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VIA E-FILING

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May 12, 2013

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

ENTERED  
Office of Proceedings  
May 12, 2014  
Part of  
Public Record

**Re: STB Finance Docket No. 35743, Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railway Company – National Railroad Passenger Corporation’s Reply In Opposition to Appeal of the Illinois Central Railroad Company and Grand Trunk Western Railroad Company From Partial Denial of Motion to Compel Responses for Production of Documents**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the National Railroad Passenger Corporation’s Reply In Opposition to the Appeal of the Illinois Central Railroad Company and Grand Trunk Western Railroad Company.

If you have any questions, please contact me.

Respectfully submitted,

A handwritten signature in cursive script that reads 'Linda J. Morgan'.

Linda J. Morgan  
Attorney for National Railroad Passenger Corporation

Enclosures

**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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**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN  
OPPOSITION TO APPEAL OF ILLINOIS CENTRAL RAILROAD AND THE GRAND  
TRUNK WESTERN RAILROAD COMPANY FROM PARTIAL DENIAL OF MOTION  
TO COMPEL RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

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May 12, 2014

**BEFORE THE  
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The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, respectfully opposes the appeal of the partial denial of the motion to compel responses to requests for documents filed by the Illinois Central Railroad Company (“IC”) and the Grand Trunk Western Railroad Company (“GTW”) (together and hereinafter referred to as “CN”).

**INTRODUCTION**

On February 14, 2014, CN filed a Motion to Compel Responses to certain requests for production of documents. *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railway Company, STB Docket No. FD 35743*, slip op. at 2 (STB Served April 15, 2014) (hereinafter “April 15 Decision”). In the Motion to Compel, CN asked the Board to order the production of the information specified in its first set of discovery requests as Request for Production (RFP) No. 5 and No. 6. *Id.* RFP No. 5 sought the production of all Amtrak operating agreements with host railroads since 1971. *Id.* RFP No. 6 sought the production of all agreements relating to Amtrak’s hosting of non-Amtrak trains

since 2008. *Id.* On February 19, 2014, Amtrak filed a reply in opposition. *Id.* at 3 (“Amtrak Reply”).

On April 15, 2014, the Board granted in part and denied in part CN’s Motion to Compel. *Id.* The Board granted that portion of CN’s Motion to Compel regarding RFP No. 5 as it related to agreements with other host railroads and ordered Amtrak to “produce and serve upon CN all of Amtrak’s operating agreements with host railroads,” in effect from May 1, 2011 to October 31, 2013. *Id.* at 6. The Board denied CN’s RFP No. 6, which sought Amtrak’s operating agreements relating to any hosting by Amtrak of non-Amtrak passenger service. *Id.* at 7. The Board concluded: “[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.” *Id.* The Board found that these agreements were “unlikely to produce evidence relevant to the subject matter of this proceeding.” *Id.*

On May 5, 2014, CN filed an interlocutory appeal of the Board’s April 15 decision. *Appeal of Illinois Central Railroad Company and Grand Trunk Western Railroad Company From Partial Denial of Motion to Compel Responses to Request for Production of Documents*, May 5, 2014 (“CN Appeal”). It claims material error as a reason for the appeal, rearguing relevance and also claiming that the decision was rendered based on erroneous premises and without critical information. *Id.* at 2, 6.

### **ARGUMENT**

The CN appeal should be denied. It was not timely filed, does not even come close to showing material error that would justify review under the Board’s highly deferential standard of review for interlocutory appeals, nor present any evidence that CN would be unduly prejudiced

and suffer irreparable harm or that the public interest would be harmed if the decision were allowed to stand. CN bases its appeal on the faulty argument that the Board's decision relied on erroneous information about passenger rail operating agreements in which Amtrak is the host. Although CN itself seems to express some doubt about this argument by indicating that it "appears" to be the case, CN then relies on this reasoning to reargue the relevance of these operating agreements.

