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VIA E-FILING

October 7, 2014

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Surface Transportation Board
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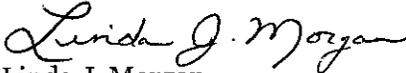
Re: STB Finance Docket No. NOR-42134, National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the National Railroad Passenger Corporation's Reply in Opposition to Canadian National's Motion to Dismiss or, in the Alternative, to Stay.

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 MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO
STAY OF CANADIAN NATIONAL RAILWAY COMPANY**

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STAY OF CANADIAN NATIONAL RAILWAY COMPANY**

The National Railroad Passenger Corporation ("Amtrak"), through undersigned counsel, hereby replies in opposition to the Canadian National Railway Company ("CN") Motion To Dismiss Or, In The Alternative, To Stay (the "Motion to Dismiss"), filed on September 17, 2014.¹

INTRODUCTION

On August 29, 2014, Amtrak filed a Motion to Amend the Complaint ("Motion to Amend") and an Amended Complaint ("Amended Complaint") in this proceeding.² In the Amended Complaint, Amtrak requests that the STB initiate an investigation of the substandard performance of Amtrak's Illini/Saluki service between Chicago and Carbondale, Illinois, which runs almost entirely on lines owned by CN subsidiary Illinois Central Railroad Company.

Motion to Amend, 1. Amtrak seeks the investigation based on 49 U.S.C. § 24308(f)(1) and requests that if the Board determines in the investigation that preference violations have occurred, the Board award damages and other relief. *Motion to Amend*, 1.

¹ *Motion to Dismiss*, 1.

² For a detailed procedural history, see *Motion to Amend*, pages 2-5.

On September 17, CN filed the Motion to Dismiss. CN argues that “there is no statutory basis for this proceeding under Section 213 of PRIIA, 49 U.S.C. § 24308(f).” *Motion to Dismiss*, 2. The CN Motion if granted would have the effect of completely depriving the STB of jurisdiction to investigate substandard performance of Amtrak intercity passenger rail service – something that Congress unquestionably intended for the Board to have. CN’s argument completely ignores the indisputably clear, logically disjunctive language of section 24308(f) and the obvious intent of Congress expressed in this section. The Board cannot ignore the plain language of section 24308(f) and thus must deny the Motion to Dismiss.³

ARGUMENT

A. Motions To Dismiss Are Disfavored By The STB

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.*, STB Docket No. 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.*, ICC Finance Docket No. 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.*, STB Docket No. 41191 (Sub-No. 1), slip op. at 2 (STB served Mar. 19, 2004)).

³ CN did not answer the Amended Complaint, even though the time limits for responding to an amended or supplemental complaint are computed as if the amended complaint was an original complaint. 49 C.F.R. § 1111.2(a). CN has waived its right to answer the Amended Complaint.

B. Congress Gave the STB Clear Authority to Investigate Amtrak Intercity Passenger Service And On-Time Performance Under The Passenger Rail Investment and Improvement Act of 2008

In Section 213(a) of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Congress provided (in new subsection to 49 U.S.C. § 24308(f)) that if on-time performance of Amtrak intercity passenger rail service fell below 80 percent for two consecutive calendar quarters and Amtrak filed a complaint, the STB would have an obligation to initiate an investigation and that, if as a result of that investigation, the STB determined that delays were the result of a host railroad’s failure to provide Amtrak with preference (under the pre-existing requirement of section 24308(c)), the STB could award damages against the host and provide other relief. *See* PRIIA Section 213(a).

In Section 207(a) of PRIIA, Congress provided that the Federal Railroad Administration (FRA) and Amtrak would jointly develop metrics for intercity passenger rail service. *See* PRIIA Section 207(a). Section 213(a) of PRIIA also provided that if Amtrak intercity passenger rail service failed to meet the service metrics jointly developed under Section 207(a) for two consecutive calendar quarters and Amtrak filed a complaint, the STB would have an obligation to initiate an investigation.

