

HARKINS CUNNINGHAM LLP*Attorneys at Law*

David A. Hirsh
dhirsh@harkinscunningham.com
Direct Dial: 202.973.7606

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
Telephone 202.973.7600
Facsimile 202.973.7610

ENTERED
Office of Proceedings
January 7, 2015
Part of
Public Record

January 7, 2015

BY E-FILING

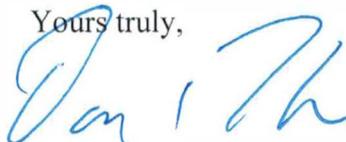
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

Re: 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 in the above-captioned proceeding please find CN's Petition for Reconsideration of the Board's Order of December 19, 2014.

Yours truly,



David A. Hirsh

Enclosure

cc: All Parties of Record

FILED
January 7, 2015
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
January 7, 2015
SURFACE
TRANSPORTATION BOARD

EXPEDITED CONSIDERATION REQUESTED

**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**

**CN'S PETITION FOR RECONSIDERATION OF THE
BOARD'S ORDER OF DECEMBER 19, 2014**

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 347-7840

Paul A. Cunningham
David A. Hirsh
Simon A. Steel
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

*Counsel for Canadian National Railway Company, Grand Trunk
Western Railroad Company, and Illinois Central Railroad Company*

January 7, 2015

EXPEDITED CONSIDERATION REQUESTED

**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**

**CN'S PETITION FOR RECONSIDERATION OF THE
BOARD'S ORDER OF DECEMBER 19, 2014**

Pursuant to 49 C.F.R. § 1115.3(b)(2), CN respectfully petitions the Board to reconsider its decision of December 19, 2014 (“December Decision”) and either grant CN’s motion to dismiss or stay this proceeding pending the Supreme Court’s decision in *Department of Transportation v. Association of American Railroads*, No. 13-1080 (“*DOT v. AAR*”). CN submits that (1) the Board’s conclusion that the Board is authorized to define “on-time performance” for purposes of Section 213 of PRIIA (49 U.S.C. § 24308(f)(1)), and its consequent denial of CN’s motion to dismiss, rest on a materially erroneous legal analysis of severability and statutory interpretation; and (2) the Board’s denial of CN’s alternative request for a stay errs in its weighing of the equities and appears to rest on a mistaken assumption regarding the duration of stay at issue.

CN respectfully requests that the Board consider this petition on an expedited basis or, in the alternative, hold the January 20 and (as necessary) February 2 filing deadlines set by the December Decision in abeyance pending the Board’s decision on this petition, since the filings set for those dates may be either mooted or informed by the Board’s decision.

I. THE BOARD IS NOT AUTHORIZED TO DEFINE “ON-TIME PERFORMANCE” FOR PURPOSES OF PRIIA.

CN’s motion to dismiss (“MTD”) argued that Amtrak cannot rely on the reference to “on-time performance” (“OTP”) in Section 213 of PRIIA as triggering an investigation independent of the metrics and standards promulgated under Section 207(a) of PRIIA because OTP is not a defined term and because PRIIA expressly provides that OTP shall be defined by rulemaking by FRA and Amtrak rather than by the Board.¹

In Section 213, Congress made OTP a trigger for investigation, and at the same time Congress enacted Section 213, it instructed in Section 207(a) that OTP was to be defined by rulemaking by *FRA and Amtrak*. Congress did not intend its reference to OTP in Section 213 as an invitation to *the Board* to define OTP. *See, e.g., Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.”) (citation omitted). Instead, as the Board’s December Decision recognizes (see discussion below), under the scheme designed by Congress – if it is constitutional – the definition of OTP is determined by the Section 207(a) metrics and standards promulgated by FRA and Amtrak, and not by the Board. Once the Board reached that essential conclusion, its analysis should have ended regardless of the D.C. Circuit’s determination that Section 207(a) of PRIIA is unconstitutional. The Board’s role is to interpret the statute as written by Congress, not to re-write the statute as it supposes Congress might have had it anticipated subsequent events.

