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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<p>IN RE NATIONAL RAILROAD PASSENGER CORPORATION:</p> <p>SECTION 213 INVESTIGATION OF SUBSTANDARD PERFORMANCE ON CANADIAN NATIONAL RAILWAY COMPANY RAIL LINES</p>	<p>Docket No. NOR 42134</p>
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**NATIONAL RAILROAD PASSENGER CORPORATION'S PROPOSED
PROCEDURAL FRAMEWORK FOR THE SURFACE TRANSPORTATION BOARD'S
INVESTIGATION**

Pursuant to the Decision issued by the Surface Transportation Board (the "Board") on November 2, 2012, the National Railroad Passenger Corporation ("Amtrak") presents the following proposal for a procedural framework for the Board's investigation under Section 213 of the Passenger Railroad Investment and Improvement Act of 2008 ("PRIIA"), Pub. L. 110-432, 122 Stat. 4848, 4925-27 (2008) (codified at 49 U.S.C. § 24308(f)).

Background

On January 19, 2012, Amtrak filed a Petition for Relief under Section 213 of PRIIA (the "Petition"), seeking an investigation regarding the performance of Amtrak passenger trains on rail lines owned by Canadian National Railway Company and its subsidiaries, Grand Trunk Western Railway Company and Illinois Central Railroad Company (collectively "CN"). The Petition requested that, as provided in the statute, the Board issue recommendations and award damages against CN. Under PRIIA, Amtrak's petition required the Board to initiate an

investigation. *See* 49 U.S.C. § 24308(f). On March 9, 2012, CN answered Amtrak's Petition. *See* CN's Response to Amtrak Petition Under Section 213 of PRIIA ("CN's Response").

On March 27, 2012, Amtrak and CN jointly moved under 49 C.F.R. § 1109.1 for Board-supervised mediation. The Board granted the parties' joint motion in a Decision dated April 3, 2012, holding the Petition in abeyance. *See Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry. Co.*, Docket No. NOR 42134 (S.T.B Apr. 3, 2012).

On November 2, the Board issued a Decision reactivating agency proceedings. *See Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry. Co.*, Docket No. NOR 42134 (S.T.B Nov. 2, 2012). The Decision directed the parties to meet and confer on an appropriate procedural framework to govern the investigation, and to submit in writing (jointly, if possible) a proposed framework.¹

The parties have conferred but have been unable to reach agreement on a proposed procedural framework for this investigation. The following presents Amtrak's proposal and its concerns with CN's anticipated proposal.

Amtrak's Proposal

Amtrak respectfully requests that the Board use the power granted to it under 49 U.S.C. 23408(f) to proceed expeditiously and to investigate the legal and factual issues raised in

¹ When CN filed its response to Amtrak's Petition, it also moved to hold the Board's proceedings in abeyance until a ruling by the United States District Court for the District of Columbia in a separate case, *Association of American Railroads v. Department of Transportation*, No. 11-cv-1499 (D.D.C. filed Aug. 19, 2011), *appeal docketed*, No. 12-5204 (D.C. Cir. docketed June 26, 2012) ("AAR Case"). On May 31, 2012, the District Court ruled on those motions and granted judgment for Defendants, making CN's motion moot. *See* Amtrak's Notice of Relevant Authority, Exhibit A (June 4, 2012) (attaching *Ass'n of Am. R.R. v. Dep't of Transp.*, --- F. Supp. 2d ---, No. 11-cv-1499 (D.D.C. May 31, 2012), *appeal docketed*, No. 12-5204 (D.C. Cir. docketed June 26, 2012)). In the Board's November 2 Decision, the Board requested that the parties confer as to whether CN would seek an abeyance pending the appeal in the AAR case. CN has informed Amtrak that it will not seek an abeyance pending the appeal.

Amtrak's Petition. PRIIA provides that, upon the filing of Amtrak's complaint, the Board "shall initiate" an investigation "to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by [the] rail carrier over whose tracks the intercity train operates." 49 U.S.C. 24308(f)(1). Under PRIIA, therefore, the Board should initiate an investigation pursuant to 49 C.F.R. § 1111.7. Amtrak proposes this investigation proceed as follows:

- *First*, in the fact development phase, the Board should employ its subpoena power under 49 C.F.R. § 1113.2 to collect information and its power under 49 C.F.R. §§ 1113.3(vi) and 1113.8 to examine witnesses and take testimony that is related to the policies, practices, and alleged statutory violations identified in the Petition.² Pursuant to 49 C.F.R. § 1113.4, the Board should begin this phase by ordering the Parties to submit, in writing, proposed investigation plans that can guide the Board's conduct of the investigation. As required by the statute, the Board would then conduct the investigation. To the extent the Board determines appropriate, information collected by the Board should be made available to the Parties, who could propose further recommendations for the investigation to the Board. The fact development phase should be completed in no more than 180 days.
- *Second*, in the findings phase, the Board should make preliminary findings necessary to fulfill its statutory duties in determining to what extent the causes for Amtrak trains' delays and failures to achieve minimum standards are attributable to CN, including whether CN's "failure to provide preference to Amtrak over freight transportation" has

² PRIIA expressly authorized the Board to "increase the number of Board employees by up to 15 for the 5 fiscal year period beginning with fiscal year 2009 to carry out its responsibilities" to conduct such investigations. Passenger Rail Investment and Improvement Act of 2008, Pub. Law. 110-432, § 213, 122 Stat. 4907, 4926 (2008).

contributed to those delays and to Amtrak's trains' inability to meet the regulatory standards. The Board should also "identify reasonable measures and make recommendations to improve the service, quality and on-time performance of the train," 49 U.S.C. 24308(f)(1), and, if appropriate, award damages against CN to remedy Amtrak's financial loss and "adequately deter future actions . . . likely to result in delays to Amtrak on the route involved," *id.* § 24308(f)(3). Pursuant to 49 C.F.R. § 1113.18, the Board should order the Parties to submit briefs providing comments on the preliminary findings and, if desired, proposing additional recommendations and other remedial measures. The Board shall then issue its final findings, recommendations, and award of damages. The findings phase should be completed in no more than 90 days.

