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VIA E-FILING

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February 4, 2015

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
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ENTERED
Office of Proceedings
February 4, 2015
Part of
Public Record

**Re: STB Docket No. EP 726 – National Railroad Passenger Corporation’s
Reply in Opposition to Conditional Rulemaking of the Association of
American Railroads**

Dear Ms. Brown:

Enclosed please find the National Railroad Passenger Corporation’s Reply in Opposition to the Conditional Petition for Rulemaking filed by the Association of American Railroads.

If you have any questions, please contact me.

Respectfully submitted,

A handwritten signature in black ink that reads 'Linda J. Morgan' in a cursive script.

Linda J. Morgan
*Attorney for National Railroad Passenger
Corporation*

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 726

**ON-TIME PERFORMANCE UNDER SECTION 213 OF THE PASSENGER RAIL
INVESTMENT AND IMPROVEMENT ACT OF 2008**

**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN
OPPOSITION TO CONDITIONAL PETITION FOR RULEMAKING OF THE
ASSOCIATION OF AMERICAN RAILROADS**

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The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, hereby replies in opposition to the Conditional Petition for Rulemaking of the Association of American Railroads (“AAR”) for On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, filed with the Surface Transportation Board (“Board” or “STB”) January 15, 2015.

BACKGROUND

On January 15, 2015 the AAR filed a Conditional Petition for Rulemaking asking the Board to “initiate a rulemaking proceeding to define ‘on-time performance’ (‘OTP’) for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (‘PRIIA’), 49 U.S.C. § 24308(f).” *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) (“Petition”).¹

¹ The AAR conditioned the petition by asking that the Board grant the Petition only in the event that the Board did not grant Canadian National Railway’s pending petition for reconsideration in NOR 42134 and the pending motions to dismiss of CSX Transportation (“CSX”) and Norfolk Southern Railway Company (“Norfolk Southern” or “NS”) in NOR 42141. *Petition*, 2.

Amtrak has two complaints to initiate investigations under Section 213 of PRIIA pending before the Board. The first Section 213 Complaint filed by Amtrak was originally filed with the Board in January 2012 and sought an investigation of substandard performance of a number of Amtrak passenger trains on rail lines owned by Canadian National Railway Company (“CN”). *Petition for Relief by Amtrak Requiring the Initiation of an Investigation of Substandard Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, January 19, 2012. In August 2014, Amtrak filed Motion to Amend the Complaint. On December 19, 2014, the Board granted Amtrak’s Motion to Amend the Complaint. *Nat’l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry. Co.*, NOR 42134, slip op. at 11 (STB served Dec. 19, 2014) (“*Amtrak/CN*”). In addition to granting the Motion to Amend the Complaint, the Board also held in *Amtrak/CN* that a recent D.C. Circuit decision invalidating PRIIA Section 207, which provides the metrics for one of the two triggers in Section 213, does not preclude the Board from construing the term “on-time performance” and initiating an investigation under the other trigger of Section 213 if on-time performance with respect to Amtrak’s Illini/Saluki service falls below 80 percent for two or more consecutive calendar quarters. *Amtrak/CN*, at 10. CN filed a Petition for Reconsideration of the Board’s decision in *Amtrak/CN* arguing that the decision rested on a materially erroneous legal analysis. *CN’s Petition for Reconsideration of the Board’s Order of December 19, 2014*, January 7, 2015. Amtrak filed a Reply in Opposition to the Petition for Reconsideration. *Nat’l R.R. Passenger Corps. Reply in Opposition to Canadian National’s Petition for Reconsideration*, January 27, 2015.

On November 17, 2014, in NOR 42141, Amtrak filed a second Section 213 complaint with the STB. This complaint sought an investigation of the substandard performance of

Amtrak's Capitol Limited Service between Chicago, IL and Washington, DC, which runs on lines owned by CSX and Norfolk Southern.

On January 12 and 13, 2015, Norfolk Southern and CSX, respectively, filed petitions to intervene in NOR 42134. On January 14 and 15, 2015, CN and Amtrak, respectively, replied to the petitions to intervene indicating (*inter alia*) that they did not oppose the intervention.