The Board’s “severability” determination went beyond interpreting the statute and found that, *because Section 207(a)’s delegation to Amtrak has been held unconstitutional*, the Board

¹ CN refuted Amtrak’s contrary arguments in CN’s Response to Amtrak’s Reply to CN’s Motion to Dismiss at 2-6.

has authority to itself define OTP. *See, e.g.*, December Decision at 8-9 (“nothing in PRIIA requires the below-80-percent on-time performance threshold of Section 213 to be defined pursuant to Section 207 **where, as here, Section 207 has been declared unconstitutional.**”) (emphasis added); *id.* at 9 (“**where the definition of on-time performance under Section 207 is presently inoperative due to an ongoing court challenge regarding the constitutionality of Amtrak’s role in the standard-setting process**, the Board concludes that it may independently set forth and implement a definition”) (emphasis added). In – and apparently only in – that circumstance, the Board concluded that Congress would have intended the Board to step in and fill the vacuum created by the constitutional defect in the metrics and standards.

This view of “severability” is both novel (it was not suggested or briefed by the parties)² and materially erroneous. The essence of a constitutional severability analysis is severing the unconstitutional provisions ““ while leaving the remainder [of the statute] intact.”” *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)). The results of such an analysis are not pre-determined, but depend on the particulars of the statute and the constitutional defect: sometimes the constitutional defect is confined to a few words and the rest of the statute can function as Congress intended without those words,³ but sometimes the remainder of the statute

² Amtrak did not argue either in its motion to amend its complaint, which anticipated jurisdictional issues, or in its reply to CN’s motion to dismiss, that Congress intended the Section 207(a) metrics and standards to supply the definition of OTP for Section 213 purposes, but that the Board could nonetheless supply that definition if and when Section 207(a) was held unconstitutional.

³ In the context of PRIIA, a possible approach might be to excise the words “and Amtrak . . . jointly” from Section 207(a), thereby eliminating the constitutionally defective delegation to Amtrak and leaving FRA with (sole) responsibility to promulgate new metrics and standards, including the definition of OTP for PRIIA purposes. That approach would leave more of the

cannot function on its own and while “intact,” it may be dormant, pending further congressional action.⁴

What is impermissible is what the Board did here – going beyond interpretation of the statute with its unconstitutional portion excised and manufacturing a new delegation to the Board that arises solely in the event of Section 207(a)’s invalidation. The December Decision assumes that OTP in Section 213 means one thing when Section 207(a) is valid – “OTP as defined [by rulemaking by FRA and Amtrak] under Section 207(a)” – and something quite different – “OTP as defined by adjudication by the Board” – when Section 207(a) is invalid. That assumption is a material error. Statutory terms (such as OTP) are not chameleons that change their meanings according to the circumstances. While judgment may be involved in determining their meaning, that judgment is to be exercised to determine a single meaning of a single term, not to determine alternative meanings for different circumstances. *See, e.g., Texas v. United States*, 497 F.3d 491,

statute “intact” than the Board’s approach, since at least one of the two parties Congress wanted to define OTP would retain that task, instead of substituting the Board for both of them. But it would still suffer the same basic flaw as the Board’s approach: it would be unfaithful to the “particular mode” of defining OTP prescribed by Congress: definition by FRA and Amtrak by rulemaking. In any event, except insofar as it underscores the Board’s own lack of authority to supply a definition of OTP, this is not a question for the Board.

⁴ The outcome of the recent Supreme Court voting rights case illustrates the fact that a statutory provision may be left intact but dormant due to a finding that a related provision is unconstitutional. In *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013), the Supreme Court held unconstitutional Section 4(b) of the Voting Rights Act, which identified the specific jurisdictions subject to pre-clearance review under Section 5 of the Act. The Court left Section 5 – in which Congress mandated pre-clearance of voting law changes for jurisdictions with a history of racial discrimination in voting – intact. *See id.* at 2631. But since the Voting Rights Act identifies those jurisdictions as those listed in Section 4(b), which was struck down, Section 5 was left without a trigger. The Court acknowledged that fact, and declined to reactivate Section 5 by legislating a new trigger, *id.* at 2629 (“[w]e cannot . . . try our hand at updating the statute ourselves”), recognizing that it is for Congress to decide whether to legislate a new trigger, and what such a trigger should be, *see id.* at 2631. The same outcome should prevail here: Section 213 of PRIIA is intact (and its meaning cannot be changed), but in the absence of the Section 207(a) trigger, it must await congressional reactivation.

504 (5th Cir. 2007) (“[T]here is no support for the proposition that later court decisions affect or effect ambiguity. Chevron’s delegation inquiry gauges congressional intent that is independent from subsequent administrative or judicial constructions of a statute.”).

