveal information that is confidential for *other* reasons. But a party is not entitled to make a secret request to the Board to impose terms on another party because it wants to prevent the Board from issuing a public precedent that might put other parties on an equal footing in terms of their understanding of the Board's view of key legal questions and policy matters. This is especially so when, like Amtrak, the party asserting confidentiality has claimed governmental status and when the question before the Board, as it is here, is ultimately what "terms and compensation" are "reasonable" in an operating agreement.

¹⁴ As stated in footnote 9, above, Appendix G to the Sacks V.S. is properly redacted to protect CN's interests, since it was a confidential settlement proposal. However, CN does not seek confidential treatment for numbers taken from that document insofar as Amtrak uses them in its proposal, and Amtrak has no other basis for treating such numbers as confidential.

49 U.S.C. § 24308(a)(2)(A)(ii). Neither Amtrak's, nor the Board's, answer to that important question of law and public policy should be a secret.

In *Conrail* and *Guilford*, the ICC and the Board detailed the parties' proposals publicly, notwithstanding that they involved relatively narrow, fact-specific cost issues. Amtrak's proposal in this case presents an even stronger case for public treatment, because it represents a fundamental departure from the principles under which operating agreements have previously been structured, and raises issues of broad public policy significance. As Amtrak told the Board earlier in this proceeding:

As the Board is well aware, its decision in this case will set important precedent for future disputes dealing with operating agreements involving Amtrak and other parties.¹⁵

That precedent should be neither secret, nor based on secret submissions.

Amtrak's redactions here are sweeping and egregious. For example, Amtrak's proposal rests on an entirely new conception of the proper purpose of penalties under § 24308(a)(1), but Amtrak has redacted its statements of that purpose (Amtrak Op. St. at 14, 15; *Vilter V.S.* at 12 & n.23, 14-15; *Sacks V.S.* ¶¶ 7, 35, 36(b), 36(c), 48), how it proposes the Board should determine penalty rates "at a conceptual level" (*id.* ¶ 37), and all discussion of proposed penalty rates and limits (Amtrak Op. St. at 14-16; *Vilter V.S.* at 12-14; *Sacks V.S.* ¶¶ 48-54). Amtrak has also used redaction to conceal its position regarding [REDACTED] (Amtrak Op. St. at 15-16; *Vilter V.S.* at 2 (describing this issue as [REDACTED]), 10, 11 n.20, 14) – which raises a critically important legal and public policy issue of general application because [REDACTED]

[REDACTED] As a result,

¹⁵ Nat'l R.R. Passenger Corp.'s Reply to Pets. to Intervene & Comments 4 (filed Feb. 28, 2014).

if Amtrak's redactions stood, neither CN nor the Board could comment publicly on Amtrak's conception of the purpose of penalties under § 24308(a)(1). Nor could CN or the Board address publicly the fact that under Amtrak's proposal, if CN achieved on all of its routes the PRIIA Section 207 Metrics and Standards standard of 900 minutes of HRD minutes per 10,000 miles,

[REDACTED]

■.

In addition, Amtrak appears to have attempted to conceal even the performance thresholds at which it would propose penalties to apply (*see, e.g.*, Sacks V.S. ¶¶ 33, 53; Sacks, Appx. C). The Board should overrule those redactions for a simple reason: Amtrak has, whether accidentally or purposefully, disclosed the thresholds in paragraph 34 of the public version of the verified statement of Benjamin Sacks, thereby irrevocably releasing that information into the public domain and forfeiting any conceivable further argument for confidential treatment. See Protective Order, ¶ 18 (excluding publicly available information from protection under the order). Nonetheless, Amtrak's effort to conceal that fundamental aspect of its proposal illustrates the extent to which Amtrak would prevent CN and the Board from discussing significant public policy issues. What is or is not a satisfactory level of HRD minutes per 10,000 miles is a matter of general public interest. In their 2010 PRIIA rulemaking, Amtrak and FRA jointly chose a standard of 900, over strong objections by many host railroads that that standard was not reasonably achievable. Amtrak's new claim that CN should be subject to penalties if it performs significantly better than that standard merits public scrutiny.¹⁶

¹⁶ In paragraph 34 of the verified statement of Benjamin Sacks, Amtrak proposes that a new contractual penalty system be based on the following minutes of HRD per 10,000 mile thresholds: Blue Water: 936; City of New Orleans: 709; Illini/Saluki: 432; Lincoln: 1,073; Texas Eagle: 615; Wolverine: 411.

