



NOSSAMAN LLP

ATTORNEYS AT LAW

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

Linda J. Morgan

239294

VIA E-FILING

ENTERED

October 5, 2015

Office of Proceedings

October 5, 2015

Part of

Public Record

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 please find the Motion for Leave and Response to CN Reply of National Railroad Passenger Corporation Motion for Extension of Procedural Schedule.

Sincerely,

Linda J. Morgan
Counsel, National Passenger Railroad Corporation

cc: David A. Hirsch

Enclosures

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35743

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

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

Linda J. Morgan
Kevin M. Sheys
Justin J. Marks
Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006

Counsel for National Railroad Passenger Corporation

William H. Herrmann
Christine E. Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Dated: October 5, 2015

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35743

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

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

MOTION FOR LEAVE TO RESPOND

The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, respectfully requests leave to file this short Response to the Reply of the Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, “CN”) to Amtrak’s Motion for Extension of Procedural Schedule submitted October 2, 2015. The Board’s rules¹ prohibit a reply to a reply, but good cause exists for allowing Amtrak to file this Response in the interest of compiling a complete record. Allowing Amtrak to file this Response one business day after CN’s Reply will not prejudice CN and will not delay the Board’s decision. *See Delaware and Hudson Railway Co. v. Consolidated Rail Corp.*, 9 I.C.C.2d 989, 990 (1993)(holding that the Board may waive Rule 1104.13(c) pursuant to Rules 1100.3 and 1110.9 for good cause shown).

RESPONSE

On September 30, Amtrak filed a Motion for Extension of Procedural Schedule (“Motion for Extension”). On October 2, CN filed a Reply in opposition (the “CN

¹49 C.F.R. § 1104.13(c).

Reply”). Amtrak hereby responds to the CN Reply. Amtrak respectfully submits that CN has offered no reason why the Board should not fully grant Amtrak’s Motion for Extension. Good cause exists to grant Amtrak’s Motion for Extension.

I. Amtrak’s Diligence

Amtrak has been diligently reviewing CN’s opening evidence since September 4th, but it is voluminous and the present Procedural Schedule is insufficient to allow Amtrak to prepare rebuttal evidence. CN seeks “incremental cost” compensation for delay allegedly caused by Amtrak. To be sure, CN’s Statement of Issues identified this issue, but being on notice to an issue does not put a party in a position in 35 days to review, evaluate and develop evidence to rebut 10 verified statements that directly or indirectly purport to show evidence of such delay costs and attribute them to Amtrak. In addition, CN’s characterization of the “relatively narrow changes to the definition and implementation of relief items” (CN Reply at 3) is belied by the numerous and (in many cases) far reaching proposed changes described on pages 56-68 of the Joint Verified Statement of Paul Ladue E. Ladue and Scott Kuxmann (“Ladue/Kuxman V.S.”) and Exhibit 15 thereto. Whatever notice the Statement of Issues provided, Amtrak was not in possession of CN’s opening evidence until September 4th and 35 days is not enough time to prepare rebuttal evidence.

CN notes that the procedural schedule in this case has always had 35 days between the opening submission and the rebuttal submission. CN Reply at 2. While true, this is beside the point. Amtrak did not seek an expansion of the 35-day gap until the present Motion for Extension for the simple reason that prior to September 4th, it continued to believe that 35 days would be sufficient and from September 4 until the Motion for Extension was filed, Amtrak was attempting to reach an extension and

discovery agreement with CN. It was not until Amtrak received CN's opening submission that Amtrak determined that it would need additional time to review it (10 verified statements and supporting evidence) and to conduct additional discovery. An earlier request to expand the time between the opening and rebuttal submissions would have had no basis and thus would have been premature.²

II. Rebuttal Discovery

CN objects that Amtrak would seeks additional discovery at the rebuttal stage. However, CN and Amtrak both contemplated the possibility of rebuttal discovery and expressly reserved the right to seek such discovery when they concluded the opening round of discovery before Judge Dring. In the June 1, 2015 Discovery Conference before Judge Dring, CN's Counsel said "[i]t is not our intention to seek further discovery prior to our initial filings. We both understand that there may be more discovery post initial filings."³

CN's first substantive issue is whether it should receive compensation for freight delays allegedly caused by Amtrak. CN Reply at 2. CN suggests Amtrak should be denied discovery now because it did not seek all the information it might need from CN to rebut CN's yet-to-be-made delay cost arguments in the first round of discovery. CN Reply at 5. CN also observes that Amtrak submitted no evidence on CN's first issue in Amtrak's opening submission. CN Reply at 2. Certainly, the argument that Amtrak

² CN says that broader rebuttal submissions would make it more likely that surrebuttal submissions will be required, but acknowledges that the issue will "ultimately depend on the content of the rebuttal submissions." (CN Reply at 7 n. 10.) In other words, it would be premature for CN to seek surrebuttal now, before it sees Amtrak's rebuttal submission. By the same token, it would have been premature for Amtrak to seek more time between opening and rebuttal submissions before it saw the content of CN's opening submission.

³ Transcript of Discovery Conference at 40:10-13, *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a) – Canadian Ntl Ry. Co.*, STB Finance Docket No. 35743 (STB served June 4, 2015)(No. 238541)(Attached hereto as "Attachment A").

should be denied rebuttal discovery now because it could have submitted evidence on CN's delay issue in its opening submission is a novel one.⁴ If parties are expected to submit evidence on the other party's yet-to-be-filed arguments, there would be no need for rebuttal evidence at all. Moreover, the notion that Amtrak was not diligent because it did not conduct all of its discovery on CN's anticipated delay argument is meritless.

