

BEFORE THE
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

APPLICANTS' REPLY TO METRA'S MOTION TO STRIKE

Applicants¹ submit this reply in opposition to the Motion to Strike that Metra filed on September 8, 2022 (*see* METR-14, hereinafter the “Motion”). Metra’s Motion seeks to strike from the record the July 12, 2022 RTC report (the “Rebuttal RTC Critique”) that Applicants prepared to identify the fatal flaws with Metra’s own RTC analysis and address the impact of corrections that CP identified in assessing the RTC evidence Metra submitted with its March 15, 2022 Comments.² Metra’s Motion claims that Applicants’ July 12 rebuttal “includ[ed] RTC modeling introduced for the first time in support of the Transaction” that “could and should have been included in the application itself,” and that allowing this evidence to remain in the record “would allow Applicants to ‘sandbag’ Metra by withholding key arguments or evidence and submitting them later – when Metra has no opportunity to respond.” METR-14 at 2, 4 (citations

¹ Applicants are Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively “CP”) and Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively “KCS”).

² Metra also seeks to strike all discussion of the Rebuttal RTC Critique in Applicants’ July 12, 2022 Reply (“Applicants’ Reply”). METR-14 at 1.

omitted). But Applicants did not create a new RTC analysis – they corrected Metra’s RTC modeling, and 100 percent of the nonpublic information and documents Applicants consulted was available to Metra when Metra performed its own modeling. CP-56/KCS-42 at 3-4. There can be no reasonable complaint of surprise or “sandbagging,” and Metra’s argument that the Rebuttal RTC Critique was procedurally improper fails.

Metra also uses its Motion to (once again) try to improperly sneak new sur-reply evidence and argument into the record. As the Board has already decided, the Board’s precedent and procedural schedule do not allow Metra a sur-reply. 49 CFR § 1104.13(c); Decision No. 11 (served Nov. 23, 2021); Decision No. 28, at 3 (served Sept. 27, 2022). Just as the Board struck filings by BNSF and CN that used their right to file a reply as a “mere[] pretext” to submit argument and evidence that the procedural schedule did not allow, Decision No. 24, at 3-5 (served Sept. 13, 2022), so too Metra should not be allowed to submit evidence and argument that would not otherwise be allowed just by disguising it as a “motion to strike.”

This is not to say that Metra was without recourse to probe the analysis put forward in Applicants’ rebuttal. If Metra had questions that related to the Rebuttal RTC Critique, Metra could have noticed a deposition of Applicants’ witness Mr. Elphick and inquired about the issues raised in Metra’s Motion. Had Metra done this, it would have learned that its concerns regarding the RTC analysis were off base, as Mr. Elphick’s Supplemental Verified Statement (“Elphick S.V.S.”) attached to this reply explains. Metra sought no such deposition, but instead proceeded unilaterally to submit additional improper testimony from Messrs. Crowley and Mulholland.

The Board should deny the Motion and disregard its content, including the new Rebuttal Verified Statement by Messrs. Crowley and Mulholland (“Fifth Crowley and Mulholland V.S.”).

I. THERE IS NO REASONABLE BASIS TO STRIKE THE REBUTTAL RTC CRITIQUE

Applicants' July 12 rebuttal, including the Rebuttal RTC Critique and Applicants' testimony discussing it, was entirely proper. The Board's procedural schedule allowed Metra to respond to the Application via its March 15, 2022 Comments. *See* Decision No. 11 (served Nov. 23, 2021); Decision No. 15 (served Feb. 25, 2022); Decision No. 18 (served May 27, 2022). It then allowed Applicants to "close the record" with their July 12, 2022 rebuttal in support of the Application. Decision No. 24, at 3 (served Sept. 13, 2022).

Applicants did not dispute Metra's right to raise issues concerning what they view to be the impact of the Transaction on Metra operations, including via the RTC analysis sponsored by Messrs. Crowley and Mulholland. But Applicants were absolutely entitled to respond to that evidence, as they did in July, including with Mr. Elphick's testimony regarding the grievous flaws in Metra's RTC analysis.

