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JERRY A. CUOMO

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January 25, 2022

303581

VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E. Street, S.W., Room 1034
Washington, D.C. 20024

ENTERED
Office of Proceedings
January 25, 2022
Part of
Public Record

Re: Docket No. FD 35743

**Application of the National Railroad Passenger Corporation Under 49
U.S.C. § 24308(a) – Canadian National Railway Company**

Dear Ms. Brown:

We represent National Railroad Passenger Corporation (“Amtrak”) in the above-captioned proceeding. Enclosed please find a Joint Motion to Establish Procedural Schedule.

In addition, please find enclosed a Notice of Appearance and please have the undersigned listed as attorney of record for this proceeding.

We would like to have attorneys from our firm, Mark S. Landman and Timothy Collazzi, listed as non-parties in this proceeding as well. Their email addresses are mlandman@lcbf.com and tcollazzi@lcbf.com.

Thank you for your attention to this matter. Should you have any questions, please contact the undersigned.

Respectfully submitted,

Jerry A. Cuomo

Jerry A. Cuomo

Enclosures.

cc: All Parties of Record

**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

JOINT MOTION TO ESTABLISH PROCEDURAL SCHEDULE

National Railroad Passenger Corporation (“Amtrak”) and Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, “CN”) hereby jointly request that the Board reactivate this proceeding and adopt the procedural schedule proposed below for presentation of evidence and argument on issues remaining for resolution by the Board.

BACKGROUND

In this proceeding, Amtrak has requested that the Board prescribe terms and compensation for Amtrak’s use of CN’s lines and other facilities for its passenger trains, to apply in lieu of those under the parties’ Operating Agreement, which expired in 2013, but which has been kept in force by the Board pending prescription by the Board of or agreement of the parties regarding new terms. Following several rounds of discovery and submissions, on August 9, 2019, the Board issued interim findings and guidance on various disputed issues in the case (the “Interim Decision”). The Board also initiated mediation under 49 C.F.R. § 1109.2(a)(2) to facilitate further negotiations between the parties in the hope they would reach agreement on some or all of the remaining issues, and directed the parties, (a) if they reached full agreement, to so notify the Board and request termination of this proceeding, and, (b) if they did not reach full agreement, to notify the Board of all issues resolved in mediation and to request “a new procedural schedule to present focused arguments on any residual issues.” Interim Decision

at 29.

As directed by the Board, the parties participated in Board-sponsored mediation. Regrettably, the Parties were unable to reach resolution on any of the issues left open in the Interim Decision. *See* Letter from B. O’Boyle and F. O’Connor to Chairman Begeman, January 21, 2020 (attached as Exhibit 1). Since that time, the parties have not been idle. In accordance with the Federal Railroad Administration’s (“FRA”) final decision on Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. 72971 (Nov. 16, 2020), the parties have certified as being aligned with the customer on-time performance metric the schedules for 20 of the 26 regularly scheduled daily Amtrak trains that operate over CN’s lines in the United States. In addition, CN has sought non-binding dispute resolution for the remaining six schedules in accordance with the FRA’s final decision, and CN and Amtrak are working to agree on a process.

All of the issues identified as unresolved in the Interim Decision remain unresolved and appropriate for briefing at the next stage of this proceeding. Therefore, in accordance with the Board’s directive that the parties “seek a new procedural schedule to present focused arguments on any residual issues,” Amtrak and CN hereby request that the Board adopt the following schedule for further submissions of evidence and argument:¹

¹ The parties may submit any Highly Confidential and Confidential versions of submissions on the dates identified in the procedural schedule, and submit redacted public (or party-specific) versions of those submissions within one-week thereafter, paragraph 16 of the Protective Order in this proceeding (served December 16, 2013) notwithstanding. *Cf.* 49 C.F.R. § 1111.9(b)(1).

- Opening Submissions: Each party shall submit its opening submission on outstanding issues on May 16, 2022. Each party's opening submission shall include a marked copy of the current Operating Agreement showing changes which that party requests that the Board make to the terms currently in effect.
- Reply Submissions: Due August 1, 2022. Reply Submission may include, at the party's option, a revised markup of the current Operating Agreement.
- Rebuttal Submissions: Due September 15, 2022.

