

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: October 7, 2015

After the National Railroad Passenger Corporation (Amtrak) filed an application under 49 U.S.C. § 24308(a)(2), the Board instituted a proceeding to establish reasonable terms and compensation for Amtrak's use of the facilities and services of Illinois Central Railroad Company and Grand Trunk Western Railroad Company (collectively, CN).<sup>1</sup> Application of the Nat'l R.R. Passenger Corp. under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 3 (STB served Aug. 9, 2013). Subsequently, the Board adopted a procedural schedule proposed by Amtrak and CN. The Board then granted several extensions of the procedural schedule to facilitate the parties' discovery. On July 14, 2015, the Board served a revised procedural schedule. Consistent with that schedule, the parties filed their opening submissions on September 4, 2015. Under that schedule, rebuttal submissions are due on October 9, 2015, with opening and reply briefs to follow.

On September 30, 2015, Amtrak filed a motion for extension of the procedural schedule, and CN replied to that motion on October 2, 2015. Amtrak filed a motion for leave to respond to CN and a surreply on October 5, 2015. On the same day, CN replied to Amtrak's motion for leave to respond and to Amtrak's surreply.<sup>2</sup>

Amtrak argues that an extension to the procedural schedule is necessary because of the voluminous, complex record and because of Amtrak's need for additional discovery. Amtrak claims it could not have anticipated the discovery that would be required before the parties filed their opening submissions and cites aspects of CN's verified statements that Amtrak claims justify additional discovery.

CN argues that Amtrak overstates the size of the record because significant portions of CN's opening filing are Amtrak's own documents. In addition, according to CN, Amtrak failed

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<sup>1</sup> Illinois Central Railroad Company and Grand Trunk Western Railroad Company are indirect subsidiaries of Canadian National Railway Company.

<sup>2</sup> Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, and because the proceeding will not be delayed by the filings, the October 5, 2015 filings of Amtrak and CN will be accepted into the record.

in its duty to be diligent by waiting until shortly before the October 9 deadline to seek additional discovery. CN argues that Amtrak should have served its discovery before filing its motion to extend the procedural schedule so that the Board could assess whether additional discovery is necessary. CN also claims that Amtrak has not explained its need for additional discovery and suggests that additional discovery would likely take several months and impose significant costs on CN. CN states that it is willing to agree to a 31-day extension of the upcoming deadline if the Board also rules that the parties do not have a right to pre-rebuttal discovery.

The Board will grant Amtrak’s motion for an extension of the procedural schedule. Under 49 C.F.R. § 1114.21, parties may seek discovery without prior Board approval and the rule does not prohibit parties from seeking additional discovery after an initial discovery period. Prior to Amtrak’s filing of the pending motion, CN acknowledged that additional discovery might be sought after the filing of opening submissions. (Hr’g Tr. 40, June 1, 2015 (CN attorney stating that both parties “understand there may be more discovery post initial filings”).) Here, the proceeding is complex, the parties anticipated additional discovery after opening submissions, and Amtrak has explained its need for additional discovery and why it did not seek discovery earlier. Therefore, the extension that Amtrak proposes is appropriate. However, to expedite discovery, parties will be directed to serve all additional discovery requests according to the schedule below.

The following procedural schedule is adopted:

October 14, 2015	Deadline for service of discovery requests
December 14, 2015	Rebuttal submissions by both parties
January 19, 2016	Opening briefs of both parties
February 9, 2016	Reply briefs of both parties

It is ordered:

1. The procedural schedule described above is adopted.
2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.