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February 8, 2021

## **VIA ELECTRONIC MAIL**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E. Street S.W., Room 1034  
Washington, DC 20423-0001

Re: **FD 36332**  
**National Railroad Passenger Corporation —**  
**Petition for Proceedings under 49 U.S.C. § 24903(c)(2)**

***Motion to Strike National Railroad Passenger Corporation's January  
29, 2021 Sur-reply***

Dear Ms. Brown:

On January 29, 2021, the National Railroad Passenger Corporation (“Amtrak”) purported to offer a “response” (technically, a “Sur-reply”) to Metra’s January 19, 2021 Errata filing that Metra had tendered at Amtrak’s request. The Board processed Amtrak’s Sur-reply accordingly (and generically) as a “reply” directed to the corrected substance of Metra’s June 24, 2021 Reply Brief (the “Metra Reply”). Indeed, the Sur-reply makes clear throughout that it is a response to specific elements of the seven-month-old Metra Reply addressing Amtrak’s unexpected, last-minute repudiation of collaborative efforts to allocate Chicago Union Station (“CUS”) square footage by way of *footnotes* in Amtrak’s Opening Statement; a truth to which Amtrak takes exception. Errata or no, Amtrak’s Sur-reply is not permitted under the governing procedural schedule, which did not provide for filings responsive to each party’s June 24, 2020 Reply Briefs, and prohibited as a matter of the Board’s rules of procedure,<sup>1</sup> as Amtrak should know. The Board must not sanction Amtrak’s prejudicial abuse of its processes. The Sur-reply must be stricken.

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<sup>1</sup> 49 C.F.R. § 1104.13(c).

# FLETCHER & SIPPEL LLC

Ms. Cynthia T. Brown

February 8, 2021

Page Two

It is troubling that Amtrak's desire to play down the facts underlying its \$3 million dollar footnotes (Metra Reply at 25-28, corrected per the recent Errata filing) has prompted it some seven months later to circumvent a procedural order and schedule to which the parties mutually agreed and that the Board has adopted. (Amtrak tried to persuade Metra to withdraw discussion of Metra's dismay at Amtrak's last-minute maneuver, which Metra was never going to do, given the egregious circumstances).<sup>2</sup> But it is more troubling still that Amtrak's circumvention of the procedural schedule violates the Board's rules of procedure, and that Amtrak has attempted this without acknowledging the agency's rules and requesting leave to introduce new evidence and argument, as a party typically would do in seeking to reopen an administrative record. Absent such leave from the Board – Metra clearly objects to Board acceptance of the Sur-reply – the Board should strike Amtrak's filing as procedurally defective.

As much as Amtrak may regret how it handled the matter, it had a full and fair opportunity to justify in detail the basis for its sudden, and massive, shift in proposed CUS square footage allocation in its Opening Statement (and to try to explain how its maneuver was not made in bad faith). It chose footnotes. So, as abusive as the Sur-reply is, it is also highly prejudicial. It would afford Amtrak an opportunity to cover its tracks, and the last word in briefing – something that the parties had agreed that neither party would have (in keeping with Section 1104.13(c)). So, while the Board should strike the Sur-reply, Metra must be afforded a full and fair opportunity to respond to this thoroughly misleading, inaccurate and highly prejudicial filing if it is not stricken. Accordingly, if the Board were to sanction Amtrak's Sur-reply, it should provide a date certain by which Metra may respond substantively in the interest of a fully-developed, and balanced, record. Metra reserves its right to a substantive response barring favorable action on the subject motion.

Respectfully submitted,

*Robert A. Wimbish*

Robert A. Wimbish  
Attorney for Metra

RAW:bjs

cc: Parties of record

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<sup>2</sup> Amtrak suggested (and Metra rejected) treating the \$3 million footnotes as an “unresolved issue” for purposes of supplemental briefing *after* the joint issues list filing of December 15, 2020. But if Amtrak thought that the subject was appropriate for additional argument, it could have proposed its own supplemental briefing list, including the footnotes issue, but it did not.