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Office of Proceedings
December 7, 2017
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December 7, 2017

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

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

Dear Ms. Brown:

Enclosed for filing under seal in the above-referenced proceeding is the Confidential version of the National Railroad Passenger Corporation's Reply to the Motion to Strike or Supplement the Record filed by the Canadian National Railway Company. Also enclosed for filing on the public record in this proceeding is the Public version of the Reply, which has been redacted in accordance with the applicable protective order.

Respectfully submitted,

Justin J. Marks
Counsel for National Railroad
Passenger Corporation

cc: David Hirsh, Harkins Cunningham

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

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 TO CN’S MOTION
TO STRIKE OR SUPPLEMENT THE RECORD**

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December 7, 2017

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

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 TO CN’S MOTION
TO STRIKE OR SUPPLEMENT THE RECORD**

Pursuant to 49 C.F.R. § 1104.13, National Railroad Passenger Corporation (“Amtrak”) hereby files this Reply in opposition to the Motion to Strike or Supplement the Record filed on November 20, 2017 by Illinois Central Railroad Company and Grand Trunk Western Railroad Company (collectively, “CN”).

CN’s motion fails to demonstrate that any aspect of the evidence submitted by Amtrak in Section I.C.1 of the Surrebuttal Verified Statement of Jason Maga (“Maga SVS”) was not within the scope of the surrebuttal agreed to by the parties and reflected in the October 11, 2017 scheduling order approved by the Board. Therefore, the Board should deny CN’s Motion to Strike.

Amtrak has no objection to CN’s motion for leave to supplement the evidentiary record in this proceeding through CN’s submission of the [REDACTED] [REDACTED] report from CN’s technical consultant about the CN grade crossing activation failures, as long as Amtrak is afforded the right to correct certain factual inaccuracies set forth in the Verified Statement of Thomas Hilliard (“Hilliard VS”) that CN also submitted with its Motion to Supplement the Record. Therefore, in the interest of developing a more complete and accurate evidentiary record about the ongoing

factual investigation into the CN grade crossing activation failures, Amtrak submits the additional factual information set forth in the Supplemental Verified Statement of Jason Maga (“Maga Supplemental VS”) which is attached hereto for the Board’s consideration.

I. CN’s Motion to Strike Should Be Rejected Because CN Has Failed To Meet Its Burden of Establishing That Any Aspect of Section I.C.1 of the Maga SVS Contains Improper Surrebuttal

CN moves to strike Section I.C.1 of the Maga SVS pursuant to 49 CFR § 1104.8, which allows the Board to “order that any redundant, irrelevant, immaterial, impertinent or scandalous matter be stricken from any document.” As the moving party, CN has failed to meet its burden of establishing that its Motion to Strike such evidence from the record is warranted. Although the Board in certain prior proceedings has stricken evidence from the record that the Board deemed to be outside the scope of proper rebuttal in those proceedings, CN has not demonstrated that any aspect of Section I.C.1 of the Maga SVS is improper surrebuttal in this proceeding for the reasons described below.

As explained in the Maga SVS, CN’s Rebuttal Evidentiary Submission included CN’s proposal to substantially lengthen the existing schedules for Amtrak’s Illini/Saluki trains.¹ One central component of CN’s schedule extension proposal is based on CN’s allegation that the Amfleet/Horizon equipment that Amtrak uses for the Illini/Saluki service fails to adequately activate CN’s grade crossing warning devices.² Based on this factual assertion about Amtrak’s equipment (which Amtrak disputes), CN has proposed to add 12 minutes of additional time in each of the Illini/Saluki train schedules to account for the operating speed restrictions that CN

¹ See Krueger RVS at 13.