The Court of Appeals for the District of Columbia Circuit has held that the process by which the 207 metrics were arrived is unconstitutional. *Association of American R.R.s v. U.S. Department of Transp.*, 721 F.3d 666 (D.C. Cir. 2013) (*cert. granted*, 82 U.S.L.W. 3731 (U.S. June 3, 2014) (No.13-1080)) (“*AAR v. DOT*”). Presently, investigations cannot be initiated under section 24308(f) based on the Section 207(a) metrics. In accordance with clear

Congressional intent, the STB still has authority to investigate on-time performance under Section 213(a) of PRIIA based on the 80 percent standard.⁴

C. CN's Motion To Dismiss Ignores The Plain Language Of Section 24308(f)

1. Section 24308(f) Clearly Provides Two Triggers For An Investigation

CN argues that the STB has no jurisdiction to initiate an investigation under section 24308(f) without PRIIA metrics in place. *See generally Motion to Dismiss*, 8-10. This argument completely ignores Congressional intent. Congress took great care to establish two “triggers” for an investigation under section 24308(f): on-time performance below 80 percent for 2 consecutive quarters “or” failure to meet PRIIA Section 207 standards for 2 consecutive quarters. *See* 49 U.S.C. § 24308(f)(1) (emphasis added). Amtrak noted in the Amended Complaint that on-time performance on the Illini/Saluki route has been below 80 percent for 2 consecutive calendar quarters. *Amended Complaint*, 3-4. Amtrak is relying on this first statutory predicate for the investigation and not at all on the second one. *Id.* An investigation is clearly triggered here.

2. The STB Has Ample Discretion To Construe “On-time Performance” In Section 24308(f) Without Reliance On The PRIIA 207 Metrics

CN makes a statute-defying argument about on-time performance as a trigger for an investigation under section 24308(f). As CN sees it, “the term [‘on-time performance’] has no legal meaning under [24308(f)] apart from [the PRIIA 207] standards.” *Motion to Dismiss*, 9.

The term “on-time performance” is not defined in section 24308(f). However, “on-time performance” was not born in PRIIA. STB/ICC cases have construed the term on many occasions, and Congress has been concerned about Amtrak on-time performance since the inception of Amtrak in 1970.

⁴ The Court’s decision in *AAR v. DOT* was exclusively focused on the process by which the 207 metrics were arrived at, does not even address the 80 percent standard, and lends no support to CN’s arguments in the Motion to Dismiss. *See AAR v. DOT*, 721 F.3d at 669-77 (D.C. Cir. 2013).

In the context of terms and compensation cases under 49 U.S.C. § 24308(a), the ICC has prescribed incentive payments using a definition of on-time performance based on adherence to public schedules. *See e.g., Nat'l Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Service Act*, 1985 ICC LEXIS 318, *32, *35-36 (ICC served July 5, 1985) (prescribed incentive payments to the host railroad based on 80 percent “on-time performance,” defined as arrival on or before the schedule arrival plus a 5 minute tolerance); and *Nat'l R.R. Passenger Corp. and Union Pac. R.R. Co., Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 926, 950-51 (ICC Served April 14, 1977) (prescribed incentive payments based on 80 percent “on-time performance,” defined as “within the schedule time plus ten minutes”). In other proceedings, the agency has directed action based on on-time performance. *See CSX Corp. and CSX Transp., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation*, 1998 STB LEXIS 1559, *391 (STB served July 20, 1998) (in a consolidation, ordered the railroads to report on, among other things, on-time performance at connections measured based on whether the gateway connections were made within two hours of schedule). Furthermore, the ICC previously had authority to establish regulations measuring the adequacy of intercity railroad passenger service. *Adequacy of Intercity Rail Passenger Service*, 351 I.C.C. 883, 889, 910 (ICC served Mar. 29, 1976). In doing so, the ICC set forth rules, which have since been repealed in connection with the termination of the ICC, for the measurement of on-time performance at both endpoints and intermediate stops. *Id.*