Amtrak's rationale – if any – for its sweeping redactions of its proposal is unclear.

However, at an earlier stage of this proceeding, in response to CN's motion to compel production of copies of Amtrak's operating agreements with other hosts, Amtrak made the following argument:

As Amtrak begins a new round of contract renegotiations with the Class I host railroads, it feels strongly that each new contract that results from this renegotiation phase should be specifically tailored to the relationship between the parties to the particular contract. This is an important objective that would be undermined if the upcoming renegotiations devolved into a process of cherry picking provisions for competitive advantage from other contracts that are produced in discovery, particularly without a showing of relevance.¹⁷

It may be that Amtrak's motivation for its redactions is similar, *i.e.*, it would prefer other host railroads not to know what position it has taken before the Board, and not to have the opportunity to read a comprehensible public precedent (while Amtrak would presumably have the benefit of a private, sealed precedent) at the conclusion of this proceeding. But if that is Amtrak's motivation, it is not a legitimate justification for sealing much of the substance of this proceeding. Indeed, its 1971 umbrella agreement with all its freight railroad hosts providing for arbitration of disputes arising under individual operating agreements (which is incorporated by reference by Article VI of the current CN-Amtrak operating agreement), Amtrak acknowledged as much. *See Nat'l R.R. Passenger Corp. Arbitration Agreement (April 16, 1971)*. Amtrak agreed that all freight railroad hosts should have notice of its arbitration demands against any one of them, *id.* § 3.1; that operating agreement arbitrations can raise "significant issues applicable to more than one" freight railroad host, *id.* § 3.2; and that in such arbitrations, any other freight railroad host "shall have the right to intervene," *id.* § 4.6. Having agreed that other hosts have a

¹⁷ Nat'l R.R. Passenger Corp.'s Reply in Opposition to Mot. to Compel Responses to Requests for Production by Ill. Cent. R.R. Co. & Grand Trunk W. R.R. Co. 4-5 (filed Feb. 19, 2014).

right to notice and intervention in proceedings about the application of individual operating agreements, Amtrak cannot plausibly claim a protectable confidentiality interest in concealing from them its position on the broader issue of what terms such agreements should contain.

Many repeat litigants would relish the opportunity to litigate under seal for precisely these reasons, but that is not how the American system of justice works. Negotiating positions taken in private negotiations are often private by agreement, but requests to courts or agencies for compulsory relief against another party – including, in this case, retroactive relief as well as imposed terms for a new “agreement” – are not. Proceedings and precedents must be public to ensure fair, reasonable and predictable outcomes.¹⁸

Finally, it would be particularly troubling for Amtrak to seek secret proceedings and secret precedents in the present context. Congress has conferred upon Amtrak some extraordinary legal advantages, including the ability to ask the Board to impose new “agreement” terms on unwilling hosts, but it has done so for public purposes, including to foster “cooperation” between Amtrak and private companies such as CN, *see* 49 U.S.C. § 24101(a)(4), and on the basis that, under the Board’s supervision, Amtrak will reach “reasonable” agreements with its hosts, *see* 49 U.S.C. § 24308(a)(2)(A)(ii). As the Board explained in overruling Amtrak’s objections to producing to CN its operating agreements with other hosts, the “terms and conditions of Amtrak’s relationships with other host freight railroads could . . . provide . . . guidance” to help determine what terms are reasonable. Decision served April 15, 2014, at 6 (granting in part CN’s first motion to compel). Amtrak’s interest in creating information asymmetries to impair the ability of hosts to negotiate reasonable terms, or to defend themselves

¹⁸ *See, e.g.*, NCHRP Report at 60 (quoted at page 13, above).

in Section 402 proceedings, is not a legitimate basis for making Amtrak’s litigation position, or the Board’s precedents, secret.