² See Ladue/Kuxmann RVS at 24-25; Krueger RVS at 12.

has imposed on Amtrak trains operating Amfleet/Horizon equipment between Chicago and Centralia.³

Section I.C.1 of the Maga SVS contains evidence which responds directly to CN's proposal that additional time should be incorporated into the schedules for the Illini/Saluki trains to account for the operating speed restrictions which CN claims are necessary because of Amtrak's use of the Amfleet/Horizon equipment. As explained in the Maga SVS, CN's proposal to add this additional 12 minutes of time to the Illini/Saluki schedules is unnecessary because it is based on CN's premature and unsupported factual conclusion about the cause of the CN grade crossing activation failures which involved Illini/Saluki trains. The Maga SVS explained to the Board that the Federal Railroad Administration ("FRA") is assisting the parties in investigating the cause of the CN grade crossing activation failures, which cause (contrary to CN's claims) has not been determined.⁴ Moreover, the Maga SVS informed the Board that CN's own technical consultant⁵ had concluded that [REDACTED]

[REDACTED], [REDACTED]

[REDACTED]. [REDACTED]⁶ Therefore, there is no evidentiary

basis for CN to conclude that Amtrak's equipment is the sole or even primary cause of the CN grade crossing activation failures. As a result, it is unnecessary for CN to propose adding 12

³ CN's proposal to add this additional time is based on the computer simulation modeling described in Section 1 of the Krueger RVS. Mr. Krueger used CN's proprietary Train Performance Calculator ("TPC") to estimate that the operating speed restrictions imposed by CN on Amtrak's Illini/Saluki trains would add 12 minutes to the overall trip time for such trains between Chicago and Centralia. See Krueger RVS at 12-13.

⁴ See Maga SVS at 11.

⁵ In response to the Maga SVS, CN has submitted a copy of the [REDACTED] report from CN's technical consultant. As explained further below, Amtrak has no objection to CN's submission of this report into the evidentiary record because it provides a more complete and accurate account of the ongoing factual investigation relating to the CN grade crossing activation failures.

⁶ See Maga SVS at 11-12.

minutes of additional time to the Illini/Saluki schedules until the FRA reaches a definitive conclusion about the cause of the activation failures and the parties agree on a solution.⁷

The parties agreed, as reflected in the scheduling order approved by the Board on October 11, 2017, that Amtrak would be permitted to file surrebuttal evidence responding to the “schedule adjustment proposal described in Section 1 of the Krueger RVS.” Section I.C.1 of the Maga SVS contains surrebuttal evidence which responds directly to the component of CN’s schedule adjustment proposal (i.e., the proposal to add 12 additional minutes) which is premised on CN’s factual presumption about the cause of the CN grade crossing activation failures. CN has failed to demonstrate that any aspect of Section I.C.1 of the Maga SVS is not squarely within the scope of the surrebuttal to CN’s schedule adjustment proposal that the parties agreed that Amtrak would be permitted to file with the Board.

CN claims for the first time in its Motion to Strike that “Mr. Krueger and his fellow CN rebuttal witnesses did not raise or rely on the specific cause or causes” of the CN grade crossing activation failures to support CN’s proposal to add 12 minutes of additional time in the Illini/Saluki schedules.⁸ This claim strains credulity and is flatly contradicted by the testimony of CN’s own witnesses. *See, e.g.*, Krueger RVS at 6 (stating that “the Illini/Saluki schedules do not account for the slower operating speeds required for safety reasons due to Amtrak’s use of Amfleet/Horizon equipment”); Ladue/Kuxmann RVS at 25, footnote 32 (claiming that the speed restriction imposed by CN, which is the basis for the additional 12 minutes that CN has proposed adding to the Illini/Saluki schedules, “is required because Amtrak’s preferred equipment fails to reliably shunt grade crossing warning devices when they operate at track speed”).

⁷ See Maga SVS at 12. Upon completion of the technical investigation, the parties will be in the best position to determine whether schedule adjustments need to be made and how to allocate responsibility for delays associated with the operating restrictions imposed by CN. *Id.* at 13.

⁸ CN Motion to Strike at 5.