ARGUMENT

The Board has discretion to define on-time performance for purposes of the trigger in the first clause² in Section 213 in an adjudication rather than a rulemaking and there are sound reasons for doing so. A decision on the definitional issue by adjudication will not prejudice any party, including any Amtrak host railroad. The Board's rules provide that it will commence a rulemaking upon a petition that presents an "adequate justification" for doing so. 49 C.F.R. 1110.2(b) and (e). AAR's Conditional Petition for Rulemaking fails to make an adequate justification because it fails to show that a rulemaking is required or even appropriate and fails to explain how a rulemaking could justify the resulting substantial delay in the Board's investigation of the causes of the substandard performance of Amtrak's Illini/Saluki and Capitol Limited services. The AAR's Petition should be denied.

I. The Choice Between Rulemaking And Adjudication Lies Primarily In The Informed Discretion Of The Administrative Agency.

Absent an express statutory mandate to use rulemaking,³ a federal administrative agency has broad discretion to choose between rulemaking and adjudication in the interpretation of statutory terms. As the Supreme Court noted in *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947) ("*Chenery*"), "any rigid requirement" to require rulemaking "would

² Unless specifically stated otherwise, all references herein to the "trigger" refer to the trigger in the first clause of Section 213.

³ There is no statutory mandate here. *See infra* at 8.

make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.” *Chenery*, 332 U.S. at 202.

In many instances, adjudication is the best way for an agency to interpret or apply a statutory provision. Again, the *Chenery* court observed that “[n]ot 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 ...” *Id.* “[T]he agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule.” *Id.* The Board has never before been called on to interpret and apply the on-time performance trigger for a Section 213 investigation and, for this reason alone, is well within its discretion to use adjudication to determine what Congress intended in its use of the phrase “on-time performance” and to apply that meaning in the case pending before it to set the trigger.

In some situations “problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.” *Id.* This is precisely what happened here. The D.C. Circuit invalidated the metrics and standards that formed the basis for one of the Section 213 investigatory triggers. *Ass’n of Am. R.R.s v. Dep’t of Transp.*, 721 F.3d 666 (D.C. Cir. 2013) (“*AAR v. DOT*”). Amtrak filed its Amended Complaint to “establish an independent basis to determine on-time performance under Section 213 of PRIIA, in light of the D.C. Circuit’s decision.” *Amtrak/CN*, at 1. The Board was suddenly faced for the first time with the “critical question” of whether it had authority to “investigate the Illini/Saluki service’s potential failure to achieve 80-percent ‘on-time performance’ under Section 213 of PRIIA in the absence of an operative definition of ‘on-time performance’ under Section 207.” *Id.* at 2. Faced with the fact that Amtrak’s Illini/Saluki

service has had deplorable on-time performance,⁴ and Congress’s clear intent to grant jurisdiction to the Board to consider on-time performance disputes in a timely and efficient manner, *Id.* at 8, the STB has determined that the Illini/Saluki service must be investigated without delay. In these circumstances, an adjudication to define the on-time performance trigger for a Section 213 investigation is well within the Board’s sound discretion.

In sum, “[t]he agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. ... [a]nd the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.” *Chenery*, 332 U.S. at 203.⁵

Defining the trigger by adjudication is also consistent with a common sense interpretation of Congressional intent as reflected in the statutory language in the first clause of Section 213. The language in the first clause sets forth a percentage as a trigger for an investigation. Congress would not have been that specific if it had envisioned an extensive analysis of the trigger through a rulemaking. And tellingly, unlike in Section 207 of PRIIA, Congress – which has used the phrase “on-time performance” in numerous other contexts in the 40-year history of Amtrak, *see Amtrak/CN*, at 7-8 – did not require comment or consultation on the meaning or application of the first clause of Section 213. The AAR now argues that the meaning of the term “on-time performance” cannot be determined by the Board, and that the Board should not exercise the jurisdiction expressly bestowed on it by Congress, but must stay its hand and not even commence an investigation without crafting a rule – without the benefit of any actual factual predicate in the form of a pending case – on the meaning of this established phrase. The AAR

⁴ See *Amtrak/CN Amended Complaint*, 1-2.

