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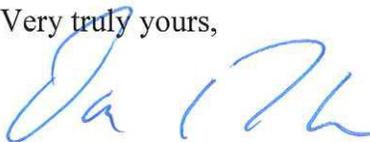
Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**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 in the above-referenced docket please find CN's Reply to Amtrak's Motion for Extension of Procedural Schedule, which is being submitted on behalf of Illinois Central Railroad Company and Grand Trunk Western Railroad Company.

Very truly yours,



David A. Hirsh

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

Enclosure

cc: Linda J. Morgan, Esquire  
William H. Herrmann, Esquire

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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**CN REPLY TO AMTRAK MOTION  
FOR EXTENSION OF PROCEDURAL SCHEDULE**

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Company and Illinois Central Railroad Company*

October 2, 2015

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  
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**CN REPLY TO AMTRAK MOTION  
FOR EXTENSION OF PROCEDURAL SCHEDULE**

Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, “CN”) hereby reply to Amtrak’s motion to extend the procedural schedule by 65 days. Amtrak’s untimely request comes nine days before the parties’ rebuttal submissions are due. As supposed “good cause” for an extension that would roughly triple the period between opening and rebuttal submissions (from 35 days to 100 days), Amtrak says only that it wants “additional time to review CN’s evidence” and “to seek discovery from CN.” Mot. at 2.

Amtrak’s request should be denied. The Board’s position has been clear in the past: parties should not be able to obtain lengthy, last-minute extensions by merely telling the Board that they would like more time and unspecified future discovery. Amtrak’s request for a blank check to pursue open-ended discovery violates that principle. If granted, Amtrak’s unsupported request would inevitably add significant additional delays – likely far exceeding 65 days – to this already burdensome and unduly lengthy proceeding. If Amtrak needs more time, then, at most, an extension of 31 days (to Monday, November 9, 2015), without further discovery, would be reasonable.

## BACKGROUND

Amtrak initiated this proceeding over two years ago, on July 30, 2013. Shortly thereafter, the parties agreed to, and the Board set, a schedule including 35 days between opening submissions and rebuttal submissions. Through multiple extensions to earlier parts of the schedule, that 35-day period has been a constant.

The parties filed statements of disputed issues on October 24, 2013. CN identified two issues (originally three, but one was later dropped) that it had already raised in negotiations with Amtrak – (1) whether CN should receive compensation for freight-delay and capacity costs; or, in the alternative, the costs of any infrastructure improvements necessary to avoid such costs, and (2) whether changes should be made in performance payments and penalties provisions of the Operating Agreement. Amtrak filed a broad and vague issues list.

The parties then spent 20 months pursuing wide-ranging discovery. Each party sought and obtained both documents relevant to its own proposal and documents relevant to issues it expected the other party to raise. For example, many of Amtrak's requests for production were addressed to infrastructure, freight delays, and capacity costs – *i.e.*, CN's first stated issue. Amtrak did not offer evidence on that issue in its opening submission.

The parties filed their opening submissions on September 4, 2015. In keeping with its statement of issues, CN proposed (1) that Amtrak reduce, eliminate, or compensate CN for freight-delay and capacity costs imposed on CN by Amtrak, and (2) that the existing Operating Agreement's structure for performance payments and penalties essentially be retained, with added relief items recognizing additional delays that are not within CN's reasonable control.<sup>1</sup>

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<sup>1</sup> In contrast, Amtrak proposed to depart sharply from the existing system of performance payments and penalties, advocating a new delay standard premised on its All-Stations On-Time Performance goals, which it did not propose in negotiations and did not reveal in its statement of

Leaving aside attachments – most of which were copies of documents produced by Amtrak – CN’s verified statements total approximately 250 pages.