Congress has been concerned with the on-time performance of Amtrak trains since the enactment of the Rail Passenger Service Act of 1970 (“RPSA”). *See e.g.* H.R. Rep. 96-198, at 212 (1979) (“Since on-time performance is absolutely necessary, the Committee is proposing a

penalty for contract carriers who cannot obtain on-time performance.”); 45 U.S.C. § 501 (1970), amended by Act of June 22, 1972, Pub. L. No. 92-316, Stat. 229 (repealed 1994) (amending RPSA to include reporting requirements for Amtrak, including “on-time performance” at the final destination of each train operated by route and by railroad); *and* 116 Cong. Rec. 14,172 (1970) (statement of Senator Pearson: “This bill, Mr. President, offers the chance for passenger trains to become an attractive means of travel. It proceeds on the notion that if the trains are fast, clean, and on time, people will ride them again.”). On-time performance was a policy focus well before PRIIA was enacted.

More generally, the STB has broad authority to construe provisions of the RPSA and has done so with undefined but essential terms like “incremental cost” and “express.” *See e.g. Nat’l R.R. Passenger Corp. and Union P. R.R. Co., Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 926, 937-949 (ICC served April 14, 1977) (established incremental costs in terms and compensation case); *and Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)—Union P. R.R. Co. and S. P. Transp. Co.*, 1998 STB LEXIS 144, *18 (STB served May 28, 1998) (evaluated the scope of the term “express”).

The STB has ample discretion to construe the term “on-time performance” and should do so here. CN’s argument that this term has no legal meaning apart from the PRIIA 207 metrics is simply without merit.

3. Congress Took Great Care To Provide For A Section 24308(f) Investigation Independent Of The PRIIA 207 Metrics

CN asserts: “Congress never intended or provided for [section 24308(f)] to function independently of [the metrics and standards under PRIIA] Section 207.” *Motion to Dismiss*, 10.

According to CN, because the PRIIA 207 metrics and standards are presently null and void, there is no statutory basis for an investigation.

This argument ignores the plain language of section 24308(f). Congress provided in 49 U.S.C. § 24308(f)(1) that if the “on-time performance of an intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters,... upon the filing of a complaint by Amtrak ... the Board shall initiate [] an investigation, to determine whether and to what extent delays ... are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak.” *Amended Complaint*, 3. If in the investigation, the Board determines that delays are due to a host railroad’s failure to provide preference to Amtrak,⁵ the Board may order the host railroad to pay damages and prescribe other relief to Amtrak. *Id.* at 5, *citing* 49 U.S.C. § 24308(f)(2). In so doing, the Board is to consider the extent Amtrak suffers financial loss as a result of host railroad delays and what reasonable measures might deter future actions expected to result in delays. *Id.* at 5, *citing* 49 U.S.C. §§ 24308(f)(3)(A) and (B). Finally, awarded damages are to be spent on the routes where the preference violations caused delays. 49 U.S.C. § 24308(f)(4).

Section 24308(f) thus sets forth a Congressionally-mandated 80 percent on-time performance threshold and requires an investigation into the delays that result in substandard performance, independent of any reliance on the PRIIA 207 metrics. In fact, Congress took great care to separate the consequences of delays from the consequences of failure to meet the PRIIA 207 metrics, using the phrase “delays or failure[s] to achieve minimum standards” *four* times,

⁵ See 49 U.S.C. § 24308(c).

once in *each* of the subsections of 24308(f) (emphasis added).⁶ CN’s argument completely ignores the disjunctive nature of these references.