III. Amtrak’s Public Status and FOIA Obligations Preclude Its Broad Claims of Confidentiality

The principles discussed and applied above apply to Board proceedings generally. But there is an additional reason for rejecting Amtrak’s confidentiality claims. Transparency is especially important in litigation involving entities accountable to the public,¹⁹ and, as the Supreme Court recently explained, Amtrak is, for many purposes, part of the Government. *See generally Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225 (2015) (“AAR”). Amtrak was chartered by Congress for public purposes, *see id.* at 1232; it is almost entirely owned by the Government, *see id.* at 1231; its Board members (who presumably authorized its attorneys to prosecute this proceeding and take the position taken in its sealed opening submissions) are mainly presidential appointees, *see* 49 U.S.C. § 24302(a)(1); it relies on over \$1 billion per year of taxpayer funds, *see AAR*, 135 S. Ct. at 1232; and Congress has assigned to it certain governmental powers, *see id.* at 1232-33. In short, “Amtrak was created by the Government, is controlled by the Government, and operates for the Government’s benefit.” *Id.* at 1232.

“Liberty requires accountability,” *id.* at 1234 (Alito, J., concurring), and the decisions, actions, and legal and public policy positions taken by the presidential appointees who direct Amtrak, using taxpayer funds, are matters of public interest that should be open to public scrutiny. Accordingly, Amtrak is subject to “substantial transparency and accountability

¹⁹ *See, e.g.,* Janice Toran, *Secrecy Orders and Government Litigants: “A Northwest Passage Around the Freedom of Information Act”?*, 27 GA. L. REV. 121, 127 (1992) (“The government is inherently different from the typical private litigant because its very identity derives from the populace it serves. Arguments favoring public access to information involved in government litigation are considerably stronger than similar arguments aimed at information generated in purely private lawsuits.”).

mechanisms.” *Id.* at 1233. For example, Congress has directed Amtrak to report regularly to the public on such matters as “route-specific ridership and on-time performance,” *id.* at 1232 (citing 49 U.S.C. § 24315), and to maintain an inspector general and submit to “frequent oversight hearings,” *id.*

In particular, Congress has provided that as long as it continues to rely on taxpayer funds, Amtrak is subject to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). 49 U.S.C. § 24301(e).²⁰ FOIA enshrines “a policy of broad disclosure of Government documents in order ‘to ensure an informed citizenry, vital to the functioning of a democratic society.’” *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (citation omitted). Under FOIA, Amtrak has an affirmative obligation to make its records public, *see* 5 U.S.C. § 552(a), and its filings before the Board are plainly Amtrak records within the scope of that obligation.²¹ Amtrak must “disclose to the public any requested documents” unless “it proves that the documents fall within one of nine statutory exemptions . . . [which] are to be narrowly construed.” *Moye*, 376 F.3d at 1276-77 (citations omitted). And, none of those exemptions has any potential application here. For example, FOIA Exemption 4 encompasses “trade secrets and commercial or financial information **obtained from a person** and privileged or confidential,” 5 U.S.C. § 552(b)(4) (emphasis added), but is limited to the proprietary confidential information of third parties.²² As

²⁰ *See also* 49 C.F.R. pt. 701 (Amtrak’s FOIA regulations); *Moye, O’Brien, O’Rourke, Hogan & Pickert v. Amtrak*, 376 F.3d 1270, 1276 n.5 (11th Cir. 2004) (Amtrak “must comply with FOIA’s requirements”); *News Grp. Boston Inc. v. Nat’l R.R. Passenger Corp.*, 799 F. Supp. 1264 (D. Mass. 1992) (ordering Amtrak to disclose records under FOIA); *Aug v. Nat’l R.R. Passenger Corp.*, 425 F. Supp. 946 (D.D.C. 1976) (same).

²¹ *See* 5 U.S.C. § 552(f)(2); *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 143-48 (1989) (defining agency “records” broadly, as including litigation decisions and filings created or obtained by the agency).

