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

ATTORNEYS AT LAW

1666 K Street, NW
Suite 500
Washington, DC 20006
T 202.887.1400
F 202.466.3215

Linda J. Morgan
D 202.887.1429
lmorgan@nossaman.com

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 National Railroad Passenger Corporation's Reply to Petitions to Intervene and Comments.

Sincerely,

Linda J. Morgan

Counsel for National Railroad Passenger Corporation

cc: Counsel of record

**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**

**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY TO PETITIONS TO
INTERVENE AND COMMENTS**

Linda J. Morgan
Kevin M. Sheys
Paul L. Knight
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002
(202) 906-3971

Counsel for National Railroad Passenger Corporation

February 28, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35743

**APPLICATION OF THE
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UNDER 49 U.S.C. § 24308(a) —
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**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY TO PETITIONS TO
INTERVENE AND COMMENTS**

The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, hereby responds to the petitions of Norfolk Southern Railway Company (“NS”) and CSX Transportation, Inc. (“CSX”), filed February 19 and 21, 2014, respectively, seeking leave to intervene in this proceeding, and to the letters to the Board from Union Pacific Railroad Company (“UP”) and BNSF Railway (“BNSF”), both filed on February 24, 2014. The petitions and letters are in response to the motion to compel filed on February 12, 2014, by the Illinois Central Railroad Company (“IC”) and the Grand Trunk Western Railroad Company (“GTW”) (together, “CN”).

Amtrak has no objection to including these submissions in the record for this proceeding. They are filed on behalf of Class I railroads that are parties to host railroad operating agreements entered into with Amtrak, and relate to issues raised in CN’s motion to compel.

Each of the four Class I railroad filings argues for a “Highly Confidential” designation if their respective operating agreements with Amtrak are ordered to be produced. This position supports Amtrak’s strongly held view, as set forth in its February 19, 2014 reply in opposition to

CN's motion to compel, that these operating agreements contain highly proprietary and commercially sensitive information that deserves the utmost protection.

NS, in Section IV of its petition, underscores why NS's Operating Agreements (both the agreement relating to Amtrak's use of NS rail lines and to NS's use of the Northeast Corridor) should be designated Highly Confidential. Specifically referring to financial terms that are included, NS states: "Revealing both the structure and level of compensation would provide a window to what a Host Railroad views as its incremental costs, information that can be valuable to an opposing railroad both in competing for freight traffic and for negotiating trackage rights or other joint facilities arrangements." *See* NS Petition at 9-10. NS is clearly concerned about information included in its operating agreements being used to its competitive disadvantage in other situations outside of this proceeding.

CSX likewise argues in its petition that these operating agreements should be designated as Highly Confidential and explains why: "For example, the operating agreements contain specific cost information for different items such as track maintenance; station utilities; and transportation of cars and locomotives.... The specific operational issues included in the operating agreements, such as train speeds; standard of performance; performance payments and penalties; and control and supervision, also constitute 'commercial information' for purposes of Section 1114.21(c)(8) of the Board's rules and 'competitively sensitive' information under the protective order." *See* CSX Petition at 2. CSX clearly views such information as highly proprietary and commercially sensitive, for which a Highly Confidential designation is appropriate and necessary.

In its letter, BNSF argues for a Highly Confidential designation, highlighting the fact that the agreement was privately negotiated and sets forth the terms of the commercial relationship

between the two parties, and “contains information on costs, fees and compensation terms that are inherently sensitive commercial information.” *See* BNSF Letter at 1. UP, in its letter, likewise calls for a Highly Confidential designation for its operating agreement. *See* UP Letter at 2.

As a party to these agreements, Amtrak has its own interest in protecting the commercially sensitive and proprietary information in these agreements.¹ Amtrak’s compromise proposal was an effort to preserve the Highly Confidential nature of these agreements and protect the sensitive nature of certain terms, while at the same time making portions of the agreements available to CN’s outside counsel. But making that offer should not be viewed as diminishing the significant concern that Amtrak continues to have about producing the entirety of these operating agreements. Amtrak stands in a position distinct from those of NS, CSX, BNSF, and UP, and as a party negotiating separately with each railroad, remains concerned about the production of certain terms of these agreements under any circumstances.

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. If it decides to adopt the approach suggested by the Class I host railroads that have filed in this case, it must ensure that the Highly Confidential designation is preserved for the entire agreement. Otherwise, in-house host railroad personnel could conceivably have access to commercially sensitive material about another host railroad competitor that could be used for competitive

¹ CN seems to suggest in its reply to the petitions to intervene and comments that, because Amtrak did not explicitly raise its own interests in response to discovery requests, it somehow waived its right to argue for its interests in response to CN’s motion to compel. Amtrak has clearly argued on behalf of its interests before the Board. *See* Amtrak Opposition to CN’s motion to compel at 3-4. Its interests, which are no different from the interests of any party to a privately negotiated contract, should not come as any surprise to CN or the Board.

advantage relative to future operating agreement negotiations or in connection with other business in which the host railroads compete. And Amtrak would be disadvantaged in its future negotiations with these various host railroads outside of this proceeding because the in-house personnel for each host railroad would be armed with knowledge of other agreements. A Highly Confidential designation would ensure that only outside counsel would have access to the information and only for the purpose of the pending matter, not for competitive advantage in future commercial negotiations and transactions.

Dated: February 28, 2014

Respectfully submitted,

/s/Linda J. Morgan

Linda J. Morgan
Kevin M. Sheys
Paul L. Knight
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

/s/William H. Herrmann

William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Counsel for National Railroad Passenger Corporation

CERTIFICATE OF SERVICE

I certify that on February 28, 2014, a true copy of the foregoing National Railroad Passenger Corporation's Reply to Petitions to Intervene and Comments was served via email upon the following individuals:

David A. Hirsh
Harkins Cunningham LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608

James A. Hixon
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23570

G. Paul Moates
Marc A. Korman
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

Mark C. Hansen
Union Pacific Railroad Co.
1400 West 52nd Avenue
Denver, CO 80221

David T. Rankin
Senior General Attorney
BNSF Railway
2500 Low Menk Drive
AOB-3
Ft. Worth, TX 76131-2828

/s/Linda J. Morgan
Linda J. Morgan