

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a)—CANADIAN NATIONAL RAILWAY COMPANY

Decided: September 23, 2014

Digest:¹ This decision grants in part an interlocutory appeal by Illinois Central Railroad Company and Grand Trunk Western Railroad Company (collectively, Canadian National Railway Company (CN)) of the Board's April 15, 2014 decision, which granted in part and denied in part CN's first motion to compel the National Railroad Passenger Corporation (Amtrak) to produce certain documents. Amtrak will be required to produce certain operating agreements identified by CN, which the Board deems relevant to this proceeding. This decision also grants in part and denies in part CN's second motion to compel Amtrak to produce certain documents and respond to certain interrogatories. Amtrak will be required to produce certain documents related to delay coding. Finally, in light of the rulings in this decision, the procedural schedule in this proceeding is modified.

BACKGROUND

On July 30, 2013, the National Railroad Passenger Corporation (Amtrak) filed an application under 49 U.S.C. § 24308(a)(2), seeking: (1) the institution of a proceeding and a procedural schedule to determine reasonable terms and compensation for Amtrak's use of Illinois Central Railroad Company and Grand Trunk Western Railroad Company (collectively, Canadian National Railway Company (CN)) facilities (including rail lines) and services, making those new terms and compensation retroactively effective as of August 12, 2013; and (2) an interim service order, effective August 12, 2013, requiring CN to continue to make available to Amtrak the facilities and services necessary for Amtrak to continue to operate on CN rail lines under the same terms and compensation as the current Amtrak-CN contract.²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² CN responded to Amtrak's application by letter on August 1, 2013, and by formal reply on August 19, 2013.

In a decision served on August 9, 2013, the Board instituted a proceeding to establish reasonable terms and compensation for Amtrak's use of CN's facilities and services.³ The Board also required CN to continue to provide facilities and services to Amtrak on an interim basis under the terms of the existing contract.⁴ Subsequently, the Board adopted the procedural schedule proposed by Amtrak and CN and granted the parties' joint motion for protective order. To facilitate the parties' discovery process, the Board also has granted several extensions of the procedural schedule.

CN's First Motion to Compel and the Director's April 15 Decision

On February 14, 2014, CN filed a motion to compel responses to certain requests for production of documents, requesting expedited consideration of its motion.⁵ In Request No. 5, CN sought the production of "all of Amtrak's Operating Agreements, including amendments, attachments, exhibits, and schedules thereto, with Host Railroads in force at any time since 1971."⁶ In Request No. 6, CN sought the production of "all agreements, including any amendments, exhibits, attachments or schedules thereto, in force at any time since 2008, relating to any hosting by Amtrak of non-Amtrak passenger service on rail lines owned, leased, or operated by Amtrak."⁷ Under the parties' Joint Discovery Protocol,⁸ these and certain other requests subsequently were limited to documents created, revised, sent, or in effect between May 1, 2011, and October 31, 2013.⁹

Following the filing of Amtrak's reply,¹⁰ the Board, through the Director of the Office of Proceedings, issued a decision that granted in part and denied in part CN's first motion to compel.¹¹ With respect to Request No. 5, the Director concluded that operating agreements with

³ Application of the Nat'l R.R. Passenger Corp. under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry. Co., slip op. at 3 (STB served Aug. 9, 2013).

⁴ Id.

⁵ CN Motion 1-2 (Feb. 14, 2014). The February 14 motion corrected a submission filed on February 12.

⁶ Id.

⁷ Id. at 3.

⁸ The Joint Discovery Protocol is an agreement between CN and Amtrak regarding discovery in this proceeding and is intended to "facilitate the conduct of discovery and the resolution of disputes." Id., Ex. 2 at 1.

⁹ Id., Ex. 2 at 2.

¹⁰ Amtrak opposed the document requests. Certain other host railroads, whose agreements with Amtrak fall within the scope of Request No. 5, filed letters and petitions stating that they would not object to Amtrak's producing the agreements as long as they were designated highly confidential under the protective order and the Board's discovery rules.

