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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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NATIONAL RAILROAD  
PASSENGER CORPORATION,

Plaintiff,

v.

JOHN DAVIS TRUCKING  
COMPANY, INC.,

Defendant.

Case No. 3:11-CV-0461-HDM (VPC)

ORDER

Before the court is the motion of John Davis Trucking Company, Inc. (“JDT”) to strike (#s 299 & 300) Amtrak’s notice of compliance (#297). National Railroad Passenger Corporation (“Amtrak”) responded (#304), and JDT replied (#306). On January 15, 2014, the court heard oral argument on the motion, and this order follows.

**I. Procedural Background**

**A. October 2013 Case Management Conference (#266)**

This dispute is based upon JDT’s request for production of documents sent to Amtrak and specifically concern what the parties and the court refer to as items 13 and 14 (#s 263, 272 & 290):

13. On demand request logs for locomotive units 43 and 177 for June 25, 2011, to and including the date on which the LDVR then in unit 43 was removed, and the date on which the hard drive caddy in unit 177’s LDVR was removed. (See items 2.13 of Jordan screenshots, Kendal Exhibit 6, page 8 of 14).

1 14. File attributes log or data for locomotive units 43 and 177  
2 covering the time period specified in 13. (See item 2,14 of Jordan  
3 screenshots, Kendall Exhibit 6, page 8 Of 14.)

4 Joint case management report for October 4, 2013 (# 263, p. 3). At the October 4, 2013 hearing,  
5 the court ordered Amtrak to respond to these and other discovery requests by October 15, 2013  
6 (#266). JDT found Amtrak's document production deficient, and JDT filed an emergency  
7 motion to compel compliance with the court's October order (#272). Amtrak responded (#281)  
8 and JDT replied (#286).

9 According to Larry Jordan of Wi-Tronix, remote video and data downloads go to  
10 Amtrak's back office server, including log information for such other downloads and other  
11 events occurring on Amtrak locomotives equipped with the Wi-Tronix system, and log  
12 information about the LDVR and event recorder equipment on the locomotives (#272, Jordan  
13 depo., pages, 17-18, 132, 144-45 (Ex.C)). Before Mr. Jordan testified as Wi-tronix's 30(b)(6)  
14 witness, he reviewed these files on an Amtrak server and made screenshots of those he reviewed.  
15 *Id.*, Ex. D, *under seal*. Pursuant to the court's October 4, 2013 order, Amtrak supplemented its  
16 response to item 13 by stating, "Amtrak does not know how to access the information or logs  
17 depicted in item 2.13 of Larry Jordan's notes," and referred to Mr. Jordan's deposition testimony  
18 that although Amtrak would generally have no reason to look at this date, Amtrak may have  
19 access to the logs, but may not know how to read them or what they meant (#272-1, Ex. A, pp. 4-  
20 5). As for item 14, Amtrak responded, "Amtrak does not know how to access the information or  
21 logs depicted on item 2.14 or Larry Jordan's notes. *See* Mr. Jordan's deposition testimony cited  
22 above. Thus, having conducted a reasonable and diligent search, Amtrak lacks the ability to  
23 comply with this request." *Id.*

24 **B. November 2013 Case Management Conference (#290)**

25 JDT did not deem Amtrak's responses sufficient and filed a motion to compel  
26 compliance with court's order of October 4, 2013 (#s 272 & 273). Amtrak responded (#281),  
27 JDT replied (#286), and the court heard oral argument at the November 22, 2013 case  
28 management conference (#s 290 & 293). The court ordered Amtrak to supplement its responses

1 to items 8, 12, 13 and 14 by December 10, 2013, and directed Mr. Kirklin, JDT's counsel, to  
2 review the supplements and, if necessary, seek an expedited hearing on this issue (#290). The  
3 court added that if Amtrak was unable to provide supplemental responses, it was to file  
4 declarations with specific details about the inquiry undertaken, the identity of individuals with  
5 whom counsel conferred, and specific details regarding what systems were searched. *Id.*

