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

**Re: STB Docket No. NOR 42141, National Railroad Passenger Corporation—
Investigation of Substandard Performance of the Capitol Limited**

Dear Ms. Brown:

Enclosed for filing is the National Railroad Passenger Corporation's Response to the Motion to Dismiss filed by Norfolk Southern Railway Company in the above proceeding.

If you have any questions, please contact me.

Respectfully submitted,

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

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42141

**NATIONAL RAILROAD PASSENGER CORPORATION -- INVESTIGATION OF
SUBSTANDARD PERFORMANCE OF THE CAPITOL LIMITED**

**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN
OPPOSITION TO MOTION TO DISMISS OF NORFOLK SOUTHERN**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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The National Railroad Passenger Corporation ("Amtrak"), through undersigned counsel and pursuant to 49 C.F.R. § 1104.13, hereby replies in opposition to the Norfolk Southern Railway Company's Motion to Dismiss Amtrak's Complaint, filed on January 7, 2015 ("Motion to Dismiss").

INTRODUCTION

On November 17, 2014, Amtrak filed a Complaint to Initiate Investigation of the Substandard Performance of the Capitol Limited ("Complaint"). In the Complaint, Amtrak requests that the Surface Transportation Board ("STB" or "Board"), pursuant to 49 U.S.C. § 24308(f)(1) (also referred to herein as "Section 213"), initiate an investigation of the substandard performance of Amtrak's Capitol Limited Service, which runs almost entirely on lines owned by CSX Transportation, Inc. and Norfolk Southern Railway Company ("NS" or "Norfolk Southern"). *Complaint*, 3. On January 7, 2015, Norfolk Southern filed the Motion to Dismiss.

ARGUMENT

Amtrak has asked the Board to investigate the substandard performance of the Capitol Limited service, pursuant to its authority under Section 213. In *Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Ry.*

Co., NOR 42134 (STB served Dec. 19, 2014) (“*Amtrak/CN*”), the STB held that Section 213 allows Amtrak to bring a complaint when the on-time performance of any intercity passenger train averages less than eighty percent. *Amtrak/CN*, 6. NS says the Complaint must be dismissed because the Board has no authority to commence an investigation of the performance of the Capitol Limited service under that statutory provision and the Board’s interpretation of Section 213 in *Amtrak/CN* conflicts with the statute. None of Norfolk Southern’s arguments in support of these assertions is persuasive. Accordingly, the Motion should be denied.

A. Motions To Dismiss Are Disfavored And Only Granted If The Complaint Does Not State Grounds For Investigation And Action.

Motions to dismiss are “disfavored and rarely granted.” *Cargill Inc. v. BNSF Ry.*, 2011 STB LEXIS 1, *9 (STB served Jan. 4, 2011) (citing *Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104, slip op. at 3 (STB served Dec. 30, 2009) and *Garden Spot & N. Ltd. P’ship & Ind. Hi-Rail Corp.--Purchase & Operate--Ind. R.R. Line Between Newton & Browns, Ill.*, FD 31593, slip op. at 2 (ICC served Jan. 5, 1993)). “In ruling on motions to dismiss, the Board assumes that all factors be viewed in the light most favorable to the complainant, including all factual allegations.” *Cargill Inc.*, 2011 STB LEXIS at *9 (citing *AEP Texas N. Co. v. Burlington N. and Santa Fe Ry.*, NOR. 41191 (Sub-No. 1), slip op. at 2 (STB served Mar. 19, 2004)).

In the rare instance when the Board grants a motion to dismiss, it does so because the complaint “does not state reasonable grounds for investigation and action. 49 U.S.C. § 11701.” *State of Montana v. BNSF Ry. Co.*, 2011 STB LEXIS 70, *5-6 (STB served Feb. 14, 2011). Indeed, to grant a motion to dismiss, the Board must find that the complaint “offers no reasonable basis for further Board consideration.” *Dairyland Power Cooperative v. Union Pac. R.R. Co.*, NOR 42105, slip op. at 5 (STB served July 25, 2008). This is not such a case. The

Board should deny Norfolk Southern’s Motion to Dismiss. Amtrak’s Complaint clearly sets forth statutorily-based grounds for an investigation.

B. Norfolk Southern Fails To Demonstrate That The Board Lacks Authority To Investigate The Performance Of The Capitol Limited Service.

