

**PUBLIC VERSION**

**EXPEDITED CONSIDERATION REQUESTED**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. FD 35743  
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March 16, 2015  
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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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**FOURTH MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY  
AND GRAND TRUNK WESTERN RAILROAD COMPANY  
TO COMPEL RESPONSES TO DISCOVERY REQUESTS**

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Pursuant to 49 C.F.R. § 1114.31(a), Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (together, “CN”) move for an order compelling National Railroad Passenger Corporation (“Amtrak”) to produce the five items identified below. CN identified each of these items as highly likely to contain responsive and relevant information based on references to them in documents that Amtrak has produced, and CN asked Amtrak to produce them. Amtrak initially took the position that it would produce, or at least search for and describe to CN, two of the items, but Amtrak has reneged on that commitment. Amtrak took nearly two months to state its position on CN’s request for the other three items. It now appears to rest on unsubstantiated burden objections, notwithstanding that the documents at issue are discrete, readily identifiable and appear to reside on Amtrak’s intranet. Because CN’s requests are for specific information that is responsive and relevant, and its production would impose no

substantial burden or delay (and, in any event, any delay is Amtrak's responsibility), the Board should compel Amtrak to produce the five items requested herein.<sup>1</sup>

### **FACTUAL BACKGROUND**

As the Board is aware from CN's prior motions to compel, CN served its only set of discovery requests on October 31, 2013,<sup>2</sup> and Amtrak served extensive discovery requests on CN shortly thereafter. The parties entered into a Joint Discovery Protocol on January 30, 2014.<sup>3</sup> CN completed its discovery to Amtrak on September 4, 2014. Amtrak purported to complete its discovery to CN on September 22, 2014, but on September 23, 2014, the Board granted CN substantial relief on two motions to compel,<sup>4</sup> and CN informed the Board of multiple additional outstanding issues with Amtrak's production that CN hoped to resolve consensually with Amtrak.<sup>5</sup> Pursuant to the Board's September 23 Order, the parties met and conferred and corresponded on multiple occasions over a period of several months. In those discussions, Amtrak recognized that there were multiple deficiencies in its document production beyond the specific matters addressed in the Board's September 23 Order; and made multiple commitments

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<sup>1</sup> In meetings and correspondence with Amtrak, CN has identified several additional deficiencies in Amtrak's document production. However, CN has concluded that those other deficiencies are unlikely to be sufficiently material to merit troubling the Board further. This motion is therefore the final motion to compel that CN expects to file based on the discovery, production, and Board orders to date.

<sup>2</sup> CN's discovery requests and Amtrak's written responses and objections thereto are set forth in Exhibit 3 to CN's First Motion to Compel, filed Feb. 12, 2014.

<sup>3</sup> Under the Joint Discovery Protocol, the agreed date range for most discovery, including the discovery at issue in this motion, is May 1, 2011 through October 31, 2013. Ex. 1, ¶ 1(a)(i).

<sup>4</sup> Decision served Sept. 23, 2014 ("September 23 Order").

<sup>5</sup> CN's Resp. to Amtrak's Reply to CN's Mot. for Extension of Procedural Schedule (filed Sept. 23, 2014).

to search for documents, provide information, and advise CN of its position on various outstanding issues.

After Amtrak advised CN that it would not produce ridership and revenue data, CN filed a third motion to compel on December 2, 2014, addressed to those data, to which Amtrak responded on December 10, stating that it would produce ridership and revenue data by December 23. Amtrak produced ridership data, but not revenue data, on January 20 and January 29. As the parties advised the Board in status reports on February 10, 2015, CN's third motion to compel thus remains pending before the Board as a live controversy between the parties regarding Amtrak's revenue data.

On February 27, 2015, Amtrak produced documents to CN which it says completed its production required by the Board's September 23 Order, and on Friday, March 6, 2015, Amtrak produced documents relating to other outstanding issues (including, for example, email attachments it had admitted to omitting by mistake in prior productions), and claimed, for the second time, that its production was complete. CN apprised the Board on Monday, March 9, that Amtrak's discovery to CN was not complete, given (i) CN's pending third motion to compel, concerning revenue data, and (ii) several specific outstanding issues, which CN undertook either to resolve or to present in a motion to compel within a week. Consistent with that undertaking, CN (i) unilaterally decided not to pursue some of those issues, (ii) specified for Amtrak the few remaining issues in the hope of resolving most or all of this discovery dispute without the need for a further Board order,<sup>6</sup> and (iii) now brings this motion regarding the few specific issues that

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<sup>6</sup> CN did so promptly after completing an initial review of Amtrak's new document production, through an email on March 13, 2015 (Ex. 2), in which it emphasized its willingness to discuss the issues either before or after the filing of a motion to compel. Amtrak responded that same day stating that it would get back to CN, but as of the time this motion was being

remain. As detailed below, the remaining items involve Amtrak's refusal (1) to honor its commitment to produce or provide pertinent information about two specific documents, and (2) to produce three specific groups of centrally-maintained business records that are directly relevant and responsive to CN's discovery requests.

CN requests that this motion be handled on an expedited basis.<sup>7</sup> With expedited handling, production of the requested items should not delay this proceeding. One item is a document that Amtrak had already undertaken to locate; one item is a document that Amtrak's counsel thought had already been produced but appears not to have been; and three are specific sets of centrally-maintained records that Amtrak uses in its regular course of business.

### **LEGAL STANDARDS**

Parties to the Board's proceedings 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);<sup>8</sup> *Ballard Term. R.R. – Acquisition & Operation Exemption – Woodinville Subdivision*, Docket No. FD 35731, slip op. at 3 (STB served Aug. 22, 2013) ("*Ballard*"). Information is relevant, and thus subject to production, if it "might be able to affect the outcome of a proceeding." September 23 Order at 8 (quoting *Waterloo Ry. – Adverse Aban. – Lines of Bangor & Aroostook R.R. in Aroostook Cnty, Me.*, Docket No. AB-124 (Sub.-No. 2), slip op. at 2 (STB served Nov. 14, 2003) ("*Waterloo*"). The opposing party cannot pick and choose the

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finalized Amtrak had not done so. If the parties resolve one or more of these issues consensually, CN will promptly inform the Board.

