



ASSOCIATION OF AMERICAN RAILROADS

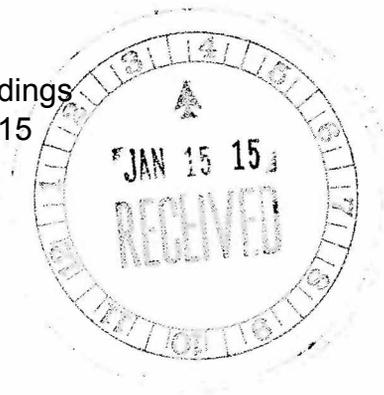
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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Dear Ms. Brown:

Enclosed for filing are the original and fifteen (15) copies of the conditional petition for rulemaking of the Association of American Railroads in EP 726, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*.

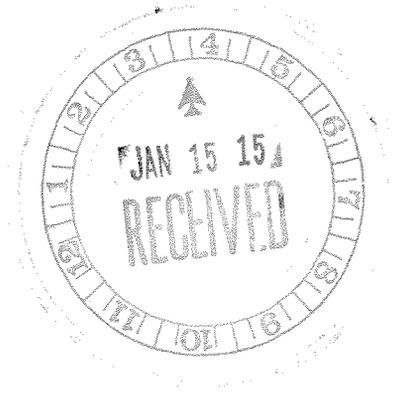
Please date stamp and return the extra copy of the cover letter and petition. If there are any questions regarding this filing, please do not hesitate to contact the undersigned.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 726



ON-TIME PERFORMANCE UNDER SECTION 213 OF THE PASSENGER RAIL
INVESTMENT AND IMPROVEMENT ACT OF 2008

CONDITIONAL PETITION FOR RULEMAKING OF THE
ASSOCIATION OF AMERICAN RAILROADS

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January 15, 2015

CONDITIONAL PETITION FOR RULEMAKING

The Association of American Railroads (“AAR”), on behalf of its Class I freight railroad members,¹ respectfully petitions the Surface Transportation Board to initiate a rulemaking proceeding to define “on-time performance” (“OTP”) for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), 49 U.S.C. § 24308(f). This is a conditional petition for rulemaking that the Board should grant only in the event that it does not grant Canadian National Railway’s (“CN”) pending motion for reconsideration in NOR 42134 and the pending motions to dismiss of CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NS”) in NOR 42141.

The AAR respectfully submits that the Board materially erred when it held that it has the authority to define OTP for purposes of Section 213 in NOR 42134. *See Nat’l. R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Can. Nat’l. Ry. Co.*, NOR 42134, slip op. at 10 (STB Dec. 19, 2014) (“*Canadian National*”). The Board should correct its error and dismiss the pending proceedings.² Subject to and without waiving its objections to the Board’s authority—both to begin a Section 213 investigation and to define OTP—the AAR respectfully requests that in the event the Board rejects the arguments made by CN, CSXT, and NS and elects to consider defining OTP itself, that the Board do so through a notice-

¹ The AAR is a trade association representing the interests of North America’s major freight railroads in this petition. The AAR and its Class I freight members have a vital interest in ensuring that the Board not exceed its statutory authority and that OTP under Section 213 be defined correctly. Amtrak is also a member of the AAR; however, this petition is not filed on behalf of Amtrak and Amtrak is not a party to this filing.

² The AAR notes that CN has asked, in the alternative to dismissal, that the Board stay NOR 42134 pending a decision by the Supreme Court in *Department of Transportation v. Association of American Railroads*, No. 13-1080. That decision may clarify the issues before the Board and potentially moot proceedings that may occur in the interim and avoid wasted resources. The AAR respectfully submits that such an action could help the Board more efficiently deal with the issues raised.

and-comment rulemaking. As Commissioner (now Vice-Chairman) Begeman suggested in *Canadian National*, that rulemaking should also invite comment as to the Board's authority to define OTP.

BACKGROUND

Section 207(a) of PRIIA provides that FRA and Amtrak “shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including . . . on-time performance and minutes of delay” Section 213 of PRIIA provides that, “[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters,” the Board “shall initiate” an investigation at Amtrak’s request “to determine whether and to what extent delays or failure to achieve minimum standards 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 or other intercity passenger rail operators.”