6 **C. Amtrak's Notice of Compliance (#297)**

7 On December 11, 2013, the day after Amtrak was ordered to supplement its responses, it  
8 filed a document styled as a notice of compliance with court's order dated November 22, 2013  
9 (#297). Amtrak reported that it completed its efforts to locate documents response to items 1, 5  
10 and 8 and supplied the declaration of Clyde Moore concerning Amtrak's efforts to locate these  
11 documents. *Id.* Amtrak produced "two items from the Contract" and submitted item 12 to the  
12 court for *in camera* review. *Id.*

13 Amtrak reported that it completed production of documents for items 13 and 14, but went  
14 on to discuss at length the first entry from Log 2.13 found on page eight of the Jordan notes,  
15 which indicated the eighty-two-second video was requested thirty-five seconds before the  
16 accident occurred. *Id.* This eighty-two-second time lapse is the basis for JDT's contention that  
17 the downloaded video is a phony. *Id.* Amtrak attached the declaration of Lawrence Jordan,  
18 president of Wi-Tronix, to explain that "the "timeOfRequest" data, specific to the "automatic"  
19 download (username "Auto"), does not mean the Wi-PU made a request for the video data thirty-  
20 five seconds before the accident as alleged by JDT." *Id.* at 5; Ex. A, Decl. Of Lawrence B.  
21 Jordan, Jr.

22 **D. JDT's motion to strike Amtrak notice of compliance (#s 299 & 300)**

23 JDT moved to strike Amtrak's notice of compliance because (1) the court's November  
24 order did not authorize the unilateral filing of such a notice, (2) the court ordered Mr. Kirklin to  
25 review the supplemental responses and then notify counsel and the clerk if an emergency hearing  
26 was warranted, and (3) Mr. Kirklin did notify Mr. Castillo that he deemed the supplemental  
27 responses insufficient, but agreed to defer filing an emergency motion to allow Amtrak to  
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1 comply with the court's November order (#299). Amtrak opposed (#304) and JDT replied  
2 (#306).

3 In response, Amtrak reported that by its notice, it simply intended to advise the court of  
4 the status of its responses to this discovery dispute and that it subsequently produced log  
5 information for the new time period JDT requested for logs 2.13 and 2.14 (#304). Amtrak  
6 submitted the declaration of Mr. Jordan, president of Wi-Tronix, in response to JDT's contention  
7 that the eighty-two-second video is a "phony." *Id.* At the January 15, 2014 case management  
8 conference, Amtrak's counsel explained that because Mr. Jordan's logs had become a critical  
9 issue in the case, Amtrak simply sought a means by which the ambiguity could be explained.  
10 Mr. Jordan did not bring documents to his May 2013, deposition because he was not asked to do  
11 so and, thereafter, he produced the "Jordan logs."

12 JDT details in its reply four areas in which it deems Amtrak's December 10, 2013  
13 supplemental responses deficient.<sup>1</sup> As noted earlier, JDT requests that Mr. Jordan's declaration  
14 be stricken (#306). According to JDT, Mr. Jordan's claims for the first time that when the Wi-  
15 PU requests an automatic video download, the Wi-PU is programmed to show the "Time of  
16 Request" as being the same as the "Requested Start of Data." *Id.* at 4. However, Mr. Jordan's  
17 declaration has no documentary support, nor does he explain "why the programming would be so  
18 illogical since the Wi-PU 'knows' the actual time of the request – in this case 11:19:30." *Id.* at 4  
19 (footnote omitted). It is JDT's view that the document that discloses this particular time  
20 discrepancy is the fourteen-page set of notes and server log screenshot (#275), which Mr. Jordan  
21 prepared and reviewed in anticipation of his 30(b)(6) deposition, but did not bring with him to  
22 that May 2013 deposition. *Id.* at 5. The Jordan declaration is now an attempt to explain the time  
23 discrepancy seven months later, and it should be stricken.

24 At the January 15, 2014 hearing, JDT also provided the court with a copy of a log  
25 Amtrak produced after December 10, 2013, marked as Confidential NRPC 0304. JDT argues

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26  
27 <sup>1</sup>The court acknowledges that the initial motion to strike primarily concerned JDT's objection to Amtrak's unilateral  
28 filing of the notice of compliance, and JDT discussed in more depth in its reply the specific objection to Amtrak's  
December 10, 2013 supplemental production.

1 that the second entry, highlighted by JDT for purposes of the hearing, is not found in the Jordan  
2 logs, and it confirms JDT's suspicions that the logs are inaccurate or were somehow revised.