<sup>7</sup> The parties agreed in their Joint Discovery Protocol that motions to compel should be handled on an expedited basis, with responses due in seven days. Ex. 1, ¶ 11.

<sup>8</sup> "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).

relevant information it will provide. Absent valid objections on other grounds, 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.*, Docket No. FD 42110, slip op. at 2 (STB served Feb. 17, 2009).

In considering a motion to compel, the Board takes into account the burden of production relative to the value of the information at issue. *See, e.g.*, September 23 Order at 8 (“discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought”) (citing 49 C.F.R. § 1114.21(c)).

## **ARGUMENT**

### **I. The Board Should Order Amtrak to Produce the Specific Documents Amtrak Had Committed to Produce or Locate and Describe.**

During several months of discussions in late 2014, Amtrak committed to locate and produce or describe two specific documents identified as responsive and potentially significant based on CN’s review of Amtrak’s initial document production. The two specific documents in question – a “Host Railroad Issue Log” and a “Policy and Procedures Manual” – are referenced in a document titled **REDACTED** produced from the files of Amtrak’s Senior Officer for Host Railroad Invoice Administration, Rich Hyer.<sup>9</sup> On February 21 and again on March 13, CN reiterated its request that Amtrak honor its commitments respecting the two documents,<sup>10</sup> but Amtrak to date has refused.

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<sup>9</sup> Ex. 3 (ATK0000126036).

**REDACTED**

<sup>10</sup> Ex. 4 (letter from CN counsel to Amtrak counsel, Feb. 21, 2015); Ex. 2 (email from CN counsel to Amtrak counsel, Mar. 13, 2015).

The “Host Railroad Issue Log” is referenced in a section of ATK0000126036

**REDACTED**

Ex. 3, Item 21. Given the name of this document and the context in which it is referenced in ATK0000126036, there is every reason to believe that Amtrak’s “Host Railroad Issue Log” contains information responsive to one or more of CN’s discovery requests.<sup>11</sup> Amtrak’s counsel agreed in November 2014 to locate the Log and to advise CN’s counsel of its contents and whether Amtrak would voluntarily produce it. Amtrak reported at the December 18 discovery conference that its investigation was continuing. Amtrak now refuses to produce the Log or provide any information about its contents.

The “Policy and Procedures Manual” is referenced twice in ATK0000126036; the references indicate that

**REDACTED**

. Ex. 3, Items 8 & 14. Based on the descriptive references in ATK0000126036, there is every reason to believe that this Manual contains information responsive to one or more of CN’s discovery requests,<sup>12</sup> and Amtrak’s counsel stated at the December discovery conference that she

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<sup>11</sup> See, e.g., Request for Production 23 (documents relating to requests by CN “for correction of CDRs, including Amtrak’s internal analyses and responses”); Request for Production 25 (documents relating to “any disagreements or relief items, whether resolved or not,” between Amtrak and CN “regarding the OTP of, or delays to, or the classification of or attribution of responsibility for delays to, Amtrak trains included in the Relevant Services” [defined as services operated in whole or part over CN lines]); and Interrogatory 17 (documents relating to complaints or grievances about “Amtrak’s operation of the Relevant Services” or “Amtrak’s promulgation or implementation of policies, practices, or procedures for the monitoring, recording, coding, reporting, measurement, or description of delays to Amtrak trains”).

<sup>12</sup> See, e.g., Request for Production 23(b) (“Amtrak’s procedures, criteria, protocols, instructions, directions, and guidance for handling requests made by Host Railroads for

thought this Manual had been produced. However, CN has been unable to locate it in Amtrak's document production, and Amtrak has not complied with CN's request that Amtrak identify it by Bates number if it contends it has been produced.

In months of discussions and correspondence, Amtrak has not purported to have determined that either the Host Railroad Issue Log or the Policy and Procedures Manual referenced in ATK0000126036 are non-responsive, irrelevant, or privileged. Moreover, producing one specifically identified Log and one specifically identified Manual which are referenced in a **REDACTED** relating to host railroads is not unduly burdensome. Amtrak should be ordered to produce them.

**II. The Board Should Order Amtrak to Produce Three Specific Sets of Responsive, Centrally-Maintained Business Records.**

At the December discovery conference, CN advised Amtrak of references in Amtrak documents to three sets of centrally-maintained records that are responsive to CN's discovery requests but that Amtrak had not produced.

The first two sets of records – the “Delay Analysis” reports and the “Delays Between Stations” reports – are described as **REDACTED** in ATK0000060147, an Amtrak email titled **REDACTED**

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correction of CDRs”); Interrogatory 13 (Amtrak's policies and procedures relating to “(a) communications with dispatchers and other employees of CN, (b) the recording, coding, measurement, reporting, and description of delays to Amtrak trains as HRD or for purposes of any Operating Agreement, and (c) the recording, coding, measurement, and reporting of OTP”); and Interrogatory 21 (“processes, procedures, and criteria employed by Amtrak to determine (a) how an individual delay to an Amtrak train or a type of delay to an Amtrak train should be categorized for purposes of the PRIIA Metrics, (b) whether a CDR should be corrected, and (c) how an individual delay to an Amtrak train or type of delay to an Amtrak train or cause of failure of OTP should be treated for purposes of Performance Payments and Penalties under the CN Operating Agreement”).

.<sup>13</sup> These reports fall squarely within the scope of at least two of CN’s discovery requests: Request for Production 15 (requesting documents relating to “training . . . to record information relating to delays to Amtrak trains for the Relevant Services”) – to which Amtrak agreed to produce “responsive, non-privileged documents” – and Interrogatory 13 (requesting Amtrak to describe with particularity its practices relating to “the recording, coding, measurement, reporting, and description of delays to Amtrak trains as HRD” and “the recording, coding, measurement, and reporting of OTP”) – to which Amtrak responded that it would produce “the relevant business records from which this information can be derived or ascertained by CN.”<sup>14</sup>

The third set of records – known as “Dockets” – are referenced in ATK0000046815, an Amtrak email titled **REDACTED** that attaches a copy of the **REDACTED** (ATK0000046816) for **REDACTED** <sup>15</sup> The Spring 2011 Docket contains information **REDACTED** <sup>16</sup> and **REDACTED**

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<sup>13</sup> Ex. 5 (ATK0000060147).

