



NOSSAMAN LLP

236717
ENTERED
Office of Proceedings
September 22, 2014
Part of
Public Record

ATTORNEYS AT LAW

1666 K Street, NW
Suite 500
Washington, DC 20006
T 202.887.1400
F 202.466.3215

Linda J. Morgan
D 202.887.1429
lmorgan@nossaman.com

September 22, 2014

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: STB Finance Docket No. 35743—Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railway Company

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the National Railroad Passenger Corporation's Response to Canadian National Railway's Motion for Extension of the Procedural Schedule.

If you have any questions, please contact me.

Respectfully submitted,

Linda J. Morgan
Attorney for National Railroad Passenger Corporation

Enclosures

**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**

**NATIONAL RAILROAD PASSENGER CORPORATION'S
REPLY IN OPPOSITION TO CANADIAN NATIONAL'S
MOTION FOR EXTENSION OF THE PROCEDURAL SCHEDULE**

Linda J. Morgan
Kevin M. Sheys
Katherine C. Bourdon
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002
(202) 906-3971

Counsel for National Railroad Passenger Corporation

September 22, 2014

**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**

**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN
OPPOSITION TO MOTION OF GRAND TRUNK WESTERN RAILROAD COMPANY
AND ILLINOIS CENTRAL RAILROAD COMPANY FOR EXTENSION OF THE
PROCEDURAL SCHEDULE**

The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, hereby respectfully opposes the Motion of Grand Trunk Western Railroad Company (“GTW”) and Illinois Central Railroad Company (“IC”) (together and hereinafter referred to as “CN”) for Extension of the Procedural Schedule (“Motion for Extension”).

INTRODUCTION

On September 9, 2014, CN filed a Motion for Extension of the Procedural Schedule.¹ CN asked the Surface Transportation Board (“Board”) to “extend the schedule in this matter to provide for opening submissions at least sixty (60) days from the date on which Amtrak satisfactorily completes document production [as certified by either the parties or the Board] in response to CN’s First Set of Discovery Requests.”² Given the lengthy delays in this case up to this point, Amtrak urges the Board to deny the Motion for Extension of the Procedural Schedule. To date, Amtrak and CN have jointly sought, and received, five extensions of the procedural

¹ *Motion of Grand Trunk Western Railroad Company and Illinois Central Railroad Company for Extension of the Procedural Schedule*, September 9, 2014.

² *Id.* at 1.

schedule.³ These extensions have resulted in a delay of the due date for opening submissions by ten months. Given the complexity and volume of discovery processed by both parties, Amtrak and CN agreed that each of those extensions was necessary. However, at this point, both parties have processed and served the other with final discovery production, and any further extension in the procedural schedule will only further delay consideration of the merits in the case. At some point, this case must proceed. The Board should deny CN's Motion for Extension.

ARGUMENT

I. Amtrak has provided CN with its discovery responses, and thus the Motion for Extension is moot.

In support of its Motion for Extension of the Procedural Schedule, CN asserts that it is still waiting for meaningful responses to its interrogatories, as well as information related to Amtrak's ridership and revenue databases from which documents concerning ridership and revenue are being derived in response to two of CN's document requests. CN also argues that one of Amtrak's document production sets is missing certain text and attachments to certain produced documents. CN further states that it is awaiting the Board's ruling on its Appeal of the

³ *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railroad Company, Joint Request for Extension of the Procedural Schedule*, STB Finance Docket No. 35743 (STB Served June 20, 2014); *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railroad Company, Joint Request for Extension of the Procedural Schedule*, STB Finance Docket No. 35743 (STB Served February 20, 2014); *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railroad Company, Joint Request for Extension of the Procedural Schedule*, STB Finance Docket No. 35743 (STB Served May 2, 2014); *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railroad Company, Joint Request for Extension of the Procedural Schedule*, STB Finance Docket No. 35743 (STB Served December 19, 2013).

Board's decision on CN's first Motion to Compel and the Board's decision on CN's Second Motion to Compel.⁴

As of the date of this Reply in Opposition, Amtrak has provided CN with its last set of document production, which includes information responding to CN's interrogatories. As part of this production, Amtrak has also provided CN with ridership and revenue reports from May 1, 2011, to October 31, 2013 (the time frame agreed upon by the parties in their Joint Discovery Protocol). In addition, Amtrak has carefully reviewed the concerns CN raised in connection with its earlier production. The attachments CN claims to be missing are not relevant to CN's discovery requests and thus should not have been and will not be produced. Regarding the other text CN claims to be missing, again there is no text missing. In fact, because of the production format used by Amtrak, CN is getting more information than if we had employed the format CN used.⁵ Finally, any discovery directed by a Board decision on CN's Second Motion to Compel Production and CN's Appeal of the Board's decision on CN's first Motion to Compel can be produced once the Board issues its decision on those Motions. Any further extension of the procedural schedule will only result in further delay of the matter, to the detriment of both parties and Amtrak's passengers.