CN also argues in its Motion to Strike that Mr. Maga’s surrebuttal testimony in opposition to CN’s schedule lengthening proposal “does not rely on an argument that causation has been established” for the CN grade crossing activation failures.⁹ This is correct, because Mr. Maga’s opposition is based on the fact that no definitive cause of the activation failures has yet been established. This salient fact – and the fact that CN’s own technical consultant concluded in [REDACTED] that [REDACTED], [REDACTED] [REDACTED] were omitted from the evidence on this issue submitted by CN in its Rebuttal Evidentiary Submission. Now that Amtrak has supplemented and clarified the evidentiary record on these points through the Maga SVS, CN should not be rewarded for its failure to provide a complete and accurate factual explanation to the Board in its earlier submissions. Therefore, CN’s Motion to Strike should be rejected by the Board.

II. Amtrak Does Not Object To CN’s Submission Into the Evidentiary Record of the Report From CN’s Technical Consultant, As Long As Amtrak Also Is Permitted To Supplement The Record To Correct Certain Factual Inaccuracies in the Hilliard VS

Amtrak does not object to, and in fact welcomes, CN’s submission into the evidentiary record of the [REDACTED] report from CN’s technical consultant. The report supports the explanation provided in Section I.C.1 of the Maga SVS [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁰ The report also notes that [REDACTED]

[REDACTED]

⁹ CN Motion to Strike at 5.

¹⁰ See generally, CN Technical Consultant Report (“CN Technical Report”), attached as Appendix 1 to the Hilliard VS.

[REDACTED]

[REDACTED]¹¹ Moreover, the report reflects the CN technical consultant's

[REDACTED]

[REDACTED]

[REDACTED]¹² However, to the extent that the Board grants CN's motion for leave to supplement the record with the Hilliard VS, Amtrak should be accorded the same right to correct the factual inaccuracies in the Hilliard VS that are described in the attached Maga Supplemental VS and summarized below.

First, Mr. Hilliard misleadingly states without any supporting evidence that "all short shunt issues [between 2002 and 2010] involving commuter or freight trains had readily identifiable causes."¹³ It is not clear what specific events Mr. Hilliard is referring to in this reference.¹⁴ Nonetheless, Amtrak's review of the available data relating to all grade crossing activation failures reported to the FRA between 2012 and 2015 by all U.S. railroads demonstrates that approximately two-thirds of the reported failures involved freight trains operating through the crossings, many of the failures were attributed by those railroads to rail contamination, and several had no identifiable causes.¹⁵ Therefore, Mr. Hilliard's implication that Amtrak's equipment must be the cause of the CN activation failures because CN did not identify a cause when it reported those incidents to the FRA is contradicted by the evidence.

¹¹ Maga Supplemental VS at 3; CN Technical Report at 40-41.

¹² CN Technical Report at 58.

¹³ Maga Supplemental VS at 1; Hilliard VS at 2.

¹⁴ Maga Supplemental VS at 1-2. For example, it is not clear if Mr. Hilliard is referring only to events on the CN corridor between Chicago and Centralia (which is referenced in his previous sentence), or instead is referring to all such events over CN's network (or over the entire U.S. railroad network) between 2002 and 2010.

¹⁵ See "2012-2015 Collection of LOS Incident Information Final" Workpaper supporting the Maga SVS.

Second, Mr. Hilliard makes the following statement: “we now believe these incidents occurred due to a combination of the weight, speed and/or design of the Amtrak Horizon/Amfleet equipment.”¹⁶ However, this self-serving conclusion is contradicted by the report from CN’s own technical consultant, which reflects that: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Third, Mr. Hilliard mischaracterizes the circumstances relating to the [REDACTED]

[REDACTED]

[REDACTED] CN mistakenly asserts,

relying on the Hilliard VS, [REDACTED]

[REDACTED]

[REDACTED]

¹⁶ Hilliard VS at 2, n. 2.

¹⁷ Maga Supplemental VS at 2; CN Technical Report at 55-57.

