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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 42134, National Railroad Passenger Corporation—
Section 213 Investigation of Substandard Performance on Rail Lines of
Canadian National Railway Company**

Dear Ms. Brown:

Enclosed for filing is the National Railroad Passenger Corporation's Response to the Petition for Reconsideration filed by Canadian National 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 42134

**NATIONAL RAILROAD PASSENGER CORPORATION – SECTION 213
INVESTIGATION OF SUBSTANDARD PERFORMANCE ON RAIL LINES OF
CANADIAN NATIONAL RAILWAY COMPANY**

**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN
OPPOSITION TO CANADIAN NATIONAL'S PETITION FOR RECONSIDERATION**

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The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, hereby replies in opposition to the Petition for Reconsideration of the Board’s Decision served December 19, 2014 (the “Decision”) filed by Canadian National Railway (“CN”).

ARGUMENT

I. Introduction

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances; or (2) involves material error. *Total Petrochemicals & Refining U.S.A., Inc. v. CSX Transp.*, NOR 42121, slip op. at 3 (STB served Dec. 19, 2013) (citing *Alleghany Valley R.R.—Petition for Declaratory Order*, FD 35239, slip op. at 3 (STB served July 16, 2013)). CN has not met either requirement.

Amtrak’s Illini/Saluki service, almost all of which operates on CN track, has had deplorable on-time performance by any measure.¹ The Board granted Amtrak’s motion to amend its Complaint to initiate a Board investigation of performance on the Illini/Saluki service under the 80 percent standard in PRIIA Section 213, based on its conclusion that any further

¹ See *Amended Complaint*, 1-2.

delay in investigation of the Illini/Saluki service “would thwart Congress’s clear intent that the Board resolve disputes over Amtrak delays in an efficient manner.”²

Section 213 includes two independent clauses, separated by the conjunctive “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”) 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).³ 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).⁴ The Board could not have construed the first trigger any way other than the way it did.

CN asserts that the Decision involves material error. In essence, CN’s Petition for Reconsideration (“Petition”) argues that the second trigger is the only trigger. According to CN, PRIIA expressly provides that on-time performance be defined *exclusively* by rulemaking by the Federal Railroad Administration (“FRA”) and Amtrak under Section 207, and that there is no separate authority under Section 213 for the Board to investigate Amtrak intercity train service.

² *Decision*, at 2.

³ For both clauses the triggering condition must occur in 2 consecutive calendar quarters. *Id.*

⁴ In the Decision, 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.

Id. at 6-7 (emphasis in original) (citation omitted). Section 213 allows investigations of Amtrak train on-time performance absent Section 207’s presently null Metrics and Standards. *Decision*, at 6.

Petition, 1. Section 207 did indeed require Amtrak and FRA to jointly develop metrics for the “performance and service quality of intercity passenger train operations, including ... on-time performance,” and those Metrics and Standards were to be used for a multitude of purposes. 49 U.S.C. § 24101 note; *see Metrics and Standards for Intercity Rail Passenger Service* (May 12, 2010), Dkt. No. FRA-2009-0016, at 24-30, available at <https://www.fra.dot.gov/eLib/Details/L02875> (“Metrics and Standards”). For the sole purpose of triggering a Board investigation into the causes and possible cures for poor performance and excessive delay, however, Congress also provided a set standard (less than 80% on-time performance) that did not depend on Metrics and Standards that would in the future be developed by FRA and Amtrak. Thus, the presence of the second trigger does not negate the first trigger.

Nowhere in either Section 207 or Section 213 does the statute say that the Metrics and Standards in Section 207 would be the *only* basis for triggering an STB investigation of Amtrak performance under Section 213. CN would have the Board ignore Section 213’s first independent clause (“the on-time performance of any intercity passenger train averages less than 80 percent”) and wait (along with Amtrak’s Illini/Saluki customers) for the Supreme Court (or the D.C. Circuit on remand) to decide whether the second trigger is constitutional and also available. The Board granted Amtrak’s motion to amend the Complaint based on Section 213’s first trigger and CN has not, by its argument about the second trigger, shown that the Decision is based on an impermissible construction of Section 213.

CN’s concern regarding the consequences of the disposition of the Metrics and Standards after the Supreme Court decision is also without foundation. This case will proceed under the *first* investigation trigger, regardless of the outcome of the Supreme Court case on the Metrics and Standards. The triggers determine whether the Board will conduct an investigation. Once

the investigation is initiated, the Board can determine its scope, subject only to the other statutory requirements of Section 213. The outcome of the Supreme Court case has no bearing on whether the investigation is conducted or what issues would be germane in such an investigation.

CN has therefore failed to meet its considerable burden. Its petition for reconsideration should be denied.

II. CN Fails To Demonstrate That Section 213 Unambiguously Bars A Board Investigation Except Pursuant To The Metrics and Standards.

CN argues that “Congress did not intend its reference to OTP in Section 213 as an invitation to *the Board* to define OTP.” *Petition*, 2 (emphasis in original). In essence, CN argues that Section 213 unambiguously *bars* a Board investigation except under the Metrics and Standards.

According to CN, the reference to on-time performance in Section 213 cannot trigger an investigation independent of the Metrics and Standards promulgated under Section 207 (*Id.* at 2) because, CN argues, PRIIA expressly provides that on-time performance be defined *exclusively* by rulemaking by FRA and Amtrak under Section 207, and not independently by the Board under Section 213.