**I. CN Has Not Shown That It Can Meet the Highly Deferential Standard of Review for Interlocutory Appeals.**

Interlocutory appeals of decisions of the Board are governed by 49 C.F.R. § 1115.9. The Board "appl[ies] a highly deferential standard of review to such appeals." *Wisconsin Power and Light Co. v. Union Pacific R.R. Co.*, STB Docket No. 42051, slip op. at 2 (STB Served June 20, 2000). Under § 1115.9(a)(4), a decision may be appealed if "the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party."<sup>1</sup> *M&G Polymers v. CSX Transp. Inc. and the South Carolina Central R.R. Co.*, 2010 STB LEXIS 566, \*5 (STB Served Dec. 22, 2010) ("*M&G*"); *See also, Total Petrochemicals USA Inc. v. CSX Transp., Inc. et al*, 2010 STB LEXIS 565, \*5 (STB Served Dec 23, 2010) ("*Total Petrochemicals*").

In *M&G*, a rail shipper challenged the reasonableness of the rates CSX charged for the shipment of a certain chemical between various origin and destination points. *Id.* at \*1.

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<sup>1</sup> 49 C.F.R. § 1115.9(a) sets out four reasons for an appeal of a Board decision: "(1) The ruling denies or terminates any person's participation; (2) The ruling grants a request for the inspection of documents not ordinarily available for public inspection; (3) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents; or (4) The ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party." Only the fourth reason is relevant to this appeal.

Following the Board's denial of the shipper's motion to compel documents relating to the profitability of its shipments on CSXT and the railroad's cost methodologies, the shipper filed an appeal of the Board's decision. *Id.* at \*3. In its appeal, M&G argued that the Board's rationale for denying the motion was faulty due to its reliance on the Uniform Rail Costing System (URCS) methodology. *Id.* at \*3. Specifically, M&G argued that the Board's reliance on the URCS costing method was flawed because it would not address the impact of the railroad's argument that transload facilities were an effective competitive constraint. *Id.* at \*4.

In denying M&G's appeal, the Board set out the four basis for appeals of Board decisions in § 1115.9 and found that M&G had not met any of the criteria for granting an appeal. *Id.* at \*5-\*6. The Board explained that M&G "fail[ed] to address how denying a motion to compel production of [the defendant]'s internal costing data caus[ed] either substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to M&G." *M&G*, 2010 LEXIS 566, at \*6. The Board went on to explain why M&G's argument failed in light of the Board's precedent for relying on UCRS. *Id.* at \*7-\*8.

Likewise, in *Total Petrochemicals*, the rail shippers who alleged unreasonable rates by the railroad appealed a Board decision denying discovery of the railroad's internal costing data. *Total Petrochemicals*, 2010 LEXIS 565, at \*3. Relying on the same reasoning for its use of the URCS as it did in *M&G Polymers*, the Board denied the appeal of its decision because *Total Petrochemicals* "failed to allege any of the four bases [of § 1115.9] for appeal of [the decision on the Motion to Compel], much less explain how [the decision met] the highly deferential standard" set out in § 1115.9. *Total Petrochemicals*, 2010 LEXIS 565, at \*6. In both *M&G Polymers* and *Total Petrochemicals*, the parties made arguments that the Board erred in its decision on the Motions to Compel but neither could meet the aforementioned "highly

deferential standard” of 49 C.F.R. § 1115.9.<sup>2</sup>

Like the appeals of *M&G* and *Total Petrochemicals*, CN’s appeal fails to meet the highly deferential standard and should be denied. In CN’s appeal of the Board’s April 15 decision, CN argues that, if allowed to stand, the portion of the Board’s decision which denied discovery of Amtrak’s operating agreements with passenger rail service providers that Amtrak hosts on its own lines (RFP No. 6), “would unduly prejudice CN, cause it irreparable harm, and harm the public interest.” CN Appeal, 1, n.2. CN sets forth no substantive arguments as to why its appeal meets the “highly deferential standard of review for appeals,” that CN itself cites, nor does it set out any “irreparable harm, substantial detriment to the public interest, or undue prejudice,” necessary for success on an appeal of a Motion to Compel discovery. *Id.* 1 n.2. It cites this standard for review in Footnote 2 but does not mention it again in its filing. Instead, CN’s appeal reargues relevance, using language from the Board’s decision that related to host railroad operating agreements.

