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VIA E-FILING

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ENTERED

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

Office of Proceedings
January 27, 2015
Part of
Public Record

Re: STB Finance Docket No. NOR-42134, National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company

Dear Ms. Brown:

We are in receipt of the Petition for Leave to Intervene filed by Norfolk Southern Railway (“NSR”) on January 12, 2015, and the Petition for Leave to Intervene for a Limited Purpose filed by CSX Transportation, Inc. (“CSX”) on January 13, 2015.

In a letter dated January 15, 2015, Amtrak consented to intervention of both railroads without waiving any rights to reply to any of the other arguments or assertions made therein. This letter addresses the arguments made by CSX and NSR in support of a rulemaking proceeding.

Both CSX and NSR assert that a notice-and-comment rulemaking is appropriate for the development of an on-time performance definition that serves as a trigger for Section 213 investigations. The arguments made by CSX and NSR for a rulemaking miss the mark. Amtrak urges the Board not to proceed with a rulemaking in this case.

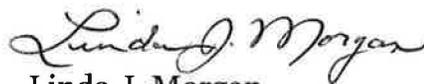
Amtrak briefly explains herein why it opposes this request, but will make a complete response on this point in reply to the Association of American Railroad’s Petition for Rulemaking. *See On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008—Conditional Petition for Rulemaking of the Association of American Railroads*, EP 726 (STB served Jan. 15, 2015). The on-time performance trigger that would be the subject of the rulemaking is just that: a trigger for an investigation. The on-time performance definition would not constitute an industry-wide legal standard replacing another legal standard and with broad applicability to an expansive universe of activity. Nor would it dictate the final

outcome of the investigation. Furthermore, handling the issue through an adjudicatory process would not, in any way, preclude interested parties from commenting. Nor would proceeding with an adjudication here prejudice other host railroads from proffering a different definition of on-time performance based on a different factual predicate in a later Section 213 adjudication. *See Shell Oil v. Federal Energy Regulatory Comm'n*, 707 F.2d 230, 236 (5th Cir. 1983) (An agency may establish a general rule in an adjudication but that does not preclude a “later challenge to the validity of the rule by one who was not a party to the proceeding in which it was announced.”).

The Board has clear discretion to choose adjudication in this case. *See Securities and Exchange Comm'n v. Chenery*, 332 U.S. 194, 203 (1946), and *National Labor Relations Board v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293 (1974) (endorsing agency authority to resolve issues on a case-by-case basis). “Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.” *Chenery*, 332 U.S. at 202. And the Board has noted that in enacting Section 213, Congress “expected the Board to ‘consider [such] disputes in an efficient and evenhanded manner.’” *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, NOR 42134, slip op. at 8 (STB served Dec. 19, 2014) (quoting S. Rep. 110-67, at 26 (May 22, 2007)). Choosing adjudication would not be inconsistent with Board precedent. And the mandate for a rulemaking in Section 207 is in no way a mandate for a rulemaking here. The on-time performance definition can and should be developed through the adjudication process.

If you have any questions, please contact me.

Respectfully submitted,



Linda J. Morgan
Attorney for National Railroad Passenger
Corporation