Section 207 did indeed require Amtrak and FRA to jointly develop metrics and minimum standards for the “performance and service quality of intercity passenger train operations, including . . . on-time performance,” 49 U.S.C. § 24101 note. In fact, Congress specifically required that “[s]uch metrics” include “measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier . . .” *Id.* However, what CN fails to acknowledge is that nowhere in either Section 207 or Section 213 does the statute say that the

metrics and minimum standards in Section 207 would be the *only* basis for triggering an STB investigation of intercity passenger train performance under Section 213.

CN's argument that the only trigger in Section 213 is the one related to the 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 CN argues constitutes the sole basis for triggering a Section 213 investigation – actually consist of three separate tests: endpoint on-time performance, all-stations on-time performance, and effective speed. Both the endpoint and all-stations on-time performance metrics vary in percentage over time for non-Northeast Corridor routes from 80 percent in Fiscal Year 2010 to 85 percent or 90 percent by Fiscal Year 2014, depending on the length of the route. *Metrics and Standards*, 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 to the average effective speed during Fiscal Year 2008. *Metrics and Standards*, 24-30. CN never explains how 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.

CN's 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).

III. Even If Section 213 Were Ambiguous, CN Has Failed To Show That The Board’s Construction Of Section 213 In *Amtrak/CN* Is An Impermissible One.

Having failed to demonstrate that Section 213 unambiguously bars a Board investigation except under the Metrics and Standards, CN’s Petition must be denied unless it can show that the STB’s construction of Section 213 is not a permissible one and constitutes material error.⁵ This has not been done.⁶

CN argues that the Board created the first trigger because the Metrics and Standards are null. This argument has not merit. As noted in the *Decision*, Amtrak filed its Amended Complaint to “establish an independent basis to determine on-time performance under Section 213 of PRIIA, in light of the decision by the U.S. Court of Appeals for the District of Columbia Circuit presently under review by the Supreme Court, holding Section 207 of PRIIA unconstitutional.” *Decision*, at 1. The Board went on to say that the “critical question presented by Amtrak’s motion [to amend the Complaint] is whether the Board may 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.” *Decision*, at 2. CN ignores the procedural posture of the case and instead argues

⁵ “[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.” *Ass’n of Amer. RRs v. Surface Transp. Bd.*, 161 F. 3d 58, 68 (D.C. Cir. 1998) (citations omitted).

⁶ 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 Canadian National’s arguments, Amtrak will assume in this section of the reply that Section 213 is ambiguous.

that “the Decision assumes that OTP in Section 213 means one thing when Section 207(a) is valid ... and something quite different ... when Section 207(a) is invalid,” and that the Board is treating the term OTP as a “chameleon” that changes its meaning according to the circumstances. *Petition*, 4. The Board never says Section 207 has a different meaning under different circumstances; that is an inaccurate reading of the point the Board was making in the Decision. Under the original Complaint the Board would have utilized the second trigger in 213, as had been requested by Amtrak. Until the motion to amend, the Board had not been asked to conduct an investigation under the first trigger. For the first time in the Decision, the Board was addressing the first trigger in Section 213. *Decision*, at 6. In other words, the Board had not previously been asked to commence an investigation based on the first trigger but nothing prevented it from doing so “where the definition of on-time performance under Section 207 [the second trigger] is presently inoperative.” *Id.* at 9. The Board’s holding that the first trigger has the force of law independent of the second trigger is based upon a full explanation of severability case law and does not constitute a material error.

IV. CN’s Concerns Regarding Potential Wasted Resources In Connection With The Board’s Investigation Are Without Foundation And Do Not Support A Finding Of Material Error.

The Board found that the first trigger provides authority for the Board to initiate an investigation independent of the legal status of the second trigger. This is a permissible construction of the statute and does not constitute material error.

CN and the Board have different views regarding the likely timing of the Supreme Court’s review of the Metrics and Standards. CN notes that a decision is likely to be issued by the end of the term (*Petition*, 7), but the Board points out that a final determination could take much longer because even if the Supreme Court rules in the government’s favor on delegation, it

could remand the case to the D.C. Circuit to address the AAR's due process claim. The Board has explained its rationale for moving forward with an investigation under the first trigger in Section 213 without waiting for a final determination regarding the Metrics and Standards and that judgment does not constitute material error.

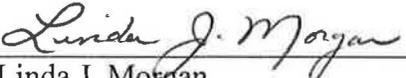
CN's concerns about the consequences of the disposition of the Metrics and Standards case are also without foundation. CN asserts that if the Supreme Court upholds the D.C. Circuit's decision, the Court's reasoning could "significantly inform the Board's further conduct of this proceeding." *Petition*, 7. Conversely, CN asserts, if the Supreme Court reverses the D.C. Circuit decision and restores the Metrics and Standards (or remands the case to the D.C. Circuit and that court restores them) it "could lead the Board to abandon, as moot, its efforts to define OTP." *Id.* at 8. Either way, CN asserts there would be a significant wasted effort. *Id.*

CN fails to acknowledge the holding of the *Decision*. There are two investigation triggers. Unless CN's Petition is granted, this case will proceed under Section 213's first trigger and the Board will investigate "whether and to what extent delays ... are due to causes that could reasonable be addressed by" CN or Amtrak; the investigation can proceed regardless of the outcome of the Supreme Court case on the Metrics and Standards and without inquiry into why there was a "failure to achieve minimum standards." 49 U.S.C. § 24308(f). The Board's decision does not constitute material error. 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.

CONCLUSION

CN has not demonstrated that the Decision involves material error. Its Petition for Reconsideration should be denied.

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 CN's Petition for Reconsideration, was served via email upon the following counsel of record:

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