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November 20, 2017  
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Public Record

November 20, 2017

**BY E-FILING**

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

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

Dear Ms. Brown:

Enclosed for filing under seal in the above-referenced docket please find the Confidential Version of the Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Strike or, in the Alternative, for Leave to Supplement the Record.

Also enclosed for filing on the public record in this proceeding is a copy of the Public Version of this submission, redacted in accordance with the protective order entered in this proceeding on December 16, 2013.

Very truly yours,

/s/ David A. Hirsh

Counsel for Illinois Central Railroad Company  
and Grand Trunk Western Railroad Company

Enclosures

cc:   Kevin M. Sheys, Esquire

**PUBLIC VERSION**

**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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**MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY AND GRAND TRUNK  
WESTERN RAILROAD COMPANY TO STRIKE OR, IN THE ALTERNATIVE, FOR  
LEAVE TO SUPPLEMENT THE RECORD**

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**MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY AND GRAND TRUNK  
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Pursuant to 49 C.F.R. §§ 1104.7 and 1117.1, Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (together, “CN”), move to strike Section I.C.1. of the Surrebuttal Verified Statement of Jason Maga (“Maga SRVS”), filed as part of Amtrak’s Surrebuttal Evidentiary Submission on October 30, 2017, or, in the alternative, for leave to supplement the record in response to that testimony by submitting the Verified Statement of Thomas Hilliard (“Hilliard VS”) (attached hereto as Exhibit 1). Section I.C.1. of the Maga SRVS addresses the “short shunt” safety issue relating to Amtrak’s Horizon/Amfleet equipment used on its Illini/Saluki trains. In doing so, it exceeds the scope of Amtrak surrebuttal authorized by the Board’s scheduling order served on October 11, 2017 (“Scheduling Order”). It is also incorrect and misleading in its discussion of the short shunt issue. If Mr. Maga’s assertions in Section I.C.1. regarding the short shunt issue are not stricken, then, in the interest of creating an accurate and complete record, CN should be permitted to submit the attached Hilliard VS.

## **BACKGROUND**

CN addressed the short shunt issue in its Opening Evidence in 2015. CN witnesses Messrs. Ladue and Kuxmann explained that when Amtrak operates Illini/Saluki trains at high speed using Horizon/Amfleet equipment, the trains sometimes fail to properly close the electrical circuit (or “shunt”) that activates automated crossing warning devices (“ACWDs”), with the result that the ACWDs are not activated in a timely manner.<sup>1</sup> They further explained that because of safety concerns arising from this problem, CN has imposed speed restrictions on Horizon/Amfleet equipment operating on portions of the CN line between Chicago and Carbondale.<sup>2</sup> Messrs. Ladue and Kuxmann noted that the parties disagree about the cause of the short shunt problem and which party should bear responsibility for the resulting delays to Amtrak trains for the speed restriction imposed to ensure safety.<sup>3</sup> Regardless of cause, however, Messrs. Ladue and Kuxmann maintained that until the short shunt problem is fixed, realistic schedules must take into account the slower speeds that are required to ensure safety by the operational restrictions governing the Illini/Saluki trains.<sup>4</sup>

In CN’s Rebuttal Evidence, filed in September 2017, CN’s witnesses again discussed the short shunt issue, but they neither argued nor rested any argument concerning schedules on the

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<sup>1</sup> See Joint Verified Statement of Paul Ladue and Scott Kuxmann (“Ladue/Kuxmann JVS”) at 25 n.32, 43 (filed Sept. 4, 2015).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.* (“The parties disagree as to responsibility for delays resulting from the operating restrictions that affect these trains.”).

<sup>4</sup> See *id.* at 44 (“Amtrak’s performance for this service would markedly improve if ... reasonably achievable schedules, including updated PRT, were adopted); see also Rebuttal Verified Statement of Harald Krueger at 12 (“Amtrak’s schedules have not been adjusted to account for this speed restriction. As a result, Amtrak’s public schedules do not reflect reality, making poor OTP practically inevitable for trains with this equipment type.”) (filed Sept. 14, 2017) (“Krueger RVS”).