Twenty-six days after opening submissions, and just nine days before reply submissions are due, Amtrak filed the present motion, seeking to add 65 days to the 35-day period for rebuttal submissions, and to pursue unspecified discovery in aid of rebuttal beyond the current rebuttal submissions deadline. With just one week remaining before rebuttal is due, Amtrak has not served any discovery requests.<sup>2</sup>

## ARGUMENT

### **I. AMTRAK HAS NOT SHOWN THAT A 100-DAY REBUTTAL PERIOD IS REQUIRED TO RESPOND TO CN’S OPENING SUBMISSION.**

Under 49 C.F.R. § 1104.7(b), Amtrak must show “good cause” for the extension it seeks. Amtrak claims that good cause exists for a 65-day extension – which would create a 100-day period between opening and rebuttal submissions – because “Amtrak needs additional time to review CN’s evidence.” Mot. at 2.

Amtrak states that “CN seeks changes in the way performance payments and penalties are measured” (in fact, relatively narrow changes to the definition and implementation of relief items) and additional compensation “for certain delay and interference costs CN says are caused by Amtrak.” *Id.* CN identified both of these issues in its 2013 statement of disputed issues.

Amtrak also states that CN’s opening submission contains a large number of pages. Included in

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disputed issues. Its proposal would impose huge penalties on CN for performance that currently earns positive performance payments.

<sup>2</sup> The Board should not be misled by Amtrak’s improper references to discussions between Amtrak counsel, Kevin Sheys, and CN counsel – discussions that Amtrak acknowledges were agreed to be confidential. Mot. at 3. CN insisted on confidentiality in large part to assure that Amtrak would not attempt to use such discussions as an excuse for its own lack of diligence. That Amtrak now attempts to do so is unfortunate and should not be rewarded by the Board.

its count, however, are copies of documents produced by Amtrak itself and of the current CN-Amtrak Operating Agreement, which together account for over 1,000 pages. As noted above, the actual texts of CN's verified statements are a manageable volume – approximately 250 pages.

Amtrak's request for over three months to respond is excessive. *See Cent. Power & Light v. S. Pac. Transp.*, No. 41242, slip op. at 3 (STB served Sept. 18, 1996) (“*CP&L*”) (granting a 15-day extension rather than a requested 58-day extension where movant had been on notice of issues). In the one case Amtrak cites, *Arkansas Elec. Coop. Corp. – Pet. for Decl. Order*, Docket No. FD 35305, slip op. at 1-2 (STB served May 11, 2010) (“*AECC*”), the Board granted only an 18-day extension for rebuttal submissions to respond to a “voluminous, detailed, and technical” submission and to take account of 1,351 pages of new evidence.

**II. AMTRAK'S BELATED EFFORT TO OBTAIN DISCOVERY AT THIS STAGE IS UNTIMELY, UNWARRANTED, AND UNREASONABLE, AND IT WOULD LEAD TO INDETERMINATE, LENGTHY DELAYS.**

Amtrak also seeks to support its extension request with a bootstrap argument: Amtrak wants additional discovery to inform its rebuttal submissions; it failed to timely seek such discovery under the existing schedule; so the Board's schedule should be extended to permit Amtrak to obtain it. Amtrak's argument is meritless: by failing to seek discovery in a timely manner, a party does not earn the right to delay proceedings; rather, it forfeits its right to discovery.

Amtrak offers no excuse for its failure to timely pursue discovery over the month since opening submissions were filed. Under the existing schedule, any discovery requests Amtrak might now serve would be out of time, and have therefore been waived.<sup>3</sup> A party who seeks to

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<sup>3</sup> As the ICC explained in a ruling barring untimely discovery requests, “[u]nder our rules, discovery may only be sought in conjunction with an ongoing proceeding, and must be sought in

extend a litigation schedule to accommodate discovery must demonstrate, among other things, that it has acted diligently.<sup>4</sup> Amtrak has not.

Amtrak's effort to use discovery as a basis for "good cause" also fails because it has neither explained why the extensive prior discovery it took is insufficient, nor specified any additional discovery that it needs. Amtrak had almost two years to seek wide-ranging discovery on the issues identified in CN's 2013 statement of disputed issues – which are the same issues CN addressed in its opening submissions – and Amtrak obtained tens of thousands of pages of documents from CN. *Cf. Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991) ("Where a significant amount of discovery has been obtained, and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied."). Amtrak has not demonstrated that it needs anything more. If Amtrak's *ipse dixit* that it "has determined that it needs to seek discovery" (Mot. at 2) were deemed good cause to abandon the Board's schedule, the Board's schedules would be meaningless.

