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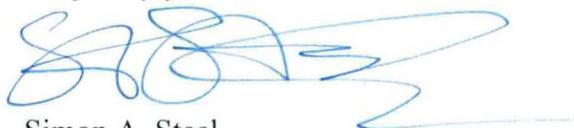
Ms. Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0012

**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 Appeal of Illinois Central Railroad Company and Grand Trunk Western Railroad Company from Partial Denial of Motion to Compel Responses to Requests for Production of Documents.

Very truly yours,



Simon A. Steel

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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**APPEAL OF ILLINOIS CENTRAL RAILROAD COMPANY  
AND GRAND TRUNK WESTERN RAILROAD COMPANY FROM  
PARTIAL DENIAL OF MOTION TO COMPEL RESPONSES  
TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

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May 5, 2014

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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**APPEAL OF ILLINOIS CENTRAL RAILROAD COMPANY  
AND GRAND TRUNK WESTERN RAILROAD COMPANY FROM  
PARTIAL DENIAL OF MOTION TO COMPEL RESPONSES  
TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

By decision served in this proceeding on April 15, 2014 (“April 15 Decision”), the Director of the Office of Proceedings granted in part and denied in part the Motion of Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”)<sup>1</sup> to Compel Responses to Requests for Production of Documents (“Motion to Compel”). Pursuant to 49 C.F.R. § 1115.9,<sup>2</sup> CN respectfully appeals the April 15 Decision insofar as it denied the Motion to Compel with respect to CN’s Request for Production No. 6 (“RFP 6”). RFP 6 asked the National Railroad Passenger Corporation (“Amtrak”) to produce its operating agreements with passenger rail service providers that Amtrak hosts on its own lines (“RFP 6 agreements”).<sup>3</sup>

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<sup>1</sup> IC and GTW are referred to together as “CN.”

<sup>2</sup> CN’s appeal meets the standards for an interlocutory appeal under § 1115.9(a)(4) because the April 15 Decision, if allowed to stand, would unduly prejudice CN, cause it irreparable harm, and harm the public interest. The April 15 Decision wrongly denied CN and the Board access to agreements having a direct bearing on important issues of first impression presented in this case. CN, however, did not appeal that decision within the 7-day period provided, as until after that period had run it had no reason to expect and did not discover the critical information omitted in the representations by Amtrak that are the basis of the decision’s material error. Accordingly, CN requests a waiver of the 7-day time period. A waiver would not prejudice Amtrak, since discovery is still ongoing.

<sup>3</sup> RFP 6 and Amtrak’s response are set out in the attached Appendix. CN’s complete set of requests, and Amtrak’s complete responses, are exhibits to CN’s Motion to Compel.

The April 15 Decision regarding RFP 6 appears to be premised on Amtrak's statement to the Board, in its reply to CN's Motion to Compel ("Amtrak Reply"), that its RFP 6 agreements were negotiated under a legal cost recovery standard different from "incremental cost." As we review in Section I below, Amtrak's statement appears to omit critical information: whatever the present technically applicable legal standard, it appears that at least some of the RFP 6 agreements were negotiated under an "avoidable cost" standard that is identical to "incremental cost." The April 15 Decision also appears to assume that the sole issue on which the RFP 6 agreements might be relevant is the meaning of "incremental cost." As we explain in Section II, whether or not a specific agreement is based on incremental cost, but especially for any that are, the RFP 6 agreements are relevant to other issues in this proceeding, including the practical identification and quantification of recoverable costs and the reasonableness of proposed incentives and penalties terms.

### **FACTUAL BACKGROUND**

CN moved to compel after Amtrak refused to produce any unredacted documents in response to CN's RFP 5 and any documents at all in response to RFP 6. In RFP 5, CN requested operating agreements between Amtrak as passenger rail tenant and third-party host railroads; in RFP 6, CN requested operating agreements between Amtrak as host railroad and third-party passenger rail tenants.<sup>4</sup>

One of the Board's statutory tasks in this proceeding is determining what terms would be "reasonable" for the next Amtrak-CN operating agreement for the hosting of passenger rail service. RFP 6 sought information about the terms of other current Amtrak operating

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<sup>4</sup> CN seeks only agreements created or in effect at any time in the period May 1, 2011 to October 31, 2013. *See* Motion to Compel at 2-3.

agreements for the hosting of passenger rail service that would be relevant to that issue. The information sought would show what positions Amtrak has taken on similar issues, what terms have been agreed in the marketplace, and what terms have worked in practice. Motion to Compel at 8-13 & n.13. RFP 6 sought whole, unredacted agreements because terms must be read in context to understand how they work together and whether concessions by one party on one issue may reflect concessions by another party on another issue. *See id.* at 12 & n.16.