⁴ *Motion for Extension*, 1-2.

⁵ See email included as Exhibit 1 from Graham Rollins, Esq. to Linda Morgan, dated September 22, 2014, forwarding correspondence to David Hirsh on this matter.

II. The discovery process in this case has been arduous for both sides, but production has progressed and no further delay is in order.

In the Motion, CN notes that the parties have agreed to provide documents on a “rolling basis” and suggests that Amtrak has not provided documents in accordance with that agreement.⁶ However, like CN, Amtrak has been providing documents in production sets since the beginning of the discovery process⁷. Further, as noted in CN’s Motion for Extension, CN’s own final production was provided after the discovery completion date agreed to between the parties.⁸ It is also important to note that CN raised its concerns about missing attachments and texts less than a month ago.⁹ The scope of discovery in this case is indeed vast, and the production process arduous for both parties. At this point, however, a further extension of the procedural schedule is unwarranted.

III. CN’s request for a further extension of the procedural schedule by 60 days from the date the completion of discovery is certified as satisfactory is unnecessary and would only encourage further delay.

In the Motion for Extension, CN asks the Board for “a modification and further extension of the procedural schedule that would require opening submissions to be filed 60 days after initial discovery is fully and satisfactorily completed (as jointly certified by the parties or as determined by the Board, upon request).”¹⁰ This request would not just extend the schedule by 60 days. It is an open ended extension that would delay the opening submissions by 60 days

⁶ *Id.* at 8.

⁷ Amtrak has produced 6 document production sets that total over 50,000 documents.

⁸ *Id.* at 4.

⁹ CN raised these issues by email from outside counsel on August, 28, 2014 (see *Motion for Extension*, Exhibit 4), when Amtrak was finalizing its latest production. Important time was lost while Amtrak reviewed CN’s concerns, not only with respect to the previous production but also to ensure that its last production did not raise similar concerns. As previously indicated, the attachments CN was claiming to be missing were not relevant and should not have been produced, and the text CN was claiming to be missing was not missing at all.

¹⁰ *Id.* at 8.

after either the parties or the Board “certify” that discovery has been satisfactorily completed. The certification process CN proposes is just another layer of procedure that would only serve to provide additional opportunity for delay in the completion of discovery and between the close of discovery and the filing of opening submissions. This is an unnecessary step, and neither a customary procedure directed by the Board nor a process agreed to by the parties in the Joint Discovery Protocol applicable to this case.¹¹

Although Amtrak agrees that both parties have received a significant amount of data in recent weeks and have a tight timeframe in which to process discovery for the opening submissions, the case has been before the Board for over a year, during which period the parties have been afforded significant time to formulate the arguments for their respective submissions. At this late stage in the game, the parties can use the remaining time under the existing schedule to review the material that has been produced and adjust or update its arguments accordingly.

CONCLUSION

Amtrak urges the Board to deny CN’s Motion for Extension of the Procedural Schedule because it would unnecessarily bring about further, lengthy delays in a case which has been before the Board for over a year.

Dated: September 22, 2014

¹¹ It is important to note that in seeking an extension, CN is proposing 60 days from the certification of “initial discovery.” This suggests that CN plans more discovery in this case, which will mean even more delays.

Respectfully submitted,

/s/Linda J. Morgan

Linda J. Morgan
Kevin M. Sheys
Katherine C. Bourdon
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
(202) 887-1400

/s/William H. Herrmann

William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Counsel for National Railroad Passenger Corporation

CERTIFICATE OF SERVICE

I certify that on September 22, 2014, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to Canadian National's Motion for Extension of the Procedural Schedule of was served via email upon the following counsel of record:

David A. Hirsh
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608

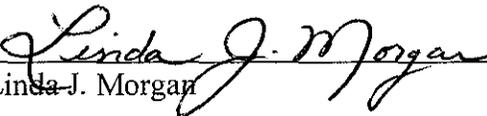

Linda J. Morgan

EXHIBIT 1

Morgan, Linda J.

