

HARKINS CUNNINGHAM LLP

241866

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
October 25, 2016
Part of
Public Record

October 25, 2016

BY E-FILING

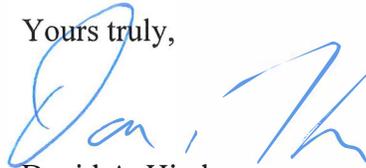
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

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 Illinois Central Railroad Company's Response to Amtrak's On-Time Performance Evidence and Request to Hold Proceeding in Abeyance.

Yours truly,



David A. Hirsh

Counsel for Illinois Central Railroad Company

Enclosure

cc: Kevin M. Sheys, Esquire
William H. Herrmann, Esquire
Christine E. Lanzon, Esquire
Justin J. Marks, Esquire

**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**

**RESPONSE TO AMTRAK’S ON-TIME PERFORMANCE EVIDENCE
AND REQUEST TO HOLD PROCEEDING IN ABEYANCE**

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 Illinois Central Railroad Company

October 25, 2016

**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**

**RESPONSE TO AMTRAK’S ON-TIME PERFORMANCE EVIDENCE
AND REQUEST TO HOLD PROCEEDING IN ABEYANCE**

Pursuant to the Board’s September 14, 2016, order, Canadian National Railway Company’s U.S. rail operating subsidiary Illinois Central Railroad Company (“CN”), the host for the Illini/Saluki service that is the sole subject of the National Railroad Passenger Corporation’s (“Amtrak”) amended complaint, hereby responds to Amtrak’s filing on October 17, 2016 (“Amtrak’s OTP Filing”). CN respectfully requests that the Board return this proceeding to abeyance, pending the decision of the U.S. Court of Appeals for the Eighth Circuit in *Union Pacific Railroad v. STB*, No. 16-3307 (8th Cir. filed Aug. 5, 2016) (“*UP v. STB*”), in which the validity of the “on-time performance” (“OTP”) trigger for this proceeding is at issue.

Response to Amtrak’s Filing

The data provided by Amtrak in Exhibit A to Amtrak’s OTP Filing appear consistent with data from Amtrak’s ARROW database that Amtrak has shared with CN over time. However, CN does not currently have sufficient information to verify whether the data in the ARROW database are themselves accurate. If and when the Board proceeds with factual investigation in this proceeding, the basis for, and accuracy of, Amtrak’s OTP data should be among the many issues to be investigated. *See* 49 U.S.C. § 24308(f)(1) (“As part of its

investigation, the Board has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays.”).

Amtrak premises the triggering of an investigation under 49 U.S.C. § 24308(f) on the Board’s new regulations at 49 C.F.R. Part 1040. *See On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Docket No. EP 726 (STB served July 28, 2016) (“OTP Rule”). As the Board is aware, CN and others have challenged those regulations as unlawful. *See Canadian Nat’l Ry. v. STB*, No. 16-1282 (D.C. Cir. petition for review filed Aug. 10, 2016) and other petitions for review consolidated with *UP v. STB*. Accordingly, CN maintains that there is no lawful basis for this investigation.

Request to Hold Proceeding in Abeyance

Section 24308(f)(1) provides that if there is a valid trigger, “upon the filing of a complaint by Amtrak,” the Board “shall initiate . . . an investigation.” But the statute does not tell the Board how to manage that proceeding, once initiated. The Board therefore retains its well-established broad inherent authority to manage its own proceedings. *See, e.g., Denver Term. R.R.—Adverse Discontinuance—In Denver, CO*, Docket No. AB-446 (Sub-No. 2), slip op. at 4 (STB served Jan. 9, 1997) (“this agency has the discretion to manage its docket, as long as, in so doing, we do not unreasonably burden or prejudice any party”); *Intramodal Rail Competition*, 1 I.C.C.2d 822, 829 (1985) (“We have the discretion to control the course of our proceedings.”) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 523-25 (1978)). In particular, “the Board has broad discretion to determine whether to hold a proceeding in abeyance, and its decision ‘to do so in any particular situation is highly dependent on the facts and circumstances of the case.’” *Petition of Nat’l R.R. Passenger Corp. for Relief pursuant to 49 U.S.C. § 24905*, Docket No. FD 36048, slip op. at 3 (STB served Oct. 3,

2016) (“*Amtrak v. MBTA*”) (quoting *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, Docket No. NOR 42125 *et al.*, slip op. at 4 (STB served Nov. 29, 2012)). Indeed, the Board has exercised that discretion and held this proceeding in abeyance on multiple occasions for multiple reasons, with and without Amtrak’s consent.