¹¹ Application of the Nat'l R.R. Passenger Corp. under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry. Co. (April 15 Decision), slip op. at 6-7 (STB served Apr. 15, 2014).

other host railroads may provide information that would be useful to the Board's prescription of new terms and conditions in the present case.¹² The Director therefore granted CN's first motion to compel as to Request No. 5, and directed Amtrak to produce and serve on CN all of Amtrak's operating agreements with host railroads, including amendments, attachments, exhibits, and schedules, created or in effect from May 1, 2011, to October 31, 2013.¹³

In contrast, the Director was not persuaded that Request No. 6 was relevant to the subject matter of this proceeding because Amtrak had argued that, unlike the operating agreements under which freight railroads like CN host Amtrak service on their tracks, the operating agreements under which Amtrak hosts non-Amtrak passenger service in the Northeast Corridor were negotiated subject to a different statutory provision—one that does not limit host-carrier compensation to incremental costs.¹⁴ Therefore, the Director denied CN's first motion to compel as to Request No. 6, concluding that the production of operating agreements under which Amtrak operates as the host railroad was unlikely to produce evidence relevant to the subject matter of this proceeding.¹⁵

CN's Interlocutory Appeal

On May 5, 2014, CN appealed the denial of its motion to compel a response to Request No. 6. CN argues that it meets the standard for an interlocutory appeal under 49 C.F.R. § 1115.9(a)(4) because the denial, "if allowed to stand, would unduly prejudice CN, cause it irreparable harm, and harm the public interest."¹⁶ CN acknowledges that its appeal was not filed within the seven-day time limit required by 49 C.F.R. § 1115.9(b). CN requests a waiver of that requirement, claiming that Amtrak will not be prejudiced because discovery is ongoing.¹⁷

In support of its appeal, CN argues that, while the Director denied Request No. 6 on the premise that Amtrak's own host carrier operating agreements with non-Amtrak passenger carriers were negotiated under a cost recovery standard different from incremental costs, some of Amtrak's hosting agreements were apparently negotiated under an avoidable cost standard that is identical to the incremental cost standard.¹⁸ CN argues that Amtrak has previously acknowledged that "avoidable costs" are the same as "incremental costs" when applied to host railroad-passenger rail tenant agreements.¹⁹ CN states that, based on public information, at least four agreements covered by Request No. 6 are based on this avoidable cost standard. CN further

¹² Id. at 6.

¹³ Id.

¹⁴ Id. at 7. Compare 49 U.S.C. § 24905(c)(1)(A), with 49 U.S.C. § 24308(a).

¹⁵ April 15 Decision, slip op. at 7.

¹⁶ CN Appeal 1 n.2 (May 5, 2014).

¹⁷ Id.

¹⁸ Id. at 2.

¹⁹ Id. at 6, citing Metro. Transp. Auth. v. ICC, 792 F.2d 287, 291 (2d Cir. 1986).

states that it appears that agreements between Amtrak and commuter passenger rail tenants on the Northeast Corridor utilize an avoidable cost methodology. In support of this argument, CN references a 1983 decision in which the ICC (the Board's predecessor agency) ruled that Amtrak must negotiate agreements on the Northeast Corridor under an avoidable cost structure.²⁰ CN also relies on Amtrak's statements to the Government Accountability Office that the avoidable cost standard governed most of its operating agreements on the Northeast Corridor.²¹

CN thus maintains that certain agreements sought under Request No. 6 are relevant to the issues in this proceeding because they "appear to apply the same incremental cost standard [that] applies in this proceeding."²² CN asserts that, while no two commercial relationships are identical, the agreements sought in Request No. 6 may provide information that would be useful to the Board's prescription of new terms and conditions in the present case because Amtrak (like CN) hosts passenger rail tenants and has expressed concerns regarding capacity limits on Amtrak-owned lines and delays to its trains caused by its tenants.²³