Amtrak objected to both RFP 5 and RFP 6 as irrelevant, arguing that different operating agreements reflect different commercial and legal contexts.<sup>5</sup> With respect to RFP 6 specifically, Amtrak stated that its agreements as host railroad and its agreements as passenger rail tenant are governed by different legal standards with respect to cost recovery:

[The RFP 6] agreements involve operations on the Northeast Corridor and are not relevant to this proceeding. ***They have been negotiated subject to a different statutory requirement that does not limit compensation to incremental costs*** as does 49 U.S.C. § 24308(a). Furthermore, under Section 212 of The Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Amtrak and other affected parties are obligated to determine an appropriate cost methodology for operations on the Northeast Corridor going forward. Clearly, agreements in place today covering passenger service evolved under an entirely different set of circumstances than the host railroad agreements and are set to evolve even further.

Amtrak Reply, at 6 (emphasis added).

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<sup>5</sup> Amtrak also raised confidentiality objections that the April 15 Decision held provided no basis for withholding or redaction of production, since Amtrak is entitled initially to designate the agreements it produces as “Highly Confidential” under the Board’s Protective Order.

Amtrak raised burden objections, overruled by the April 15 Decision, in response to RFP 5, but did not raise any burden objection either in its specific response to RFP 6 or in the Amtrak Reply regarding RFP 6. In any event, RFP 6 seeks only operating agreements, and only that subset of Amtrak operating agreements that both involve Amtrak hosting a passenger rail carrier, and were created or in force during the period May 1, 2011 to October 31, 2013. Most likely there are relatively few such agreements. The Northeast Corridor Infrastructure and Operations Advisory Commission (“NEC IOAC”) identifies eight commuter railroads on the Northeast Corridor. NEC IOAC, *Overview*, available at <http://www.nec-commission.com/the-corridor/overview/>. CN does not know whether Amtrak has operating agreements with other entities that fall within RFP 6.)

The April 15 Decision ruled that the RFP 5 documents – Amtrak’s operating agreements with other hosts – are relevant and must be produced in full, reasoning as follows:

Operating agreements voluntarily reached in the marketplace, which reflect the terms and conditions of Amtrak’s use of host railroad facilities and services, may provide information that would be useful to the Board’s prescription of new terms and conditions in the present case. These operating agreements are probative sources of evidence, which are relevant to the underlying proceeding. Amtrak argues that it is only the present commercial relationship between Amtrak and CN that is relevant and not past operating agreements with host railroads. But Amtrak has not demonstrated that its commercial relationship with CN is so unusual that the terms and conditions of Amtrak’s relationships with other host freight railroads could not provide any guidance to the Board.

April 15 Decision, at 6.

The April 15 Decision relied on Amtrak’s representation about different governing legal standards in ruling that the RFP 6 documents – Amtrak’s operating agreements with passenger service providers where Amtrak is the host – are irrelevant, and thus not subject to production:

CN’s Request No. 6 seeks the production of Amtrak’s operating agreements related to any hosting by Amtrak of non-Amtrak passenger service. The Board is not persuaded that these operating agreements are relevant to the subject matter of this proceeding. *As Amtrak notes, these agreements with commuter authorities on the Northeast Corridor have been negotiated subject to a different statutory authority that does not limit host-carrier compensation to incremental costs.*

*Id.* at 7 (emphasis added) (comparing (in n.43) 49 U.S.C. § 24905(c)(1)(A), which concerns Amtrak as host, with 49 U.S.C. § 24308(a), which applies to freight railroads as hosts of Amtrak).

#### STANDARDS GOVERNING RELEVANCE OBJECTIONS

As the Board recently explained in *Canadian Pacific Ry. – Control – Dakota,*

*Minnesota & Eastern R.R.:*

In Board proceedings, parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Waterloo Ry. – Adverse Aban. – Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al.* (STB served Nov. 14,

2003). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2).

Docket No. FD 35081 (Sub-No. 2), slip op. at 2 (STB served Mar. 26, 2014). A party is entitled in discovery to “all relevant and potentially admissible information – ... not only the information that the [opposing party] believes is sufficient.” *Seminole Elec. Coop. Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 2 (STB served Feb. 17, 2009).