²² *See, e.g., Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (“Exemption 4 . . . is limited to information ‘obtained from a person,’ that is, to information obtained outside the Government.”); *Grumman Aircraft Eng’g Corp. v. Renegotiation Bd.*, 425

that limitation reflects, because Amtrak is accountable to the public, it is not entitled to conceal its records relating to matters of public interest on the basis of its own asserted commercial secrecy interests.²³

This is, of course, not a FOIA proceeding. However, FOIA “demarcates [Amtrak’s] obligation to disclose,” *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979), setting a “floor” of transparency above which it may rise, but below which it should not be allowed to fall, in other proceedings, *see, e.g., Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984). FOIA represents the minimum transparency Congress requires of Amtrak – transparency Amtrak failed to provide in the public version of its opening submissions. When, as here, “it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994).

As a matter of principle, the Board should not allow Amtrak to use the Board’s Protective Order to shield itself from the accountability Congress mandated in FOIA. And, as a practical matter, it would serve no purpose to subject the public to the burden and delay of obtaining

F.2d 578, 582 (D.C. Cir. 1970) (Exemption 4 “encompass[es] only information received from persons outside the Government.”); *Benson v. Gen. Servs. Admin.*, 289 F. Supp. 590, 594 (W.D. Wash. 1968) (Exemption 4 “condones withholding information only when it is obtained from a person outside the agency, and that person wishes the information to be kept confidential.”); *see also* 49 C.F.R. § 701.9 (Amtrak’s FOIA regulation implementing FOIA Exemption 4, which assumes, correctly, that the information covered by that exemption belongs to a third party “submitter”).

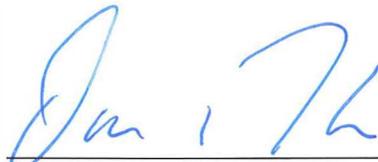
²³ The courts in both *News Group* and *Aug* rejected Amtrak efforts to invoke Exemption 4 based on Amtrak’s own asserted competitive interests in secrecy. *See News Group*, 799 F. Supp. at 1268-69; *Aug*, 425 F. Supp. at 951.

Amtrak's complete filings by means of FOIA requests. Moreover, reliance on the possibility that a member of the public may file a FOIA request and ultimately obtain disclosure by that means is insufficient to secure the ability of both CN and the Board "to refer to and address the evidence in a meaningful way," *CF Indus.*, 4 S.T.B. at 638 n.3. *See Grove Fresh*, 24 F.3d at 897 ("In light of the values which the presumption of access [to litigation filings] endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous.") (citations omitted). Both under the normal principles the Board applies in proceedings involving other litigants, and under the FOIA principles that apply to Amtrak, Amtrak has no right to conceal its proposal, and the Board should order its prompt disclosure.

CONCLUSION

For the foregoing reasons, the Board should order Amtrak to file a new public version of its opening submissions promptly, with its redactions eliminated in accordance with Exhibits A, B, and C attached to the confidential version of this motion.

Respectfully submitted,



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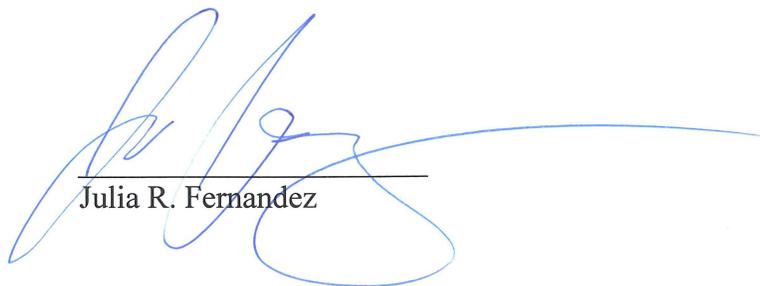
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October 28, 2015

EXHIBITS REDACTED

CERTIFICATE OF SERVICE

I certify that I have this 28th day of October, 2015, caused a true copy of the foregoing CN Motion to Remove the Confidentiality Designation for Portions of Amtrak's Opening Submissions to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Julia R. Fernandez