¹⁸ CN Technical Report at 20-21. The wheel profile is the only aspect of the “design” of Amtrak’s equipment that CN previously has claimed might be responsible for causing the activation failures. See *CN’s Answer to Amtrak’s Amended Complaint*, STB Docket NOR 42134, at 10-11 (filed Jan. 8, 2015) (reflecting CN’s suspicion at the time that Amtrak’s wheel design was the cause of the CN grade crossing activation failures).

¹⁹ CN Motion to Strike at 6; Hilliard VS at 3-4.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Amtrak has been an active participant in the technical meetings²² with the FRA about these matters, has devoted technical and other resources in an effort to determine a definitive cause for these incidents, and is committed to working with the FRA and the other parties to identify a solution to these issues.²³

Finally, Mr. Hilliard disclaims any CN responsibility for the CN grade crossing activation failures despite the conclusion of CN's own technical consultant that [REDACTED]

[REDACTED]²⁴ and

[REDACTED]

²⁰ Maga SVS at 11 n. 22.

²¹ Maga Supplemental VS at 3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²² Maga Supplemental VS at 3. Mr. Hilliard attended only the first of the two technical meetings that have occurred. The next technical meeting is scheduled for December 12th.

²³ Contrary to the statement by Mr. Hilliard that Amtrak "backed out of the [TTCI] study when CN sought to include Amtrak's equipment within its scope," Hilliard VS at 2, Amtrak did not agree to fund the TTCI study because TTCI could not commit to determining a definitive cause and solution to the grade crossing activation failures. Amtrak's reasoning was made clear in communications between Amtrak and CN's Scott Kuxmann. Mr. Hilliard also fails to mention that Amtrak has offered to operate test trains over CN ([REDACTED]) in order to assist in the technical investigation, but CN has not pursued this option with Amtrak.

²⁴ CN Technical Report at 37 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁵ Mr. Hilliard asserts without any evidentiary support that the [REDACTED]

[REDACTED].²⁶

Mr. Hilliard also exaggerates the projected cost [REDACTED]

[REDACTED]
U.S. railroad industry would need to be upgraded. The specific issue here is limited to CN grade crossing warning devices only on the approximately 50-mile CN segment between Mattoon and Kinmundy.

III. Conclusion

For the foregoing reasons, the Board should issue an order:

1. Denying CN's Motion to Strike;
2. Granting CN's Motion for Leave to Supplement the Record as long as the Board accepts into the record the additional evidence from Amtrak that is set forth in this Reply and the attached Maga Supplemental Verified Statement in order to correct certain factual inaccuracies in the Hilliard Verified Statement.

²⁵ CN Technical Report at 55-56.

²⁶ Hilliard VS at 2, n 2.

Respectfully submitted,

A handwritten signature in blue ink, reading "Justin J. Marks", is written over a horizontal line.

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49 U.S.C. § 24308(A) – CANADIAN NATIONAL RAILWAY COMPANY

SUPPLEMENTAL VERIFIED STATEMENT OF JASON MAGA

My name is Jason Maga. I am a Senior Manager in the Host Railroads Group at Amtrak and sponsor of a Surrebuttal Verified Statement (“Maga SVS”) that was submitted by Amtrak in this proceeding on October 30, 2017.¹

I am submitting this Supplemental Verified Statement in order to correct certain factual inaccuracies set forth in the Verified Statement of Thomas Hilliard (“Hilliard VS”) that was submitted with CN’s Motion to Strike or Supplement the Record that was filed in this proceeding on November 20, 2017.

Mr. Hilliard asserts that “all short shunt issues [between 2002 and 2010] involving commuter or freight trains had readily identifiable causes.”² However, Mr. Hilliard does not identify the specific events he is referencing or the relevance of his statement to the CN grade crossing activation failures which CN says prompted it to impose the speed restrictions on Amtrak’s Illini/Saluki trains (which occurred in 2014).³ Amtrak’s analysis of the available data

¹ I also was the co-sponsor, with my Amtrak colleague Paul Vilter, of a Rebuttal Verified Statement that was submitted by Amtrak in this proceeding on September 14, 2017 (the “Vilter/Maga RVS”).