### ARGUMENT

The RFP 6 agreements are relevant under the above standard. As the April 15 Decision acknowledges, “[o]perating agreements voluntarily reached in the marketplace . . . may provide information that would be useful to the Board’s prescription of new terms and conditions in the present case.” April 15 Decision, at 6. The ultimate issue before the Board is what terms are “reasonable” in host railroad-passenger rail tenant operating agreements. 49 U.S.C. § 24308(a)(2)(A)(ii). Relevant information or information likely to lead to the discovery of relevant information is likely to be contained in other host railroad-passenger rail tenant operating agreements. Terms that have been voluntarily agreed upon in comparable contexts will indicate what the parties have considered to be reasonable. And evidence from other operating agreements may “lead to the discovery of [other] admissible evidence” of, for example, why certain provisions were adopted or rejected, how they have worked in practice, and how they might be interpreted and applied. Moreover, operating agreements are particularly likely to provide or lead to “information that might affect the outcome of [this] proceeding” when they involve one of the parties to this proceeding, Amtrak. For example, evidence showing that Amtrak as host has taken positions and obtained provisions that appear contrary to what it

asks the Board to impose when it is hosted by CN would be relevant to the Board's judgment as to whether Amtrak's demands are reasonable.

Nonetheless, the April 15 Decision concluded that the RFP 6 agreements are irrelevant because, "[a]s Amtrak notes, these agreements with commuter authorities on the Northeast Corridor have been negotiated subject to a different statutory authority that does not limit host-carrier compensation to incremental costs." April 15 Decision, at 7. That conclusion appears to rest on two erroneous premises:

- (1) that the "incremental costs" standard for host compensation that applies under 49 U.S.C. § 24308(a)(2)(B) does not apply to any of Amtrak's RFP 6 agreements; and
- (2) that the sole purpose of RFP 6 was to develop evidence of what costs constitute "incremental costs" within the meaning of 49 U.S.C. § 24308(a)(2)(B).

**I. Notwithstanding Amtrak's Representation to the Board, It Appears that at Least Some of Its RFP 6 Agreements Are Governed by an Incremental (or "Avoidable") Cost Standard**

The April 15 Decision expressly relied on Amtrak's statement that the RFP 6 agreements "have been negotiated subject to a different statutory requirement that does not limit compensation to incremental costs as does 49 U.S.C. § 24308(a)." Amtrak Reply, at 6; *see* April 15 Decision, at 7. Based on the public information available to CN, that statement appears to omit important information.

While the RFP 6 agreements are not governed by 49 U.S.C. § 24308(a), it appears that at least four of them are based on an "avoidable cost" standard. And, as Amtrak itself has acknowledged in the past, at least as applied to host railroad-passenger rail tenant agreements, "avoidable cost" is the same standard as the "incremental cost" standard in 49 U.S.C. § 24308(a)(2)(B). *See, e.g., Metro. Transp. Auth. v. ICC*, 792 F.2d 287, 291 (2d Cir. 1986)

(“MTA”) (“‘Incremental costs,’ all parties to this case agree, are the same as so-called ‘avoidable costs,’ *i.e.*, the costs of the carrier whose facilities are being used that would be avoidable except for [the passenger rail tenant’s] use.”).<sup>6</sup>

The history of Amtrak agreements with commuter passenger rail tenants on the Northeast Corridor (“NEC”) is complex. But what is clear is that in 1983, the ICC ruled that Amtrak must negotiate agreements with the original commuter railroads running on the Northeast Corridor under an “avoidable cost” standard. *Costing Methodologies for Northeast Corridor Commuter Services*, 367 I.C.C. 192, 193 (1983) (“*Ex Parte 417*”) (“an avoidable costing methodology is the most appropriate one to calculate the level of compensation paid to Amtrak”).

Notwithstanding various subsequent changes to the law, in 2006, Amtrak told the U.S. Government Accountability Office (“GAO”) that the “avoidable cost” legal standard still governed most of its commuter rail operating agreements on the Northeast Corridor:

According to Amtrak officials, another factor that influences the specific terms and conditions of some of Amtrak’s commuter rail contracts is the Interstate Commerce Commission’s 1983 ruling known as *Ex Parte 417*. This ruling governed compensation for access to the NEC for some commuter rail agencies, but not necessarily others.