The parties understand that the upcoming round of submissions is not an opportunity to seek reconsideration of issues decided in the Interim Decision.

Further, if new evidence is submitted by either party, the parties reserve the right to seek discovery regarding such evidence and to request adjustment of the procedural schedule to accommodate such discovery. If discovery becomes necessary, the parties will make every effort to agree upon and submit a proposed revision to the schedule as necessary to accommodate that discovery.

WHEREFORE, Amtrak and CN respectfully request that their jointly-proposed procedural schedule be adopted and ordered by the Board.

Respectfully submitted,

Jerry A. Cuomo

Jerry A. Cuomo
Landman Corsi Ballaine & Ford, P.C.
One Gateway Center, 22nd Floor
Newark, NJ 07102

Counsel for National Railroad Passenger Corporation

David A. Hirsh

David A. Hirsh
Dentons US LLP
1900 K Street, N.W.
Washington, DC 20006

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

Dated: January 25, 2022

EXHIBIT 1



Surface Transportation Board
Washington, D.C. 20423-0001

January 21, 2020

Chairman Ann Begeman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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

Dear Chairman Begeman:

By your letter dated August 12, 2019, you appointed the Federal Mediation and Conciliation Service (FMCS) to serve as lead mediator in the above-referenced matter. We were appointed to assist in the mediation.

On behalf of both the FMCS and STB mediators, we write to inform you that the mediation team met with the parties multiple times over the last several months, but the parties ultimately were unable to reach a settlement. Accordingly, as required by the decision served on August 9, 2019, in this docket, we are hereby providing notice that the mediation has ended. As required by the Board's regulations, we will remain recused from the formal proceeding. As such, we will continue to remain available to the parties as mediators should they decide to reactivate mediation at a later date.

Sincerely,

Brian O'Boyle
Office of Public Assistance,
Governmental Affairs &
Compliance

Francis O'Connor
Office of Economics

cc: Kathryn Gainey, Canadian National
David Hirsh, Counsel for Canadian National
William Herrmann, Amtrak
Jim Blair, Amtrak
Martin Oberman, Vice Chairman, Surface Transportation Board
Patrick Fuchs, Board Member, Surface Transportation Board
David Moora, Federal Mediation & Conciliation Service
Eileen Hoffman, Federal Mediation & Conciliation Service

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

NOTICE OF APPEARANCE

Please take notice that Jerry A. Cuomo of Landman Corsi Ballaine & Ford P.C. hereby submits this Notice of Appearance on behalf of National Railroad Passenger Corporation (“Amtrak”) in the above-captioned matter.

Please have the undersigned listed as counsel of record for all filings, decisions, and notices in this proceeding.

Dated: January 25, 2022

Respectfully Submitted,

LANDMAN CORSI BALLAINE & FORD P.C.

Jerry A. Cuomo

Jerry A. Cuomo
One Gateway Center, 22nd Floor
Newark, New Jersey 07102
(973) 623-2700
jcuomo@lcbf.com

Counsel for National Railroad Passenger Corp.

CERTIFICATE OF SERVICE

I, Jerry A. Cuomo, declare under penalty of perjury that the foregoing is true and correct.

Pursuant to 49 § 1104.12, I hereby certify that on the 25th of January, 2022 I have caused to be served a copy of the foregoing Joint Motion to Establish Procedural Schedule, upon all parties of record via electronic mail.

Executed on: January 25, 2022

By: *Jerry A. Cuomo*
Jerry A. Cuomo

CERTIFICATE OF SERVICE

I, Jerry A. Cuomo, declare under penalty of perjury that the foregoing is true and correct.

Pursuant to 49 § 1104.12, I hereby certify that on the 25th of January, 2022 I have caused to be served a copy of the foregoing Joint Motion to Establish Procedural Schedule, upon the following parties of record via USPS First Class Mail:

David T. Rankin
2500 Lou Menk Drive
P.O. Box 961039
Fort Worth, TX 76161

Michael K. Murphy
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306

Mark C. Hansen
1400 West 52nd Avenue
Denver, CO 80221

David B. Kutrosky
300 Lakeside Drive, 14th Floor East
Oakland, CA 94612

Executed on: January 25, 2022

By: *Jerry A. Cuomo*
Jerry A. Cuomo