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January 23, 2013

BY E-FILING

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

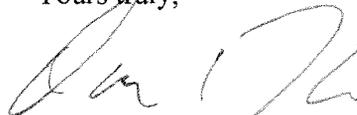
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ENTERED
Office of Proceedings
January 23, 2013
Part of
Public Record

Re: Docket No. NOR 42134, *National Railroad Passenger Corporation – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding please find CN's Petition for Reconsideration to Clarify or, As Necessary, Modify the Board's January 3 Procedural Order.

Yours truly,



David A. Hirsh

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42134

NATIONAL RAILROAD PASSENGER CORPORATION –
SECTION 213 INVESTIGATION OF SUBSTANDARD
PERFORMANCE ON RAIL LINES OF CN

**PETITION FOR RECONSIDERATION TO CLARIFY OR, AS NECESSARY, MODIFY
THE BOARD'S JANUARY 3 PROCEDURAL ORDER**

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Railroad Company*

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Pursuant to 49 C.F.R. § 1115.3, Respondents Canadian National Railway Company, Illinois Central Railroad Company, and Grand Trunk Western Railroad Company (together, “CN”) hereby petition the Board to reconsider one aspect of the procedural order served on January 3, 2013, by the Director of Proceedings on behalf of the Board (“January 3 Order”).

CN’s concerns involve the relation between the April 3, 2013 discovery closing date and the subsequent dates for evidentiary filings set out in the January 3 Order. CN respectfully suggests that in order to avoid confusion and unnecessary disputes, clarification from the Board at this stage would be beneficial to all parties.¹

Below, CN proposes that the Board resolve these issues by mandating automatic disclosure of workpapers and similar documents simultaneous with the filing of evidentiary filings, and by providing that the parties may petition the Board, on an expedited basis, for leave to take discovery targeted to the rebuttal of specific points in the evidentiary filings. This proposal is designed to ensure that each party has a fair and meaningful opportunity to rebut the other party’s evidentiary filings, while at the same time preserving the discovery closure date for all other purposes, keeping this investigation manageable, and avoiding delay and unnecessary

¹ CN asked Amtrak to join CN in a petition seeking clarification or modification regarding the

discovery burdens and discovery disputes. CN believes that its proposal will both facilitate reliable fact development and tend to reduce both the scope of discovery requested and the incidence of discovery disputes.

DISCUSSION

As the Board's January 3 Order notes, "a thorough but manageable record" will be needed to resolve the broad array of issues – including legal issues relating to preference and policy issues relating to recommendations – implicated in this investigation. January 3 Order at 4. Accordingly, the parties' evidentiary filings on June 3, July 17, and August 16 are likely to include various factual statements, calculations, charts, table, graphs, demonstrative exhibits, and/or fact and expert witness statements.

In order to permit complete and reliable fact development, each party must have a fair and meaningful opportunity to question the reliability of, and otherwise rebut, the other party's evidentiary filings. The Board's January 3 Order does not provide for any evidentiary hearings at which witnesses may be cross-examined regarding the basis, accuracy, or reliability of that evidence. CN nonetheless infers that the Board intends each party to have the opportunity for rebuttal both in their successive evidentiary filings and in their Closing Briefs.

If, however, the April 3 date set by the January 3 Order for close of discovery were understood to preclude all subsequent discovery, the value of that opportunity would be sharply limited.² Such an interpretation could mean, for example, that if Amtrak includes an expert witness statement in its June 3 evidentiary filing, CN will have no subsequent opportunity to seek workpapers, data relied upon or considered, or, potentially, a deposition of the expert in

issues herein, but at the time of this filing had not received a definitive answer.

² CN discusses herein various possible interpretations of the Board's Order and various discovery requests. In so doing, CN reserves all rights to argue for or against particular interpretations (to the extent not foreclosed by the Board's order in response to this petition), and

order to prepare an informed rebuttal. Amtrak would, of course, be similarly handicapped if CN included an expert witness statement in its July 17 evidentiary filing. And, if either party were thus handicapped, the Board would lose the benefit of knowing that the evidence before it has been subjected to an adversarial test calculated to ensure that it is reliable and that its meaning and import are understood.³

Another possible interpretation of the Board's January 3 Order is that the parties can obtain discovery regarding each other's evidentiary filings, because, although they must request any such discovery by April 3, months before the evidentiary filings, they can propound broad anticipatory requests. Both parties have served initial discovery requests expressed to impose continuing obligations to supplement responses. CN has requested that Amtrak "produce, with your Opening and Rebuttal filings (as provided for in the Board's January 3, 2013 Order), all data, databases, workpapers, and other documents supporting or otherwise relating to any factual statements, calculations, charts, graphs, exhibits, fact witness statements, or expert reports or statements included in or attached or appended to your Opening and Rebuttal filings."⁴ Amtrak has also served broad requests that appear anticipatory in intent. For example, Amtrak has

to make and to argue for or against objections to particular discovery requests.