On May 12, 2014, Amtrak filed a reply in opposition to CN's appeal, in which Amtrak argues that CN's appeal should be denied not only because it was not timely, but also because it does not meet the Board's standard of review for interlocutory appeals.²⁴ Amtrak argues that CN's appeal offers no substantive argument for how the Board's ruling "may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party," as required by the Board's regulations.²⁵ Amtrak asserts that CN has not shown "how the Board's reliance on the statute was in error, or that the Board relied on some other argument that was in error."²⁶ Furthermore, according to Amtrak, it did not argue that incremental cost was not applied in the agreements covered by Request No. 6, or that incremental cost and avoidable cost were not the same in the context of those agreements.²⁷ Rather, Amtrak asserts, it focused on the existence of the two different statutory provisions and indicated that, because of the different statutory framework, there were other issues involved in the negotiation of the agreements covered by Request No. 6 that made them irrelevant to the issues in this case.²⁸

²⁰ Id. at 7, citing Costing Methodologies for the Ne. Corridor: Commuter Serv., 367 I.C.C. 192, 193 (1983).

²¹ Id. at 7, citing GAO-06-470, Commuter Rail: Commuter Rail Issues Should Be Considered in Debate Over Amtrak (Report to the Chairman, Committee on Banking, Housing and Urban Affairs), at 20 (2006).

²² CN Appeal 9 (May 5, 2014).

²³ Id. at 10.

²⁴ Amtrak Reply 3 (May 12, 2014).

²⁵ Id. at 4, 6.

²⁶ Id. at 8.

²⁷ Id.

²⁸ Id. Amtrak argued in its February 19, 2014 reply that these agreements "have been negotiated subject to a different statutory requirement that does not limit compensation to

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CN's Second Motion to Compel

On May 2, 2014, CN filed its second motion to compel responses to document requests and interrogatories that CN served on October 31, 2013. CN claims that Amtrak has unreasonably refused to answer legitimate requests for discovery related to infrastructure funding and to Amtrak's coding of the causes of passenger train delays ("delay coding").²⁹

With respect to infrastructure funding, CN seeks to compel responses to:

- Request No. 8: "all documents relating to any consideration of, or communication regarding, actual or potential capital expenditures (whether by Amtrak or by the Host Railroad or by other entities of jointly) or contributions to capital expenditures to improve, facilitate, or reduce costs associated with Amtrak service on any Host Railroad's tracks since 2003";³⁰
- Request No. 9: "all documents from 2006 to the present relating to monies earmarked or otherwise available to Amtrak to fund, contribute to, or compensate a Host Railroad for capital expenditures or capacity or infrastructure improvements on the rail lines of any Host Railroad";³¹
- Request No. 10: "all documents from 2006 to the present relating to Amtrak efforts to obtain funds from public or private sources for capital expenditures or capacity or infrastructure improvements on the rail lines of any Host Railroad";³² and
- Interrogatory 20: "identify and describe with particularity all documents relating to communications between Amtrak (including its employees, representative or agents) and Government agencies, Members of Congress, congressional committees, state

(. . . continued)

incremental costs as does 49 U.S.C. §24308(a)." Amtrak Reply 6 (Feb. 19, 2014). Amtrak further argued that, for Northeast Corridor operations going forward, the parties would negotiate an appropriate cost methodology. Id. Finally, Amtrak argued that "agreements in place today covering passenger service evolved under an entirely different set of circumstances than the host railroad agreements and are set to evolve even further." Id. However, aside from its reference to a different statutory requirement that does not limit compensation to incremental costs, Amtrak did not identify the "different set of circumstances" under which these agreements evolved.

²⁹ CN Motion 4-6 (May 2, 2014).

³⁰ Id., App. at 1.

³¹ Id.