<sup>14</sup> The “Delay Analysis” reports may also be responsive to Document Requests 21 and 22 (documents relating to, *inter alia*, “any analysis by, within, or for Amtrak” of measures to reduce delays to Amtrak trains for the Relevant Services) and 24 (documents relating to, *inter alia*, “analysis by, within, or for Amtrak” of “the criteria used by Amtrak to identify and categorize delays as FTI or other HRD”).

<sup>15</sup> Ex. 6 (ATK0000046815 and ATK0000046816).

<sup>16</sup> “PRT” is short for “pure run time.” Pure run time represents Amtrak’s assessment of how long an Amtrak service should take if there are no problems or impediments, and is the first and essential building block for Amtrak schedules. If Amtrak adjusted PRT to increase it, that would normally lead to time being added to the train schedule, which would result in some train trips that are currently counted as not on time being counted as on time, in CN being charged with less delays (since, under the CN-Amtrak operating agreement, delays are assessed against PRT), and thus with CN being credited with, and paid for, improved performance.

**REDACTED**

.<sup>17</sup> This information is responsive to Request

for Production 21 (documents relating to “any consideration or analysis by, within, or for Amtrak” of measures that might be taken “to improve the OTP of, and reduce delays to Amtrak trains for, the Relevant Services”), to which Amtrak stated it would produce “any responsive, non-privileged documents.” There is every reason to believe Amtrak’s more recent quarterly Dockets contain similar relevant, responsive information.

It should not be unduly burdensome to produce these three specific records, since Amtrak appears to generate them in the ordinary course of business and maintain them on its intranet. Nor can Amtrak properly contend that it is not obligated to produce them because they do not reside in the files of one of individual custodians whose files Amtrak stated it would search. In the Joint Discovery Protocol, the parties agreed to exchange “initial lists of custodians,” subject to supplementation as appropriate, *see* Ex. 1 ¶ 1(c), in order to manage the electronic term-searching process they agreed to use in responding to document requests, *see id.* ¶ 1(a)(ii). This was not intended to shield centrally stored records from discovery. Indeed, the Joint Discovery Protocol provides for production from corporate databases, *see id.* ¶ 3(e), and both parties have produced business records beyond the files of their individually-designated custodians. Specifically-identified documents and business records that are relevant, responsive, and centrally maintained, such as the items at issue here, are subject to discovery.

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<sup>17</sup> ATK0000046816 (Ex. 6), *e.g.*,

**REDACTED**

## CONCLUSION

For the forgoing reasons, CN respectfully requests that the Board consider this motion on an expedited basis and order Amtrak to produce the following:

1. The Host Railroad Issue Log identified in ATK0000126036 (and any subsequent iterations during the period May 1, 2011 through October 31, 2013).
2. The Policy and Procedures Manual identified in ATK0000126036 (and any subsequent iterations during the period May 1, 2011 through October 31, 2013).
3. The "Delay Analysis" reports referenced in ATK0000060147 for the period May 1, 2011 through October 31, 2013.
4. The "Delays Between Stations" reports referenced in ATK0000060147 for the period May 1, 2011 through October 31, 2013.
5. All quarterly dockets that refer or relate to Amtrak services run in whole or in part over CN lines for the period May 1, 2011 through October 31, 2013.

Amtrak's discovery should not be considered complete, and the 30 days for opening submissions under the Board's schedule should not begin to run, until Amtrak has done so.

Respectfully submitted,



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March 16, 2015

# **EXHIBIT 1**

**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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**JOINT DISCOVERY PROTOCOL**

The following Joint Discovery Protocol (“Protocol”), dated this 30th day of January 2014, shall apply to all documents, including but not limited to electronically stored information and other electronically stored discovery materials (hereinafter “ESI”), maintained and/or exchanged by the Parties (“Parties” or “Party”) in this proceeding, and to certain other issues relating to discovery in this proceeding. The obligations in this Protocol are in addition to those set forth in the Protective Order entered by Surface Transportation Board (“Board”) on December 16, 2013. The purpose of this Protocol is to facilitate the conduct of discovery and the resolution of disputes. Compliance with this Protocol may be considered by the Board in resolving discovery disputes.

1. **Searches for Responsive Documents.** In response to a request for document production, a Party shall search both the paper files and the reasonably accessible ESI of custodians who are reasonably likely to possess responsive documents that are not duplicative of documents that would be possessed by other custodians already being searched. In order to search such reasonably accessible ESI, each Party shall apply the relevant time frame and search terms reasonably necessary to satisfy all non-objectionable parts of document production requests. Each Party shall produce on a rolling basis non-privileged, relevant, and responsive

documents and information, including ESI, in the format provided for under Paragraph 3 and within a time frame agreed by the Parties or otherwise ordered by the Board.

(a) Search Dates and Methodology.

(i) The Parties have agreed that the starting date for selection of responsive documents will be May 1, 2011 (encompassing documents created, revised, sent, in force, in effect, or in operation from that date forward), with the exception of: (1) documents relating to actual and potential capital expenditures and investments in rail lines and infrastructure/capacity funding issues with respect to rail lines; and (2) documents relating to general discussions or analyses of public policy issues or PRIIA metrics. The ending date for selection of responsive documents will be October 31, 2013 (the date of the first document request in this proceeding).

(ii) The use of search terms appears to be reasonably necessary to identify emails and email attachments, and may be reasonably necessary to identify other ESI, likely to contain discoverable information. Prior to document production, the Parties shall exchange search terms and try to reach agreement on them, but agreement shall not be a precondition to searching for and producing documents. The Parties shall fully document their use of search terms, including which search terms are used for which custodians and for which ESI sources. If a Party discovers that the search terms it is using are failing to collect non-privileged documents that are within the non-objectionable scope of document requests, it shall broaden its search to the extent reasonably necessary to collect such documents.