A. Nothing About the Rebuttal RTC Critique Should Surprise Metra.

Metra's RTC analysis in its March Comments (and as updated and radically altered in June and July) raised various arguments to suggest that the Transaction would harm Metra's service. Under the Board's procedural schedule, Applicants were entitled to respond, as they did, by identifying and correcting the fundamental errors that rendered Metra's analysis uninformative, and Applicants were also entitled to show the impact of those corrections by re-running Metra's analysis. In correcting Metra's errors, 100 percent of the nonpublic information Applicants used was information that Metra already had in its possession, either because (a) Applicants had previously supplied it to Metra with the Application and accompanying workpapers or in response to Metra's discovery requests, or (b) Metra itself included the information in the workpapers it produced in conjunction with the Crowley and Mulholland RTC

models. See CP-56/KCS-42 at 3-4. Messrs. Crowley and Mulholland were on notice of all of the information they needed to avoid the errors Applicants corrected. Metra has no reasonable basis to claim that Applicants' Reply constituted any kind of "sandbag[ging]."

Metra goes on to argue that because the Application itself did not include an RTC report, Applicants' July 12 Reply could not conduct any RTC modeling to correct errors in Metra's RTC model. Metra's rationale is that this information "could and should have been included in the . . . application itself" (METR-14 at 4), but there is no universe in which Applicants could have corrected Metra's RTC report *before* Metra's RTC report was filed. Correcting errors in the other side's opposition analysis is classic rebuttal.

Metra cites two decisions in support of its position that Applicants were required to include RTC analysis in the Application or forfeit the ability to respond to Metra's RTC analysis on Reply. See METR-14, at 4. Neither supports Metra. First, in *Union Pacific Corp. – Control – Chicago & North Western Transportation Co.*, 1994 WL 498541 (ICC Sept. 9, 1994) ("UP/CNW/Conrail"), the Board granted a primary applicant's motion to strike some of the responsive applicants' reply as improper rebuttal. The ICC's decision recognizes the following rule: In evaluating a motion to strike, the agency will strike rebuttal evidence that "does not seek to controvert any specific evidence opposing the responsive application, but rather is an attempt to bolster [the responsive applicant's] case-in-chief." *Id.* at *3. On the other hand, the Board *will not* strike evidence that "is responsive to evidence presented by [the opposing party]." *Id.* at *5. The whole point of the Rebuttal RTC Critique was to respond to Metra's RTC evidence which wrongly suggested the Transaction would hinder Metra's service. *Elphick R.V.S.*, Ex. 1. The Rebuttal RTC Critique was proper rebuttal evidence.

Metra quotes a single word (“reworked”) from the ICC’s decision in *UP/CNW/Conrail* to support its view that Applicants were not allowed to “rework” Metra’s study in their Reply. See METR-14, at 4. But this argument is based on a misreading of the ICC’s decision. The cited holding was that a responsive applicant could not rework *its own study*, which it had included in its Application, *to say something different* in reply that did not respond to comments it had received. 1994 WL 498541, at *9. In contrast, rebuttals *may properly respond* to the evidence presented by opposing parties even through new or revised evidence. *Id.* at *5.

Metra then cites *Duke Energy v. CSX Transportation Inc.*, a Board decision from a line of Standalone Cost Cases. The Board’s Standalone Cost precedent does not support Metra’s position. For example, similar to *UP/CNW/Conrail*, the Board stated in *Duke Energy v. CSXT*, 2003 WL 1523337 (S.T.B. served Mar. 25, 2003) that “[r]ebuttal may not be used in Standalone Cost Cases as an opportunity to introduce new evidence that could and should have been submitted in the party’s case-in-chief,” and this specifically meant that a party could not substantially redesign its *own* study to support its *own* case-in-chief on rebuttal. *Id.* at *3. But the only aspect of this precedent applicable here is to contrary to Metra’s position: the complainant *may* provide new “corrective evidence” on rebuttal to show the evidence it is rebutting is “itself unsupported, infeasible or unrealistic.” *Consumers Energy Co. v. CSXT*, Docket No. NOR 42142, at 4, 14 (S.T.B. served Dec. 7, 2016). Here, Applicants did just that: in direct response to arguments and evidence that Metra put into the record, Applicants supplied “corrective evidence” in the Rebuttal RTC Critique showing that Metra’s critique of the Application was “unsupported, infeasible, [and] unrealistic.” And in correcting Metra’s model, Applicants only used information that was available to Metra. CP-56/KCS-42 at 3-4. The Rebuttal RTC Critique was proper rebuttal evidence.