The Board commonly holds proceedings in abeyance when failing to do so could result in substantial wasted effort in light of other legal developments.¹ As exemplified by the Board’s order in the *Amtrak v. MBTA* case earlier this month, holding proceedings in abeyance is particularly appropriate when they may be rendered a nullity (or otherwise significantly affected) by a ruling in a pending court case. *See Amtrak v. MBTA*, slip op. at 2 (holding the proceeding in abeyance “because the Board’s and parties’ resources would be wasted if § 24905 were found to be unconstitutional [in a pending district court case, since] § 24905 provides the Board’s only authority to make an award in this proceeding”).²

The Board should follow these precedents here and place this proceeding into abeyance pending the Eighth Circuit’s decision. If the Eighth Circuit upholds the legal challenges raised

¹ *See, e.g., AEP Tex. N. Co. v. STB*, 609 F.3d 432, 437 (D.C. Cir. 2010) (noting that Board held proceeding in abeyance “while it resolved the industry-wide rulemaking”); *Major Issues in Rail Rate Cases*, Docket No. EP 657 (Sub No. 1), slip op. at 2 (STB served Feb. 27, 2006) (“Because several of these issues have been raised or are implicated in the rail rate cases pending before us, we are holding [two proceedings] in abeyance while we examine these important issues.”).

² *See also Ariz. Elec. Power Coop. v. BNSF Ry.*, Docket No. NOR 42113, slip op. at 1 (STB served Apr. 23, 2009) (“This decision orders a portion of [the petitioner’s] rate reasonableness complaint to be held in abeyance pending a determination by the U.S. District Court for the District of Arizona whether, and to what extent, a rail transportation contract exists . . .”); *Ocean Logistics Mgmt., Inc.—Petition for Declaratory Order—Certain Rates & Practices of NPR, Inc.*, Docket No. WCC-102, slip op. at 1 (STB served Apr. 9, 1999) (noting that “the Board held the processing of the proceeding in abeyance pending the District Court’s disposition of the related action”); *PSI Energy, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42034, slip op. at 1, 3 (STB served Sept. 11, 1998) (holding Board proceeding in abeyance “pending resolution of a court action” where the “resources of the Board and the carriers would be wasted if we were to proceed with a complaint and . . . the court were later to uphold the carriers’ [argument].”).

by CN, the Association of American Railroads, and the other Class I railroads to the Board's OTP Rule, that Rule will be null and void, and the statutory trigger required for proceeding under 49 U.S.C. § 24308(f) will be absent. If that occurs, as recently observed by Commissioner Begeman, the only effect of proceeding with an investigation in the interim would be "wasting the resources of Amtrak, CN, and the Board." *See Nat'l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry.*, Docket No. NOR 42134, at 3 (STB served Oct. 21, 2016) (Comm'r Begeman, dissenting).

The risk that proceeding without abeyance will waste resources is serious. Without rearguing CN's view that the Board lacked authority to issue its OTP Rule, it is undeniable that the legal challenges to the OTP Rule raised by CN and others are substantial. CN respectfully refers the Board to petitioners' joint opening brief in the Eighth Circuit, which argues, among other things, that because Congress expressly assigned the task of defining OTP to different entities, it cannot be taken to have impliedly authorized the Board to perform that same function, and the constitutional defect in Congress's chosen assignment does not justify reading into the statute an assignment to the Board that Congress never made.

Moreover, the waste involved if the Board does proceed and the Eighth Circuit's decision later determines that the proceeding is a nullity would be considerable, for "Amtrak, CN, and the Board." As reflected by the Board's withdrawn proposed statement of policy and the many comments filed in EP 728, the Board and the parties will inevitably confront a host of novel and difficult legal and evidentiary questions if the Board proceeds with this as the first investigation under Section 213. And, as reflected by Amtrak's OTP Filing, which encompasses approximately 4,000 train trips and approximately 40,000 station stops over 33 months, the

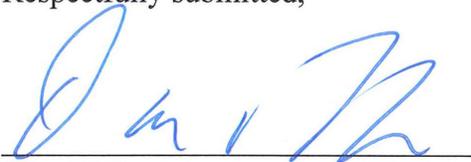
process of fact development will likely be arduous.³ In short, the litigation as to which effort may be wasted is bound to be highly “resource intensive,” OTP Rule at 7.

On the other hand, little, if anything, will be lost if the proceeding is held in abeyance pending the Eighth Circuit’s decision. Briefing before the Eighth Circuit is due to be completed in under two months, on December 20, so the period of abeyance should not be unduly long and would not unreasonably burden or prejudice any party.

CONCLUSION

CN respectfully maintains its position that the Board lacks authority for this proceeding. Since the Eighth Circuit may well agree when it rules on the pending petitions for judicial review, the prudent course of action, consistent with the Board’s practice of managing its docket in cases involving the potential for a nullity, including the recent decision in *Amtrak v. MBTA*, is for the Board to place this proceeding in abeyance pending the Eighth Circuit’s decision.

Respectfully submitted,



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

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

Counsel for Illinois Central Railroad Company

October 25, 2015

³ The Board could not have known on September 14, 2016, when it decided to remove this proceeding from abeyance that Amtrak would seek to expand it to encompass 11 quarters.

CERTIFICATE OF SERVICE

I certify that I have this 25th day of October, 2016, caused true copies of the foregoing Response to Amtrak's On-Time Performance Evidence and Request to Hold Proceeding in Abeyance to be served upon the following parties by email.

Kevin M. Sheys
ksheys@nossaman.com
Justin J. Marks
jmarks@nossaman.com
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006

William H. Herrmann
herrmaw@amtrak.com
Christine E. Lanzon
lanzonc@amtrak.com
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002



Spencer R. Leroux