The December Decision posits that manufacturing a change in the meaning of Section 213 is required to advance Congress’s “purpose” of expediting “the resolution of preference disputes.” December Decision at 9. But the Board is not authorized to re-write a statute, and to change the intended meaning of the words Congress used, to pursue broader, abstract notions of Congress’s ultimate “purpose.” As the Supreme Court has explained, courts and agencies are “bound, not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.” *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994). If a constitutional defect prevents those “means” from achieving their “ultimate purposes,” it is up to Congress to decide whether and how to fix the problem; it is not up to agencies (or courts) to invent new “means” to achieve the purpose. *See, e.g., Texas*, 497 F.3d at 502 (rejecting “this kind of ‘whatever-it-takes’ approach to Chevron analysis” when proffered by the Secretary of Interior to restore powers impaired by a collateral constitutional ruling).⁵

Had Congress anticipated its triggering section – Section 207(a) – would be struck down, it might have supplied an alternative trigger so that investigations could proceed under Section 213. But there is no basis for the Board’s speculation that Congress would have wanted the

⁵ As support for its action, the Board notes that “there are no pending legislative actions suggesting that Congress intends to revise Section 207.” December Decision at 9. That is a materially erroneous mode of statutory analysis: Congress’s decision not to re-write PRIIA is a valid democratic result, not a reason for the Board to usurp Congress by re-writing PRIIA itself. *See, e.g., Cimino v. Raymark Indus.*, 151 F.3d 297, 321 (5th Cir. 1998) (it is not appropriate for courts [or agencies] to “stretch the law to fill the gap resulting from congressional inaction”).

Board to determine that alternative trigger (and thus its own jurisdiction).⁶ Under a proper severability analysis, Section 213 of PRIIA remains valid and intact, but it awaits a new, valid trigger, and cannot be re-written just to fill a vacuum.⁷

II. THE BOARD’S DENIAL OF A STAY ERRS IN WEIGHING THE EQUITIES AND MISUNDERSTANDS CN’S REQUEST.

If the Board declines to reverse its determination that it is authorized to define OTP, CN requests that it reconsider its denial of CN’s alternative request for a stay. The December Decision assumes a stay could last for years, thereby causing undue delay. CN’s request is for a stay that should last no more than three to six months – and could prevent significant wasted effort, diversion of resources, and confusion.

CN’s motion to dismiss requested as alternative relief a stay “pending the Supreme Court’s decision reviewing *AAR v. DOT* [now *DOT v. AAR*], which is expected in the first half of

⁶ The Board’s decision in the December Decision to proceed by adjudication – by defining OTP in this proceeding, rather than by rulemaking – exacerbates the error. In Section 207(a), Congress provided for OTP to be defined by a specific rulemaking process involving broad consultation of stakeholders. That procedural choice by Congress was appropriate, because, as Vice Chairman Begeman has explained, the setting of a statutory trigger for Section 213 proceedings will “have a far-reaching impact on the entire industry,” including the three Class I railroads – CN, NS and CSX – who are already involved as hosts in pending proceedings (this proceeding and NOR 42141). *See* December Decision at 12. Accordingly, even if it denies this petition, the Board should revise its order to provide for an orderly rulemaking process in which “[a]ll interested stakeholders [are] given an opportunity to offer public comment” before the Board decides whether and how to define OTP. *Id.* (emphasis in original).

⁷ The Board suggests (December Decision at 9-10) that its contrary conclusion need be merely “permissible,” as opposed to correct, to survive judicial review under *Chevron*. While the issue of judicial review standards is not yet ripe, CN respectfully disagrees. *Chevron* deference applies when an agency has been authorized to implement and interpret a particular area of regulation under an ambiguous statutory term. *See, e.g., Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”). It does not apply to constitutional judgments of severability, or to issues (such as the definition of OTP here) that Congress intended to assign to a different decision maker.

next year.” MTD at 13. *DOT v. AAR* presents the question whether the D.C. Circuit erred in ruling that Section 207(a) of PRIIA (and the metrics and standards promulgated thereunder) are unconstitutional because Section 207(a) delegates regulatory power to Amtrak, along with the FRA. The Supreme Court heard oral argument in that case on December 8, 2014. The Court’s term is scheduled to end on June 29, 2015. Barring extraordinary circumstances, the Court will issue its decision on the constitutionality of Section 207(a) on or before that date – probably in or before April.⁸ The potential costs of a stay at this point are thus small – a likely delay of three, or a maximum delay of six, months.⁹

Whatever the Court decides, its decision could have significant implications for this proceeding. If the Court upholds the D.C. Circuit’s decision and rules that Section 207(a) is unconstitutional, the Court’s reasoning could significantly inform the Board’s further conduct of this proceeding.¹⁰ Conversely, if the Court reverses the D.C. Circuit and holds Section 207(a)

⁸ The Court typically issues decisions on cases argued in December long before the end of its term. Of the 11 cases argued before the Supreme Court in December 2013, five were decided by March 5, 2014, two others by April 2, and two others by the end of April.