B. The Rebuttal RTC Critique Is Admissible.

Metra's Motion makes a series of claims regarding the persuasiveness of the Rebuttal RTC Critique, suggesting that some of Applicants' changes "reduce[d] the . . . probative value," METR-14 at 8, "reduce[d] . . . the modeling's reliability," METR-14 at 10, were "confus[ing]" and "prejudic[ial]," METR-14 at 10, or called the corrected model's "credibility" into question. See METR-14 at 8.

As a threshold matter, a motion to strike that calls into question the persuasiveness of evidence is improper because it confuses the question of how much weight the Board should give an item with the question of whether the Board may admit that item into evidence at all. *CSX Transportation, Inc. – Abandonment – Harnett County*, 1987 WL 98548, at *1 (I.C.C., May 21, 1987) ("We deny the motion to strike because protestants address the weight of the evidence and the persuasiveness of argument rather than show that any of it should be stricken from the record because it is inadmissible.").

In any case, the Board's regulations – see 49 C.F.R. § 1114.1 – set a very permissive standard for admissibility in Board proceedings, one that is even more permissive than in federal court. Any evidence that would be admissible in a federal bench trial is admissible before the Board, but the Board may also admit evidence that would not be admissible in a federal bench trial. See, e.g., *Denver & Rio Grande Ry. Historical Foundation Petition for Declaratory Order*, FD No. 35496, at 3-4 (S.T.B., served Aug. 18, 2014) ("The Board's rules of practice are more informal than the Federal Rules of Evidence" and "are to be construed liberally"); *ICC v. Louisville. & Nashville R.R.*, 227 U.S. 88, 93 (1913). The Rebuttal RTC Critique clears that hurdle by a wide margin (whereas Metra's own RTC analysis arguably does not).

First, Metra argues the Rebuttal RTC Critique is "confusing" and "prejudicial." METR-14 at 10. The Rebuttal RTC Critique was neither confusing nor prejudicial. But in any event,

although judges may strike evidence under Rule 403 that may be “confusing” or “prejudicial” to a jury, judges have no power to do so in bench trials. *Schultz v. Butcher*, 24 F.3d 626, 631-32 (4th Cir. 1994); *Hussey v. Chase Manhattan Bank*, 2005 WL 2203146, at *7, n.10 (E.D. Pa. July 29, 2005); *United States v. Kienlen*, 349 Fed. App’x. 349, 351 (4th Cir. 2009). Because 49 C.F.R. § 1114.1 explicitly applies the federal rules of evidence in cases “not involving trial by jury,” the Board may not strike the Rebuttal RTC Critique on this basis.

Second, Metra’s allegation that some of Applicants’ changes affect the “credibility” of the model is both wrong as a factual matter and by definition a merits argument with no impact on admissibility. *See, e.g., Newtown v. State Farm Lloyds*, 2022 WL 2196314, at *3 (E.D. Tex. Apr. 13, 2022); *Harrington v. RoundPoint Mortgage Servicing Corp.*, 2017 WL 1331072, at *4 (M.D. Fla. Ap. 11, 2017) (“Credibility is a question of weight for the trier of fact, and is not grounds for striking the Loan History here.”).

Third, Metra’s allegation that some of Applicants’ changes “reduce” the Rebuttal RTC Critique’s “probative value” fails on its face, again both on the facts and the law. Evidence is probative and therefore relevant under Rule 401 “if the evidence has ‘any tendency’ to make a material fact more or less likely.” *United States v. Rodriguez-Soler*, 773 F.3d 289, 293 (1st Cir. 2014) (emphasis in original).³

Finally, Metra appears to ask the Board to strike the Rebuttal RTC Critique under Rule 702 because some of Applicants’ changes allegedly “reduce[d]” its “reliability.” METR-14 at

³ Metra also implies that the Rebuttal RTC Critique is not admissible under the Administrative Procedures Act, and that the Board risks reversal on appeal if it does not strike it. METR-14, at 4-5. Yet, Metra does not point to a single instance in which a reviewing court reversed the Board because the Board refused to strike evidence from the record. The fact that the Board may consider “[a]ny evidence” admissible under “the rules of evidence” or “under the general statutes of the United States” or “under the provisions of the Administrative Procedure Act,” 49 C.F.R. § 1114.1, gives the Board significantly more discretion in what evidence it may consider as compared to federal courts. The Board and the Supreme