In order to prevail on its Motion, NS must show that Section 213 does not permit a Board investigation of the Capitol Limited service. NS has failed to do so. Section 213 contains two independent clauses, separated by the conjunction “or”. The first clause (also referred to herein as the “first trigger”) authorizes an investigation if “the on-time performance of any intercity passenger train averages less than 80 percent”; the second clause (or “second trigger”), alternatively authorizes an investigation if “the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards” 49 U.S.C. § 24308(f).¹ In *Amtrak/CN*, the STB applied the unambiguous language of the first trigger and held that it had authority to investigate the performance of Amtrak’s Illini/Saluki service.² The plain language in Section 213 allows investigations of Amtrak train on-time performance without regard to Section 207’s Metrics and Standards for Intercity Passenger Rail Service, Federal Railroad Administration, *Metrics and Standards for Intercity Rail Passenger Service* (May 12, 2010), Dkt. No. FRA-2009-0016, at 24-30, available

¹ For both clauses the triggering condition must occur in 2 consecutive calendar quarters. *Id.*

² The STB held that:

The plain language of Section 213 allows Amtrak to bring a complaint either when “the on-time performance of any intercity passenger train averages less than 80 percent” “or” when “the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards” for any two consecutive calendar quarters.

Amtrak/CN, 6-7 (emphasis in original) (citation omitted).

at <https://www.fra.dot.gov/eLib/Details/L02875> (“Metrics and Standards”). *Amtrak/CN*, 6. This is so irrespective of whether the Metrics and Standards are in force.

Norfolk Southern asserts that Section 213 unambiguously *bars* a Board investigation of Amtrak intercity train performance except pursuant to the Metrics and Standards. *Motion to Dismiss*, 9. To support its assertion that Section 213 unambiguously *bars* a Board investigation, NS contrives a distinction in Section 207 between “performance” and “service quality” and uses it to argue that a Section 213 investigation can only be triggered by a failure to meet the Metrics and Standards. NS wants the Board to ignore the first trigger based on the second trigger, but the presence of the second trigger does not negate the first trigger. In fact, Norfolk Southern’s argument would render the entire first clause of Section 213 without any meaning. Not only is NS wrong, but quite the opposite of NS’s argument is true. 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). The Board could not have construed the first trigger in *Amtrak/CN* any way other than the way it did. Thus, Norfolk Southern’s argument as to the “unambiguous” meaning of Section 213 is unavailing.

If, on the other hand, Section 213 is ambiguous, NS’s Motion to Dismiss must be denied unless NS can show that the Board’s construction of Section 213 in *Amtrak/CN* is not a permissible construction. NS makes several arguments that the STB’s construction of Section 213 is not a permissible construction, but none of the arguments is persuasive.

- 1. The First Clause of Section 213 Unambiguously Grants The Board Authority To Investigate Performance Of Amtrak Intercity Trains.**

Section 213 unambiguously authorizes the Board to investigate the performance of Amtrak intercity trains if “the on-time performance of any intercity passenger train averages less

than 80 percent.” 49 U.S.C. § 24308(f). The Board could not have construed the first trigger any way other than the way it did.

2. Norfolk Southern Fails To Demonstrate That Section 213 Unambiguously Bars A Board Investigation Except Pursuant To The Metrics and Standards.

Norfolk Southern makes the opposite argument that Section 213 unambiguously *bars* a Section 213 investigation except under the Metrics and Standards. To support its assertion, NS argues that Congress in Section 207 required Amtrak and Federal Railroad Administration (“FRA”) to jointly develop metrics for:

[O]n the one hand, “performance” (meaning “measures of on-time performance and delays incurred”) and, on the other hand, separate metrics relating to a laundry list of “service quality” attributes. “Performance” was distinct from “service quality,” not a subset of it.

Motion to Dismiss, 8-9. According to Norfolk Southern, “Section 213 picked up on this distinction between ‘performance’ and ‘service quality’ and the ‘Board’s interpretation reads entirely out of the statute Congress’s express command that ‘on-time performance’ metrics be among those developed under Section 207.” *Id.* at 9.

Section 207 did not require separate “performance” and “service quality” metrics.

Section 207 required Amtrak and FRA to jointly develop metrics:

[F]or measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on board services, stations, facilities, equipment, and other services.

49 U.S.C. § 24101 note. Thus, “on-time performance” is explicitly but one of many attributes included within the broader description of “performance and service quality of intercity passenger train operations,” and nothing in the language of that sentence ascribes on-time

performance to a “performance” metric and all other qualities to a “service quality” metric. In the next sentence, Section 207 separately provided:

Such metrics, at a minimum, shall include ... measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier ...