Amtrak's Concerns With CN's Anticipated Proposal

In its response to Amtrak's Petition, CN outlined an unduly complicated, prolonged, and multi-phased procedure for the investigation. *See* CN's Response at 73–78. CN has informed Amtrak that its proposed procedural framework will be similar to that proposal. The proposal in CN's Response suggests that (after an abeyance period and a mediation) the Board (1) publish a proposed procedural order for public comment, with a 20 day comment period; and (2) separate the investigation into two distinct, lengthy phases, with Phase I focusing on PRIIA data and recommendations and Phase II focusing on preference and damages. This process includes several periods of negotiation and mediation and would have the Board narrow Amtrak's Petition prior to any investigation, open its decisions for public comment, and invite the participation of third-parties against whom Amtrak has not sought an investigation. Amtrak urges the Board to reject this inappropriately protracted and fragmented process, for several reasons.

First, nothing in PRIIA contemplates such a process, and CN's Response offers no statutory basis for its proposal. The language of PRIIA is clear. Upon the filing of Amtrak's Petition, the Board "shall initiate" an investigation "to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by [the host railroad]." 49 U.S.C. 24308(f)(1). In doing so, the Board "shall obtain" information from the parties necessary to make its determination, after which the Board is to issue recommendations, *see id.*, and, if the delays or failures to achieve the minimum standards "are attributable to a rail carrier's failure to provide preference," award damages, 49 U.S.C. 24308(f)(2). Nowhere does the statute require, contemplate, or even mention publishing the Board's orders for public comment; inviting the participation of third-parties; or simultaneously narrowing, bifurcating, and prolonging the investigation at the host railroad's request. The Board should follow the clear and simple direction of PRIIA and conduct a comprehensive investigation into all of the allegations in Amtrak's Petition.

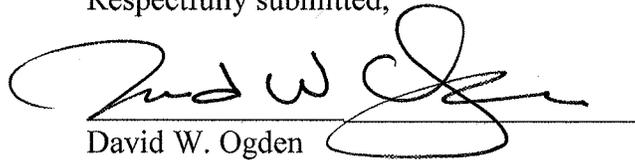
Second, contrary to the statute, CN's proposal is time-consuming and dilatory, requiring several needlessly protracted, multi-staged processes for the Board's inquiry. *See id.* at 76-78. Contrary to this cumbersome structure, PRIIA plainly contemplates an expeditious process to address the poor performance of Amtrak passenger service on rails managed by freight railroads. The statute provides that when, for "any 2 consecutive calendar quarters," an Amtrak train's performance has failed to achieve the minimum standards, the Board shall investigate and resolve the issues. 49 U.S.C. § 24308(f). A process triggered by performance over a mere two calendar quarters and intended to improve the experience of passengers on the affected routes plainly must reach a resolution very quickly to serve the statutory goals. Amtrak's proposal is consistent with that clear statutory intent. CN's proposal, on the other hand, would require many

months, *if not years*, before recommendations for improved service or fines for statutory violations could be imposed. Specifically, it would potentially require that the parties each file two separate pleadings, one at each of the two phases, *see* CN's Response at 77 (stating that Phase II "may require a new pleading" from Amtrak and a response from CN); would have the parties conduct up to five rounds of briefing and undergo several periods of mediation and negotiation, *see id.* at 76-77; and would require the Board to offer its rulings and decisions for public comment on up to three separate occasions, *see id.* Such a process is calculated to produce delays, fail to deliver the improvements Congress mandated in a timely fashion, and fail to afford a meaningful deterrent for statutory violations in handling Amtrak's trains. The inordinate procedural delay inherent in CN's proposal is plainly inconsistent with the goals and purposes of PRIIA and would harm the public interest. For those reasons, that approach should be rejected.

Third, CN's proposal improperly cabins the issues raised in Amtrak's Petition by isolating delay data and recommendations from issues of preference. PRIIA requires an investigation into, and a determination of, all the "causes" of delays suffered by Amtrak trains on CN's lines, and only the remedy depends on whether the Board has determined that the delay was attributable to a failure to afford Amtrak preference or to some other cause. 49 U.S.C. § 24308(f). Under PRIIA, therefore, the Board should thoroughly investigate all the causes for the delays described in Amtrak's Petition, including the delays attributable to CN's failure to afford Amtrak trains preference. After it has determined the delays' causes, the Board then should issue recommendations to redress the delays and award damages against CN to remedy Amtrak's financial loss and adequately deter future actions likely to result in delays to Amtrak on the route involved.

Amtrak filed its Petition in January. It is now the end of November, and tens of thousands of Amtrak passengers continue to suffer inordinate delays and substandard performance on CN rail lines, while CN continues to grant preference to its own freight trains over Amtrak passenger trains in clear defiance of the law. There has been enough delay, and the time has come for a full investigation into CN's unlawful conduct.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2012, I served the following Proposed Procedural Framework on counsel for Canadian National Railway Corporation by electronic mail.



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