(b) Custodians. Prior to document production, the Parties shall exchange initial lists of custodians whose files they propose to search, including the custodian's title, the date the custodian assumed the position, and the names of any persons within the company who,

at any time after May 1, 2011, had prior responsibility for one or more of the custodian's present responsibilities respecting an area or subject of the other party's discovery requests. The Parties shall supplement and update their list of custodians as their search and production progresses.

(c) Disputes. Either before or after production, the Parties after conferring may seek resolution at the Board of any remaining disputes regarding search terms, custodians, or other discovery issues. Each party agrees to promptly raise concerns with the producing party concerning its list of search terms or list of custodians.

2. **ESI Not Reasonably Accessible.** ESI may not be reasonably accessible where the requirements in order to search that ESI involve undue burden and costs. For purposes of this Protocol, ESI available from a live, readily accessible source shall be considered "reasonably accessible." ESI maintained on voicemail systems and mobile phones, and ESI which cannot be retrieved without great effort and cost, including ESI maintained on obsolete or "legacy" systems no longer in use, or on backup tapes and other archival media, shall be considered "not reasonably accessible." Neither Party shall have an affirmative obligation to investigate whether ESI that is not reasonably accessible contains potentially responsive and non-duplicative information.

(a) Each Party shall provide the opposing Party with a list and description of any ESI that a Party considers not reasonably accessible, setting forth (i) a description of the nature of the ESI (*e.g.*, email communications, account payable information, etc.); (ii) the type of media in which the not reasonably accessible data is contained, to the extent it is known or can reasonably be ascertained; and (iii) the reasons the ESI is considered not reasonably accessible. If, after conferring, the Parties are unable to resolve their disagreement as to whether the ESI is

or is not reasonably accessible, the Party contesting the designation of the ESI as not reasonably accessible may seek resolution of that issue from the Board.

(b) Each Party shall promptly notify the other Party if it learns of responsive, non-privileged documents that are not duplicative of documents already being produced that are contained in ESI that is not reasonably accessible. Upon such notification, the Parties shall promptly meet and confer to determine what steps, if any, should be taken with respect to such not reasonably accessible ESI. If, after conferring, the parties are unable to agree on what steps should be taken with respect to such ESI, then the Party seeking the search and production of such ESI may seek resolution from the Board.

3. **Production.** Unless the Parties agree otherwise, the provisions set forth in this Section shall govern the format for the production of all documents. To the extent that issues arise in the course of productions that are not fully addressed in this Protocol, the parties shall immediately confer to resolve them. In all instances, the producing Party shall make all reasonable efforts to insure that documents are produced in a manner that is easily reviewable and not inconsistent with modern e-discovery techniques.

(a) Bates Numbering and Confidentiality Designations. Each Tagged Image File Format (“TIFF”) image of a produced document (see Subsection 3(b), below) shall contain a legible Bates number that: (i) is unique across the document production; (ii) has a constant length across the production; and (iii) is sequential within a given document. Each page shall be numbered such that it can be uniquely identified and will include before the Bates number an acronym identifying the producing Party (*e.g.*, “CN” or “ATK”) followed by the zero-filled sequential number (*e.g.*, CN0000000987 or ATK0000019931). Rather than skipping Bates numbers within the range of production, the Parties shall use placeholders (marked “No

Document For This Bates Number”). In addition, a producing Party designating a document for confidential treatment shall place the appropriate confidentiality designation – “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” – on each TIFF image of that document. Both the Bates number and confidentiality designation shall be placed on the page image in a manner that does not conceal or interfere with any information contained on the page. The producing Party shall not place any stamp or information on a document it produces that is not on the original, other than the Bates number, any confidentiality designation, or an indication of any redactions. The provisions of this Subsection 3(a) notwithstanding, Bates numbering and the confidentiality designations of documents produced in native format shall be in accordance with Subsections 3(b) and 3(i).

(b) Format for Production.

(i) Except for ESI produced in native format, the Parties shall electronically produce any non-privileged, relevant, and responsive document in electronic format as a single-page black and white Group IV TIFF image with a minimum resolution of 300 dpi. Receiving Parties shall have the right to request that a document be produced in color if they have a reasonable basis to believe that color will significantly improve their understanding of the document, and such a request shall not be unreasonably denied.

(ii) For each document produced, the Parties shall provide a document level or multipage text file containing Optical Character Recognition (“OCR”) text (for documents without extractable text) or extracted text (where available). Each such text file shall be named to correspond with the beginning Bates number of the produced document from which the text was obtained. All text files shall be provided in separate folder titled “Text.” For each produced document, the Concordance .DAT file (or similar load file if provided in another

format) shall contain a field named "OCR PATH," which shall be populated with the path to the corresponding OCR/Extracted text file.

(iii) The producing Party shall also provide both a metadata load file and an image load file. Those load files shall be produced in Concordance format (.DAT file using Concordance standard delimiters for the metadata load files, and .OPT file using Concordance standard fields for the image load files). The producing Party shall also provide image load files in a format viewable in or readily convertible to the IPRO Image Viewer, with extracted text files at the document level having the same file name as its corresponding image file, unless a document has otherwise been redacted. The image load file shall provide image and document break information for the TIFF files produced that correspond to the beginning Bates numbers contained in the metadata load file. Every TIFF file in each production must be referenced in the production's corresponding image load file, and the total number of TIFF files referenced in a production's image load file shall match the number of TIFF files in the production. The metadata load file for each production shall provide the Bates numbers and the Bates number attachment range for email or other documents containing attachments and any applicable confidentiality designation.

(iv) The producing Party shall also provide a multipage searchable OCR text file for the unredacted portions of each redacted document as well as for the entirety of each document that does not contain redactions. The OCR text files and image load files should indicate page breaks, to the extent possible.