## **II. CN’s Explanation for Its Untimely Filing is Without Merit.**

On page 1 of CN’s appeal, CN argues that it did not timely file its appeal within seven days of the Board’s decision, in accordance with the requirement of 49 C.F.R. § 1115.9(b), because “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.” CN Appeal, 1 n. 2. However, CN’s appeal contains no explanation as to why the

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<sup>2</sup> Another example of an appeal which did not meet the highly deferential standard of review is *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, 2012 STB LEXIS 239, \*10 (STB Served June 21, 2012) (In reviewing an appeal of a discovery order, the Board stated: “[w]e find no error in the balancing test applied by the Director. All discovery requests entail the balancing of relevance of the information sought against the burden of producing that information.”).

“critical information” was unavailable prior to the submission of the appeal. *See generally* CN Appeal. The statutory provisions involved, 49 U.S.C. § 24905(c)(1)(A) and 49 U.S.C. § 24308(a), have been available. Additionally, the sources cited by CN in its appeal date back to 1983, 1986, 2006 and 2010, all well before Amtrak submitted its Motion to Compel. CN Appeal, 6-8. Thus, there is no basis for CN’s argument that it was unable to file its appeal within seven days of the Board’s decision, pursuant to the rule.

### **III. CN Mischaracterizes the Basis for the Board’s Decision in Asserting Error.**

As a basis for its appeal, CN states that “[t]he April 15 decision regarding RFP 6 appears to be premised on Amtrak’s statement to the Board ... that its RFP 6 agreements were negotiated under a legal cost recovery standard different from ‘incremental cost.’” CN Appeal, 2 (emphasis added). CN goes on to argue that the Board’s conclusion in determining that the RFP No. 6 agreements are irrelevant “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 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).”

*Id.* at 6 (emphasis added). CN’s arguments are without foundation for several reasons.

First, the Board’s decision clearly relies on the statute. It states: “[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 the incremental costs.” April 15 Decision, 7. The decision includes a footnote reference to the

statutory provisions following the sentence quoted above. The decision goes on to say: “[t]herefore, the Board will deny CN’s Request No. 6 because the production of operating agreements where Amtrak operates as the host railroad is unlikely to produce evidence related to the subject matter of this proceeding.” *Id.*

In this case, the Board clearly reviewed and analyzed the statute independently and made a decision based on its reading of the statute. CN has failed to show how the Board’s reliance on the statute was in error, or that the Board relied on some other argument that was in error.

Second, even assuming the Board relied on, or should have relied on, other arguments in addition to the plain reading of the statute, CN’s arguments are unpersuasive. CN claims that Amtrak omitted information in presenting its arguments about RFP No. 6 but never specifies what those omissions are. CN seems to suggest that Amtrak was trying to argue that incremental costs was not applied in RFP No. 6 agreements or that incremental cost and avoidable cost were not the same in the context of those agreements. This was not at all what Amtrak argued. Amtrak focused on the existence of the two different statutory provisions, whose existence cannot be disputed. And it indicated that there were other issues involved in the negotiation of the RFP No. 6 agreements because of the different statutory framework that made them irrelevant to the issues in the case.

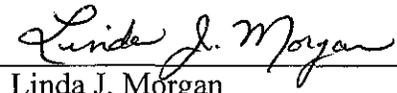
Finally, CN argues that the Board committed error in not analyzing all the issues, not just incremental cost, in the case and the possible relevance of RFP No. 6 agreements to those issues. The Board determined that, given the different statutory provision, “the production of operating agreements where Amtrak operates as the host railroad is unlikely to produce evidence relevant to the subject matter of the proceeding.” April 15, Decision, 7. The Board did not have to analyze further. The decision was not in error.

## **CONCLUSION**

CN has not met the highly deferential standard for overturning this Board decision on appeal. The Board's decision was based on an independent reading of the applicable statutory provisions, and CN has not shown material error in that decision. CN's appeal should be denied.

Dated: May 12, 2014

Respectfully submitted,



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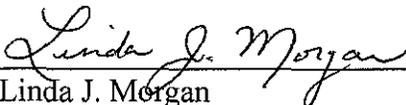
*Counsel for National Railroad Passenger Corporation*

**CERTIFICATE OF SERVICE**

I certify that on May 12, 2014, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to the Appeal of Illinois Central Railroad Company and Grand Trunk Western Railroad Company was served via email upon the following counsel of record:

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