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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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

Dear Ms. Brown:

I am writing in my capacity as outside counsel for Amtrak in this proceeding and in response to the letter that was filed by CN's counsel on September 5, 2017. In that letter, CN's counsel makes various assertions regarding Amtrak's handling of certain CN workpapers and memorializes CN's recent agreement, at Amtrak's request, to officially re-designate the confidentiality status of some of those CN workpapers (specifically, the "Baranowski/Fisher SRS Workpapers") from Highly Confidential to Amtrak Confidential. Although CN's letter does not request any specific action from the Board at this time, I am submitting this response in order to clarify the record and provide additional relevant information for the Board's benefit that was omitted from CN's correspondence.

On September 4, 2015 CN submitted its opening evidence in this proceeding, including several Verified Statements that CN designated as Highly Confidential. These Verified Statements that were designated by CN as Highly Confidential included the Verified Statement of Michael Baranowski and Benton Fisher ("Baranowski/Fisher V.S."). CN also provided to Amtrak and the Board copies of the workpapers corresponding to the Verified Statements filed by CN, all of which workpapers CN designated as Highly Confidential.

At Amtrak's request, CN agreed in November 2015 to re-designate the confidentiality status of the Baranowski/Fisher V.S. Amtrak made this request in order to allow Amtrak in-house personnel to review the evidence set forth in the Baranowski/Fisher V.S. that was redacted from the public version, including the detailed information and analysis relating to CN's SRS database and CN freight train delays.

Following CN's consent to the re-designation, Amtrak and CN submitted a Joint Motion to Amend the Protective Order in order to create an Amtrak Confidential level of



confidentiality in this proceeding.¹ Under the Amended Protective Order, Amtrak personnel who sign the Amtrak Confidential version of the confidentiality undertaking are permitted to review information designated as such for the purpose of preparation and presentation of evidence and argument in this proceeding. The intent of the Amended Protective Order was to allow Amtrak personnel to review such information but to ensure that third party intervenors in the proceeding - including freight railroad intervenors - would not have access to such information.²

After Board approval of the Amended Protective Order, Amtrak's counsel made the Baranowski/ Fisher V.S. and the corresponding workpapers available to Amtrak in-house personnel who had signed the Amtrak Confidential undertaking of the Amended Protective Order. Amtrak's counsel reasonably understood that the re-designation decision by CN in November 2015 applied to the Baranowski/Fisher V.S. workpapers. The workpapers do not appear to contain information that would qualify as Highly Confidential under the Amended Protective Order. Moreover, CN produced in discovery a substantial number of similar documents that were not designated as Highly Confidential. It was not until communications initiated by Amtrak's counsel last month about the confidentiality designations of other CN workpapers that CN's counsel indicated that CN did not intend the Baranowski/Fisher re-designation to include the Baranowski/ Fisher workpapers. Thereafter, Amtrak's counsel asked CN to re-designate the confidentiality status of the Baranowski/Fisher SRS Workpapers from Highly Confidential to Amtrak Confidential. Amtrak's counsel also revoked all access that Amtrak in-house personnel had to the Baranowski/Fisher workpapers, directed them to delete or destroy any copies of the Baranowski/Fisher workpapers and notified CN's counsel that these remedial steps had been taken.

With respect to the deposition transcript of Harald Krueger, CN's September 5th letter omits crucial details about the handling of the transcript. As Amtrak's counsel has informed CN's counsel in both writing and over the telephone, the Krueger deposition transcript was designated at the outset by the parties as Confidential (not Highly Confidential). Although that deposition involved numerous questions to the CN witness about the corresponding Krueger V.S. workpapers, CN's counsel did not indicate at any point during the deposition that any portion should be designated as Highly Confidential. Therefore, when the court reporter made the Krueger deposition transcript available, Amtrak's counsel shared a copy with a lawyer and a paralegal in Amtrak's Legal Department (both of whom had signed the Amtrak Confidential version of the Protective Order). Upon learning on August 4th that CN would be proposing to re-designate portions of the Krueger deposition transcript as Highly Confidential, Amtrak's counsel immediately instructed the two Amtrak employees to delete their copies of the

¹ The Board approved the Amended Protective Order on November 4, 2015.

² See Joint Motion to Amend the Protective Order, 1. At previous stages of this proceeding that were relevant at the time of the amendment of the protective order, other freight railroads intervened on a discovery matter. As parties to the proceeding, those intervenors potentially could access information designated Confidential. Therefore, CN and Amtrak agreed to create the Amtrak Confidential designation to allow Amtrak personnel to view information that had been re-designated from Highly Confidential, but for that same information to be shielded from any freight railroad intervenors.



Krueger deposition transcript.³ These employees both confirmed that they deleted their copies and in fact never looked at the transcript.

Despite CN's recent confirmation that the Baranowski/Fisher SRS Workpapers do not merit the Highly Confidential designation, CN's counsel has demanded that Amtrak respond to a series of detailed questions about Amtrak's access to and use of the CN workpapers. CN's recent decision to re-designate the Baranowski/Fisher SRS Workpapers makes several of these questions moot. CN's September 5th letter to the Board fails to mention that counsel for the parties have been discussing which questions from CN were still relevant in the event that CN agreed (as it has now done) to re-designate the Baranowski/Fisher SRS Workpapers as Amtrak Confidential.

Amtrak has already provided CN's counsel with information by telephone that is responsive to many of CN's questions about Amtrak's handling of the CN workpapers. In recent discussions about these issues, Amtrak's counsel has specifically informed CN's counsel that only the Baranowski/Fisher workpapers were shared with two Amtrak employees (both of whom have signed the Amtrak Confidential undertaking), that such workpapers were not shared outside of Amtrak or with anyone else within Amtrak, and that none of the workpapers corresponding to the Krueger V.S. were shared with Amtrak personnel. CN's September 5th letter fails to mention any of these relevant communications.

Amtrak intends to respond in writing to those questions from CN that remain relevant in light of the re-designation of the Baranowski/Fisher SRS Workpapers, subject to attorney-client and work product privileges. Amtrak continues to hope that the parties are able to resolve any outstanding issues themselves without CN returning to the Board for intervention. In the interim, Amtrak believes it is important for the Board to have the benefit of all of the relevant information related to this matter.

Sincerely,

Edward Fishman
Counsel for National Railroad Passenger
Corporation

cc: David Hirsh, Harkins Cunningham

³ Amtrak did not receive CN's proposed re-designations of the Krueger deposition transcript until August 25, 2017.