Consistent with Section 207(a), the FRA and Amtrak conducted a rulemaking proceeding and jointly issued a set of metrics and standards in 2010. *See* 75 Fed. Reg. 26,839 (May 12, 2010) (available at www.fra.dot.gov/Elib/Document/1511). Many interested parties submitted comments, including the AAR, freight railroads, commuter railroads, and state regulators. *See* FRA Docket No. 2009-0016 (available at <http://www.regulations.gov/#!docketDetail;D=FRA-2009-0016>).

In 2013, the United States Court of Appeals for the District of Columbia Circuit struck down Section 207 of PRIIA and the metrics and standards promulgated thereunder as an unconstitutional delegation to Amtrak. The D.C. Circuit held that Congress could not vest Amtrak with authority to issue rules governing other companies in the same industry. *See Ass’n*

of *Am. R.R. v. Dept. of Trans.*, 721 F.3d 666, 677 (D.C. Cir. 2013). In reaching this conclusion, the court explained PRIIA § 207 “provides the means for devising the metrics and standards, [while] § 213 is the enforcement mechanism. If the ‘on-time performance’ or ‘service quality’ of any intercity passenger train proves inadequate under the metrics and standards for two consecutive quarters, the STB may launch an investigation” *Id.* at 669. The Supreme Court granted the Government’s petition for certiorari and held oral argument on December 8, 2014. During the argument, the Solicitor General took the position that “the investigation by the Surface Transportation Board is triggered by there having been a failure by Amtrak to satisfy the metrics and standards.” S. Ct. No. 13-1080, Tr. of Oral Arg. at 8 (Dec. 8, 2014).

In its December 19 *Canadian National* ruling, the Board denied Canadian National’s motion to dismiss and stated that it will define OTP under Section 213 in the course of that proceeding.³ *Canadian National*, slip op. at 10 (“[W]e conclude that the invalidity of Section 207 does not preclude the Board from construing the term ‘on-time performance’ and initiating an investigation under Section 213.”). Commissioner Begeman dissented. She suggested that the Board conduct a notice-and-comment rulemaking proceeding to consider whether it has authority to define OTP and, if so, how to define it. She cautioned against developing a rule that will have “a far-reaching impact on the entire industry.” *Id.* at 12 (Commissioner Begeman, dissenting). Proceeding by rulemaking, in contrast, would “establish clear standards” through an “inclusive” process that would give all interested parties a voice and “present the Board with a wide-ranging analysis of the potential standards.”⁴ *Id.*

³ As noted above, CSXT and NS have each separately moved to dismiss a section 213 complaint on similar grounds and those motions remain pending before the Board.

⁴ Canadian National moved for reconsideration of the Board’s 2-to-1 decision in *Canadian National* on January 7, 2015.

ARGUMENT

1. Notice-and-Comment Rulemaking Is Consistent With The Board's Rules and Historic Practice Of Using Rulemaking To Develop Rules Of Industrywide Significance.

The Board's rules provide that it will commence a notice-and-comment rulemaking proceeding upon a petition that presents "adequate justification" for doing so. 49 C.F.R. § 1110.2(b); § 1110.2(e). The Board has long relied on such notice-and-comment rulemaking to develop rules of industrywide significance. "In our judgment, rulemaking is the proper vehicle to tackle . . . issues of industrywide import." *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1), 2006 STB LEXIS 250, at *8 (STB Apr. 14, 2006); *see also E.I. DuPont De Nemours & Co. v. Norfolk S. Ry. Co.*; *Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry. Co.*, NOR 42125 & NOR 42130, 2012 STB LEXIS 419, at *14 (STB Nov. 29, 2012) ("In general, more significant changes with broader application should be made through rulemaking rather than adjudication."). The Board has also utilized notice and comment rulemakings to interpret statutory terms and define the scope of its authority. *See, e.g., Demurrage Liability*, EP 707 (STB served May 7, 2012); *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, EP 669 (STB served Mar. 29, 2007).