⁵ See also *National Labor Relations Board v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293-94 (1974) (“*NLRB*”); the Board has itself noted that “the choice between rulemaking and adjudication lies in the first instance within the agency’s discretion.” *Major Issues in Rail Rate Cases*, 2006 STB LEXIS 250, at *3 (STB served Apr. 10, 2006) (“*Major Issues*”) (internal citation omitted).

has failed to offer adequate justification for a rulemaking, and its petition should be denied. Consistent with Congress's interest, *see Amtrak/CN* at 8, in an efficient handling of circumstances of substandard performance, the Board is well within its discretion to determine the trigger by adjudication and proceed with the investigation.

II. The Choice Of Adjudication Over Rulemaking Here Would Not Prejudice Any Host Railroad.

By using adjudication to determine the on-time performance trigger in *Amtrak/CN*, the Board would not prejudice the interests of NS or CSX because they will have the right to participate (as intervenors in *Amtrak/CN*) in defining the trigger to be used in the Capitol Limited case. As in any adjudication, any party in a later-filed case has the right to argue a different factual predicate for the trigger. *Shell Oil v. Fed. Energy Regulatory Comm'n*, 707 F.2d 230, 236 (5th Cir. 1983) ("*Shell Oil*").

III. The AAR Has Failed To Present Adequate Justification For A Rulemaking To Define The Board's Jurisdiction To Initiate An Investigation.

A. AAR's Conditional Petition For Rulemaking Attacks The Board's Decision in *Amtrak/CN* And Restates The Petition For Reconsideration of *Amtrak/CN* Filed by CN.

AAR's Conditional Petition for Rulemaking is an attempt to re-argue the issue decided by the Board in *Amtrak/CN*. *Amtrak/CN* clearly stated that there are two investigation triggers. Unless CN's Petition for Reconsideration is granted, the *Amtrak/CN* case will proceed under Section 213 's first trigger. Once the investigation is initiated, the scope of the investigation is up to the Board, subject only to the other statutory provisions of Section 213.⁶

⁶ See generally *Nat'l R.R. Passenger Corps. Reply in Opposition to Canadian National's Petition for Reconsideration*, January 27, 2015.

B. AAR Misconstrues The Scope Of The Issue To Be Adjudicated Or Decided By Rulemaking.

AAR argues that the Board's interpretation of the phrase "on-time performance" as used in Section 213 will have an industry-wide impact because "failure to meet a properly established on-time performance can trigger a Board investigation that can result in the imposition of penalties." *Petition*, 6. AAR conflates the trigger for a Section 213 investigation with the investigation itself and brushes past most of the functions and goals of the investigation and all that would be required, unrelated to the trigger, before the Board would impose penalties. The 80 percent on-time performance standard in Section 213 simply provides a trigger for initiation of the investigation.⁷ Once an investigation is initiated, the statute provides broad direction regarding the scope of what issues and facts the Board will consider during the investigation. When the Board initiates an investigation, it will determine whether and to what extent delays are "due to causes that could reasonably be addressed" by a host railroad or by Amtrak; the agency can review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays; it will obtain information from all the parties involved (including, if the Board chooses, the public and interested stakeholders other than Amtrak and host railroads) and "identify reasonable measures and make recommendations to improve service, quality, and on-time performance." 49 U.S.C. § 24308(f)(1). If in the course of the investigation the Board determines that delays are attributable to a host railroad's failure to provide preference to Amtrak over freight transportation, then the Board may award damages

⁷ Section 213 contains two separate clauses with two distinct triggers for investigations. The Board's "on-time performance" definition in first clause of Section 213 ("if the on-time performance of any intercity passenger train averages less than 80 percent") is distinct from on-time performance standards promulgated pursuant to the second clause (failure to meet "the service quality of intercity passenger train operations for which minimum standards are established under section 207").

and other relief. *See* 49 U.S.C. § 24308(f)(2). The trigger determines whether the Board invokes its jurisdiction and conducts an investigation, but the trigger is not the investigation.

The only issue before the Board with this petition is the question of whether to do a rulemaking for the trigger itself. Though important, the AAR has not provided adequate justification that the trigger is an issue of industry-wide significance such that a rulemaking is in order. Defining the trigger in an adjudication would be both good government and well within the discretion of the Board.⁸ Proceeding with *Amtrak/CN* and interpreting “on-time performance” in the case is sound given that the definition of the trigger is a matter of first impression and the initiation of a rulemaking on a provision of law that has not yet been tested by actual cases would be inefficient and unwise.