3 JDT raised three other issues in its reply. First, JDT argues that the Declaration of Clyde  
4 Moore in response to items 1 and 5, from Docket # 263-1, is inadequate because Mr. Moore  
5 discloses only that he spoke with other Amtrak employees who disclaimed personal knowledge,  
6 and that Mr. Moore has no idea what document search was made or who may have performed  
7 document searches. JDT requests that Amtrak be required to provide a new declaration to  
8 address the deficiencies and forth in detail the document searches it made, what was searched,  
9 who made the searches, where searches were performed, how they were done and when they  
10 were made (#306).

11 Next, as to item 8, JDT also sought user manuals, guides and training materials for the  
12 software and hardware that Amtrak employees used to configure LDVRs, event recorders, and  
13 Amtrak servers, and to download those devices remotely or by cable. Amtrak produced three  
14 items in response to these requests, none of which is particularly responsive or relevant to the  
15 underlying basis for the requests. *Id.* at 3-4. There is no declaration that provides an explanation  
16 of the nature of the document search Amtrak undertook to locate the documents, and JDT would  
17 like one.

18 Finally, JDT asks for the readable version (larger print) from Amtrak's server of the Wi-  
19 PU Internal Event Log for June 24, 2011. Wi-Tronix apparently considers the log proprietary.

## 20 **II. Conclusion**

21 The court recognizes that JDT has pursued the production of the documents at issue for  
22 months and months, and it is apparent to the court that Wi-Tronix is the third party who can best  
23 explain the discrepancies between Mr. Jordan's logs and the document JDT provided the court at  
24 the January 15, 2014 hearing. The court is well aware of that fact discovery must end, and soon.  
25 However, this deadline must be balanced with the parties' need to complete legitimate discovery  
26 that may be pivotal to this case. Having considered the papers filed by the parties and arguments  
27 of counsel at the January 15, 2014 hearing, the court orders as follows:

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**A. Mr. Jordan’s Declaration and Motion to Strike**

Discovery is the search for the truth. There are serious claims that the documents produced regarding items 13 and 14 contain discrepancies that may be critical to the parties’ claims and defenses in this action. The court is not content to let this matter simply rest by either striking or allowing Mr. Jordan’s declaration to stand and to leave open to question the time discrepancy in Mr. Jordan’s notes and any explanation about the second highlighted line on the log produced at the January 15, 2014 hearing. For that reason, the court orders as follows:

1. JDT’s motion to strike (#299) is **GRANTED**;
2. Amtrak’s notice of compliance (#297) is hereby **STRICKEN** in its entirety;
3. JDT shall have leave to depose Mr. Jordan of Wi-Tronix concerning items 13 and 14, the Jordan logs, Mr. Jordan’s declaration, and the log provided to the court at the January 15, 2014 hearing;
4. The fact discovery deadline will be extended for this limited purpose; and
5. Within ten calendar days of the date of this order, JDT shall report to the court the date set for Mr. Jordan’s deposition.

**B. The Clyde Moore Declaration – Items 1, 5 & 8**

1. Amtrak shall provide additional declarations concerning its efforts outlining in detail the document searches for items 1, 5 and 8, including who made the searches, what was searched, where the searches were performed, how the searched the searched were done, and when they were made; and
2. Amtrak shall have twenty calendar days from the date of this order to produce these declarations to JDT.

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**C. Amtrak Document Production**

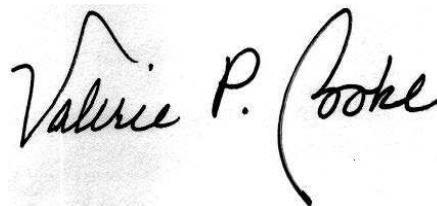
1. Amtrak and its witnesses shall be prohibited from relying upon any document not produced to JDT on or before December 10, 2013, with the exception of the documents Amtrak subsequently produced by December 30, 2013.

**D. Wi-PU Internal Event Log for June 24, 2011**

1. Amtrak is ordered to produce from its serve in readable format the Wi-PU Internal Event Log for June 24, 2011.

**IT IS SO ORDERED.**

Dated: January 30, 2014.



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VALERIE P. COOKE  
UNITED STATES MAGISTRATE JUDGE