From: Rollins, Graham <grollins@morganlewis.com>
Sent: Monday, September 22, 2014 3:29 PM
To: Morgan, Linda J.
Subject: FW: Amtrak/CN - Amtrak's Production ATK006 and Revised ATK005

Per our discussion.

Graham Rollins

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington DC 20004
Direct: 202.739.5865 | Main: 202.739.3000 | Fax: 202.739.3001
grollins@morganlewis.com | www.morganlewis.com

From: Rollins, Graham
Sent: Monday, September 22, 2014 3:28 PM
To: 'dhirsh@harkinscunningham.com'
Cc: 'Morgan, Linda J.'; nkling@harkinscunningham.com
Subject: Amtrak/CN - Amtrak's Production ATK006 and Revised ATK005

Good afternoon David,

I am transmitting Amtrak's production ATK006 to Neill King via electronic transfer. This is Amtrak's final production in response to CN's requests for production. It contains 49,322 documents. In addition, I am sending Neill a revised copy of ATK005 with a slipsheet in place of document ATK0000032723 per your email of September 9th. Lastly, we are providing supplemental information to Amtrak's response to CN's Request for Admission #4.

Production Issues

With respect to the issues you have raised in previous correspondence re: Amtrak's productions:

1. Ridership and Ticketing Revenue Data

Amtrak maintains and uses an enterprise data warehouse built on an Oracle database that stores ridership and ticketing revenue data. In Amtrak's production ATK006, Amtrak has produced reports from this database that are created and distributed to Amtrak personnel in the ordinary course of business. These reports are generated monthly, and one is included for each month from April 2011 to October 2013. I will send you a list of Bates numbers that identify these reports. Amtrak believes these reports provide the information CN seeks regarding ridership and ticketing revenue requests for production 16 and 17 with respect to data contained in Amtrak's data warehouse.

2. Incomplete Document Families

Amtrak's document production includes emails where one or more documents attached to that email have not been produced. Amtrak has withheld those documents from production because they are not responsive to CN's document requests. I have attached a report that lists the documents that have one or more attachments withheld as non-relevant from Amtrak's production ATK005. I will send a further report for ATK006. If you have any questions or concerns about specific documents on this log, please let us know.

3. Word Documents with Mismatched Text

The documents you identified with mismatched text contain Track Changes information. The differences between the extracted text and the information visible on the TIFF image of the document are the result of this Track Changes metadata. The text is not incorrect or mismatched and, in fact, provides more information than is visible on the TIFF. Amtrak does not intend to reproduce prior productions as the versions produced are usable and do not contain incorrect information. However, we have made changes to our process for ATK006 to accommodate your request that the TIFF images and searchable text match by re-OCR'ing the TIFF images. ATK006 and any future productions will reflect this change, which is consistent with CN's productions to date.

Response to Request for Admission #4

CN's Request for Admission #4 is reproduced here for reference:

Admit Amtrak has increased the number of trains it operates on IC's and GTW's lines from 8 trains per day on IC and none on GTW in 1971, to 16 trains per day on IC and 8 trains per day on GTW at present.

We responded with:

Amtrak objects to this RFA on the grounds it's compound. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak admits that the number of trains operated on GTW's lines increased from none in 1971 to 8 trains per day at present. Except as expressly admitted herein, Amtrak denies RFA #4.

A revised response with additional information is below:

Amtrak objects to this RFA on the grounds it's compound. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak admits that the number of trains operated on GTW's lines increased from none in 1971 to 8 trains per day at present. Amtrak further admits that the number of trains operated on IC's lines increased from 12 trains per day in 1971 (not 8 trains per day as stated in the request) to 16 trains per day at present. Except as expressly admitted herein, Amtrak denies RFA #4.

Please let me know if you have any issues with the production sets for ATK006 or the revised ATK005. Please also send confirmation that you have deleted all copies of ATK0000032723.

Regards,

Graham Rollins

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington DC 20004
Direct: 202.739.5865 | Main: 202.739.3000 | Fax: 202.739.3001
grollins@morganlewis.com | www.morganlewis.com

DISCLAIMER

This e-mail message is intended only for the personal use of the recipient(s) named above. This message may be an attorney-client communication and as such privileged and confidential and/or it may include attorney work product. If you are not an intended recipient, you may not review, copy or distribute this message. If you have received this communication in error, please notify us immediately by e-mail and delete the original message.