C. AAR Overstates The Board’s Past Reliance On Rulemaking And Disregards Long-Standing Precedent On Agency Discretion To Choose Between Rulemaking And Adjudication.

There is clear Board precedent for the interpretation of key statutory terms in individual adjudications. For example, the Board is charged with administering 49 U.S.C. § 10702(2), which states that rail carriers shall establish reasonable practices. Numerous parties have brought complaints alleging unreasonable practices by railroads, yet the Board has never set forth a single test or standard to determine whether a railroad’s practice is unreasonable. The agency has successfully dealt with the unreasonable practice issues through adjudication. *See N. Am. Freight Car Ass’n, et. al., v. BNSF Ry. Co.*, NOR 42060, slip op. at 8 (STB served Jan. 26,

⁸ AAR also argues that Congress mandated on-time performance be defined through rulemaking because Section 207 directed the FRA and Amtrak to consult with various parties and, when FRA and Amtrak did consult, they conducted a notice and comment rulemaking. *Petition*, 7. According to AAR, Congress “specifically directed” that on-time performance be defined through Notice and Comment rulemaking. *Petition*, 7. AAR is incorrect. Congress explicitly stated that the FRA and Amtrak should consult with other parties only with respect to the Section 207 metrics. There is no analogous language with respect to the definition of on-time performance in Section 213. Section 213 unambiguously *authorizes* the Board to investigate if “the on-time performance of any intercity passenger train averages less than 80 percent.” 49 U.S.C. § 24308(f).

2007). The Board has explained that “[Congress] gave the Board ‘broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered.’” *Id.* (citing *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005)). As a result, the Board has relied on its discretion to determine through adjudication whether challenged practices are reasonable. *Arkansas Electric Cooperative Corp.—Petition for Declaratory Order*, FD 35305, slip op. at 5 (STB served March 3, 2011) (finding that BNSF Coal Dust Tariff was not a reasonable practice).⁹

AAR attempts to bolster its argument that a rulemaking is the proper vehicle to “develop rules of industrywide significance,” and that a rulemaking should be initiated here by citing *Major Issues* and *E.I. DuPont De Nemours and Co. v. CSX Transp., Inc.*, 2008 STB LEXIS 361, at *30 (STB served June 27, 2008)(“*DuPont*”). *Petition*, 5. In *Major Issues*, the Board decided to use a rulemaking to address certain issues that had surfaced in a number of rail rate cases involving the application of the stand-alone cost (SAC) methodology. *Id.* at 1. The Board addressed six separate issues raised in several recently concluded and pending SAC cases and focused in particular on a problem in the application of the SAC methodology that it had determined was susceptible to manipulation by the railroads and complainant shippers. The Board elected to conduct a rulemaking because it had exposed a “flaw” in the method of determining maximum reasonable rates and because it was not satisfied with the solutions to the flaw proposed by parties in the concluded or pending adjudications. *Id.* at 5-7.

⁹ The Board has interpreted key statutory terms in adjudications pursuant to other sections of the law it administers. See *Caddo Antoine and Little Missouri R.R. Co.—Feeder Line Acquisition—Arkansas Midland R.R. Co. Line between Gurdon and Birds Mill*, AR, 4 S.T.B. 326 (1999) (Board by adjudication set statutorily-required Constitutional Minimum Price based on Net Liquidation Value), and *Norfolk S. Corp. and Norfolk S. Ry. Co.—Construction and Operation—In Indiana County, PA*, 2003 STB LEXIS 280, at *2, *10-11 (STB served May 15, 2003) (relying on ICC/STB established test to determine statutory “public convenience and necessity”).