³² Id., App. at 2.

governors, and their staffs regarding the Relevant Services or Amtrak’s funding, funding needs, or funding priorities”³³

With respect to delay coding, CN seeks to compel responses to:

- Request No. 14: “all documents from 2008 to the present relating to communications between and among Amtrak employees, or between and among Amtrak employees and former employees, relating to the classification or coding of delays to Amtrak trains for HRD or for purposes of any Operating Agreement”;³⁴ and
- Interrogatory No. 17: “identify all documents related to complaints, grievances, Ombudsman files, whistleblower disclosures, reports, and any other documents including criticism or an assessment regarding (a) Amtrak’s operation of the Relevant Services, or (b) Amtrak’s promulgation or implementation of policies, practices, or procedures for the monitoring, recording, coding, reporting, measurement, or description of delays to Amtrak trains).”³⁵

On May 9, 2014, Amtrak filed its reply to CN’s second motion to compel. Amtrak argues that CN’s motion far exceeds what is relevant to this proceeding.³⁶ Amtrak stresses that the burden of demonstrating relevance is on the moving party, that speculation about whether something might be relevant is inadequate to meet that burden,³⁷ and that discovery requests must be narrowly tailored and directed toward a relevant issue.³⁸

More particularly, Amtrak argues that CN’s infrastructure-related requests are overly broad and unduly burdensome.³⁹ With respect to Request No. 8, Amtrak states that it has already agreed to produce all responsive documents from 2008 forward that relate to funding for improvements on CN’s lines.⁴⁰ With respect to Request No. 9, Amtrak states that it has agreed to produce “documents related to any funds allocated to Amtrak for the specific purpose of compensating CN for capital expenditures or capacity or infrastructure improvements on CN’s rail lines from 2008 forward.”⁴¹ Amtrak also states that it has agreed to produce documents

³³ Id.

³⁴ Id., App. at 3.

³⁵ Id.

³⁶ Amtrak Reply 3 (May 9, 2014).

³⁷ Id. at 4.

³⁸ Id. at 5, citing Duke Energy Corp. v. Norfolk S. Ry., NOR 42069, et al., slip op. at 4 (STB served July 26, 2002).

³⁹ Amtrak Reply 6-7 (May 9, 2014).

⁴⁰ Id.

⁴¹ Id.

related to its efforts to obtain funds for capital expenditures or capacity or infrastructure improvements on CN's lines from 2008 forward.⁴²

Amtrak further argues that CN's delay coding request and interrogatories are overly broad and unreasonably burdensome.⁴³ Amtrak notes that CN already has access to Amtrak's On-Time Performance Monitoring System, which, Amtrak states, will provide near-real-time information for all Amtrak trains on all host railroads. Further, Amtrak states that it has already agreed to provide documents and information responsive to Request No. 14 and Interrogatory 17 that are applicable to CN's lines used by Amtrak.⁴⁴

On May 19, 2014, CN filed a reply to Amtrak's reply, arguing that Amtrak's reply raised new unfounded burden arguments and offered new "compromise" positions that would serve to narrow some of CN's discovery requests.⁴⁵ CN maintains that its requests are not overly burdensome and notes that Amtrak has not provided specific estimates of how much time and expense would be required to respond to CN's discovery requests, nor has it proposed ways to limit the requests to reduce the burden of production.⁴⁶

With respect to its infrastructure-related requests, CN states that it is willing to limit Request No. 8 to "documents that propose, analyze, approve, or disapprove of potential capital investments."⁴⁷ CN further states that it is not requesting all documents relating to potential capital investments, but only those pertaining to investments that were made or proposed by or to Amtrak.⁴⁸ With respect to its delay coding request and interrogatory, CN states that it is willing to combine and limit its request to:

[D]ocuments relating to criticisms and assessments of (i) the way Amtrak has interpreted and deployed its various delay codes, (ii) Amtrak's internal processes for and inconsistencies in reviewing coding issues, and (iii) Amtrak decisions regarding reporting, publication, or correction of delay coding (*e.g.*, imposing time limits on carriers seeking to identify coding errors).⁴⁹

On May 27, 2014, Amtrak filed a letter in response to CN's May 19 reply. Amtrak states that CN's proposed limitation on Request No. 8 still would require Amtrak to provide documents about proposed investments involving the lines of all Class I carriers regardless of how

⁴² Id. at 8.