4. The Measurement Of On-Time Performance In The Amended Complaint Is Consistent With Congressional Intent As Reflected In The Language Of Section 24308(f)

The measurement of on-time performance used in the Amended Complaint reflects, and is consistent with, Congressional intent as expressed in the governing statutes. Although “on-time performance” is not a defined term in Section 213, there is no support for CN’s argument that Congress intended the trigger for an STB investigation in Section 213 to be completely dependent upon whatever metrics and standards were eventually developed and adopted by the FRA under Section 207. If that had been the case, the reference to a separate, Congressionally-mandated 80 percent on-time performance standard would have been superfluous. Amtrak’s measurement of on-time performance is consistent with the directive for an investigation based on the 80 percent on-time performance standard.

Furthermore, in 49 U.S.C. § 24101(c)(4), which was enacted before PRIIA, Congress provided: “Amtrak shall ... operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables.” This provision was enacted by Congress (and codified as 45 U.S.C. § 501(a)(6)) in 1970 – 38 years before the passage of PRIIA – and PRIIA amended other sections of 24101(c) but did not make changes to subsection (c)(4). Clearly, Congress was aware of its own goal of on-time performance at all stations within 15 minutes of the time established in the timetable—the same measurement used

⁶ Much of CN’s argument is based on the discussion of the PRIIA 207 metrics in the Original Complaint; or Amtrak’s participation in promulgation of the metrics; or what the Court in *AAR v. DOT* said about use of the metrics to trigger an investigation. See *Motion to Dismiss*, 8-11. To the extent it does so, CN’s Motion to Dismiss is not responsive to the Amended Complaint and does not acknowledge the plain language of section 24308(f).

in the Amended Complaint—when it enacted the independent 80 percent on-time performance standard in Section 213 of PRIIA.⁷

Measuring performance using endpoint on-time performance with a tolerance based on length of the route also has a basis in the law that predates PRIIA Section 207 and the metrics developed thereunder. In *Adequacy of Intercity Rail Passenger Service*, 344 I.C.C. at 809, the ICC provided: “Insofar as the scheduling and operation of any train is within a carrier’s control, and where safe operation permits, the train shall arrive at its final terminus no later than 5 minutes after scheduled arrival time per 100 miles of operation, or 30 minutes after scheduled arrival time, whichever is the less.” This measurement has been used internally by Amtrak and published externally in a variety of reports, including Amtrak’s annual reports and performance reports provided to host railroads, Congress, and the FRA.

As noted in the Amended Complaint, the All-stations on-time performance of the Illini/Saluki service was 49.2 percent for the quarter ending June 30, 2014 and that it was 42.1 percent in the previous quarter. *Amended Complaint*, 1. Endpoint on-time performance was 57.7 percent and 41.6 percent in the same two quarters, respectively. *Id.* at 3-4. Amtrak’s on-time performance measurements are consistent with both the statutory language of, and Congressional intent behind, section 24308(f), and are not dependent on the presently null and void 207 PRIIA metrics.⁸

⁷ See also *Adequacy of Intercity Rail Passenger Service*, 351 I.C.C. 883, 910 (ICC served Mar. 29, 1976) (modifying Rule 6(b) of 1973 on-time performance regulations “to make clear that on-time service is required at intermediate stops, as well as at the end-point stations of any route.”).

⁸ In an effort to construe Amtrak’s Amended Complaint as dependent on the PRIIA Section 207 metrics, CN says Amtrak’s on-time performance measurements “accurately paraphrase” the metrics. *Motion to Dismiss*, 10. In fact, Amtrak’s on-time performance measurements differ from the presently null and void 207 PRIIA metrics in several respects (e.g., they have a uniform 15-minute grace period for on-time station stop measurement and there is no change in “effective speed” measurement). Compare FRA,

The Board should use Amtrak's on-time performance measurements as the basis for initiation of the investigation.⁹ These measurements are not dependent on the 207 PRIIA metrics and are clearly consistent with the statute.