issue of who or what is causing these occurrences.<sup>5</sup> They observed that, although CN was working with the Federal Railroad Administration (“FRA”) and others to find a solution to the problem, “[t]hus far, ... the problem has not been fixed.”<sup>6</sup> Consistent with its Opening Evidence, CN proposed revised schedules for the Illini/Saluki service that, until the problem is fixed, would provide a longer run time for Illini/Saluki trains.<sup>7</sup> CN’s evidence did not purport to resolve the question of causation of the short shunt problem, nor were its proposed Illini/Saluki schedules based on any assumption as to that causation. Its proposed schedule adjustment related to the short shunt issue was instead intended to “reflect [the] reality” of Illini/Saluki operations while that problem continues.<sup>8</sup> In his Surrebuttal Verified Statement, Mr. Maga mischaracterizes the arguments of CN’s rebuttal witnesses as “all presum[ing] that Amtrak’s equipment is the sole cause of the CN grade crossing activation failures.”<sup>9</sup> He argues at length against that alleged presumption, making various allegations that are, as Mr. Hilliard explains, inaccurate and misleading.<sup>10</sup>

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<sup>5</sup> See Joint Rebuttal Verified Statement of Paul Ladue and Scott Kuxmann (“Ladue/Kuxmann JRVs”) at 18 n.23, 20 n.26, 25 n.32 (filed Sept. 14, 2017); Krueger RVS at 12-13.

<sup>6</sup> Ladue/Kuxmann JRVs at 25 n.32.

<sup>7</sup> See Krueger RVS at 12-13 & Ex. 4; Ladue/Kuxmann JRVs at 24-25.

<sup>8</sup> Krueger RVS at 12.

<sup>9</sup> Maga SRVS at 12.

<sup>10</sup> Maga SRVS at 8-13; *see generally* Hilliard VS.

## LEGAL STANDARD

Under 49 C.F.R. § 1104.8, “[t]he Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.” In particular, the Board will, when appropriate, strike evidence which exceeds the proper scope of rebuttal (or, in this case, surrebuttal).<sup>11</sup> In the exercise of its discretion, however, the Board may decline to grant a motion to strike and instead permit the movant to submit a response to the allegedly improper submission, in the interests of creating a more complete record.<sup>12</sup>

## ARGUMENT

The portion of the Maga SRVS discussing the short shunt issue exceeds the proper scope of surrebuttal, as defined by the Board’s scheduling order of October 11, 2017,<sup>13</sup> and should therefore be stricken. Alternatively, if the Board chooses not to strike that improper surrebuttal, then, in the interests of developing a more complete and accurate record, it should permit CN to correct incorrect and misleading allegations in that portion of the Maga SRVS, by submitting the attached Hilliard VS.

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<sup>11</sup> *Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry.*, Docket No. NOR 42130, slip op. at 2 & n.3 (STB served July 15, 2013); *SWKR Operating Co.—Abandonment Exemption—In Cochise County, AZ*, Docket No. AB-441 (Sub-No. 2X), slip op. at 2 (STB served Nov. 12, 1997) (striking as improper rebuttal evidence not directly responsive to issues raised and evidence presented in opponent’s reply).

<sup>12</sup> *E.g., JGB Props., LLC—Pet. for Declaratory Order*, Docket No. FD 35817, slip op. at 6 (STB served May 22, 2015); *Consolidated Rail Corp.—Abandonment Exemption—In Hudson County, N.J.*, Docket No. AB 167 (Sub-No. 1190X), slip op. at 2-3 (STB served May 17, 2010).

<sup>13</sup> Scheduling Order at 1 (“Amtrak’s surrebuttal [is] limited to additional evidence responsive to the Train Performance Calculator runs and the schedule adjustment proposal discussed in Section I of the Rebuttal Verified Statement of Harald Krueger, and to the capacity ‘bubble’ analysis discussed in Section II of that statement, including related exhibits and supporting material.”).

**I. THE BOARD SHOULD STRIKE THE SHORT-SHUNT DISCUSSION FROM MR. MAGA’S SURREBUTTAL VERIFIED STATEMENT.**

The portion of the Maga SRVS discussing the short shunt issue (Section I.C.1.) should be stricken as improper surrebuttal. The Board’s Scheduling Order authorized Amtrak to address a few narrowly delineated topics, including “the schedule adjustment proposal discussed in Section I of the Rebuttal Verified Statement of Harald Krueger.”<sup>14</sup> Mr. Krueger and his fellow CN rebuttal witnesses did not raise or rely on the specific cause or causes of the short shunt issue in explaining why provision should be made in Amtrak’s schedules to account for it. They noted that the problem had not been resolved and was continuing to delay Illini/Saluki trains, harming on-time performance, and argued that those trains’ schedules should be lengthened in order to “reflect [the] reality” of Illini/Saluki operations.<sup>15</sup>