⁴³ Id. at 10.

⁴⁴ Id. at 10-11.

⁴⁵ CN Reply 1 (May 19, 2014).

⁴⁶ Id. at 4.

⁴⁷ Id. at 6.

⁴⁸ Id.

⁴⁹ Id. at 7-8.

preliminary a proposal may have been.⁵⁰ Amtrak maintains that CN's limitations do not sufficiently reduce the scope of the request.⁵¹ Amtrak argues that, while CN has consolidated and narrowed its requests concerning delay coding, the combined request remains overly broad.⁵² In assessing CN's second motion to compel, the Board will accept into the record CN's and Amtrak's additional replies with respect to the second motion to compel, because they discuss the narrowing of certain disputed discovery requests.

DISCUSSION AND CONCLUSIONS

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub.-No. 2), et al. (STB served Nov. 14, 2003). Further, it "is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2). Under 49 C.F.R. § 1114.21(c), however, discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.

Interlocutory Appeal of First Motion to Compel

Interlocutory appeals, including appeals of a Director Order ruling on a motion to compel, are governed by 49 C.F.R. § 1115.9. The Board applies a highly deferential standard of review to such appeals. Wisc. Power & Light Co. v. Union Pac. R.R., NOR 42051, slip op. at 2 (STB served June 21, 2000). Nevertheless, under 49 C.F.R. § 1115.9 (a), a decision may be appealed if "[t]he ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party." Section 1115.9(b) provides that an interlocutory appeal shall be filed with the Board within seven days of the ruling from which review is sought. 49 C.F.R. § 1115.9(b).

Based on the circumstances of this case, the Board will grant CN's interlocutory appeal in part. CN's appeal was not filed within seven days of the April 15 Decision. However, CN has demonstrated on appeal that at least four agreements covered by Request No. 6 include compensation provisions that use a cost structure substantially similar to incremental costs.⁵³ Had the Director been made aware of these facts, CN's request to compel Amtrak's hosting agreements sought under Request No. 6 (as limited by the parties' Joint Discovery Protocol)

⁵⁰ Amtrak Letter 2 (May 27, 2014).

⁵¹ Id. at 2.

⁵² Id. at 3.

⁵³ As noted earlier, the Director denied CN's first motion to compel with respect to Request No. 6 because Amtrak had stated that the hosting agreements were negotiated subject to a different statutory requirement that does not limit compensation to incremental costs.

would have been granted. Thus, under the circumstances the Board finds that it would be unduly prejudicial to CN to deny it discovery of the Amtrak hosting agreements now covered by Request No. 6. Therefore, the Board will waive the seven-day filing requirement for interlocutory appeals and require Amtrak to produce all agreements negotiated pursuant to an avoidable cost structure (including any amendments, exhibits, attachments or schedules thereto) that relate to any hosting by Amtrak of non-Amtrak passenger service on rail lines owned, leased, or operated by Amtrak and that were created, revised, sent, or in effect from May 1, 2011, to October 31, 2013.⁵⁴

Second Motion to Compel

Ordinarily, motions to compel are addressed in the first instance by the Director of the Office of Proceedings, as in the April 15 Decision on CN's first motion to compel. However, in the interest of efficiency, the Board will directly address CN's second motion to compel, as the discovery disputes raised by that motion are fully briefed. See 49 CFR § 1011.2(b) (the Board may bring before it any matter typically assigned to a Board employee).