⁹ The Board appears to assume that if the Supreme Court reverses the D.C. Circuit and holds that Section 207(a) does not violate the non-delegation doctrine, but remands for consideration by the D.C. Circuit of whether it violates due process, a much longer stay pending remand would be inevitable. *See, e.g.*, December Decision at 2 (rejecting a stay because “[e]ven a Supreme Court decision upholding the constitutionality of Section 207 of PRIIA may not end the pending lawsuit, as the Court could remand the case to the D.C. Circuit for further proceedings on other unresolved challenges to the constitutionality of Section 207.”). That assumption is unfounded. The Board could continue the stay in those circumstances if it so chose, but CN has asked only for a stay pending the Supreme Court’s decision. The parties and the Board can consider the merits of extending a stay beyond that time if the Court were to remand.

¹⁰ For example, the Court might discuss the regulatory significance of the metrics and standards in Congress’ scheme, which could bear on the question of whether the metrics and standards are essential to triggering any investigation under Section 213. *See, e.g.*, *DOT v. AAR*, Tr. of Oral Arg. at 13 (U.S. argued Dec. 8, 2014) (Justice Kagan asked the Government’s lawyer whether the Board can “award damages without the showing that there’s been a violation of the metrics and standards;” the Government’s lawyer replied “No.”).

constitutional, the metrics and standards, including the FRA/Amtrak definition of OTP, would be restored as triggers for Section 213 investigations. The restoration of the metrics and standards could lead the Board to abandon, as moot, its efforts to define OTP.

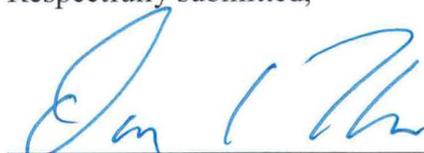
In either scenario, the Supreme Court's decision is likely to clarify the issues before the Board, and it has the potential to moot any proceedings that occur in the interim. Those proceedings could therefore entail a considerable waste of effort. Given the importance of the issues and number of interested stakeholders, there is a strong public interest in the Board proceeding with the benefit of the Supreme Court's ruling. Not only Amtrak and CN, but also NS and CSX (as hosts in the *Capitol Limited* proceeding (STB Dkt. No. NOR 42141)) have immediate interests in the outcome of Section 213 triggering determinations, and these issues will have, as Vice Chairman Begeman noted, a "far-reaching impact on the entire industry." December Decision at 12. Accordingly, good governance demands a thorough, informed process if the Board is going to proceed to define OTP.¹¹ Waiting for the Supreme Court's decision would serve that end by avoiding significant wasted effort, providing valuable further information, and ensuring that a decision with "far-reaching impact" is not taken precipitously.

¹¹ As Vice Chairman Begeman elaborated, multiple parties will have valid interests in commenting, whether by intervention in this proceeding or in a separate proceeding, and a notice-and-comment rulemaking would be an orderly and appropriate way to address these issues (if the Board does not accept CN's argument that it lacks jurisdiction to address them at all). *See id.*

CONCLUSION

For the foregoing reasons, the Board should reconsider its December Decision and grant CN's motion to dismiss, or, in the alternative, stay this proceeding in its entirety pending the Supreme Court's decision in *DOT v. AAR*.

Respectfully submitted,



Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608
(202) 347-7840

Paul A. Cunningham
David A. Hirsh
Simon A. Steel
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

*Counsel for Canadian National Railway Company, Grand Trunk
Western Railroad Company, and Illinois Central Railroad Company*

January 7, 2015

CERTIFICATE OF SERVICE

I certify that I have this 7th day of January, 2015, served copies of CN's Petition for Reconsideration of the Board's Order of December 19, 2014 upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

A handwritten signature in blue ink, appearing to read 'Marissa A. Robertson', written over a horizontal line.

Marissa A. Robertson