Id. Again, nothing in this sentence requires the mandatory “measures of on-time performance and delays” to be included under a rubric of “performance” metrics or “service quality” metrics, or suggests that no other trigger for on-time performance review would be permitted under the statute. The mandatory measures directed by Section 207 just needed to be in the “metrics.”

Norfolk Southern is conflating these two sentences from Section 207 and ignoring the plain language of the first one.³ Norfolk Southern’s Section 207 argument is incorrect. Norfolk Southern’s proffered interpretation of Section 213 ignores and contradicts the plain language of the statute.

Because Section 213 unambiguously authorizes Board investigations under the first trigger and without reliance on the Metrics and Standards, *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2445 (U.S. 2014) (“*Utility Air Regulatory Group*”), and the other cases cited in the Motion to Dismiss on 16-17, do not help Norfolk Southern. Similarly, this is not a case like *United States v. Stevens*, 559 U.S. 460 (2010), also cited by Norfolk Southern, where the Government seeks to apply a statute in an “impermissible,” and unconstitutional manner.⁴

³ The language of Section 207 is dispositive, but it is worth noting that the Metrics and Standards do not divide into “performance” and “service quality” categories. Rather, three measurements are set forth for “On-Time Performance” and other metrics are set forth for “Other Service Quality,” consistent with Section 207’s mandate that on-time performance standards be “includ[ed] in the metrics for measuring the performance and service quality of intercity passenger train operations.” *Metrics and Standards* at 24-30.

⁴ Norfolk Southern also cites several cases regarding valid severance of a portion of the statute when another portion is unconstitutional. *Motion to Dismiss*, 17. The Board squarely addressed this issue in *Amtrak/CN* at 6, n. 9. In the absence of a persuasive argument that the Board’s construction of Section 213 is impermissible, these cases do not support Norfolk Southern’s Motion to Dismiss.

Rather the STB has, consistent with Supreme Court precedent, interpreted ambiguity in the “fully operative” remaining portion of Section 213. *See Amtrak/CN*, 6 n. 19.⁵

3. Norfolk Southern’s Construction Of Section 213 Would Leave The First Clause Of Section 213 Without Any Meaning Or Purpose.

Norfolk Southern’s argument that the only trigger in Section 213 is the one related to Section 207 Metrics and Standards would render Section 213 inoperative even if the Metrics and Standards are held to be constitutional. The on-time performance metrics developed under Section 207 – which NS argues constitutes the sole basis for triggering a Section 213 investigation – actually consists of three separate tests: endpoint on-time performance, all-stations on-time performance, and change in effective speed. Both the endpoint and all-stations on-time performance metrics vary in percentage over time for non-Northeast Corridor routes from 80% in FY 2010 to 85% or 90% by FY 2014, depending on the length of the route. *Metrics and Standard*, 26-27. The “change in effective speed” metric is not even expressed as an on-time percentage, but instead is measured by dividing a train’s mileage by the sum of the scheduled end-to-end running time plus the average endpoint terminal lateness, and comparing that to the effective speed during FY 2008. *Metrics and Standards*, 24-30. Norfolk Southern never explains how in actual practice the STB could trigger an investigation based on performance of less than 80% of two different metrics and one measurement that is not expressed as a percentage. Nor is it conceivable that Congress – which did not know what the Metrics and Standards would provide in 2008 when PRIIA was passed – could have intended such an absurd result.

⁵ Because NS has failed to show that Section 213 unambiguously bars an investigation except under the Metrics and Standards, its discussion of the legislative history of Section 207 and Section 213 is irrelevant. *Motion to Dismiss*, 13-17.

Stated simply, Norfolk Southern applies a tortured construction of Sections 207 and 213 in order to render the Congressionally-mandated 80% trigger a nullity, a result which violates well-settled principles of statutory construction. *See Corley v. United States*, 556 U.S. 303, 314 (U.S. 2009) (“[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”) (citations omitted).

