

HARKINS CUNNINGHAM LLP

239309

Attorneys at Law

David A. Hirsh
202.973.7606
dhirsh@harkinscunningham.com

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
Telephone 202.973.7600
Facsimile 202.973.7610

ENTERED
Office of Proceedings
October 5, 2015
Part of
Public Record

October 5, 2015

BY E-FILING

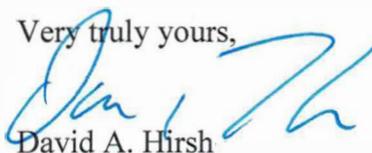
Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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 Leave and Response to 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

Docket No. FD 35743

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

**CN REPLY TO AMTRAK MOTION FOR LEAVE AND RESPONSE TO
CN REPLY TO AMTRAK MOTION
FOR EXTENSION OF PROCEDURAL SCHEDULE**

Theodore K. Kalick
CN
601 Pennsylvania Ave, N.W.
Suite 500 North Building
Washington, D.C. 20004-3608
(202) 347-7840

Paul A. Cunningham
David A. Hirsh
Simon A. Steel
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

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

October 5, 2015

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**CN REPLY TO AMTRAK MOTION FOR LEAVE AND RESPONSE TO
CN REPLY TO AMTRAK MOTION
FOR EXTENSION OF PROCEDURAL SCHEDULE**

The Board should either deny Amtrak’s motion for leave to file a sur-reply (Sur-reply Mot.) or, alternatively, accept the following response to it as the final filing with respect to Amtrak’s motion for extension. Amtrak’s claim that CN is not prejudiced (Sur-reply Mot. at 1) is disingenuous. Without excuse, Amtrak filed its extension motion late (*see* 49 C.F.R. § 1104.7(b)), seeking expedited consideration, so CN responded in two days. Three days later, Amtrak seeks to file a sur-reply that is more than twice as long as its motion, adds an exhibit, and adds new claims regarding confidential discussions between counsel – in further violation of the confidentiality agreement. That is not going “about this in the right order” (Sur-reply Mot. at 6); it is a blatant attempt to deprive CN of a fair opportunity to respond.

**I. Amtrak’s Improper and Misleading Effort to Rely on “Confidential”
Discussions Between Counsel.**

CN’s Reply demonstrated that to show the requisite “good cause” for the extension it seeks, Amtrak must show that it has acted diligently. CN further explained why Amtrak’s reliance in its motion on admittedly “confidential” discussions between counsel was improper.

CN Reply at 2 n.3. Amtrak's sur-reply exacerbates that impropriety by relying on those discussions as if they were a substitute for diligence. *See* Sur-reply at 2-3, 5-6. The Board should disregard the discussions between counsel, because they were conducted on the explicit basis that they would not be used before the Board.

However, if the Board does consider them because Amtrak has breached the confidentiality agreement between counsel, the Board should know the following:

1) Amtrak states that "from September 4 . . . Amtrak was attempting to reach an extension and discovery agreement." Sur-reply at 2-3. In fact, while Mr. Sheys contacted CN's counsel on September 8 to say that Amtrak might be interested in an extension, Amtrak made no proposal to CN regarding an extension until September 21.

2) Amtrak states that "CN was prepared before Amtrak's Motion for Extension to forgo any additional discovery." *Id.* at 5. CN did, indeed, state in the confidential discussions between counsel that CN was prepared to proceed on the basis of no discovery for either side before rebuttal submissions. What Amtrak fails to disclose is that Amtrak also proposed to forgo discovery if CN would enter into a stipulation precluding both parties from even seeking sur-rebuttal submissions, regardless of what new material may appear in rebuttal submissions. This raises serious questions as to Amtrak's supposed need for discovery.

II. Amtrak Has Acted Strategically, Not Diligently

Apart from its reliance on counsel discussions, Amtrak says only that it has been "reviewing CN's opening evidence" for the past month. Sur-reply Mot. at 2-3. That falls far short of the requisite diligence.

Amtrak offers no explanation for why, after more than a month – whether or not it was pursuing counsel discussions – it has not served any of the 29 additional discovery requests (*id.*

at 5) it claims to be necessary – or for why it failed to reveal the substance of its requests in time for CN’s response to its motion. To go “about this in the right order,” Amtrak should have served its discovery requests before filing its motion, so that CN and the Board could assess whether the discovery requests are important enough to merit changing the schedule¹ and how much burden and delay they are likely to cause. Instead, Amtrak made the strategic choice to ask the Board to trust its claim that its discovery requests are necessary and “limited” (*id.* at 6) without revealing them.²

Amtrak argues that the parties “contemplated the possibility of rebuttal discovery.” *Id.* at 3. Indeed they did; CN never suggested otherwise. But saying that “there may be more discovery” (*id.*) between opening and rebuttal submissions is not the same as saying that a party may wait for 31 of the 35 days provided by the schedule between opening and rebuttal submissions and then serve 29 new discovery requests with no concrete limitation. Amtrak offers no assurance that its 29 discovery requests will adhere to the date and other limitations agreed by the parties in their Joint Discovery Protocol, or that they will not include multiple parts, or that they will not require new and burdensome document searches. Limited, targeted discovery – *e.g.*, depositions – could have occurred consistent with the schedule if promptly and diligently sought. But Amtrak did not act diligently, and now seeks extensive discovery as a

¹ Amtrak’s yet-to-be-served discovery requests are essential to its extension motion. Apart from discovery, the 66 days from opening to rebuttal submissions proposed by CN should be ample.

² The Board should not do so. Amtrak’s statement that it intends to serve 29 new discovery requests (*id.* at 5) states no limitations and provides no assurance that Amtrak is not seeking to initiate a new months-long open-ended discovery war of attrition. For example, Amtrak also fails to address whether it will seek depositions and how many it will seek.

basis for the extraordinarily long extension it seeks, and with the threat of extending the schedule indefinitely.

Respectfully submitted,



Theodore K. Kalick
CN
601 Pennsylvania Ave, N.W.
Suite 500 North Building
Washington, D.C. 20004-3608
(202) 347-7840

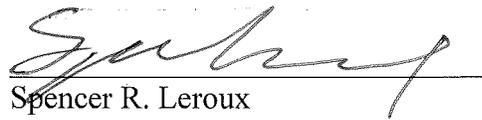
Paul A. Cunningham
David A. Hirsh
Simon A. Steel
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

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

October 5, 2015

CERTIFICATE OF SERVICE

I certify that I have this 5th day of October, 2015, caused a true copy of the foregoing Reply to Amtrak's Motion for Leave and Response to CN's Reply to Amtrak's 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.


Spencer R. Leroux