10. Rule 702 sets the standard for admissibility of expert testimony in federal court. Even before federal courts, Rule 702 “has a liberal policy of admissibility.” *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008); *see also UHS of Delaware, Inc. v. United Health Services, Inc.*, 2017 WL 1928341, at *1 (M.D. Pa. May 10, 2017) (“Rule 702 embraces a ‘liberal policy of admissibility,’ under which it is preferable to admit any evidence that may assist the factfinder.”). Because Rule 702 does not apply to administrative proceedings, agencies are even less likely to exclude evidence on this basis. *Mudahinyuka v. Holder*, 444 Fed. App’x. 901, 905 (7th Cir. 2010). Although the Board has received more than its share of expert testimony over the years, Metra was not able to cite one single example of the Board striking evidence under Rule 702, and Applicants are not aware of one either. Metra has done nothing to make the case it would need to make for exclusion under Rule 702 – that the Rebuttal RTC Critique is somehow worse than virtually any other expert testimony the Board has received over the years, and/or it in no way “assist[s] the factfinder,” 2017 WL 1928341, at *1.

As explained above, Metra’s Motion wrongly assumes that the Board’s standard for striking evidence is low, and Metra makes no effort to address the very high bar for such a motion that actually applies. Metra should consider itself fortunate that the standards it espouses are not the real ones. Under Metra’s standards, the Crowley and Mulholland RTC evidence referred to in Metra’s March 15 Comments (as repeatedly amended in June and July) should not survive. Metra’s RTC model was so riddled with errors and prone to wild fluctuations based on any “errors” Metra’s own witnesses committed that it was demonstrably incapable of informing

Court have said as much. *See, e.g., ICC v. Louis. & Nash. R.R.*, 227 U.S. at 93 (“The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties.”); *CSX – Control & Operating Lease/Agreements – Conrail*, Finance Docket No. 33388, STB Decision No. 51, n.4 (STB served Nov. 3, 1997), at 2-3.

the Board: it could not accurately model the status quo and was an utterly useless as a tool to make projections about the future. Reply Vol. I, at 168. The list of errors that contributed to this outcome is too long to list, and are explained in the Rebuttal RTC Critique. *See* Elphick R.V.S., Ex. 1.

II. THE BOARD SHOULD REJECT METRA’S ATTEMPT TO IMPROPERLY SUPPLEMENT THE RECORD VIA ITS “MOTION TO STRIKE”

Ever since Applicants filed their rebuttal in July addressing these issues, Metra has repeatedly sought the last word on the issues Metra raised in March. But the procedural schedule gives Applicants the last word. Decision No. 24, at 3 (Sept. 13, 2022). Applicants’ submission of the Rebuttal RTC Critique was proper rebuttal; and Metra thus has no right to include further evidentiary submissions.

Metra has nevertheless tried to submit further evidence. Metra filed two motions for leave to file a sur-reply, and then went ahead and filed the sur-reply without leave. *See* METR-11, METR-12 METR-13. The Board subsequently denied both motions for leave and declined to enter the sur-reply into the record. Decision No. 28, at 3 (served Sept. 27, 2022). In filing its new Motion, Metra is circumventing the procedural schedule again by putting another verified statement by their consultants in the record that rebuts Applicants’ Reply on the merits. *See* Part I.B. above.⁴

The Board has already struck filings by CN and BNSF from this proceeding that were presented as “responses” that were allowed by the procedural schedule as a “mere pretext for submitting new evidence or arguments that were made, or reasonably could have been made, in

⁴ Applicants note that Metra again sought to force its supplemental RTC analysis into the record at the Board’s hearing on September 28, 2022. That effort was equally improper.

prior filings.” Decision No. 24, at 3-5 (Sept. 13, 2022). And the Board has already recognized that Metra is not entitled to further evidentiary filings in this proceeding. Decision No. 28, at 3 (served Sept. 27, 2022). Because Metra’s Motion puts merits evidence in the record that would not otherwise be allowed under the pretext of supporting a motion to strike, and because Metra had all the information and documents it needed to perform the RTC modeling correctly in its Comments, CP-56/KCS-42 at 3-4, the Board should not consider Metra’s Motion and its supporting evidence.