The situation in *Major Issues* could not be more different than the issue before the Board presented by the AAR's Petition. The Board has never been called upon to interpret and apply on-time performance in a Section 213 investigation. If the Board proceeds in *Amtrak/CN* to define the on-time performance trigger for a Section 213 investigation, Amtrak, CN, Norfolk Southern and CSX will all be participating in the development of the definition and thus cannot be prejudiced. If the Board determines in a later case that its definition has a flaw or is subject to manipulation like the problem that prompted the *Major Issues* rulemaking, it will have the option to commence a rulemaking to rectify the problem.¹⁰

The Board also used a rulemaking in *DuPont*, concluding that the "proper forum for considering the[] methodological issues" involved in complex rate proceedings is a rulemaking. In citing this case, AAR fails to note that in *DuPont*, the Board denied Norfolk Southern's motions to hold two related adjudications in abeyance pending the rulemaking. *Id.* at 13-18. The definition of the on-time performance trigger in Section 213 is not a complex methodological issue, but in any case *DuPont* does not support what AAR seeks here, which is postponement of the Board's investigation of the substandard performance of the Illini/Saluki and Capitol Limited services.

AAR argues that the Board uses Notice and Comment proceedings to "interpret statutory terms and define the scope of its authority." *Petition*, 5 (citing *Demurrage Liability*, EP 707 (STB served May 7, 2012) ("*Demurrage Liability*"); and *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, EP 669 (STB served Mar. 29, 2007) ("*Interpretation of Contract*"). These cases are inapposite. AAR seeks a rulemaking on the trigger itself but, in defining the trigger, the Board will not be defining the scope of its authority under Section 213. The Board already

¹⁰ See 1 *Richard S. Pierce, Jr., Administrative Law Treatise* (5th Ed. 2010) § 6.9, at 504 (an agency "may desire to defer an effort to issue a generally applicable rule until after it has educated itself by conducting a series of adjudications in varying contexts.").

has held that it has statutory authority to investigate Amtrak's performance if "the on-time performance of any intercity passenger train averages less than 80 percent." *Amtrak/CN*, at 6. If the Board denies the CN Petition for Reconsideration in NOR 42134 and the NS and CSX Motions to Dismiss in NOR 42141, it will affirm its ruling in *Amtrak/CN*. If it grants the petition and motions, the Petition for Rulemaking will be moot. *Petition*, 1. If there is a rulemaking, the Board will be defining the trigger and will not be interpreting the scope of its authority. To the extent *Demurrage Liability* and *Interpretation of Contract* involved the Board's interpretation of its authority, reliance on those cases is misplaced because that issue will have already been addressed here before the definition of the trigger is considered.

In *Demurrage Liability*, the Board issued a Notice of Proposed Rulemaking to address a split among the circuit courts on the issue of who should bear liability for demurrage charges in certain cases involving intermediary receivers. Slip op. at 4. *Demurrage Liability* primarily sought to tackle the question of who was liable for demurrage in certain situations, a question that the courts were addressing separately. *Id.* at 4, 5. *Demurrage Liability* does not lend support to AAR's petition, because here the Board is not presented with conflicting court interpretations.

The issue in the *Interpretation of "Contract"* Notice of Proposed Rulemaking was far more complex than the interpretation of Congress's intent in using the term "on-time performance" to trigger a Section 213 investigation. In that case, the Board sought comments on whether newly-developed "hybrid pricing mechanisms" were common carrier rates, governed by the Board, or contract rates that were outside the Board's jurisdiction. *Interpretation of "Contract,"* at 3-4. The Notice of Proposed Rulemaking addressed a myriad of issues pertaining to the characterization of the new pricing mechanisms as common carrier rates or contract rates,

including the possibility that increased use of hybrid pricing mechanisms could result in “an environment where collusive activities in the form of anticompetitive price signaling could occur,” whether a revised definition of common carrier could render the statutory definition of contract meaningless, and the fact that the proposed changes to the definition of contract could contradict “past agency statements regarding whether a bilateral agreement can constitute a common carrier rate.” *Id.* at 4-6. By contrast, interpreting the meaning of the phrase “on-time performance” under Section 213 will be a comparatively straight-forward exercise and thus *Interpretation of “Contract”* does not support AAR’s petition.