D. Amtrak's Amended Complaint Does Not Rely on Section 11701(a)

CN argues that Amtrak relies on 49 U.S.C. §11701(a) "as an alternative basis for the Board's authority," and further argues that "that provision is inapplicable." *Motion to Dismiss*, 12. However, Amtrak did not cite 49 U.S.C. § 11701 as a basis for the Amended Complaint. *See generally Amended Complaint*, 1, 3-4, 6-7. Rather, Amtrak noted that the Board's long-standing investigatory powers, pursuant to 49 U.S.C. § 11701, have provided a basis for investigations by the Board for some time. *Amended Complaint*, 6-7. The Board's investigation in this case, while under a different statutory authority, mirrors other Board investigations. Amtrak's complaint, which is pursuant to 49 U.S.C. § 24308(f), is in keeping with the Board's long-standing investigatory authority. The Board should conduct the investigation sought by Amtrak in the way it has conducted other investigations within its authority.¹⁰

Metrics and Standards for Intercity Rail Passenger Service (May 12, 2010), Dkt. No. FRA-2009-0016, at 26-27, available at <https://www.fra.dot.gov/eLib/Details/L02875>.

⁹ CN says that since 2011 its contract "performance within tolerance" was above 80 percent in every quarter except the first quarter of 2014. *Motion to Dismiss*, 7. Performance under the contract is based on many things other than "delays" against the public schedule. Moreover, if investigations under section 24308(f) were based on host agreements, there could be a different investigation threshold for every host railroad. Thus, it is not appropriate to use host agreement tolerance provisions to measure "on-time performance" under section 24308(f).

¹⁰ In prior investigations the Board has ordered parties to provide certain information it needed to conduct the investigation. *See Amended Complaint*, 9. In this connection, CN has argued that sampling remains necessary even though the Amended Complaint only covers one line, the Illini/Saluki, citing the fact that there are 730 trains for each two-quarter period for that route. Amtrak continues to believe that this amount of data is manageable and sampling is not necessary, but the STB can decide in connection with the procedural schedule how it wants information submitted in the investigation.

E. CN's Alternative Relief Would Not Be Consistent With 24308(f)

CN argues in the alternative, that the proceeding should be stayed pending the Supreme Court's final decision in *Department of Transportation v. Association of American Railroads*, No. 13-1080, because this would avoid expenditure of STB and party resources and enable the STB and the parties to focus their efforts on the case pending in Finance Docket No. 35743,¹¹ which will “address the CN-Amtrak commercial relationship more comprehensively . . . and in a more forward-looking manner.” *Motion to Dismiss*, 14.

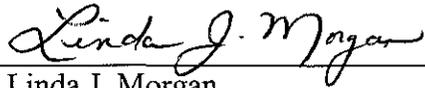
CN's alternative request that this proceeding be stayed should be denied, because if the Amended Complaint states a basis for the investigation under section 24308(f) (and it does), the Board is obligated to investigate and does not have discretion to stay the proceeding. Amtrak understands CN's desire to not delve into issues surrounding the substandard performance of the Illini/Saluki service, but this is not a legally valid basis for staying this proceeding.

CONCLUSION

For the foregoing reasons, the Board should: (1) deny CN's Motion to Dismiss this proceeding; (2) deny CN's Motion in the Alternative to Stay this proceeding; and (3) deny CN's request for twenty additional days to answer the Amended Complaint.

¹¹ See *Application of the Nat'l Rail Passenger Corp. under 49 U.S.C. 24308(a) – Canadian Nat'l Ry. Co.*, STB Finance Docket No. 35743 (STB served Sept. 23, 2014).

Respectfully submitted,



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Dated: October 7, 2014

CERTIFICATE OF SERVICE

I certify that on October 7, 2014, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to CN's Motion to Dismiss or, in the Alternative, to Stay, was served via email upon the following counsel of record:

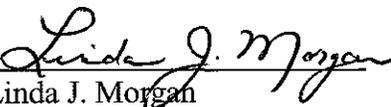
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