Metra is also wrong to assert that the Board’s procedures were insufficient to protect its rights just because they did not allow Metra an additional round of evidence. METR-14 at 5. If Metra (or its witnesses Crowley and Mulholland) saw problems with the Rebuttal RTC Critique, Metra could have noticed a deposition of Mr. Elphick in July or August in order to cross examine him on all of those issues. Metra then could have referred to the fruits of that deposition in its remarks at the public hearing or its final brief. See 49 C.F.R. §§ 1114.21, 1114.24, 1114.28; See *CSX Corp. & CSX Transportation, Inc., Norfolk Southern Corp. & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*, 1998 WL 32193, at *3 (S.T.B. served Jan. 29, 1998) (allowing “circumscribed discovery of applicants’ rebuttal witnesses and inclusion of the resulting cross-examination testimony in the deponents’ briefs”). Metra opted not to notice a deposition of Mr. Elphick. Mr. Elphick’s S.V.S. provides the Board and Metra with the benefits of the responses Mr. Elphick would have given had Metra availed itself of its rights. Doing so would have disclosed that Metra’s concerns lacked merit and would have spared the Board this Motion to Strike.

III. METRA’S LATEST ROUND OF RTC ANALYSIS IS ONCE AGAIN SUBSTANTIVELY MISGUIDED

The Board need not and should not consider the substance of Metra’s latest attempt to supplement the record with RTC evidence. Nevertheless, for the avoidance of doubt, the Elphick S.V.S. accompanying Applicants’ response explains why the arguments and issues that Metra raises in the Fifth Crowley and Mulholland V.S. have no merit.⁵

IV. CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Board deny the Motion and disregard its supporting evidence.

⁵ The Elphick S.V.S. is provided only for purposes of supporting this response. If the Board rejects Metra’s motion as procedurally improper – as it should – there would be no need to consider the Elphick S.V.S.

Respectfully submitted,

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FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

**SUPPLEMENTAL VERIFIED STATEMENT OF RAYMOND A. ELPHICK
IN SUPPORT OF REPLY TO METRA’S MOTION TO STRIKE**

1. My name is Raymond A. Elphick. I am the Assistant Vice President Service and Product Design for Canadian Pacific Railway Company (“CP”).

2. I have reviewed Metra’s September 8, 2022 Motion to Strike and the attached evidence, including the September 8, 2022 Rebuttal Verified Statement of Thomas D. Crowley and Robert D. Mulholland (the “Fifth Crowley/Mulholland V.S.”). The Fifth Crowley/Mulholland V.S. raises various new assertions and questions regarding the modelling addressed in my July 12 Reply Verified Statement (“R.V.S.”) as Exhibit 1 (“Rebuttal RTC Critique”) which corrected Metra’s RTC Model. Like Messrs. Crowley and Mulholland’s previous RTC work in this proceeding, the Fifth Crowley/Mulholland V.S. generally reflects a misunderstanding of the CP network and of proper RTC modeling practices. With respect to the questions that Messrs. Crowley and Mulholland raise in the Fifth Crowley/Mulholland V.S., neither Metra, its counsel, nor its paid consultants ever asked these questions of me during this proceeding in a deposition or otherwise. Nevertheless, in this Supplemental Verified Statement (“S.V.S.”), I briefly explain how I would have addressed concerns the questions in the Fifth Crowley/Mulholland V.S. raise if Metra had deposed me.

Questions About River Junction Improvements

3. Messrs. Crowley and Mulholland assert that Applicants added new infrastructure improvements at River Junction in the modelling addressed in the Rebuttal RTC Critique that were not included in the Application.¹ If Metra’s counsel had asked me about this, I would have answered that the River Junction improvements were not included in the Application because they were not related to the Transaction. Messrs. Crowley and Mulholland could have modeled

¹ Fifth Crowley/Mulholland V.S. at 31.

them correctly in any event, as Metra is well aware of these improvements. They were publicly disclosed in the Amtrak-CP Agreement filed with the Board and elsewhere such as on the Wisconsin Department of Transportation website.²

