

**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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**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY FOR LEAVE TO  
INTERVENE IN PARTIAL OPPOSITION TO MOTION OF ILLINOIS CENTRAL  
RAILROAD COMPANY AND GRAND TRUNK WESTERN RAILROAD COMPANY  
TO COMPEL RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

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**Dated: February 19, 2014**

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Pursuant to 49 C.F.R. § 1112.4, Norfolk Southern Railway Company (“NS”) submits this Petition for Leave to Intervene in Partial Opposition to the Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, “CN”) to Compel Responses to Requests for Production of Documents, filed February 12, 2014 (“Motion to Compel”). NS is not a party to this proceeding, but one of the requests for production raised in CN’s Motion to Compel implicates confidential private agreements that NS has entered with the National Railroad Passenger Corporation (“Amtrak”). CN and Amtrak have made conflicting assertions concerning the confidentiality of those contracts and NS’s interest in preserving that confidentiality. To better inform the Board of the facts concerning NS’s contracts, and to ensure that NS’s commercial interests are not compromised by a proceeding to which it is not a party, NS petitions for leave to intervene for the limited purpose of partially opposing the Motion to Compel.

Pursuant to 49 C.F.R. § 1114.21(c), “any person with a reasonable interest in the data, information, or material sought to be discovered” in a proceeding may request that the Board

protect such information, including “[t]hat a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way.” NS does not object to the production of its operating agreements with Amtrak pursuant to the Joint Protective Order approved by the Board on December 16, 2013 (“Protective Order”), but NS’s agreements should be designated “Highly Confidential” pursuant to that Protective Order for the reasons explained below.

### **I. NS’s Interest in this Proceeding**

CN’s Motion to Compel takes issue with Amtrak’s response to two production requests. Relevantly, Request for Production No. 5 asks Amtrak to “produce all of Amtrak’s Operating Agreements, including amendments, attachments, exhibits, and schedules thereto, with Host Railroads, in force at any time since 1971,” a request which CN later limited to those operating agreements in effect or agreed to on or after May 1, 2011. Motion to Compel at 5. According to CN, Amtrak has refused to produce any documents in response to this request, in part claiming third party confidentiality and commercial sensitivity. *Id.* at 15. CN has disputed this assertion, arguing among other things that “Amtrak has done nothing to establish that it is under any contractual or other duty to protect from disclosure third party information in Amtrak’s OAs.” *Id.* at 18. CN also questioned Amtrak’s standing to assert the rights of independent third parties. *See id.* at 17, n.22.

NS has two operating agreements (including amendments) with Amtrak that appear to be subject to CN’s production request: the Amended and Restated Northeast Corridor Freight Operating Agreement, dated February 1, 2006 (the “On-Corridor Agreement”), and the Amended and Restated Off-Corridor Operating Agreement, also dated February 1, 2006 (the “Off-Corridor

Agreement”). As detailed below, both agreements contain confidential and commercially sensitive information that would prejudice NS’s interests if made freely available to the public or CN in this proceeding. NS is not a party to this proceeding and is deeply concerned that the Board might act based on the representations and speculations of unaffiliated industry participants about NS’s interests. Moreover, CN bases its motion in part on the apparent assertion that only NS can properly raise its interest in preventing competitive harm to oppose public dissemination of its operating agreements. *See id.*; *see also id.* at 17 (“Amtrak’s discovery responses did not base its refusal to produce on protecting any information of its own, but instead on unidentified ‘highly confidential and commercially sensitive information of third parties.’”). Therefore, NS petitions for leave to intervene and respond to CN’s Motion to Compel to assist the Board in ensuring that the document production in this proceeding allows both parties to fully develop their cases without harming third parties, such as NS, that are not involved in the dispute.

## **II. NS Does Not Object to the Disclosure of its Operating Agreements Pursuant to the Protective Order Already in Place in this Proceeding**

According to CN, Amtrak has refused to produce its operating agreements with the Host Railroads in part because “they contain highly confidential and commercially sensitive information of third parties.” *Id.* at 15. As detailed below, Amtrak is correct in its characterization as it pertains to the operating agreements Amtrak has with NS.