(v) Paper documents shall be imaged and produced in digital form, including an OCR file and a TIFF file for each document. When scanning paper documents, distinct documents shall not be merged into a single record, and single documents shall not be

split into multiple records. The Parties shall use physical bindings as document boundaries, such that the smallest binding shall be the document, and the largest binding shall be the attachment group.

(vi) In order to minimize any delays that may arise from conflicts or incompatibilities between the software used by each Party, the parties shall exchange sample image load files, metadata load files, OCR text files, and TIFF files within seven (7) calendar days of the date of this Protocol, which shall be representative of the principal file formats in which the Parties expect to produce documents.

(c) Metadata.

(i) ESI. During the process of converting ESI from the electronic format of the application in which the ESI is normally created, viewed and/or modified to TIFF, metadata values shall be extracted and produced in a metadata load file, unless one or more of the metadata fields would reveal information that has otherwise properly been redacted, in which case that specific information may be redacted from the pertinent metadata field. To the extent they are available in collected data, the metadata values that are to be extracted and produced in the metadata load files are:

1. BEGBATES
  - (a) Starting production number
2. ENDBATES
  - (a) Ending production number
3. BEGATTACH
  - (a) Starting production number of attachment range
4. ENDATTACH
  - (a) Ending production number of attachment range
5. CUSTODIAN
  - (a) Name of individual custodian. Where not reasonably available, identify company custodian (e.g., "CN" or "ATK")
6. ATTACHMENT COUNT
  - (a) Number of attachments
7. ATTACHMENT NAMES
  - (a) Names of attachments, delimited by ";"
8. MD5 HASH
9. ELECTRONIC DOCUMENT TYPE/FILE EXTENSION

10. FILE SIZE
11. FILE NAME
12. FILE LOCATION
13. NATIVE FILE PATH
14. DATE SENT/CREATED
15. TIME SENT/CREATED
16. DATE LAST MODIFIED
17. TIME LAST MODIFIED
18. FROM/AUTHOR(S)
19. TO
20. CC
21. BCC
22. SUBJECT
  - (a) Subject line of email
23. COMMENTS
  - (a) Any comments recorded in document properties (not internal comments within the document)
24. IMPORTANCE FLAG
  - (a) Marked as YES if an email was sent with high importance
  - (b) Marked as NO if not

(ii) Attachments. In addition, for every document that includes an attachment, to the extent available, the following fields should be produced and populated as part of the metadata load file record for both parents and attachments to provide the parent/child or parent/sibling relationship:

- 1) BEGBATES
  - a) Starting production number
- 2) ENDBATES
  - a) Ending production number
- 3) BEGATTACH
  - a) Starting production number of attachment range
- 4) ENDATTACH
  - a) Ending production number of attachment range

(iii) Paper Documents. With respect to images of paper files, the producing Party shall provide in the metadata load file information corresponding to items 1-5 in the list in subparagraph (i) above and information relating to attachments in accordance with subparagraph (ii) above.

(d) Logical Unitization for Images. The producing Party shall make reasonable efforts to split image-based electronic files (scanned PDFs and multi-page TIFFs) into logical files (known in the information technology industry as logical unitization).

(e) Spreadsheets and Database Data.

(i) Spreadsheets are defined as MS-Excel and other application programs whose primary function is the organization, display and processing of data in a row/column format. Each spreadsheet shall be produced in native format unless the spreadsheet is to be redacted and redacting the spreadsheet in native format would be unduly burdensome as compared to redaction not using native format. The producing Party shall retain for the duration of this proceeding (including any appeals, judicial review and or proceedings on remand) unredacted originals of any spreadsheets that are produced with information redacted. When producing redacted spreadsheets in other than their native formats, the producing Party shall legibly display all unredacted data including all hidden rows, columns, cells, worksheets, comments, formulas, and metadata, as well as any associated headers or footers.

(ii) The Parties shall identify any databases containing non-duplicative relevant and responsive information. If any such information exists, the Parties shall confer to determine what data is contained in each database, and to agree upon the method and format for producing any such relevant and responsive information. The Parties shall also confer with respect to the most reasonable form of production for any other data contained in any other format that cannot reasonably be produced and understood in single-page TIFF format or where the review of native data by the receiving Party would require the use of a proprietary or non-standard file viewer or media player.

(iii) If after conferring the Parties are unable to resolve a production issue discussed in this Subsection 3(e), the Party seeking production may seek resolution of that issue from the Board.

(f) Media Files. Media files shall be produced in the native media file format in which they were maintained in the ordinary course of business, unless redactions are needed. If redactions are needed, the redacted media file may be produced in either the original native format or a standard media format.

(g) System and Program Files. System and program files defined as such in the National Software Reference Library need not be processed, reviewed, or produced. Additional files may be added to the list of excluded files by mutual agreement of the Parties.

(h) Native File Production. Any file produced in its native format shall be assigned a single Bates number and shall be named with its Bates number and producing Party acronym, and shall be assigned any applicable confidentiality designation, following the format conventions of Subsection 3(a). The load file entry for any file produced in native format shall include a field containing the file's original file name and a link to the produced file. For every file produced in native format there shall be a single TIFF image containing the words "File Produced in Native Format," the name of the file as produced, and the corresponding Bates number and any confidentiality designation for the file. The Parties reserve the right to request production of additional ESI in native format after review of data produced as TIFF images rather than in native format. The Party from whom native files are requested shall not unreasonably deny a request to produce the native files if the other Party has shown a particularized and substantial need for such information. Should the Parties not reach agreement after conferring, the requesting Party may file with the Board a motion to compel the production of such ESI in native format.

(i) Physical Production of Documents. The Parties shall produce all documents in electronic format to the requesting Party on CD, DVD, flash drive, via secure ftp,

or hard drive, as appropriate for the size of the production. Multiple small media (*e.g.*, several CDs) shall not be provided where one larger medium (*e.g.*, a DVD) can reasonably be produced.

(j) Redactions. If the producing Party redacts a document, such redaction shall be clearly marked on the TIFF image of the document. For each redacted document, the producing party shall also either (i) provide a list identifying by Bates number those pages that have been redacted or that contain redactions and the reason(s) for such redactions or (ii) a database field populated with an indicator of redaction and the reason(s) for redaction. A failure to redact information shall be subject to the provisions of Section 10.