² Hilliard VS at 2.

³ For instance, Mr. Hilliard does not specify if he is referring only to grade crossing activation failures on the CN corridor between Chicago and Centralia, or if he is referring to all grade

relating to all grade crossing activation failures reported to the Federal Railroad Administration (“FRA”) between 2012 and 2015 by all U.S. railroads demonstrates that approximately two-thirds of the reported failures involved freight trains operating through the crossings, many of the failures were attributed by those railroads to rail contamination, and several had no identifiable causes.⁴

Mr. Hilliard also asserts the following: “we now believe these incidents occurred due to a combination of the weight, speed and/or design of the Amtrak Horizon/Amfleet equipment.”⁵

This conclusion is contradicted by the report from CN’s own technical consultant, which states that: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

crossing activation failures on CN (or over any U.S. railroads) which occurred between 2002 and 2010.

⁴ See “2012-2015 Collection of LOS Incident Information Final” Workpaper supporting the Maga SVS.

⁵ Hilliard VS at 2, n 1.

⁶ CN Technical Report at 7-10.

⁷ CN Technical Report at 20-21.

⁸ See CN’s Answer to Amtrak’s Amended Complaint, STB Docket NOR 42134, at 10-11 (filed Jan. 8, 2015) (reflecting CN’s suspicion at the time that Amtrak’s wheel design was the cause of the CN grade crossing activation failures).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Amtrak has been an active participant in the technical meetings¹¹ with the FRA about these matters, has devoted technical and other resources in an

⁹ CN Motion to Strike at 6; Hilliard VS at 3-4.

¹⁰ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹¹ The next technical meeting is scheduled for December 12th.

effort to determine a definitive cause for these incidents, and is committed to working with the FRA and the other parties to identify a solution to these issues.¹²

Finally, notwithstanding the conclusion of CN's technical consultant that CN could

[REDACTED]¹³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴ Mr. Hilliard

further states, without any evidentiary support or references, [REDACTED]

[REDACTED] "would be prohibitive and disproportionate to the cost of modifying

Amtrak's equipment or operations."¹⁵ Mr. Hilliard overstates the projected cost of the solution

recommended by CN's own technical consultant by presuming that much of the crossing

equipment across the U.S. railroad industry would need to be upgraded. The issue under

investigation by the parties relates only to CN grade crossing warning devices on the

approximately 50-mile CN segment between Mattoon and Kinmundy.

¹² In his statement, Mr. Hilliard asserts that Amtrak "backed out of the [TTCI] study when CN sought to include Amtrak's equipment within its scope." Hilliard VS at 2. However, Amtrak did not agree to fund the TTCI study because TTCI could not commit to determining a definitive cause and solution to the grade crossing activation failures. This reasoning was made clear in communications between Amtrak and CN's Scott Kuxmann. Mr. Hilliard also did not mention that Amtrak has offered to operate test trains over CN ([REDACTED]) in order to assist in the technical investigation, but CN has not pursued this option with Amtrak.

¹³ CN Technical Report at 37 ([REDACTED]).

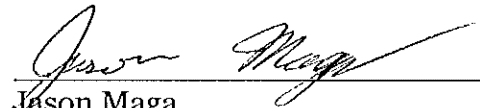
¹⁴ CN Technical Report at 55-56.

¹⁵ Hilliard VS at 2, FN 2.

VERIFICATION

I, Jason Maga, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Supplemental Verified Statement.

Executed on December 7, 2017



Jason Maga

CERTIFICATE OF SERVICE

I certify that on December 7, 2017, a Confidential and Public version of the foregoing National Railroad Passenger Corporation's Reply was served electronically upon the following counsel for Canadian National Railway Company:

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