Amtrak officials stated that NEC commuter rail agencies that were established prior to the ruling – namely LIRR, SEPTA, NJT, MBTA, and MARC – start from an *avoidable cost basis* in NEC-access negotiations with Amtrak. Avoidable costs refer to only those expenses above what Amtrak would pay if the commuter rail did not use Amtrak infrastructure.

GAO-06-470, COMMUTER RAIL: COMMUTER RAIL ISSUES SHOULD BE CONSIDERED IN DEBATE OVER AMTRAK (Report to the Chairman, Committee on Banking, Housing and Urban Affairs), at

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<sup>6</sup> *MTA* involved the incremental cost standard under what is now 49 U.S.C. § 24308(a). As the passenger rail tenant, Amtrak was one of the parties.

20 (2006) (footnotes omitted). Further, “a senior Amtrak official stated that commuter rail agencies covered by the ICC ruling use it as the basis for access negotiations.” *Id.* at 20, n.18.<sup>7</sup>

Moreover, in May 2010, the NEC Master Plan Working Group, including Amtrak and the FRA, stated the following:

LIRR, NJT, SEPTA and MARC, the commuter agencies in existence when the NEC was transferred to Amtrak, are required to pay “avoidable” operating and maintenance costs that assume Amtrak is the primary NEC user with commuters paying only the additional costs required to support their operations.

NEC Master Plan Working Group, THE NORTHEAST CORRIDOR INFRASTRUCTURE MASTER PLAN 11 (May 2010), *available at* <http://www.amtrak.com/ccurl/870/270/Northeast-Corridor-Infrastructure-Master-Plan.pdf>.

Accordingly, it appears that unless Amtrak renegotiated its agreements under a new cost recovery standard between May 2010 and May 2011,<sup>8</sup> at least four Amtrak-as-host operating agreements within RFP 6 were negotiated under the same cost recovery standard that applies in this proceeding. If Amtrak has contrary information, it should provide it.

As for Amtrak’s reference to section 212 of PRIIA (Amtrak Reply, at 6), that provision appears to have little or no bearing on the agreements at issue. Section 212 amended 49 U.S.C. § 24905 to create the Northeast Corridor Infrastructure and Operations Advisory Commission (“NEC IOAC”), which it tasked with developing a new formula to govern Amtrak’s recovery of costs from commuter rail tenants on the Northeast Corridor *in the future*. *See* 49 U.S.C.

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<sup>7</sup> *See also* Nat’l Coop. Highway Research Program, Research Results Digest 313, *Cost Allocation Methods for Commuter, Intercity, and Freight Rail Operations on Shared-Use Rail Systems and Corridors* 19 (Feb. 2007), *available at* [http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp\\_rrd\\_313.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rrd_313.pdf) (“NCHRP Report”) (“older commuter rail operators must pay only avoidable costs in order to access Amtrak’s right-of-way”).

<sup>8</sup> As noted above, RFP 6 encompasses operating agreements created or in effect at any time during the period May 1, 2011 to October 31, 2013.

§ 24905(c)(1).<sup>9</sup> That formula is apparently still under development. *See* NEC IOAC, *Cost Allocation*, available at <http://www.nec-commission.com/resources/cost-allocation/>.

Accordingly, it appears to have no bearing on the negotiation of the Amtrak operating agreements that were in effect on May 1, 2011.

To be sure, PRIIA indicates an intention to move away from the “avoidable cost” standard going forward. But it does not negate the fact that Amtrak appears to have several operating agreements within the scope of RFP 6 that are based on the same essential cost standard that applies in this proceeding. Accordingly, the Amtrak-as-host agreements sought by RFP 6 are apt to provide or lead to relevant information regarding the interpretation and implementation of that standard and the positions that Amtrak has taken.

## **II. The RFP 6 Agreements Are Relevant to Issues Beyond the Legal Definition of “Incremental Cost”**

The April 15 Decision’s implicit second assumption – that the RFP 6 agreements are only potentially relevant to the legal interpretation of the statutory “incremental cost” standard – is also erroneous. CN sought the RFP 6 agreements because they are broadly relevant to a variety of important issues in this proceeding. That relevance is only heightened by the fact that a number of those agreements appear to apply the same incremental cost standard as applies in this proceeding.