(k) De-duplication. A Party is only required to produce a single copy of any responsive document. A Party may de-duplicate ESI across each Party's custodians or sources, but is not required to do so. A Party may only de-duplicate "exact duplicate" documents as identified by MD5 hash and not de-duplicate "near duplicate" documents. Hard copy documents may not be eliminated as duplicates of responsive ESI if the hard copy document contains any distinguishing writings, markings, or other features not evident from an otherwise duplicate version of the document.

4. **Costs**. The costs of discovery, including ESI, shall be borne by each respective Party. However, the Board may, upon application by a Party, consider apportioning the costs of discovery where appropriate and upon a showing of good cause.

5. **Applicable Provisions**. Except as otherwise expressly addressed in this Protocol, each Party's discovery and ESI production obligations shall be subject to the obligations, limitations, and protections contained in the Board's rules governing discovery, 49 C.F.R. Part 1114, Subpart B, and in the Protective Order entered by the Board on December 16, 2013.

6. **Expert Materials**. The Parties agree not to seek discovery of any experts' notes, drafts of expert reports or communications with counsel, unless that expert had involvement with

the factual issues in this proceeding (outside that expert's role in preparing to advise or testify) and such materials are otherwise discoverable. However, counsel may inquire at any expert's deposition about any facts provided to the expert by counsel and upon which the expert is relying in formulating the expert's opinions.

7. **Meet and Confer.** The Parties shall meet and confer to agree upon the timing for beginning and completing the rolling production of relevant and responsive documents and information.

8. **Confidential Documents.** Documents that contain Confidential Information (as defined in the Protective Order) shall be handled according to the procedures set forth in that Order. If a Party converts native files or other ESI designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" under the Protective Order to hard copy form, it shall mark the hard copy with the appropriate designation.

9. **No Privilege Logs, Absent Order.** Except as the Board may provide by specific order in this proceeding, no privilege logs shall be required in this proceeding, and the failure to provide a privilege log shall not be relied upon in any way in support of any claim of waiver of attorney client privilege or of attorney work product protection. The Parties reserve the right, however, to challenge before the Board any claims of privilege or work product protection.

10. **Handling of Privileged Documents.**

(a) Each Party shall make reasonable efforts to identify and withhold from production all information that it claims to be privileged or subject to work product protection. If information subject to a claim of attorney-client privilege or work product protection or otherwise immune from discovery is inadvertently or mistakenly disclosed or produced by a Party (such information hereinafter referred to as "Inadvertently Disclosed Information"), such disclosure or production shall in no way constitute a waiver or forfeiture of, or estoppel as to, any claim of privilege or work product protection or immunity for such information and its subject matter.

(b) If a Party intends to produce a document marked as privileged or as subject to work product protection, the producing Party shall so notify the receiving Party, identifying the document by Bates number, at the time of production. Subparagraphs (c) and (d) below shall not apply to such documents. In the event that a receiving Party discovers that a producing Party has produced a document that is marked as privileged or otherwise bears indicia of attorney-client privilege or work product protection the receiving Party shall promptly cease reading the document and so notify the producing Party through its counsel, specifically identifying such document by its Bates number. The producing Party shall promptly respond to any such notification, stating whether it claims attorney-client privilege or work product protection with respect to the document. If the producing Party states that it makes such a claim, the document shall be treated as Inadvertently Disclosed Information in accordance with subparagraph (e) below. If the producing Party does not state within seven (7) days that it makes such a claim, any such claim with respect to that document shall be deemed waived, and the receiving Party shall be free to retain and resume reading and otherwise use the document, subject to such confidentiality restrictions as may apply.

(c) No receiving Party shall assert that the fact that it has been permitted to review or receive Inadvertently Disclosed Information constitutes a waiver of any right, privilege, or other protection that the producing Party had or may have had. In thereafter seeking production of the Inadvertently Disclosed Information, the receiving Party shall not assert waiver or estoppel as a ground for such production. Nor shall the producing Party use the Inadvertently Disclosed Information as a basis for arguing for disqualification of counsel for the receiving Party.

(d) If the producing Party asserts that Inadvertently Disclosed Information was privileged or otherwise protected from discovery, the receiving Party shall destroy all copies of, and any electronic records, notes or memoranda that reflect the substance of, such Inadvertently Disclosed Information within ten (10) business days of such request, except that portions of backup tapes may instead be destroyed in accordance with standard retention

policies. The receiving Party shall promptly provide a certification of counsel that all such Inadvertently Disclosed Information has been destroyed. If Inadvertently Disclosed Information to be destroyed was not produced to the receiving party in a format permitting destruction of the Inadvertently Disclosed Information without also destroying other documents or data that have been produced, then the producing party shall provide a replacement set for such other documents or data and the receiving party need not destroy the Inadvertently Disclosed Information until that replacement set has been received. The producing Party will maintain copies of all Inadvertently Disclosed Information until the later of (1) 60 days following its request to the receiving Party for the destruction or return of the Inadvertently Disclosed Information, or (2) the resolution by the Board of any and all challenges to the producing Party's assertions of privilege regarding such Inadvertently Disclosed Information that are brought within those 60 days.

11. **Motions.** The Parties agree that all discovery-related motions in this proceeding should be determined on an expedited basis. To that end, unless otherwise agreed to by the Parties or ordered by the Board, replies to discovery-related motions shall be due within seven (7) days of the filing and service of the motion.