Questions About Alleged “Hidden and Unstated” Changes to Metra’s RTC Model

4. Metra and Messrs. Crowley and Mulholland assert that Applicants’ Rebuttal RTC Critique made various “hidden” changes to improve performance, without identifying them.³ If they had asked me about this, I would have explained that these changes made sense and were fully disclosed, not “hidden”:

- a. It was necessary to correct errors at all 102 crossings in Metra’s model. By placing sit restrictions on all 102 crossings – without concern for whether these crossings were public, private, *or even closed* – Messrs. Crowley and Mulholland severely and artificially placed onerous operating restrictions on both the Marquette and Chicago subdivisions, making it extremely and unrealistically difficult for the RTC model to dispatch successfully. First, Applicants went through and removed crossings that were closed per the publicly-available FRA database.⁴ Second, Applicants corrected Metra’s erroneous classification of certain crossings as “public” based on information in the FRA’s crossing database, and then reset sit restrictions *for private crossings* (and *only* private crossings) from 30 minutes to 30 days; Applicants did not do this for public crossings. 30-day sit restrictions are the default RTC setting, and Messrs. Crowley and Mulholland’s decision to reduce these restrictions all the way to 30 minutes for private crossings was incredibly restrictive. It is important to note that imposing a 30-day sit restriction does not mean the simulation will sit a train on a crossing for 30 days; it simply makes the dispatch logic less restrictive when resolving conflicts.

² Wisconsin Department of Transportation, Twin Cities-Milwaukee-Chicago Intercity Passenger Rail Service, <https://wisconsindot.gov/Pages/projects/multimodal/tcmc.aspx> (Sept. 16, 2022); Amtrak-Canadian Pacific Agreement, Ex. B, Finance Docket 36500 (filed with the Board February 2, 2022).

³ METR-14, at 10.

⁴ The FRA Crossings Database is publically available at this link: <https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/DownloadCrossingInventoryData.aspx>

- b. Next, Messrs. Crowley and Mulholland accuse Applicants of artificially altering dispatching priority to give Metra trains priority over Amtrak trains.⁵ Applicants did not do this. In fact, our corrections give less priority to Metra trains than Messrs. Crowley and Mulholland's RTC model. And contrary to Metra's assertion, Applicants did not mislead anyone about this; we explained exactly what we did and why.⁶
- c. Messrs. Crowley and Mulholland also criticize Applicants' decision to alter the priority given to manifest and intermodal trains in the model. But as I explained in Exhibit C-1, at 4 of the Rebuttal RTC Critique, this was necessary because Messrs. Crowley and Mulholland's model gave wildly incorrect priority for freight trains.
- d. Messrs. Crowley and Mulholland then accuse Applicants' of clandestinely modifying the number of Metra trains in the modelling addressed in the Rebuttal RTC Critique to inflate the base case traffic and thereby make the future case traffic look better by comparison.⁷ In fact, we clearly stated which schedules they used and why.⁸ Messrs. Crowley and Mulholland's decision to use Metra and Amtrak's temporary reduced pandemic schedules in the base case, and then use Metra and Amtrak's full pre-pandemic schedules in the future case transparently created an apples to oranges comparison. It made it look like delays that were the result of Metra increasing its own study were somehow related to the Transaction.⁹

Randomization and Train Event Data

5. One of the most important features of RTC analysis is randomization. This feature allows the model to reflect real-world variation in the movement of trains and other factors. Messrs. Crowley and Mulholland did was the exact opposite of randomization. They

⁵ Fifth Crowley/Mulholland V.S. at 16.

⁶ CP RTC Report, Exhibit C-1, page 4 ("Train Types-Train Priorities-Train Rank").

⁷ Fifth Crowley/Mulholland V.S. at 39; *see also* METR-6, at 7.

⁸ *See, e.g.*, Reply Vol. II, at 540-41, 548, 550, 553.