In *Major Issues*, the Board determined that it would proceed through notice-and-comment rulemaking, explaining that "[b]ecause our proposed changes . . . would have industrywide significance for rail carriers and their captive shippers, all interested parties should have an opportunity to comment on the proposals." *Id.* at *5-6. Furthermore, proceeding through rulemaking would allow the Board's proposals to "be tested through the notice and comment process before being applied to a pending case." *Id.* at *6. For similar reasons, the Board declined to adopt a rule of industry-wide significance in *Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern & Santa Fe Railway Co.*, NOR 42057, 2004 STB

LEXIS 335 (STB June 7, 2004). In that case, the Board rejected a proposed alternative approach where it “would impact many companies that are not a party to this adjudication but that might be parties to other pending or future . . . cases.” *Id.* at *70. The Board emphasized that “it would not be appropriate to consider setting aside the underlying . . . pricing principle without notice and an opportunity for comments from all those that would be potentially affected.” *Id.* at *70 (citing *Tahoe-Sierra Pres. Council v. Tahoe Reg.’l Planning Agency*, 535 U.S. 302, 335 (2002) & *Pfaff v. U.S. Dept. of Housing and Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996)).

The Board should follow these precedents here. An attempt by the Board to define OTP under Section 213 will have industrywide impact. The statute provides that failure to meet a properly established OTP can trigger a Board investigation that can result in the imposition of penalties. Therefore, the standard that is selected will materially affect interactions between AAR’s member freight railroads and Amtrak. It will also have a substantial effect on the many shippers, commuter railroads, and other stakeholders that have strong interests in ensuring a fluid rail network. Commissioner Begeman is correct that the definition of OTP under Section 213 “will most assuredly be used in all other current and future cases, and have a far-reaching impact on the entire industry.” *Canadian National*, slip op. at 11-12 (Commissioner Begeman, dissenting).

As the Board noted in *Major Issues*, “administrative agencies are cautioned that ‘there may be situations where the [agency’s] reliance on adjudication would amount to an abuse of discretion,’” 2006 STB LEXIS 250, at *4 (quoting *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) (alteration in original)).⁵ A determination with such significant

⁵ See also *First Bancorp. v. Bd. of Governors of the Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984) (an agency may not “propose legislative policy by an adjudicative order”); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1982) (an agency may not use an adjudication to promulgate a rule with

potential consequences for rail transportation in the United States should not be made through an adjudication involving a single stakeholder. Rather, in the event the Board maintains that it has the power to define OTP under Section 213, it should proceed through notice-and-comment rulemaking to give multiple stakeholders including the freight railroads, commuter railroads, freight shippers, state agencies, and others the opportunity to provide input and develop a record before the Board adopts a broadly applicable rule.

2. Congress Directed That On-Time Performance Be Defined Through Rulemaking.

Congress mandated that the definition of OTP for the metrics and standards be developed through rulemaking. PRIIA § 207(a) directed the FRA and Amtrak to consult with “the Surface Transportation Board, [host] rail carriers[,] . . . States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers,” in formulating its definition. And that is what they did. The FRA and Amtrak conducted a notice-and-comment rulemaking; they received comments from multiple parties; they put their proposed definition of OTP out for public review and comment; and they modified their proposal in response to public comments.

The Board did not explain in *Canadian National* why it believed it should define OTP through adjudication when Congress specifically directed that it be done through notice-and-comment rulemaking. The Board has erroneously concluded that it has the power to define OTP despite the plain language of Section 207 giving that power to the FRA and Amtrak. Proceeding

“general application” that did “far more than remedy a discrete violation”); *Patel v. Immigration & Naturalization Serv.*, 638 F.2d 1199, 1205 (9th Cir. 1980) (an agency “improper[ly] circumvent[s]” its rulemaking procedure when it employs an adjudication to develop criteria that “may be stated and applied as a general rule”).

through notice-and-comment rulemaking is consistent with congressional intent; proceeding through adjudication is not.

3. Notice-And-Comment Rulemaking Would Enable The Board To Consider A Variety Of Perspectives In Defining On-Time Performance.

Defining Section 213 OTP through rulemaking would ensure that the Board hears from a variety of different interests in developing a standard. The AAR agrees that “[a]ll interested stakeholders should be given an opportunity to offer public comment and the Board should use that input in order to develop the most appropriate standard.” *Canadian National*, slip op. at 12 (Commissioner Begeman, dissenting). Rulemaking would be a more “inclusive approach” that would “present the Board with a wide-ranging analysis of the potential standards.” *Id.* “The Board could then use that complete rulemaking record as sound support for its ultimate decision.” *Id.*