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time to allow incorporation of the evidence obtained in a timely pleading in that proceeding." *Hunt v. United Parcel Serv., Inc.*, No. 40996, slip op. at 2 (ICC served Aug. 26, 1994).

<sup>4</sup> Federal Rule of Civil Procedure 16(b)(4), which governs motions to modify schedules, including discovery deadlines, in federal court, contains the same "good cause" standard as the Board's rule, 49 C.F.R. § 1104.7(b). The courts consistently hold that the "good cause standard precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'" *Sosa v. Airprint Sys.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (quoting Fed. R. Civ. P. 16 advisory committee's note); *accord, Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Even a *pro se* litigant seeking an extension of a discovery deadline must affirmatively demonstrate diligence. *See, e.g., Rowell v. Metro. Life Ins. Co.*, 579 Fed. App'x 805, 807 (11th Cir. 2014) (upholding denial of *pro se* litigant's motion to extend discovery deadline filed three days before discovery deadline, since "the party seeking the extension [of a discovery deadline] must establish that the schedule could not be met despite the party's diligence"); *Watkins v. Regions Mortg. Inc.*, 555 Fed. App'x 922, 924 (11th Cir. 2014) (upholding denial of *pro se* litigant's motion to extend discovery to permit "untimely-filed discovery requests," given the movant's failure to demonstrate diligence and good cause); *see also Gonzalez v. City of Milwaukee*, 791 F.3d 709, 712-14 (7th Cir. 2015) (upholding denial of motion to compel filed the day before dispositive motions were due, given "the lateness of Gonzalez's request" and "his lack of diligence").

Amtrak's lack of due diligence should be dispositive,<sup>5</sup> but even if it were not, the predictable effects of extending the schedule to provide for discovery at this point would also weigh against granting Amtrak's request. Doing so would unreasonably impose further burdens on CN and add lengthy, indeterminate delays to a proceeding that is already scheduled to last 2½ years. Prior discovery in this proceeding consumed almost two years (due in substantial part to Amtrak's delays, which resulted in its meeting its discovery obligations about eight months later than CN met its). That history suggests a new round of open-ended discovery at this stage would likely take several months – not the 65 days Amtrak suggests. Discovery responses and negotiations and document production take substantial time, and for document production to be useful, further time would be required to incorporate it into rebuttal submissions.<sup>6</sup> Moreover, if discovery is now provided for Amtrak, CN must also be allowed to take discovery (particularly given Amtrak's unanticipated proposal of a penalty provision based on an All-Stations OTP standard), and Amtrak's history in this proceeding does not inspire confidence that it will provide discovery within a short period. Realistically, Amtrak's effort to provide now for open-ended discovery should be recognized as a request for an extension of indeterminate length.<sup>7</sup>

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<sup>5</sup> Under the good cause standard for motions to extend schedules, “[a]lthough the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party’s reasons for seeking modification. If that party was not diligent, the inquiry should end.” *Johnson*, 975 F.2d at 609 (citation omitted).

<sup>6</sup> CN recognizes that discovery in the form of a limited number of depositions, without document production, could potentially be completed with less delay and burden. But Amtrak did not propose such a limit.

<sup>7</sup> Indeed, if the Board decides (over CN's objection) to now provide for unlimited pre-rebuttal discovery, CN suggests that rather than set a fixed schedule, which is unlikely to hold, it would make more sense to schedule rebuttal submissions for the close of discovery plus 30 days, as was the case with opening submissions.

Additional months of delay would impose significant and unfair costs on CN, in a proceeding CN did not choose to bring. Every month of discovery entails substantial litigation costs and consumes a significant amount of CN management's valuable time. Moreover, while this proceeding continues, CN is forced to host Amtrak under conditions of uncertainty, not knowing what retroactive changes may be made to its compensation,<sup>8</sup> while the evidence gathered by the parties pursuant to their agreed 2013 discovery cut-off date becomes increasingly stale. The Board should not add substantially to the delay and cost of this proceeding merely because Amtrak belatedly says it would like some unspecified new discovery that it has not diligently sought and not demonstrated it requires.