⁹ Messrs. Crowley and Mulholland made other train count errors such as omitting several main line deadhead Metra movements from the Base Case. The Fifth Crowley and Mulholland's V.S. asserts that Metra did not exclude deadhead passenger trains from its model, but labeled empty equipment moves (deadhead) the same as Metra trains carrying passengers. First, coding them as passenger moves is an error. Second, even so Messrs. Crowley and Mulholland did not include all of the deadhead movements in their model. Applicants fixed these errors.

took train operations in the worst service month within the two years of data CP had provided to Metra – April 2021 – and hard coded train operations to assume all of the delays in that month would occur every single day. If Metra had asked me why the modelling addressed in the Rebuttal RTC Critique used randomization, I would have told them it is the only way to do RTC modeling that has validity as an assessment of real world conditions. I understand the Fifth Crowley/Mulholland V.S. now accuses Applicants of “modeling a fixed minimum dwell time without any variation,”¹⁰ but that is what Messrs. Crowley and Mulholland did, *not* what Applicants did.

6. Messrs. Crowley and Mulholland also have other criticisms of Applicants’ use of train event data. If Metra had asked me about these criticisms, I would have explained to them that they are misreading data that they reported in their own workpaper.¹¹

- a. Messrs. Crowley and Mulholland assert that Applicants removed a daily stop at La Crosse, WI for Trains 198 and 199.¹² Trains 198 and 199 do not have scheduled stops at La Crosse.
- b. Messrs. Crowley and Mulholland also criticize Applicants for assuming away foreign line interference at Grand Crossing, WI.¹³ CP controls all train movements at both Grand Crossing and Duplainville, WI, and so generally do not experience foreign line interference there.

7. Finally, Messrs. Crowley and Mulholland question why Applicants’ modelling addressed in the Rebuttal RTC Critique does not use randomization for local trains.¹⁴

¹⁰ Fifth Crowley/Mulholland V.S. at 25.

¹¹ See Workpaper “RTC Train Development_CP Trains_02222022.”

¹² Fifth Crowley/Mulholland V.S. at 27.

¹³ *Id.* at 28.

¹⁴ *Id.* at 8-9.

- a. If Metra had asked me, I would have explained that locals are assignments and have scheduled start times that do not vary. They can be on-duty in and around a yard for several hours before they enter the mainline or pass an AEI reader.¹⁵
- b. Even if local trains are delayed, this will generally not cause delays to roads, freights or passenger trains (including Metra trains) because local trains have a significantly lower priority.¹⁶

Dispatching Success Rate

8. If Messrs. Crowley and Mulholland had asked me about the fact Applicants' modelling addressed in the Rebuttal RTC Critique only had a 56% dispatching success rate,¹⁷ I would have told them that dispatching failures in RTC modeling are common and expected. The RTC software's automated protocols continue to dispatch a model until a set number of runs are completed, and cannot simulate the ability of dispatchers and line operating personnel to make adjustments (like holding trains upstream) that would avoid such failures in the real world. A 56% success rate is successful for modeling that is as complex as what was attempted by Metra's consultants.

9. Messrs. Crowley and Mulholland go on to assert that the actual dispatch failure rate would be higher (81%) after adjustment work they conducted. It is unclear how Messrs. Crowley and Mulholland could have performed this adjustment work. They say that once they

¹⁵ When Messrs. Crowley and Mulholland state that only 13% of locals operated precisely on schedule, *id.*, they are going based on the data from AEI readers, which does not tell them when the train came on duty.

¹⁶ Messrs. Crowley and Mulholland also complain that Applicants modified the routes of freight trains from what he was able to discern from his review of train event and loading/unloading data Metra received in discovery, and that this somehow means Applicants have deviated from reality to artificially make the routes look less congested. Fifth Crowley/Mulholland V.S. at 27. They have trotted out this complaint before, and Applicants have already explained why this complaint is false and merely shows a lack of understanding of train modeling. See CP-60/KCS-46, at A-7.

¹⁷ Fifth Crowley/Mulholland V.S. at 34.

undid Applicants' corrections to the model, that only five out of 27 of the Future Case simulations Applicants included in their workpapers are able to dispatch.¹⁸ But Applicants' workpapers included only the 15 Future Case simulations that were successful, so Metra could not have adjusted all 27 Future Case simulations.

PERMIT File

10. Messrs. Crowley and Mulholland assert that Applicants "eliminated 13 permits entirely, changed the location of 48 permits, changed the speed restrictions for 143 permits, and changed the time and/or date for 103 permits."¹⁹ If Metra had asked me about this, I would have told them these assertions were inaccurate.