However, NS recognizes that Amtrak’s operating agreements with the Host Railroads are relevant, and indeed, of great importance in this proceeding, in which Amtrak has asked the Board to prescribe new terms and compensation for Amtrak’s use of CN’s facilities. NS further agrees with CN that under Board procedures, the typical method for addressing relevant but

confidential third-party information in discovery is production of that material subject to a protective order. *See, e.g., Texas Mun. Power Agency v. Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42056, slip op. at 2-3 (STB served Feb. 9, 2001) (“While we understand the concerns raised by those shippers here, we are satisfied that the parties' agreements regarding scope and the application of the ‘highly confidential’ provisions of the protective order are sufficient to protect the interests of third-party shippers.”). NS appreciates that Amtrak has sought to uphold its obligation to keep NS’s operating agreements confidential. But in accordance with Board’s procedures, NS has no objection to disclosure of its operating agreements with Amtrak subject to a “Highly Confidential” designation under the Protective Order in this case.

**III. NS Objects to CN’s Request that the Board Prohibit Amtrak from Designating Any Operating Agreements as “Highly Confidential” Under the Protective Order**

Although CN recognizes that disclosure under a protective order is the proper way to address discovery of confidential information, it goes beyond such accepted procedure by also requesting “the Board to provide that Amtrak may not categorize the requested operating agreements (or any part thereof) as ‘Highly Confidential’ pursuant to the Protective Order.” Motion to Compel at 17. The Board should reject CN’s argument that the requested materials not be “Highly Confidential.”

***A. The Protective Order in this Proceeding, and Board Procedure, Give Amtrak the Exclusive Ability to Initially Designate the Level of Confidentiality of its Discovery Responses***

The Protective Order agreed to by both parties in this proceeding provides a very clear procedure for the designation, and potential challenge, of a document as “Highly Confidential.”

The Protective Order permits any party to the proceeding that in good faith determines that a discovery response it produces contains “individual personnel information, shipper-specific rate or cost data, trackage rights compensation levels, certain other confidential financial or cost information, or other competitively sensitive or proprietary information [to] designate or stamp such document, discovery request, discovery response, transcript, or pleading or other paper as ‘HIGHLY CONFIDENTIAL.’” Protective Order at 2 (¶3). In turn, “[a]ny party to these Proceedings may challenge the designation by any other party . . . by filing a motion with the Board or with an administrative law judge . . . .” *Id.* at 8 (¶8). CN does not dispute this arrangement. *See* Motion to Compel at 17 (“[The Protective Order] allows the producing party to make those designations, subject to review by the Board if the receiving party objects.”).

The Protective Order follows the typical procedure approved by the Board, in which third parties initially direct concerns regarding sensitive information to the disclosing party. *See, e.g., Carolina Power & Light Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42072 (STB served Aug. 26, 2002) (“Any concerns of the shippers regarding disclosure of the sensitive materials should be directed to the complainant, who, along with the defendant, can determine what level of confidentiality should be assigned to the material produced.”). If the parties disagree on confidentiality, the recipient may challenge designations after receiving and reviewing the documents (or, in the case of “Highly Confidential” information, review by outside counsel). *See, e.g., Union Pacific Corp., Union Pacific Ry. Co., and Missouri Pacific R.R. Co. – Control and Merger – S. Pacific Rail Corp., S. Pacific Transp. Co., St. Louis S.W. Ry. Co., SPCSL Corp., & the Denver and Rio Grande W. R.R. Co.*, Finance Docket No. 32760, 1995 ICC LEXIS 279, at \*14 (ICC served Oct. 27, 1995) (“Nevertheless, if upon examination of matters designated ‘highly confidential,’ any protestant believes that applicants have abused this process by

claiming protection for matters that do not merit it in any particular instance, and that they have been prejudiced in any way by this, they should petition the Commission for relief.”). That procedure is eminently sensible, as it minimizes the burden on the parties and the Board by limiting intervention to actual disputes based on review of disclosed information, rather than entertaining potential or hypothetical claims.

Here, CN seeks to have the Board restrict the level of confidentiality for discovery responses before Amtrak (or the Board) has received input from the relevant third parties or has designated that information in the first place and before Amtrak has produced those documents to CN (or the Board) for review. Indeed, many of CN’s justifications for asserting that none of the operating agreements should receive a “Highly Confidential” designation are inaccurate with respect to NS’s operating agreements, as detailed below. In all events, as is clear from reviewing the Motion to Compel, CN’s assertions are simply conjecture at this time. *See, e.g.*, Motion to Compel at 18 (“There is every reason to believe . . .”); *id.* at 21 (“It is much more plausible . . .”). Finally, as noted by this Petition, NS believes its information should be designated as “Highly Confidential” under the Protective Order.

***B. The “Highly Confidential” Designation is Properly Balanced to Protect Commercially Sensitive and Confidential Information***

CN’s justification for deviating from the standard, accepted procedure provided for in the Protective Order is not compelling.