Amtrak should not be deprived of the opportunity to conduct rebuttal discovery. It could not have anticipated the volume and precise content of evidence CN would introduce in its opening submission. For example, CN submitted a verified statement to quantify the hours of delay to CN's freight trains allegedly caused by Amtrak, and the costs thereof, using CN's Service, Reliability & Strategy ("SRS") database. Joint Verified Statement of Michael Baranowski and Benton Fisher ("Baranowski V.S."). CN submitted another verified statement to explain the mechanics of the SRS. Joint Verified Statement of John Summerfield, Gregg Girard, and Anne Morehouse. CN alleges that CN incurred \$4,690,089 in costs for delay caused by Amtrak over an 18 month period. Baranowski V.S. at 24 (Public Version). Amtrak should have the opportunity to seek discovery regarding the SRS system and CN's related evidence.

As an additional example, CN introduced two verified statements modeling line capacity in order to determine what level of delay to CN's freight trains it thinks is attributable to Amtrak and what capacity improvements (at specified service levels) it thinks would be required to eliminate the delay. Verified Statement of Harald Krueger, Brian Doyle, and Nikola Rank and Verified Statement of Jeffrey A. Dubin. Amtrak

⁴ Especially since CN did the same thing. In its opening submission, CN says some of its proposals are "tentative, as they are made without the benefit of Amtrak's positions or evidence." Ladue/Kuxmann V.S., at 50, n.70.

should have the opportunity to conduct discovery regarding the model and CN's related evidence.

CN says Amtrak "requests a blank check to pursue open-ended discovery" that will "inevitably add significant additional delays" to the proceeding. CN Reply at 1. This is not the case. As indicated in its Motion for Extension,⁵ Amtrak will today serve its discovery requests. The discovery includes 13 interrogatories generally covering 4 topics and 16 document production requests generally covering 6 topics. If the STB grants Amtrak's Motion for Extension, CN can respond to this discovery in time for Amtrak to review and incorporate CN's responses in its rebuttal submission.

CN notes that if an opportunity for discovery is provided to Amtrak, CN must also be allowed to take discovery. Certainly, this is the case. If CN's further discovery is as limited in scope as Amtrak's discovery – and presumably it will be because CN was prepared before Amtrak's Motion for Extension to forgo any additional discovery - then Amtrak would be able respond to it in time for CN to review and incorporate Amtrak's responses in its rebuttal submission.

III. The Timing of Amtrak's Motion for Extension and Amtrak's Discovery

CN calls Amtrak's Motion for Extension "last-minute" and berates Amtrak for having not yet served its discovery requests. CN Reply at 1 and 3. As noted in the Motion for Extension, Amtrak counsel contacted CN counsel on September 8, just four days after the opening submissions and between that day and the day Amtrak filed its Motion for Extension, counsel conferred confidentially regarding Amtrak's desire for an extension to conduct rebuttal discovery and to have more time to review CN's evidence.

⁵ Motion for Extension at 2 n. 2.

As to the fact that Amtrak did not serve discovery before today, CN elsewhere acknowledges that without an extension, Amtrak's service of discovery would serve no purpose, because the existing schedule's 35-day window is insufficient to prepare discovery and allow time for response and review. CN Reply at 6.

Amtrak went about this in the right order. It sought an agreement regarding schedule extension and discovery with CN, which would have obviated the need for the Motion for Extension. When it became clear that no agreement was possible, Amtrak filed its Motion for Extension. Amtrak should not be deprived of the extension or the discovery it needs because it exhausted efforts to reach an agreement with CN before seeking an extension from the Board.

IV. A Shorter Extension Without Discovery Would be Insufficient

CN is amenable to an extension to November 9, 2015, but without discovery. Amtrak is entitled to and needs the opportunity to seek additional, limited discovery (as described above) and, as CN acknowledges elsewhere (CN Reply at 6), a rebuttal submission deadline of November 9th would not allow Amtrak sufficient time to evaluate and use the information obtained in discovery from CN in its rebuttal submission.

[This space intentionally left blank]

Respectfully submitted,

By: 

Linda J. Morgan
Kevin M. Sheys
Justin J. Marks
Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006

Counsel for National Railroad Passenger Corporation

William H. Herrmann
Christine E. Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Dated: October 5, 2015

1 their response, they finally gave us some of the
2 information about some of these items. Based on
3 that, we dropped several other requests, because
4 we're not looking to extend this, and we made clear
5 this is it for the discovery prior to our initial
6 filings. We both recognize there could be new
7 discovery --

8 JUDGE DRING: You recognize right now that
9 if you get the logs, this is it?

10 MR. HIRSH: Linda, it is not our intention
11 to seek further discovery prior to our initial
12 filings. We both understand that there may be more
13 discovery post initial filings.

14 JUDGE DRING: Do you feel better now,
15 Ms. Morgan?

16 MS. MORGAN: I feel a little better.

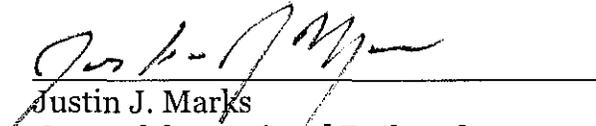
17 JUDGE DRING: A little better? That's
18 good. We're going in the right direction. All
19 right.

20 MR. HIRSH: There's one other issue, then,
21 your Honor.

22 JUDGE DRING: Go ahead.

CERTIFICATE OF SERVICE

I hereby certify that on October 5, I served a copy of the foregoing upon Canadian National Railway Company and the other parties on the service list in Finance Docket No. 35743.


Justin J. Marks
Counsel for National Railroad Passenger Corporation