Read and approved by:

1/30/14  
Date:

Linda J. Morgan

Linda J. Morgan  
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1/30/14  
Date:

Paul A. Cunningham

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

# **EXHIBIT 2**

From: David A. Hirsh/Harkins Cunningham/US  
To: lmorgan@nossaman.com  
Cc: grollins@morganlewis.com  
Date: 03/13/2015 04:45 PM  
Subject: Remaining Document Production Issues

Linda,

As you know, we indicated in our letter of March 9 to the STB that we would evaluate the remaining omissions in Amtrak's document production and move to compel with respect to any unresolved material issues by Monday March 16. We have completed our assessment of Amtrak's newest productions (of March 6 and February 27) and your responses to the items listed in our letter of February 21. There are a small number of items as to which we intend to seek further relief if Amtrak remains unwilling to provide the documents or otherwise satisfactorily address our requests. The items are the following:

- Host Railroad Issue Log referenced in ATK0000126036 – Please produce this log or, if you believe it is non-responsive, explain why.
- Policy and Procedures Manual referenced in ATK0000126036 – You stated at the December discovery conference that you thought this manual had been produced. However, we cannot find it in Amtrak's document production. Please identify its Bates number or produce this document.
- "Delay Analysis and "Delays Between Stations" reports referenced in ATK0000060147 – These intranet-based records appear to be directly responsive to CN discovery requests. Please produce them.
- "Dockets" referenced in ATK0000046815 – Based on the Spring 2011 Docket attached to ATK0000046815, these intranet-based records contain information about schedules and operational issues concerning Amtrak services that run over CN lines. Please produce the other quarterly dockets that fall within the discovery period (May 2011 through October 2013).

I hope we can reach agreement on these few discrete items in order to avoid the need for a further motion to compel or at least a Board decision on such a motion. None of these items will come as a surprise to you as we have raised each of them with you before. Please let me know if Amtrak will reconsider its refusal to produce or provide further information on these documents. We would be happy to work with you on this whether before or after a further motion to compel.

Thanks,

David

# **EXHIBIT 3**

**REDACTED**

# **EXHIBIT 4**

# HARKINS CUNNINGHAM LLP

*Attorneys at Law*

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February 21, 2015

Linda J. Morgan, Esquire  
Nossaman LLP  
1666 K Street, N.W., Suite 500  
Washington, D.C. 20006

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

Dear Linda:

This responds to your February 10 letter and asks that you clarify Amtrak's position on several important outstanding discovery items you had previously undertaken to investigate and/or produce.<sup>1</sup>

We were disappointed by Amtrak's abrupt departure from the prior cooperative way the parties had been working to address discovery issues, and by your delay in responding to our February 3 letter until 3 pm on February 10 – just 2 hours before the Board's deadline for reports on the status of Amtrak's long-overdue production from its ridership and revenue database.

As we detail below, during months of discussions between counsel, you have made multiple commitments to us to search for and produce various documents and information. You committed to produce revenue data; you committed to provide specific information about the contents of the TDRS database; you committed to produce all attachments to responsive emails; you committed to produce stubbed attachments; and you committed to search for and, if found, produce several other regularly maintained reports or business records we identified as responsive and potentially significant based on our review of Amtrak's document production so

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<sup>1</sup> This letter focuses on the most significant of Amtrak's ongoing failures to meet its discovery obligations (with the exception of its withholding of revenue database information relating to services operated over CN lines, addressed in our February 10 status report and related motion to compel). As you are aware, we have addressed several other issues in our meet-and-confers. CN expects Amtrak to comply fully with its discovery obligations, and does not waive any rights insofar as it does not repeat here points already discussed between the parties.

# HARKINS CUNNINGHAM LLP

Attorneys at Law

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far. Your February 10 letter appears to retract many of those commitments. We urge you to reconsider.

Amtrak's abrupt and inexplicable reversal of position now threatens to further delay this proceeding, which has already been excessively delayed by Amtrak's deficient initial production and repeated delays. It is now more than 15 months after CN served its requests, almost five months after Amtrak incorrectly informed the Board its production was complete, and almost five months after the Board's September 23 order granting a CN motion to compel. Nonetheless, as you concede in your letter, Amtrak has not completed its document production and it is now backtracking on essential commitments it made to complete its production. To minimize further delays, we ask that you provide clear and definitive responses to this letter as soon as possible, but no later than February 27.

## Delay Reporting Documents / TDRS

At our December 18 meet and confer, both parties recognized that the documents regarding delay reporting that Amtrak has yet to produce pursuant to the Board's September 23 order should include, but not be limited to, data from Amtrak's TDRS (Transportation Department Review System). Pursuant to Section 3 of the Joint Discovery Protocol, you had undertaken in November to investigate and provide specific information relating to Amtrak's TDRS to enable the parties to determine (i) what would be produced from TDRS in response to the Board's September 23 order and (ii) whether Amtrak would need to supplement its production from TDRS with information from other central repositories.<sup>2</sup> Given your report on December 18 that you were still investigating these matters, we had hoped to receive this information at the January 30 meet and confer, but you cancelled that conference. Your February 10 letter vaguely references possible production from the TDRS but does not explain what Amtrak intends to produce from it and what supplementation might be required from other sources, and does not provide the background information necessary for CN to consider those issues. *Please do so.*

## Email Attachments

Your description of the circumstances relating to Amtrak's production of "several thousand email attachments that were initially withheld as non-responsive ... [a]t CN's request and at Amtrak's expense" (Feb. 10 letter, Point 4) omits the critical fact that Amtrak's failure to include the attachments in its initial production was, as you recognized during our meet-and-confers, Amtrak's mistake. Amtrak was therefore merely rectifying its own error.

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<sup>2</sup> The specific information we discussed and that Amtrak agreed to provide is listed in my February 3 letter: (i) whether, when an incorrect coding issue is discovered and a code changes is made, a TDRS field shows what the change is; and if not, (ii) identification of the depository (in TDRS or elsewhere) that contains this information.