- a. First, Metra's model only had 63 permits, so when they assert that Applicants changed the speed restrictions on 143 of their permits, I do not know what they are referring to. Metra should have included many more permit windows to have a viable model, and for this reason Applicants' modelling addressed in the Rebuttal RTC Critique included 462 permits.
- b. Second, Applicants did not change the "time" of any of the permits. We moved *all* permits one day later, but this would not impact the results of the model.
- c. Third, any changes Applicants made to the speed restrictions were based on the operating timetables that Metra should have consulted as explained above.
- d. Fourth, Applicants disabled 12 (not 13) of Metra's permits because these permits were based on unplanned, random track outages. There is no reason to include permits that were based on unplanned track outages when simulating *normal* operating capacity.

Increased CP Freight Delays

¹⁸ Fifth Crowley/Mulholland V.S. at 18.

¹⁹ Fifth Crowley/Mulholland V.S. at 19.

11. Metra also asserts that Applicants' modelling addressed in the Rebuttal RTC

Critique identified an increase in delay to Applicants' freight trains on the Marquette

Subdivision.²⁰

- a. First, if Metra had asked me about this, I would have told them Applicants' modelling addressed in the Rebuttal RTC Critique forecasts an acceptable increase in freight delays on the Marquette Subdivision considering the additional trains.
- b. Second, I would also have told them that the RTC model – even with Applicants' corrections – exaggerates freight delays because Applicants did not make their own model; Applicants just corrected the most fundamental errors in Metra's. To be accurate, Metra's model should have extended beyond Sabula Junction, and then the model would have forecasted fewer freight delays as is the case in the real world including because dispatching capability would be set up for less freight delay on the Marquette Subdivision for trains running north and south between River Junction and Kansas City.

Track Charts

12. If Metra had asked me why Applicants still consulted track charts despite criticizing Metra's use of track charts,²¹ I would have told them that the RTC Manual says to use a variety of sources, including track charts and timetables, and Applicants did so.²² I have never said that track charts should not be used at all in RTC analysis; my criticism of Messrs. Crowley and Mulholland is their failure to notice that the track charts they were using were more than a decade old. If Messrs. Crowley and Mulholland had taken the time to validate the sources they were using against timetables (and/or GIS database files), they would have seen that the sources Messrs. Crowley and Mulholland chose to use were out of date, and that CP's timetable had updated track charts that they could use. Applicants told Metra repeatedly that the track charts

²⁰ METR-14 at 9.

²¹ See Fifth Crowley/Mulholland V.S. at 20-21.

²² RTC Manual (at page 35).

did not always reflect the most current conditions. Applicants produced the timetables and GIS database files in this proceeding (in the Virtual Data Room at subfolder 10.5) that Metra needed to identify the current configuration of CP's trackage – and to perform the requisite validation. Performing this type of validation is standard practice which Messrs Crowley and Mulholland obviously failed to undertake.²³

13. If Messrs. Crowley and Mulholland had asked me why Applicants failed to change the lengths of some of the sidings in the modelling addressed in the Rebuttal RTC Critique that Applicants had said Metra modeled incorrectly,²⁴ I would have told them Applicants did not have time to fix every single error Metra made. In the Rebuttal RTC Critique, my focus was on updating and correcting the most severe errors model-wide in Metra's analysis; Applicants then fixed more specific errors in the areas where Metra operates. None of the errors that Messrs. Crowley and Mulholland now identify are in areas where Metra operates.

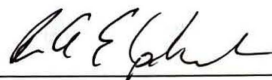
²³ To this point, Messrs. Crowley and Mulholland express disagreement with a number of Applicants' changes on pages 36-38 and in some instances assert that they could not have avoided these errors because they relied on the documents they were provided in discovery. Fifth Crowley/Mulholland V.S. at 36-38. I have responded to several of these critiques elsewhere, but regarding points 1-5 on pages 36-37, Messrs. Crowley and Mulholland could have avoided all these errors by consulting the timetables and GIS database files in subfolder 10.5, in addition to publically available information, instead of relying on outdated track charts.

²⁴ Fifth Crowley/Mulholland V.S. at 20-25.

VERIFICATION

I, Raymond A. Elphick, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 28th day of September, 2022.



Raymond A. Elphick

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Response to Metra's Motion to Strike to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Nathan H. Golden

Nathan H. Golden

September 28, 2022