First, CN highlights the so-called “severe restriction” that a “Highly Confidential” designation places on parties and their outside counsel. *Id.* at 17, n. 21. Although the limitation of “Highly Confidential” information to review by outside counsel does impose some restrictions on corporate representatives, the Board and ICC have made clear that this is not a sufficient reason to object to designations. *See, e.g., Burlington Northern Inc. and Burlington Northern*

*R.R. Co. – Control and Merger – Santa Fe Pacific Corp. & the Atchison, Topeka and Santa Fe Ry. Co.*, Finance Docket No. 32549, 1995 ICC LEXIS 100, at \*2-\*6 (ICC served May 3, 1995) (rejecting request to permit in-house counsel to review highly confidential documents over contention “that the applicable protective order greatly hinders the ability of its in-house counsel”). The Board is aware that “Highly Confidential” materials are used extensively in a variety of proceedings, from rate cases to abandonments. NS itself has been a party in several recent proceedings involving such information and knows that the designation is not a barrier to outside counsel producing effective advocacy on behalf of in-house representatives. Each of the parties in this proceeding is represented by experienced counsel, and NS has no doubt that they will be able to effectively represent their clients’ interests. In turn, failure to properly protect the confidentiality of NS’s operating agreements in this proceeding would damage NS’s interests without any means of recourse. The Board should require CN to adhere to the Protective Order and wait until it actually receives and reviews the relevant information before appealing any confidentiality designations.

Second, the circumventing the normal procedure is not necessary to “avoid any unnecessary future dispute or delay.” *Id.* at 17. NS has already explained that the Board’s normal approach is far more likely to avoid unnecessary dispute than create it.

#### **IV. NS’s Operating Agreements Should Be Designated “Highly Confidential”**

NS has argued above that while it does not object to the disclosure, subject to the Protective Order in this proceeding, of its operating agreements with Amtrak in response to CN’s request for production the Board should not prohibit Amtrak from designating any of the Host Railroad operating agreements as “Highly Confidential.” NS does not know the terms of other

Host Railroads' operating agreements, so it cannot comment on the appropriate designation for those agreements. However, NS's operating agreements are confidential and contain trackage rights compensation levels, confidential financial and cost information, and other competitively sensitive information. Pursuant to 49 C.F.R. § 1114.21(c), "any person with a reasonable interest in the data, information, or material sought to be discovered" in a proceeding may request that the Board protect such information, including "[t]hat a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way." NS requests that its operating agreements with Amtrak be designated as "Highly Confidential" in this proceeding.

***A. NS's Operating Agreements Are Confidential***

NS and Amtrak both assert that the operating agreements governing Amtrak's use of NS's facilities and NS's use of the Northeast Corridor are and are intended to be confidential, and CN and the Board should recognize that understanding of the parties to those agreements. NS's operating agreements have not been freely shared or disclosed to third parties, nor has NS taken other affirmative actions since the execution of the two agreements to make the provisions of NS's operating agreements subject to disclosure. Further contrary to CN's speculations,<sup>1</sup> NS's On-Corridor Agreement contains an explicit confidentiality provision.<sup>2</sup> In short, with regard to NS's operating agreements, CN's assertion that the requested operating agreements are not intended to be confidential is inaccurate.

***B. NS's Operating Agreements Contain Competitively Sensitive Information***

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<sup>1</sup> "In fact, there is every reason to believe that Amtrak's operating agreements with third party railroads are not, and were not intended, to be confidential." Motion to Compel at 18.

<sup>2</sup> Per its agreement, NS will not disclose the terms of that provision in this public filing.

NS's operating agreements are treated confidentially for good reason. They contain exactly the sort of "individual personnel information, shipper-specific rate or cost data, trackage rights compensation levels, certain other confidential financial or cost information, or other competitively sensitive or proprietary information" supposed to be designated as "Highly Confidential" in this proceeding. Protective Order at 2 (¶ 3).

Preliminarily, there should be no doubt that information on the payments Amtrak makes for use of NS's facilities is competitively sensitive. Whether the information is competitively sensitive with CN is not the test. The information is competitively sensitive to NS.

First, Amtrak is far from the only passenger service provider that seeks to use NS's system. NS hosts numerous other commuter and regional passenger services on its lines, and receives inquiries from even greater numbers of prospective providers. If the terms and rates for Amtrak's access became public, these entities would use such information for their competitive advantage in dealing with NS.