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Point 4 in your letter states that “CN has now identified a small number of additional as yet unproduced attachments that they believe to be responsive,” and you state that “Amtrak is preparing these documents for production to the extent that they are responsive as it did with the other previously unproduced attachments.” We do not understand the underlined portion of your concluding sentence. As we have discussed before, and consistent with conventional practice, if an email is responsive, it should be produced in full, including its attachments. ***Please tell us if you will produce the missing attachments (which we believe number 34) in full.***

“Stubbed Attachments”

In November you told us you believed the so-called “stubbed attachments” shown as family members of various emails produced by Amtrak, but that could not be accessed in the files we received, were email extenders that had been archived and were no longer reasonably accessible. You agreed to investigate their location, lack of accessibility, and timing and to provide us with a report. Graham then reported at the December 18 session that these documents were intact and available, acknowledged their relevance, and assured that we would get what we needed. We agreed that you would send us a list and that, based on that list, we would notify you of the documents Amtrak should produce. We received the list on January 20 and responded on January 21 that

given their relevance and relatively small volume (147 documents), and our understanding from the last meet and confer that these documents have been restored, it seems most efficient if Amtrak simply produces all 147 of the stubs. Please confirm that you will do so. We can discuss further on next week’s call if necessary.

However, Amtrak then cancelled that call, and we received no response to our January 21 email until your February 10 letter stating that Amtrak does not intend to produce any of the 147 documents due to the “substantial effort” that would be required.

Amtrak’s position that it will not produce any of the 147 documents is unacceptable. These documents are responsive to document requests propounded in October 2013, and Amtrak – not CN – bears responsibility for the fact that they were mistakenly separated from their parent emails as “the result of a data migration process that was underway within Amtrak at the time of the collection” (Feb. 10 letter, Point 5) – a point in time when Amtrak was obliged to preserve and gather its documents so that it could meet its discovery obligations in this proceeding.

Amtrak’s post-complaint, post-request mishandling of the document collection does not excuse Amtrak from producing any of these relevant, responsive documents. Amtrak had an obligation to preserve and produce all 147 of them. Moreover, a number of those documents appear to be particularly significant regarding key issues in the case. We are willing to permit Amtrak to exclude those attachments that reflect or constitute documents sent to or received from

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CN (e.g., CDRs, executed copies of agreements). ***Please tell us if you will produce all other attachments.***

Other Documents and Data Sources

Your statement that “CN has continuously made new requests for additional production of documents and from data sources” and your related characterization of my February 3 email are inaccurate and misleading. CN has served no new discovery requests since its October 2013 discovery requests. Amtrak has failed to comply with those initial requests, and with the Board’s orders granting CN’s motions to compel, in multiple respects. What you call “new requests” are CN’s identification of various specific aspects of Amtrak’s failures to comply. Moreover, CN identified those deficiencies by late 2014, and you previously committed to remediate them.<sup>3</sup>

Host Railroad Issue Log. You agreed back in November to locate this log (referenced in ATK0000126036) and advise us of its contents and whether Amtrak would voluntarily produce it. Graham reported at our December 18 conference that the log was not part of TDRS and that his investigation was continuing. ***Please tell us if you will produce this log or, if you believe it is non-responsive, explain why.***

Policy and Procedures Manual. You stated at the December discovery conference that you thought the specific Policy and Procedures Manual referenced in ATK0000126036 had been produced. However, we cannot find it in Amtrak’s document production and you have not identified it in that production. ***Please identify its Bates number or produce this document.***

Operating Forecast. At the December discovery conference, Graham reported that the operating forecast referenced in ATK0000215625 had been inadvertently omitted from Amtrak’s last production and would be included with the production made pursuant to the Board’s September 23 Order. ***Please confirm that it will be included in that production.***

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<sup>3</sup> On page 3 of your February 10 letter you state that (apart from the outstanding delay reporting document production) Amtrak has produced the results of the searches it said it would run for the custodians it had identified. However, the parties committed to do more than that. Under the Joint Discovery Protocol, the “initial lists of custodians” do not exhaust the parties’ discovery duties, *see* ¶ 1(c), and production is also required from corporate databases, *see* ¶ 3(e). Custodian lists are useful to delineate a reasonable scope for electronic term searches, but specifically identified documents and business records that are relevant and responsive must be produced insofar as they are reasonably accessible, without regard to the identity of their individual custodian. CN has produced relevant and responsive documents to Amtrak without limiting its production to named custodians’ files. As chronicled above, you had committed to do likewise to find the specific documents and business records listed herein.

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Business plans. Amtrak has produced various versions of a Business Plan from FY2008, and excerpts of a later draft Business Plan from FY2013, in response to CN discovery requests. At our December conference we asked whether Amtrak has updated its Business Plan since FY2008 and requested that any updates be produced. You agreed to check. ***Please tell us if you will do so.***

Monthly Performance Reports. Amtrak produced only two of these reports, from July 2012 and April 2013, for the pertinent discovery period (May 2011 through October 2013), in response to CN's discovery requests. We advised you in December that we are willing to forgo production of all 30 monthly reports if you agree to produce the December 2011, December 2012 and October 2013 reports. It cannot possibly be burdensome to produce these reports, which Amtrak generates (and presumably maintains) in the regular course of business. ***Please tell us if you will do so.***

Other Specific Business Records. At the December meet and confer, we advised you that we had discovered references in various Amtrak documents to three intranet records that appear to be responsive to CN's discovery requests but were not produced: the "Delay Analysis" and "Delays Between Stations" reports referenced in ATK0000060147; and the "Dockets" referenced in ATK0000046815 and ATK0000190758, which appear to be generated on a quarterly basis and contain relevant, responsive information regarding schedules and operational issues concerning Amtrak services that run over CN lines. It should not be unduly burdensome to produce these centrally-maintained records, which fall squarely within the scope of CN's document requests. ***Please tell us if you will do so.***

\* \* \*

To conclude, Amtrak has been required to supplement its productions "at Amtrak's expense" because of mistakes, errors, and omissions in its original productions. Those admitted Amtrak discovery deficiencies have also caused significant expense to CN, by necessitating a series of meet and confers, correspondence, and motions to compel, and they have delayed this proceeding for many months. It is long overdue for Amtrak to fully comply with its obligations. Please respond by February 27.

Sincerely,



David A. Hirsh

cc: Graham Rollins

# **EXHIBIT 5**

**REDACTED**

# **EXHIBIT 6**

**REDACTED**

**CERTIFICATE OF SERVICE**

I certify that I have this 16<sup>th</sup> day of March, 2015, caused a true copy of the foregoing Fourth Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Discovery Requests to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

  
Spencer R. Leroux