³ The Board could partly address such concerns by declining to consider evidentiary filings insofar as they lack adequate supporting documentation. In accordance with 49 C.F.R. § 1114.1, the Board should not rely on self-serving evidentiary submissions by either party that lack adequate evidentiary support. And, indeed, in another context, the Board has warned parties that if the source of a value in a spreadsheet submitted to the Board "is not identified parties run the risk that we will assume that the value is unsupported." *STB Ex Parte No. 347 (Sub-No. 3), General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 2001 STB Lexis 235, *10 (served March 12, 2001). However, in the context of this complex case in which parties are likely to make wide-ranging claims and propose recommendations with significant implications for the rail industry and those who rely upon it, that principle does not adequately address evidence that meets the minimum threshold of *prima facie* admissibility but nonetheless raise issues of reliability and weight that are best resolved, and can be resolved expeditiously, through the adversary process aided by adequate discovery.

⁴ CN's First Set of Requests for Production of Documents and Interrogatories, Document Request No. 37 (served Jan. 9, 2013).

requested from CN “[a]ll Documents concerning the damages requested by Amtrak in the Petition,” notwithstanding that, beyond a vague reference to deterrence, Amtrak has yet to state what damages it is requesting, according to what principle, or based on what alleged facts.⁵

Each party, of course, may object to such requests on various grounds, and, absent clarification from the Board, disputes may arise regarding whether, to what extent, and when discovery is required to be supplemented after April 3. Moreover, broad anticipatory requests do not appear to be an apt means of addressing potential needs for depositions of witnesses whose statements are included in evidentiary filings or interrogatories directed at those statements.

CN respectfully suggests that the Board should provide clarification based on two principles: (1) each party should have a reasonable and prompt opportunity to obtain sufficient targeted discovery to give it a meaningful opportunity to rebut the opposing party’s evidentiary filings; but (2) discovery after the discovery closure date should be limited to such targeted discovery. By providing clarity now, the Board can ultimately save time by minimizing the potential for discovery disputes later. By assuring the parties that they will be able to obtain targeted discovery for rebuttal purposes in due course, the Board can reduce the parties’ incentives to pursue sweeping anticipatory discovery before April 3 in order to protect themselves from missing evidence the relevance of and need for which may only become apparent when the other party files its evidentiary filings. And, by limiting the scope of any

⁵ National Railroad Passenger Corporation’s First Set of Requests for Production to Canadian National Railway Company, Request No. 37 (served Jan. 11, 2013).

Amtrak’s requests to CN also include one that appears similar to CN’s Request No. 37: Amtrak requested that CN produce “[a]ll Documents supporting or otherwise relating to any factual statements, calculations, charts, graphs, exhibits, fact witness statements, or expert reports or statements included in, attached, or appended to CN’s Reply.” *Id.*, Request No. 3. However, Amtrak’s counsel informed CN’s counsel last night that Amtrak intended “CN’s Reply” in that request to refer to CN’s Response (of March 9, 2012) to Amtrak’s Petition, not to CN’s Reply scheduled for July 17, 2013 (although CN’s Response did not include any “fact witness statements” or “expert reports”).

post-April 3 discovery, requiring simultaneous production of relevant documents when evidentiary filings are filed, and imposing expedited time limits on consideration of any further discovery, the Board can avoid unnecessary delays.

Accordingly, CN proposes that the Board clarify or modify its January 3 Order to provide that:

(1) simultaneous with the filing of each of the three evidentiary filings (Amtrak's Opening, CN's Reply, and Amtrak's Rebuttal), insofar as such documents, facts, and data have not already been disclosed in discovery, the filing party shall disclose to the other party (a) all non-privileged documents⁶ (including electronic documents, digital files, photographs, tables, charts, graphs, recordings, databases, spreadsheets, and workpapers) considered in the formulation of, or relied upon to support, every fact or expert witness statement or report, factual statement, opinion, table, chart, graph, calculation, or exhibit included in or appended to the filing party's evidentiary filing; and (b) the qualifications of any expert witness and all facts and data considered by any expert witness in forming any opinions stated in any expert witness statement or report included in or appended to the filing party's evidentiary filing;⁷ and

(2) if a party believes that additional discovery (including but not limited to depositions or interrogatories) is warranted to enable it to rebut a specific factual statement or opinion, table, chart, graph, calculation, or exhibit included in or appended to the opposing party's evidentiary filing, that party may seek the Board's leave for such additional discovery, within 10 days of such filing. The opposing party will then have 5 days to respond. The Board

⁶ For this purpose, experts' notes, drafts of expert reports, and experts' communications with counsel should be deemed privileged. Absent further Board order upon motion, privilege logs should not be required with the disclosures provided for in this paragraph.

⁷ This proposed provision encompasses materials "considered" as well as materials relied upon to ensure that disclosure will not be purely self-serving. In that respect, it is modeled on Federal Rule of Civil Procedure 26(a)(2)(B), which requires, *inter alia*, disclosure of all "facts or data

may grant such additional discovery, in its discretion, if and to the extent that the Board determines that the discovery is reasonably calculated to yield material non-privileged evidence that is not cumulative of other discovery or otherwise objectionable.

CONCLUSION

CN respectfully requests that the Board's January 3 Order be reconsidered and clarified or modified as stated above.

Respectfully submitted,



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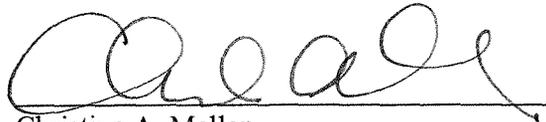
considered" by an expert witness.

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of January, 2013, served the foregoing Petition for Reconsideration to Clarify or, As Necessary, Modify the Board's January 3 Procedural Order by sending a copy by e-mail to the following:

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