One area where such issues arise relates to CN’s contention that it should be compensated for “the incremental costs of delays to its trains incurred due to Amtrak’s use of its lines,” and/or for “the costs of any infrastructure improvements necessary to avoid such costs.” *Statement of Ill. Cent. R.R. & Grand Trunk W. R.R. Identifying Disputed Issues*, at 2 (filed Oct. 24, 2013). CN suffers significant delays to its freight traffic due to Amtrak’s operations on its lines, and those delays entail substantial costs to CN. CN believes that as a matter of law those host train delay costs are

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<sup>9</sup> This is the provision cited in n.43 of the April 15 Decision.

“incremental costs,” since they are costs incurred solely due to Amtrak’s use of CN’s lines. But there are a variety of practical issues regarding such costs, including their scope, identification, and quantification, and there are broad issues regarding how to approach such costs in order to compensate the host carrier fully and also help minimize future delays (including issues regarding infrastructure funding and service and schedule adjustments).

In approaching such practical issues it will be useful for the parties and the Board to understand approaches developed and solutions negotiated in the marketplace as reflected in other host railroad agreements with passenger rail providers, particularly in areas where the Board’s precedent provides little specific guidance. Like CN, Amtrak hosts passenger rail tenants. Like CN, Amtrak has expressed concerns about its capacity and about delays to its host trains caused by the obligation to accommodate those tenants. And, like CN, Amtrak has sought capital funding from its tenants to address capacity problems to which they contribute. No two commercial relationships are identical, so the RFP 6 agreements may not provide one-size-fits-all solutions to these issues.

However, given the common practical issues, the RFP 6 agreements “may provide information that would be useful to the Board’s prescription of new terms and conditions in the present case.”

April 15 Decision, at 6.

Another area in which Amtrak’s operating agreements as host “might be able to affect the outcome of the proceeding” is with respect to performance-based contractual incentives and penalties, a subject that was raised by both parties in their statements of the issues. If the RFP 6 agreements include any provisions intended to provide incentives or penalties, such agreements could provide useful points of comparison for the parties’ arguments on myriad potential issues concerning the basis (or bases) for incentives/penalties, their efficacy and practicality, and their appropriate dollar levels and limits.

CN does not know whether Amtrak's RFP 6 agreements provide for potential variations in Amtrak's compensation (whether or not formally referred to as incentives or penalties), but it seems likely that they do. Whatever statutory standard may underlie a particular operating agreement, there are practical economic benefits to incentivizing a host railroad to provide better than the minimum legally required service to a passenger rail tenant. And, in *Ex Parte 417*, Amtrak urged, and the ICC agreed, that, based on the analogy to what is now 49 U.S.C. § 24308(a)(2)(B), Amtrak's operating agreements as host should provide for "a method whereby Amtrak would receive additional compensation for providing improved service to commuter and freight operators on the NEC." 367 I.C.C. at 195.

Incentives and penalties may also be used for other purposes, for example, to incentivize tenants to traverse the host lines quickly and without incident in order to maintain the fluidity of the host's lines. Whether any such provisions exist in RFP 6 agreements and, if so, how those issues are approached in such agreements, would also be directly relevant to this proceeding.

In sum, the relevance of the RFP 6 agreements extends far beyond the legal question of what is encompassed by an incremental cost standard to include other issues that are central to this proceeding.

## CONCLUSION

The Board should reverse the April 15 Decision with respect to RFP 6 and order Amtrak to produce in full Amtrak's operating agreements as requested in RFP 6, subject to the agreed date limitations.

Respectfully submitted,



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*Counsel for Illinois Central Railroad Company  
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May 5, 2014

## APPENDIX

### **CN's REQUEST FOR PRODUCTION NO. 6**

Please produce all agreements, including any amendments, exhibits, attachments or schedules thereto, in force at any time since 2008, relating to any hosting by Amtrak of non-Amtrak passenger service on rail lines owned, leased, or operated by Amtrak.

### **AMTRAK's RESPONSE TO REQUEST FOR PRODUCTION NO. 6**

Amtrak objects to this Request for Production on the grounds that it is compound and seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding. Amtrak further objects on the ground that this Request for Production seeks agreements that contain highly confidential and commercially sensitive information of third parties. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak responds that it will not produce any documents in response to this Request for Production.

## CERTIFICATE OF SERVICE

I certify that I have this 5th day of May, 2014, caused a true copy of the foregoing Appeal of Illinois Central Railroad Company and Grand Trunk Western Railroad Company from Partial Denial of Motion to Compel Responses to Requests for Production of Documents, to be served by e-mail upon:

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