Second, NS's agreements contain information about freight traffic and rates, because NS operates over Amtrak's lines in the Northeast Corridor. Providing this information to any competing railroad (and the shipping public) would be harmful to NS's business and competitive position. Second, even if the trackage rights charges, facilities fees, and other incremental costs NS charges Amtrak for passenger service will not necessarily correlate directly to freight rates, it is still closely held information that could be used to garner a competitive advantage. Amtrak and the Host Railroads may freely negotiate the structure and the level of compensation, but they are educated by the dictates of the statute that indicate that the compensation should be based upon incremental cost. 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.

Finally, this information falls precisely under this enumerated list of “Highly Confidential” information covered by the Protective Order in this case. The operating agreements contain “trackage rights compensation levels,” “confidential financial information,” “confidential cost information,” and other “competitively sensitive” terms. Protective Order at 2 (¶ 3). NS is not a party to this proceeding, so the Board should be especially cognizant of NS’s interests in protecting its own competitive information and ensure NS receives at least the level of protection the parties themselves agreed to provide.

***C. CN’s Other Arguments Are Irrelevant with Respect to NS’s Operating Agreements***

In addition to the arguments addressed above, CN points the Board towards a variety of other materials to conclude the Host Railroad operating agreements should not be treated as “Highly Confidential” – a 1995 ICC proceeding involving Conrail, the 1971 Basic Agreement, disclosures in agency decisions,<sup>3</sup> CN’s operating agreements with Amtrak, and operating agreements involving CSX and the Florida Department of Transportation. *See* Motion to Compel at 18-19. All of these agreements have one thing in common – they have nothing to do with the treatment of NS’s operating agreements. While CN attempts to show that Amtrak or other Host Railroads may have publicly disclosed some terms from some past versions of certain operating agreements, such a showing, even if true, reflects nothing on the terms and treatment

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<sup>3</sup> NS notes that disclosure in an agency decision is not necessarily evidence of a lack of confidentiality. The Board has frequently explained that “[a]lthough the Board attempts to avoid references to confidential or highly confidential information in our decisions, we reserve the right to rely on and disclose such information when necessary.” *Cargill Inc. v. BNSF Ry. Corp.*, STB Docket No. 42120, slip op. at 12, n.7 (STB served Aug 12, 2013).

of NS's operating agreements with Amtrak since they were signed in 2006.<sup>4</sup> As NS explained, those agreements are clearly confidential and commercially sensitive, and NS's operating agreements should be protected by a "Highly Confidential" designation.

## V. Conclusion

NS recognizes that this proceeding places both Amtrak and CN in the difficult position of navigating the handling of operating agreements involving third parties. However, as a non-party, NS's primary concern is that neither Amtrak nor CN take any action that would violate NS's right to confidentiality or compromise any commercially sensitive business information. As explained above, NS does not object to the disclosure of its operating agreements subject to the Protective Order, with the understanding that NS's operating agreements are confidential, sensitive business information and will be protected as "Highly Confidential" under the Protective Order already in place.

If, after initial disclosure and designation, CN's outside counsel would like to consult with NS and Amtrak about whether specific provisions within the operating agreements might be reviewable by inside personnel in the context of this proceeding, NS will confer with the parties. Indeed, such a process would be very similar to the proposal CN itself offered Amtrak to avoid this dispute. *See* Motion to Compel at 4 (discussing offer by which "Amtrak could propose redactions that would be subject to review by CN's outside counsel.").

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<sup>4</sup> Nor does NS agree that unauthorized disclosures by Amtrak would necessarily vitiate NS's ability to protect the confidentiality of its sensitive commercial information. *Cf. Holland v. Island Creek Corp.*, 885 F. Supp. 4, 7 (D.D.C. 1995) (holding, for legal memoranda, that "unilateral disclosure of privileged information without the consent of the joint privilege-holder the BCOA, cannot waive the privilege for the document").

But NS opposes CN's more expansive attempt to preemptively prohibit Amtrak from designating any portion of any operating agreement as "Highly Confidential." Such a decision would undermine non-parties rights, including NS's, without any review or consideration of the actual agreements at issue, and for minimal, if any, gain in this proceeding. For the foregoing reasons, NS asks that the Board deny that aspect of CN's request.

Respectfully submitted,



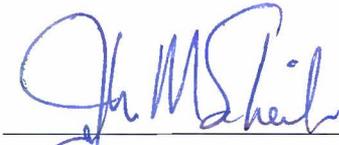
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**Dated: February 19, 2014**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of February, 2014, I served a copy of the foregoing Petition of Norfolk Southern Railway Company for Leave to Intervene in Partial Opposition to the Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Requests for Production of Documents upon all parties of record in this proceeding by electronic mail in accordance with 49 C.F.R. § 1104.12.

  
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John M. Scheib