CN's Request for Production No. 8

Request No. 8, as limited on reply, seeks the production of documents that propose, analyze, approve, or disapprove of potential capital investments for all Class I railroads. Documents regarding potential capital investments involving CN's lines that host Amtrak's trains are clearly relevant to the issues in this proceeding. Indeed, Amtrak has previously agreed to provide documents responsive to Request No. 8 that pertain to CN. Thus, to the extent the motion to compel would require, with respect to Request No. 8, production of documents that pertain to CN, the motion is moot. As for the balance of this request, CN has failed to establish the relevance of documents reflecting capital investments by other Class I railroads. Moreover, it would be unduly burdensome for Amtrak to produce all documents regarding other Class I railroads. Therefore, the Board will deny CN's motion to compel as to Request No. 8.

CN's Request for Production No. 9

Request No. 9 seeks the production of documents relating to monies earmarked or available to Amtrak to fund or contribute to a host railroad's capacity and infrastructure improvements. Documents regarding the funding of capital improvements on CN's lines that host Amtrak's trains are clearly relevant to the issues in this proceeding. Indeed, Amtrak has previously agreed to provide documents related to funds allocated to Amtrak for the purpose of compensating CN for improving capacity or infrastructure on CN's rail lines. Thus, to the extent the motion to compel would require, with respect to Request No. 9, production of documents that pertain to CN, the motion is moot. As for the balance of this request, CN has failed to establish the relevance of documents reflecting monies available to Amtrak to fund or assist in funding

⁵⁴ Again, the parties' Joint Discovery Protocol limits Request Nos. 5 and 6 to documents created, revised, sent, or in effect between May 1, 2011 and October 31, 2013. See CN Motion, Ex. 2 at 2 (Feb. 14, 2014).

capacity and infrastructure improvements on the lines of other host railroads. Moreover, it would be unduly burdensome for Amtrak to produce all documents regarding any host railroad. Therefore, the Board will deny CN's motion to compel as to Request No. 9.

CN's Request for Production No. 10

Request No. 10 seeks the production of all documents relating to Amtrak's efforts to obtain funds from public or private sources for capital expenditures on the rail lines of any host railroad. CN has not demonstrated that such documents are relevant to the issue in this proceeding. Amtrak's general efforts to obtain funds go beyond the scope of this proceeding and do not appear reasonably likely to provide information relevant to the Board's prescription of new terms and conditions in the present case. Therefore, the Board will deny CN's motion to compel as to Request No. 10.

CN's Interrogatory 20

Interrogatory No. 20 requests that Amtrak identify and describe all documents relating to communications between its employees and government agencies, members of Congress, congressional committees, state governors and their staffs regarding Amtrak's funding needs and priorities. Interrogatory No. 20 also requests Amtrak to identify all employees, current and present, who may have participated in or contributed to or may have knowledge of such documents. CN has not demonstrated that a response to this interrogatory is reasonably likely to lead to information that is relevant to the issues in this proceeding. To the contrary, this interrogatory is overly broad and appears overly burdensome on its face. For these reasons, CN's motion to compel as to Interrogatory No. 20 is denied.

CN's Request for Production No. 14 and Interrogatory No. 17

On reply, CN combined and limited Request No. 14 and Interrogatory No. 17. The combined request seeks the production of documents related to criticisms and assessments of delay code deployments, Amtrak's internal processes in reviewing coding issues, and Amtrak's decisions regarding delay reporting. The Board agrees with CN that this combined and limited request appropriately balances the burden of production with CN's discovery rights. The production of documents related to delay coding may provide information that would be useful to the Board's prescription of new terms and conditions in the present case. Therefore, Amtrak will be required to produce, pursuant to the time limitations outlined in the Joint Discovery Protocol, all documents relating to criticism and assessments of (i) the way Amtrak has interpreted and deployed its various delay codes; (ii) Amtrak's internal processes for and inconsistencies in reviewing coding issues; and (iii) Amtrak decisions regarding reporting, publication, or correction of delay coding (e.g., imposing time limits on carriers seeking to identify coding errors). Given the breadth of these requests, the parties will be directed to meet and confer by September 30, 2014, to formulate an appropriately limited list of document custodians whose files will be searched for responsive documents.