Considering a variety of perspectives would enhance the Board’s decision making process. That is one of the reasons why agencies typically proceed through notice-and-comment rulemaking when developing important regulations: they recognize that the more information the agency has, the better its rule will be. *See* 1 Pierce, *Administrative Law* (4th ed. 2002) § 6.8, p. 368. The parties that will be subject to the regulation often have industry-specific knowledge or can identify the pros and cons of particular proposals. Indeed, the “accuracy and thoroughness of an agency’s actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis.” Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L. J. 1311, 1373 (1992). When an agency is unaware of different perspectives such as the views of the regulated parties who may have information the agency

does not—the quality of the regulations often suffers as a result. In addition, other government agencies frequently weigh in during the rulemaking process, providing another valuable source of information and guidance. See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 165 (2003) (“[A]dditional input from other agencies may also have a beneficial effect . . . speaking directly to the agency’s strategic planning efforts that constitute the essence of the rulemaking process.”).

All of these reasons apply with full force here. Developing an industrywide standard for Section 213 OTP requires input from the all stakeholders – freight and commuter railroads, shippers, state agencies, and the public. That is why in Section 207 Congress specified a host of parties and agencies that “shall” be consulted in developing a definition of OTP, including, “[host] rail carriers[,] . . . States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers.” Allowing these groups to participate through a notice-and-comment process will assist the Board by developing a full record and helping the Board to better understand the consequences of particular approaches. Indeed, even stakeholders within each of these groups may have divergent views.

Proceeding through notice-and-comment rulemaking would also avoid the risk that the particular facts of an individual case could produce a standard that is ill-suited for other cases. As Commissioner Begeman noted, an adjudication “will use a much more limited record assembled by only two parties—Amtrak and a single carrier—to establish a Section 213 standard” *Canadian National*, slip op. at 12 (Commissioner Begeman, dissenting). It is a well-established principle of administrative law that rulemaking is “generally superior to adjudication for agency lawmaking because the former requires the agency to focus on the issues of law that must be decided, without being diverted, as it is in adjudication, by the more specific and

parochial concerns of particular parties who wish to have their dispute resolved.” Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 41 ADMIN. L. REV. 121, 127 (1990).

Here, the particular facts of the single service at issue in the *Canadian National* proceeding may not enable the Board to develop a rule of general applicability—that is, a rule that could be sensibly applied to the many Amtrak services hosted by different carriers throughout the United States. Each of these services involves different facts and circumstances and poses unique issues and challenges. For that reason, the Board should not attempt to formulate a one-size-fits-all standard without an understanding of how that standard might apply to services other than the single service at issue in *Canadian National*—an understanding that can best be achieved through an inclusive notice-and-comment process.

4. Subjecting Parties To An On-Time Performance Standard With No Opportunity To Be Heard Would Raise Fairness Concerns.

It would raise fundamental fairness issues—and could implicate due process concerns—were the Board to apply against parties a Section 213 OTP standard on which they had no meaningful opportunity to be heard. *See Shell Oil Co. v. Fed. Energy Reg. Comm’n*, 707 F.2d 230, 235-36 (5th Cir. 1983) (“[N]o due process guarantees are extended to non-parties in an individual adjudication, although non-parties may be greatly affected by a general rule an agency adopts in such a proceeding. Shell was afforded no meaningful opportunity in [the agency’s adjudication] to challenge . . . [the agency’s] factual assumption[s] . . . [so] [d]ue process requires that Shell be allowed to challenge that assumption here and now.”); *cf. Pfaff*, 88 F.3d at 749 n.5 (noting that a “disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency’s authority”).

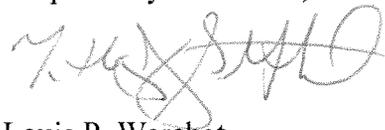
The fairness concerns are particularly acute in this context because the Board already has *multiple* OTP cases pending before it. If the Board were to develop a standard in one investigatory proceeding and then automatically apply it in others it could violate due process. At a minimum, the fact that the identical issue has arisen in multiple pending proceedings—and will arise in more if and when Amtrak requests additional Section 213 investigations—demonstrates that this is a question that should be resolved through an open, inclusive notice-and-comment process in which all stakeholders will have a say in helping the Board formulate a definition of OTP. Such an approach would also allow the Board maximize its scarce administrative resources.

CONCLUSION

The Board should grant Canadian National's motion for reconsideration and the motions to dismiss of CSX and NS. However, if the Board does not do so, it should address both whether it has the authority to define OTP for purposes of PRIIA Section 213 and, if so, how Section 213 OTP should be defined, through notice-and-comment rulemaking.

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