AAR cites *Public Service Co. of Colorado d/b/a Xcel v BNSF*, 2004 STB LEXIS 335 (STB served June 7, 2004), a case where the Board was asked in an adjudication to change “Ramsey pricing,” one of the central economic underpinnings of constrained market pricing and rate regulation, as an example where the Board decided not to resolve an issue in an adjudication. *Petition*, 5-6. In that case the Board was presented with a request for a “momentous” change to an *existing* guideline. *Pub. Serv. Co.*, at *69 (emphasis added). There is simply no comparison to this case. The application of the 80 percent on-time performance trigger for a Section 213 case is an issue of first impression, not a change to existing precedent. Moreover, while the Board’s authority to investigate substandard Amtrak performance under Section 213 is important, the trigger itself—how to define on-time performance less than 80 percent—is not a “momentous” issue. Framing this definition is appropriately suited for an adjudication.¹¹ Finally, even without the proposed change in *Public Service Co.*, the Board had a sound method for adjudicating the issues in that case, and consideration of the change thus lacked the urgency

¹¹ This is especially true because of what *Shell Oil* says about procedural due process. The parties in a 213 investigation will have the right to argue a different factual predicate in any other 213 investigations and that an on-time performance definition used in another 213 investigation should not apply. *See Shell Oil supra* at 6.

of the present situation. Here, Amtrak's Illini/Saluki service and Capitol Limited services have had deplorable on-time performance and under the law the Board must address that in a timely manner. Amtrak submits that a rulemaking on the trigger definition would only delay the Board's investigations of these services.

AAR cautions that there are situations when an agency's reliance on adjudication would amount to an abuse of discretion. *Petition*, 6-7 (citing *NLRB*, 416 U.S. at 294). AAR does not argue that reliance on adjudication here would be an abuse of discretion, and that is not what the Supreme Court said in *NLRB* either. In *NLRB*, the Supreme Court weighed the benefits of adjudication and rulemaking and upheld the NLRB's reliance on adjudication to resolve the very important issue of whether "buyers" in a bargaining unit of one of Bell Aerospace's plants were within the National Labor Relations Act's definition of "managerial employees." *NLRB*, 416 U.S. at 294. Thus, rather than supporting AAR's petition, *NLRB* supports the Board's authority to announce a basic definition like the investigation-triggering definition of 80 percent on-time performance in an adjudicative proceeding. Indeed, if the NLRB could construe a broad term like "buyers" in an adjudication, the Board is well within its discretion to determine the comparatively discrete Section 213 investigation trigger in an adjudication.

AAR cites *Pfaff v. U.S. Dep't of Housing and Urban Development*, 88 F.3d 739 (9th Cir. 1996), for its discussion of the disadvantages of announcing new law in adjudication. *Petition*, 10. First of all, the 80 percent trigger is not new law. In any event, *Pfaff* demonstrates precisely why the definition of a trigger for an investigation is a question that is more conducive to adjudication. *Pfaff* states "[a]djudication has distinct advantages over rulemakings when the agency lacks sufficient experience with a particular problem to warrant ossifying a tentative judgment into a black letter rule." *Id.* at 784 n. 4 (citing *Chenery*, 332 U.S. at 202-03). The

Chenery court observed that “[s]ome principles must await their own development . . .” and that an “agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule.” *Chenery*, 332 U.S. at 202. The Board has never been called upon to interpret and apply the trigger for on-time performance in a Section 213 investigation and, for this reason alone, would be well within its discretion to use adjudication to define on-time performance in *Amtrak/CN*.¹²

D. Rulemaking Is Not Necessary Here To Ensure Procedural Due Process.

AAR argues that if the Board develops a standard in this proceeding, the automatic application of that standard could violate the due process rights of future parties. *Petition*, 10-11. That this is not the case is shown by the very case AAR cites. “[A]n agency may establish a general rule in an individual adjudication. But neither that decision nor any other precludes a later challenge to the validity of the rule by one who was not a party to the proceeding in which it was announced.” *Shell Oil*, 707 F.2d at 236. Norfolk Southern and CSX have filed petitions to intervene in *Amtrak/CN*, and CN and Amtrak have indicated that they did not oppose the