Finally, in ruling on CN's second motion to compel, we emphasize that it is generally not helpful to the Board for parties to move to compel responses to very broad and potentially

burdensome document requests and interrogatories, force opponents to respond to the motion, and then narrow the discovery sought in a reply for which leave to file must be sought. Motions to compel should reflect at the outset any limitations that the party seeking discovery is willing to accept to reduce the burden of discovery. Parties that fail to heed this warning run the future risk that the Board will deny the motion to compel based on the Board's assessment of the relevance and burden of the discovery requests as initially presented without considering late efforts to narrow the discovery through a reply.

CN's Motion to Extend the Procedural Schedule

On September 9, 2014, CN moved for a further extension of the procedural schedule. CN asserts that it completed its discovery production to Amtrak on September 4 but "is still awaiting the bulk of Amtrak's document production."⁵⁵ CN states that Amtrak has to date produced fewer than 3,500 documents notwithstanding having asserted earlier in this case that it was in the process of providing "hundreds of thousands of documents."⁵⁶ CN asks the Board to extend the procedural schedule to require opening submissions to be filed 60 days after initial discovery is completed by both parties and to extend subsequent deadlines accordingly.⁵⁷

On September 22, 2014, Amtrak filed a reply in which it objects to any extension of the procedural schedule. Amtrak claims that, as of that date, it has completed its document production and argues that any further discovery that may be ordered in a Board ruling on CN's second motion to compel or CN's appeal of the April 15 Decision does not require an extension of the procedural schedule.⁵⁸ Amtrak claims that the proceeding has already been delayed and that both parties have had sufficient time to formulate their arguments.⁵⁹

CN's request will be denied, as an extension of the requested length would unduly prolong the procedural schedule. However, in light of the Board's rulings in this decision, we will modify the procedural schedule so that opening submissions are due no later than 30 days after Amtrak completes its discovery to CN.⁶⁰ Amtrak will be directed to file a notice with the Board when its production to CN is complete. The following represents the new procedural schedule:

⁵⁵ CN Mot. for Extension of Procedural Schedule 1 (Sept. 9, 2014).

⁵⁶ Id.

⁵⁷ Id. at 8-9.

⁵⁸ Amtrak Reply to Mot. for Extension of Procedural Schedule 4 (Sept. 22, 2014).

⁵⁹ Id. at 6.

⁶⁰ CN states that it completed its discovery to Amtrak on September 4, 2014. CN Mot. for Extension of Procedural Schedule 4 (Sept. 9, 2014). Amtrak states that it completed its discovery as of the date of its September 22, 2014 reply, Amtrak Reply to Mot. for Extension of Procedural Schedule 4 (Sept. 22, 2014), but we are ordering Amtrak to complete further discovery in this decision.

Discovery End + 30 days	Opening submissions by both parties
Discovery End + 65 days	Rebuttal submissions by both parties
Discovery End + 100 days	Opening briefs of both parties
Discovery End + 121 days	Reply briefs of both parties

It is ordered:

1. CN's request to waive the seven-day filing period required under 49 C.F.R. § 1115.9(b) is granted.
2. CN's interlocutory appeal of the April 15 Decision is granted in part as discussed above.
3. CN's first motion to compel is granted in part. Amtrak shall respond to CN's Document Request No. 6 as narrowed above.
4. CN's second motion to compel is granted in part and denied in part. CN's second motion to compel is denied as to Document Request Nos. 8, 9, and 10 and Interrogatory No. 20. Amtrak shall respond to CN's combined and limited delay coding request (based on CN's Document Request No. 14 and Interrogatory No. 17) as discussed above.
5. The parties are directed to meet and confer by September 30, 2014, to formulate an appropriately limited list of document custodians, whose files will be searched for documents responsive to CN's combined and limited delay coding request (based on CN's Document Request No. 14 and Interrogatory No. 17).
6. The procedural schedule is modified as set forth above.
7. Amtrak is directed to file a notice with the Board when its production to CN is complete.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.