C. Norfolk Southern Has Failed To Show That The Board’s Construction Of Section 213 Is An Impermissible One.

Having failed to demonstrate that Section 213 unambiguously bars a Board investigation except under the Metrics and Standards, Norfolk Southern’s Motion to Dismiss must be denied unless it can show that the STB’s construction of Section 213 is not a permissible one.⁶ This has not been done.⁷

First, Norfolk Southern argues that for the Board’s construction of Section 213 to be plausible,⁸ Congress would have had to refer to “on-time performance” (along with “service quality”) in the second clause of Section 213 where Congress refers explicitly to the Section 207 Metrics and Standards. *Motion to Dismiss*, 10. However, as noted above, Section 207 did not

⁶ “[I]f Congress has not unambiguously addressed the specific issue before us, then [the Court] must determine whether the agency’s construction of the statute is permissible.” *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1076 (9th Cir. 2013) (quoting *Chevron, U.S.A. Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 842-43). “In this second step, the court must accord considerable weight to the agency’s construction of the statute and it may not substitute its own construction of the statute for the agency’s reasonable interpretation.” *Association of American Railroads v. Surface Transp. Bd.*, 161 F. 3d 58, 68 (D.C. Cir. 1998) (citations omitted).

⁷ As noted above, Section 213 unambiguously authorizes the Board to investigate the performance of Amtrak intercity trains if “the on-time performance of any intercity passenger train averages less than 80 percent.” 49 U.S.C. § 24308(f). For purposes of rebutting Norfolk Southern’s arguments, Amtrak will assume in this section of the reply that Section 213 is ambiguous.

⁸ Norfolk Southern arguments build off the word “plausible.” *Chevron* uses the word “permissible.” *Chevron*, 467 U.S. at 843. *See also Apotex Inc. v. FDA*, 414 F. Supp. 2d 61, 72 (D.D.C. 2006) (“At the second step of *Chevron*, the Court must determine whether the agency’s [] approach is “based on a permissible construction of the statute . . . that is, is it one of the possible interpretations reasonably supported by the language and structure of the statute?” (citation omitted)).

require “measures of on-time performance and delays” to be included under a rubric of “performance” or “service quality.” If one asks an Amtrak passenger whether “service quality” includes high “on-time performance” the answer likely will be “yes.” Thus, even apart from the express inclusion of “on-time performance” as a category of “service quality” within the text of Section 207 and within the Metrics and Standards themselves, a construction of Section 207 under which “service quality” includes “on-time performance” is a permissible one. The same is true for Section 213.

Second, Norfolk Southern argues that the Board’s construction of Section 213 is not plausible because it allows two investigation triggers under Section 213, which is inconsistent with the development of a single set of Metrics and Standards. *Motion to Dismiss*, 10-11. Section 213 investigations under two separate triggers will not create a separate, second set of Metrics and Standards. The Metrics and Standards developed under Section 207 have a much broader purpose than that of conferring jurisdiction on the Board to begin an investigation into the causes of delays under Section 213 investigations. 49 U.S.C. § 24101 note. The Metrics and Standards were designed to measure and evaluate performance and service quality of intercity passenger train operations, including cost recovery, minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. *Metrics and Standards*, 3. Even with respect to on-time performance, the Metrics and Standards had much broader purposes than merely facilitating Board investigations under the second trigger in Section 213. *Id*; see *Metrics and Standards* at 6 (“The Metrics and Standards are designed to allow for both historical and cross-sectional analysis and comparisons.”) As NS recognizes, the process of developing the Metrics and Standards was long and exhaustive, and resulted in two percentage-based on-time performance standards (which vary over time), one effective speed standard, and a delay-per-

10,000 mile standard. Section 213 provided that failure to meet those standards could trigger an investigation as well. Establishing two investigation triggers and establishing two sets of Metrics and Standards is not the same thing.⁹

Third, Norfolk Southern argues that the Board's construction is not plausible because it would allow the Board (under the first trigger) to conduct Section 213 investigations based on past performance of Amtrak trains even though Congress made a "conscious decision to have investigation under Section 213 *triggered* by a set of new standards that would have only *prospective* application." *Motion to Dismiss*, 11-13 (emphasis in the original). Here, Norfolk Southern attempts to use the FRA- and Amtrak-developed Metrics and Standards to retroactively ascribe intent to Congress. Although the FRA chose to delay application of the Metrics and Standards for two quarters following publication,¹⁰ nothing in Section 207 required that outcome with respect to either statutory trigger. The prospective versus retrospective application issue was determined in the Metrics and Standards, not in the statute.