Mr. Maga’s opposition to CN’s schedule proposal likewise does not rely on an argument that causation has been established for the short shunt issue.<sup>16</sup> There was, therefore, no basis for Mr. Maga in surrebuttal to launch into his lengthy arguments about causation of and responsibility for the short shunt problem. Those arguments are neither responsive to CN’s rebuttal testimony, nor relevant to how schedules should be constructed before those issues are resolved. Amtrak could have made arguments about causation and responsibility for the short shunt problem in its Opening Statements or in its Rebuttal Statements, but the proper function of its Surrebuttal, as defined by the Board’s Scheduling Order, was to address a different topic – CN’s schedule proposal. Accordingly, Mr. Maga’s arguments and claims about causation and responsibility for the short shunt problem should be stricken as improper surrebuttal.

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<sup>14</sup> *Id.*

<sup>15</sup> Krueger RVS at 12.

<sup>16</sup> Maga SRVS at 12-13.

**II. ALTERNATIVELY, THE BOARD SHOULD GRANT CN'S MOTION FOR LEAVE TO SUPPLEMENT THE RECORD WITH MR. HILLIARD'S VERIFIED STATEMENT.**

Amtrak's failure to limit the scope of Mr. Maga's surrebuttal testimony in accordance with the Scheduling Order is particularly prejudicial because, as Mr. Hilliard explains in the attached Verified Statement, Mr. Maga's statements concerning the short shunt issue are incorrect and misleading in key respects. Mr. Maga wrongly claims, for example, that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>17</sup> In fact, as Mr. Hilliard testifies, [REDACTED]

[REDACTED]

[REDACTED]<sup>18</sup>

The Board should not allow Amtrak to prejudice CN and gain an unfair advantage by inserting tardy and misleading evidence into the record in violation of the surrebuttal limits it agreed to and that were imposed by the Board. Accordingly, if the Board does not strike Mr. Maga's improper surrebuttal on the short shunt issue, in the interest of fairness and creating a more complete and accurate record, it should allow CN to supplement the record with the Hilliard VS.<sup>19</sup>

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<sup>17</sup> Maga SRVS at 11 n.22.

<sup>18</sup> Hilliard VS at 3-4.

<sup>19</sup> Cf. *City of Alexandria, Va.—Pet. for Declaratory Order*, Docket No. FD 35157, slip op. at (STB served Nov. 6, 2008) (allowing otherwise impermissible reply to reply, along with response thereto, “[i]n the interest of compiling a full record”).

## CONCLUSION

CN respectfully requests that the Board strike Section I.C.1. of the Maga SRVS as improper surrebuttal, or, in the alternative, permit CN to supplement the record with the attached Verified Statement of Thomas Hilliard.

Respectfully submitted,

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November 20, 2017

# **EXHIBIT 1**

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Docket No. FD 35743

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**VERIFIED STATEMENT OF THOMAS HILLIARD**

My name is Thomas Hilliard. I am Assistant Chief Engineer – Signals and Communications, a position I have held since 2014. I have led CN’s efforts to investigate and identify causes and potential solutions to the short shunt safety issue involving Amtrak’s Horizon/Amfleet equipment, *i.e.*, the failure of Amtrak’s equipment to consistently activate automated crossing warning devices (“ACWDs”) sufficiently in advance of the train’s arrival at highway/rail at-grade crossings.

I have been asked to respond to Mr. Maga’s contentions in Section I.C.1. of his “Surrebuttal Verified Statement” filed on October 30, 2017 (“Maga SRVS”).

**BACKGROUND**

Between 2002 and 2010, there were 48 unexplained short shunt incidents on CN’s line between Chicago and Carbondale involving Amtrak’s Illini/Saluki trains using Horizon/Amfleet

equipment.<sup>1</sup> During that same period, all short shunt incidents involving commuter or freight trains had readily identifiable causes.

Unexplained short shunt incidents raise serious safety concerns. In an effort to address the issue, in 2009-2010, CN spent approximately \$2 million to: (i) upgrade its grade crossing predictors with an enhanced detection option card, (ii) install updated software for these crossing predictors, (iii) install crossing event log recorders on all crossings in the Chicago-Carbondale corridor, and (iv) lengthen the crossing approaches.<sup>2</sup> Even with these upgrades, however, unexplained short shunt incidents involving Amtrak's Horizon/Amfleet equipment continued. Therefore, beginning in late August, 2010, CN progressively imposed operating restrictions designed to improve the shunting of this Amtrak equipment, including minimum axle requirements and speed restrictions. With these restrictions in place, there have been no further unexplained Amtrak short shunt incidents on CN's lines.