¹² AAR cites three law review articles, but none of them support its *Petition* because none of them grapple with issues of federal agency rulemaking versus adjudication. First, AAR relies on an article criticizing the issuance of binding policy statements and manuals without notice and comment rulemaking. *Petition*, 8 (citing Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use them to Bind the Public?*, 41 Duke. L.J. 1311, 1315 (1992)). The article focuses its criticism on agency actions taken without resort to *either* rulemaking or adjudication and thus has no bearing whatsoever on an agency choice *between* rulemaking and adjudication. Second, AAR cites Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95, 165 (2003), for the premise that additional input from other agencies in rulemaking may have a “beneficial effect.” *Petition*, 9. The author proposes a comprehensive revision to the rulemaking process which would include the issuance and circulation of “goal statements” for third-party agency feedback. *Id.* at 164-65. Again, this has nothing to do with rulemaking versus adjudication. Finally, AAR cites Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 Admin. L. Rev. 121, 127 (1990). As the title indicates, this article is about *state* agency preference for rulemakings. Moreover, immediately following the quoted language about rulemakings as superior, the article states, “[o]f course, it may also be argued that a general preference for lawmaking by rule is undesirable because it requires agencies to make decisions in the abstract, without the benefit of any actual case to test their wisdom or help clarify the issues.” *Id.*

intervention. As for later-filed Section 213 cases, no host railroad will be precluded from challenging application of the trigger under a different set of facts. *See Shell Oil supra*, 6.

IV. The Concerns Set Forth In Vice Chairman Begeman’s Dissent Can Be Addressed In An Adjudication.

AAR restates many of the concerns raised by Vice Chairman Begeman in her dissenting opinion in *Amtrak/CN*. *See Amtrak/CN*, at 11-2. The Vice Chairman expressed concern about the need to establish “clear standards by which on-time performance cases could be fairly processed.” *Id.* However, a rulemaking proceeding is not the only means of ensuring that there are clear and fair standards for on-time performance cases. As discussed *supra*, establishing the on-time performance measure in this case offers the Board the benefit of efficiently resolving *Amtrak’s* pending cases in the context of actual facts rather than abstract concepts, and without creating rigid law that a party might argue is not be suitable for subsequent Section 213 investigations. *See Pfaff*, 88 F.3d at 748 n.4. Vice Chairman Begeman also wrote that proceeding with the adjudication will yield a “much more limited record assembled by only two parties.” *Amtrak/CN*, at 12. Yet, Norfolk Southern and CSX are intervenors in the *Amtrak/CN* case. Therefore, there are already three host railroads weighing in on the record for the Board’s decision on the trigger definition of on-time performance. Further, *Shell Oil* provides that future parties will not be precluded from coming before the Board in later-filed Section 213 cases to argue different factual predicates. The concerns expressed by Vice Chairman Begeman can be addressed if the on-time performance definition is decided in *Amtrak/CN* through adjudication.

V. Any Rulemaking Will Not Include The Issue of Whether the Board Has Authority To Define On-time Performance.

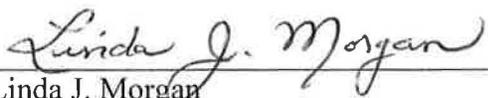
AAR argues that the Board should address whether it has the authority to define on-time performance for purposes of Section 213. *Petition*, 11. However, if there is a rulemaking, this

issue will already have been decided. AAR's petition is conditional. *Petition*, 2. If the Board grants the CN Petition for Reconsideration in NOR 42134 and the NS and CSX Motions to Dismiss in NOR 42141, the condition will not have been met and the Petition for Rulemaking will be moot. If the Board denies the aforementioned petition and motions, the legal issue of the Board's authority will have been decided and should not be subject to collateral attack in any other proceeding, let alone a rulemaking. Thus, if AAR's Petition is granted it should not include the issue of the Board's authority under Section 213.

CONCLUSION

Using the facts of a pending case to interpret the meaning of "on-time performance" in the context of the 80 percent investigation trigger is well within the discretion of the Board, would not prejudice any host railroad, and is consistent with Board precedent and general administrative law jurisprudence. It would allow the Board to move forward efficiently to handle this matter consistent with Congressional intent without precluding further examination or argument in a later case. The AAR arguments to the contrary are not persuasive and there is not adequate justification to institute a rulemaking. The Petition should be denied.

Respectfully submitted,



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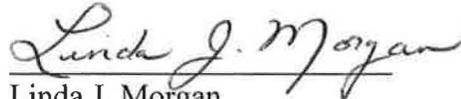
Dated: February 4, 2015

CERTIFICATE OF SERVICE

I certify that on February 4, 2015, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to AAR's Conditional Petition for Rulemaking, was served via email upon the following counsel of record:

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