Fourth, Norfolk Southern cites statements of Amtrak, former STB Chairman Nottingham, and the Board itself made in connection with the Metrics and Standards or implementation of Section 213; and the Department of Justice in the briefs and at the oral argument in *Ass'n of Am. R.R.s v. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013) ("*AAR v. DOT*"). *Motion to Dismiss*, 17-20. However, none of these statements was made in the context of interpreting the effect of the 80% on-time performance trigger. Thus, for example, Amtrak's testimony that Section 207 required Amtrak, the FRA, and others to "work together to establish uniform metrics and standards" is both literally true and irrelevant to whether Section 213 provides two independent

⁹ For the same reason, Norfolk Southern's reliance on Amtrak's acknowledgement that there were to be a single set of Metrics and Standards, *see Motion to Dismiss*, 17-18, is misplaced.

¹⁰ *See Metrics and Standards*, 4.

triggers for an investigation by the Board. Similarly, statements made in the *AAR v. DOT* litigation to the effect that the Section 207 Metrics and Standards would “help determine” when Amtrak could or could not trigger an STB investigation have no bearing on whether another trigger exists which could also start such an investigation.¹¹ NS is reaching here for meaning in statements that did not purport to even consider the effect of the first statutory trigger, and therefore cannot show that the Board’s construction of Section 213 was an impermissible one. With regard to the Board’s comments in the Metrics and Standard’s docket, to the extent they express a different view of the Board’s authority under Section 213 than the holding of *Amtrak/CN*, the Board has fully explained the basis for its decision. *See Amtrak/CN*, 6, 9.¹²

Fifth, Norfolk Southern argues that the joint development by Amtrak and the FRA of on-time performance measures under the Metrics and Standards makes the STB’s construction of Section 213 in *Amtrak/CN* implausible. *Motion to Dismiss*, 20-22. For the same reason the decision to give prospective application of on-time performance Metrics and Standards cannot be used to ascribe the intent of Congress, see *supra* at 5-6, the record of the development Section 207 Metrics and Standards cannot be used to demonstrate what Congress meant earlier, when it enacted Sections 207 and 213.

¹¹ In particular, statements made in the briefs and the oral argument in *AAR v. DOT* do not support Norfolk Southern’s Motion to Dismiss. It is worth noting that during oral argument Mr. Gannon, Assistant to the Solicitor General, Department of Justice, arguing on behalf of the Petitioners, twice informed that High Court that the Board’s authority to conduct a 213 investigation absent the 207 Metrics and Standards was before the Board. Transcript of Oral Argument at 10-11, 23-24, *Dep’t of Transp., et al. v. Ass’n of Am. R.R.s*, S. Ct. No. 13-1080, (Dec. 8, 2014).

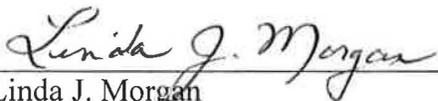
¹² Norfolk Southern makes the argument that in *AAR v. DOT*, 721 F.3d 666, 672 (D.C. Cir. 2013), *cert. granted* 134 S. Ct. 2865 (June 23, 2014), the District of Columbia Court of Appeals concluded that the Metrics and Standards “define the circumstances in which the STB will investigate” preference violations. The Court of Appeals did not reach the issue before the Board in *Amtrak/CN* and again in this proceeding. *See Amtrak/CN. Id.* at 9, n. 26.

Norfolk Southern's final argument, regarding the incentive and penalty provisions in its operating agreement with Amtrak, *Motion to Dismiss*, 22-24, is even further afield. While noting NS's position that the Operating Agreement binds it to certain performance standards enforceable in an arbitral proceeding, Section 213 provides an independent basis for Board jurisdiction without reference to contractual requirements, which differ from host railroad to host railroad. Nothing about the operating agreements can be employed to support an argument that the Board's interpretation of Section 213 is impermissible.

CONCLUSION

Norfolk Southern's assertion that Section 213 unambiguously bars a Board investigation except under the Metrics and Standards is unpersuasive. To the contrary, Section 213 unambiguously authorizes an investigation without reliance on the Metrics and Standards. Even assuming Section 213 is ambiguous, NS has failed to demonstrate that the Board's construction of the statute in *Amtrak/CN* is an impermissible one. For these reasons, the Board should deny Norfolk Southern's Motion to Dismiss.

Respectfully submitted,



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Dated: January 27, 2015

CERTIFICATE OF SERVICE

I certify that on January 27, 2015, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to Norfolk Southern's Motion to Dismiss Amtrak's Complaint, was served via email upon the following counsel of record:

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