CN has actively investigated the short shunt issue to find a cost-effective solution that would permit the safe, unrestricted operation of the Horizon/Amfleet equipment. CN and Amtrak initially planned to sponsor jointly a study by the Transportation Technology Center ("TTCI"), but Amtrak backed out of the study when CN sought to include Amtrak's equipment within its scope. CN then hired an independent engineering firm at its own expense to

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<sup>1</sup> Based on the results of CN's continuing investigation, detailed below, we now believe these incidents occurred due to a combination of the weight, speed, and/or design of the Amtrak Horizon/Amfleet equipment.

<sup>2</sup> Amtrak's suggestion that the problem is with CN's equipment is the equivalent of suggesting that much of the crossing equipment across the industry – at tens of thousands of crossings – is in need of major upgrade or replacement wherever Amtrak runs with its Horizon/Amfleet cars. The cost of doing so would be prohibitive and disproportionate to the cost of modifying Amtrak's equipment or operations.

investigate and report on the short shunt issue. In an effort to engage Amtrak, CN shared the resulting report with FRA and Amtrak. In addition, CN initiated and organized meetings among Amtrak, FRA, and [REDACTED] to discuss the short shunt issue, including a meeting held on August 24, 2017.

### **RESPONSE TO MR. MAGA'S STATEMENTS**

Mr. Maga states that short shunts “are not unique to Amtrak trains.” Maga SRVS at 9 n.18. CN and other rail carriers occasionally experience short shunts involving commuter or freight trains with different equipment types, but those incidents can generally be fully explained by a readily identifiable cause independent of the rolling stock itself. It is only the Amtrak Horizon/Amfleet equipment that has been involved in repeated short shunt incidents on CN’s lines that cannot be fully explained by an independent cause.

Mr. Maga further states that Amtrak has “seldom . . . experienced [short shunt incidents] in other host railroad territories with the Horizon/Amfleet equipment.” Maga SRVS at 11. In particular, he dismisses the concerns of [REDACTED]

[REDACTED] by claiming that Amtrak trains [REDACTED]  
[REDACTED]

[REDACTED] Maga SRVS at 11 n. 22. Mr. Maga’s suggestion that the short shunt issue is essentially limited to CN is wrong and misleading.

First, Mr. Maga does not specify what he means by “seldom,” but he appears to concede that Amtrak is aware of multiple short shunt incidents on other host carriers involving Amtrak’s Horizon/Amfleet equipment. Moreover, Mr. Maga is mistaken in claiming [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, Mr. Maga misleadingly characterizes the report delivered by the independent technical consulting firm hired by CN (TUV Rheinland Mobility Inc.). For example, he states that the report [REDACTED]

[REDACTED] Maga SRVS at 12. In fact, the TUV report (attached as Appendix 1) concluded that the “main cause” of the unexplained short shunt incidents was a [REDACTED]

[REDACTED]

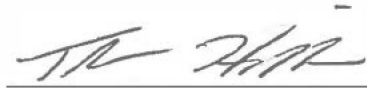
[REDACTED] See TUV Report at 55. The report does not suggest that unexplained short shunt incidents are occurring with other equipment or that the cause of any of the Horizon/Amfleet short shunt incidents was unrelated to that equipment.

In sum, the short shunt problems we have experienced with Amtrak’s Horizon/Amfleet equipment have been specific to that equipment. Moreover, CN is not the only Amtrak host experiencing such problems. Until Amtrak ceases to use that equipment, or a permanent solution is found, it is my opinion that the minimum axle requirements and speed restrictions imposed by CN on the Horizon/Amfleet equipment are necessary for its safe operation on CN’s lines.

### **VERIFICATION**

I, Thomas Hilliard, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement in this proceeding.

Executed on November 20, 2017.

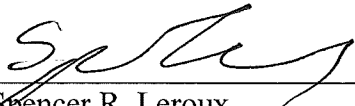
  
\_\_\_\_\_  
Thomas Hilliard

# **Appendix 1**

REDACTED

## **CERTIFICATE OF SERVICE**

I certify that I have this 20th day of November, 2017, caused the foregoing Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Strike or, in the Alternative, for Leave to Supplement the Record to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

  
\_\_\_\_\_  
Spencer R. Leroux