### **III. CN DOES NOT OBJECT TO A MODEST EXTENSION OF TIME.**

CN objects to a 65-day extension as excessive, and to a new round of open-ended discovery as untimely, unsupported, unreasonably burdensome, and likely to result in indefinite delay. CN would not object, however, to a 31-day extension (to Monday, November 9, 2015) for rebuttal submissions,<sup>9</sup> accompanied by a Board ruling making clear that such extension does not include a right to pre-rebuttal discovery.<sup>10</sup> This resolution would be consistent with the Board's practice of granting modest and limited extensions for filing (but not for new discovery), when it

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<sup>8</sup> Amtrak has argued for retroactive application of its proposed new penalty scheme. Amtrak Opening Statement at 18. That scheme would establish far stricter performance standards and, in combination with other changes proposed by Amtrak to the Operating Agreement, would, if adopted, result in millions of dollars of retroactive CN payments to Amtrak for CN conduct that is lawful and performance that earns positive performance payments under the current contract.

<sup>9</sup> If such an extension is granted, then CN suggests that opening briefs be due on December 9, 2015, and, in order to accommodate the holidays, rebuttal briefs be due on January 8, 2016.

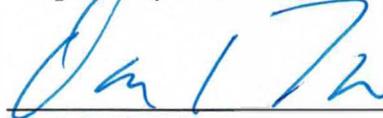
<sup>10</sup> The Board should also recognize that the broader scope of rebuttal likely to result from any such extension makes it more likely that surrebuttal submissions may be necessary to safeguard the parties' due process right to respond to significant new and unanticipated evidence. Of course, that issue will ultimately depend on the content of rebuttal submissions.

appears reasonable to do so. *See, e.g., CP&L* (granting 15-day extension, rather than 58 days requested) and *AECC* (granting request for 18-day extension for response to “voluminous, detailed, and technical” submission and 1,351-page supplemental filing).<sup>11</sup>

### CONCLUSION

Amtrak’s motion should be denied. Instead, it would be reasonable for the Board to grant a 31-day extension for rebuttal submissions (to Monday, November 9, 2015), with the proviso that additional discovery would not be permitted prior to rebuttal submissions.

Respectfully submitted,



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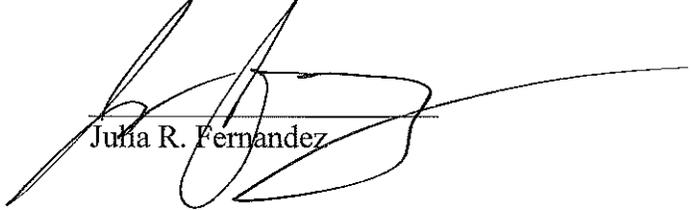
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<sup>11</sup> Similarly, a year ago in this case, in response to CN’s request for a 60-day extension for opening submissions after the completion of discovery, CN Mot. for Extension (Sept. 9, 2014), Amtrak argued that CN should be compelled to file its opening submissions four days after the close of document production, Amtrak Opp. to CN Mot. for Extension (Sept. 22, 2014), and the Board denied CN’s motion because “an extension of the requested length would unduly prolong the procedural schedule,” but provided a 30-day extension. Sept. 23, 2014 Order at 11. There is, however, a fundamental difference between CN’s 2014 motion for extension and Amtrak’s current motion: CN sought an extension so that it could receive and use discovery it had sought almost a year earlier, whereas Amtrak seeks an extension so that it can seek unspecified discovery that it has failed to seek in a timely manner.

**CERTIFICATE OF SERVICE**

I certify that I have this 2nd day of October, 2015, caused a true copy of the foregoing CN Reply to Amtrak Motion for Extension of Procedural Schedule to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

  
Julia R. Fernandez