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ENTERED  
Office of Proceedings  
October 25, 2016  
Part of  
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Michael K. Murphy  
Direct: +1 202.955.8238  
Fax: +1 202.530.9657  
MMurphy@gibsondunn.com

October 25, 2016

VIA ELECTRONIC 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

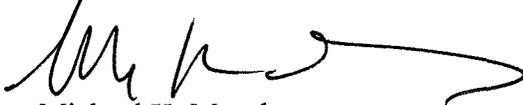
Re: In Re National Railroad Passenger Corporation's Complaint To Initiate Investigation  
Of The Performance Of The Capitol Limited

Dear Ms. Brown,

Enclosed for filing in the above-referenced docket is CSX Transportation's Request To Hold Proceeding In Abeyance And Response To Amtrak's All-Stations OTP Evidence For The Capitol Limited.

Thank you for your assistance with this matter.

Sincerely,



Michael K. Murphy

Counsel for CSX Transportation, Inc.

Enclosure

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. NOR 42141**

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**IN RE NATIONAL RAILROAD PASSENGER CORPORATION'S  
COMPLAINT TO INITIATE INVESTIGATION OF THE  
PERFORMANCE OF THE CAPITOL LIMITED**

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**CSXT'S REQUEST TO HOLD PROCEEDING IN ABEYANCE AND RESPONSE TO  
AMTRAK'S ALL-STATIONS OTP EVIDENCE FOR THE CAPITOL LIMITED**

Peter J. Shutz  
CSX TRANSPORTATION, INC.  
1331 Pennsylvania Avenue, N.W.  
Suite 560  
Washington, D.C. 20004  
Tel. (202) 783-8124  
peter\_shutz@csx.com

Paul R. Hitchcock  
Cindy Craig Johnson  
Sean M. Craig  
CSX TRANSPORTATION, INC.  
500 Water Street, J150  
Jacksonville, FL 32202-4423  
Tel. (904) 359-1192  
paul\_hitchcock@csx.com

Thomas H. Dupree, Jr.  
Michael K. Murphy  
David Fotouhi  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Tel. (202) 955-8500  
tdupree@gibsondunn.com

Charles D. Nottingham  
CHARLES D. NOTTINGHAM PLLC  
1701 Pennsylvania Avenue, N.W.  
Suite 300  
Washington, D.C. 20006  
Tel. (202) 215-5456  
chip@chipnottingham.com

*Counsel for CSX Transportation, Inc.*

Dated: October 25, 2016

CSX Transportation, Inc. respectfully requests that the Board hold this proceeding in abeyance pending resolution of the judicial challenge to the All-Stations On-Time Performance (“OTP”) rule. Abeyance is particularly appropriate given Amtrak’s decision to significantly expand the scope of its complaint and the Board’s acknowledgement that Section 213 investigations are likely to be resource intensive; and all the more so in light of the Board’s agreement that Amtrak’s current public schedules are not designed for a metric focusing on intermediate stations.

### **BACKGROUND**

On April 29, 2016, the D.C. Circuit ruled (for the second time) that PRIIA Section 207 is unconstitutional. *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 821 F.3d 19, 39 (D.C. Cir. 2016). As the Board recognized in its Section 213 rulemaking, as a result “the FRA and Amtrak metrics are currently invalid.” *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, No. EP 726, at 3 (STB served July 28, 2016) (“OTP Rule”). The Board, however, took the position that “the invalidation of Section 207 of PRIIA leaves a gap that the Board has the delegated authority to fill.” *Id.* at 5. Accordingly, on July 28, 2016, it issued its *own* definition of On-Time Performance for the purpose of triggering investigations under Section 213. *See generally id.* CSXT, three other railroads, and the Association of American Railroads promptly challenged the rule in court as an unconstitutional exercise of power and a violation of the Administrative Procedure Act. Those petitions were subsequently consolidated and are now pending before the United States Court of Appeals for the Eighth Circuit. *See* Decision at 2 (STB served Sept. 15, 2016) (“Procedural Decision”).

Recognizing the inefficiency of parallel proceedings, the Board ordered this matter held in abeyance at the same time it issued its notice of proposed rulemaking. *See* Decision at 2 (STB

served Dec. 28, 2015) (holding proceeding in abeyance “[i]n light of the rulemaking and its relevance to the issues raised by the parties”).

But after issuing the OTP Rule, and after the court challenges were filed, the Board reopened this proceeding on September 14, 2016. Procedural Decision at 3. The Board ordered Amtrak to indicate “which two (or more) consecutive calendar quarters now serve as the basis for the complaint” and to “provide, and explain its calculation of, the denominator, the numerator, and the resulting OTP percentage, as described in” the new rule. *Id.* Amtrak submitted its evidence, requesting investigation of the Capitol Limited’s performance over the past eleven quarters, from the first quarter of 2014 through the third quarter of 2016. *See* Amtrak’s OTP Evidence (filed Oct. 17, 2016).

#### **REQUEST TO HOLD PROCEEDING IN ABEYANCE**

The Board should hold this proceeding in abeyance to avoid a waste of considerable resources by both the agency and the parties should the Eighth Circuit vacate the OTP Rule. Its decision to do precisely that in the Amtrak-MBTA matter earlier this month is instructive: In both cases, ongoing “litigation could invalidate” the underlying legal authority for the proceeding, and “[i]f that were to happen, the Board and party resources required to litigate this proceeding would be wasted.” *Petition of the Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, No. FD 36048, 2016 WL 5904759, at \*3 (STB served Oct. 3, 2016). And here, as there, “the proceeding would . . . likely involve extensive discovery by the parties (and related discovery motions filed before the Board) prior to briefing and review of a large record.” *Id.* The Board has already said as much, agreeing that a Section 213 investigation will be “resource intensive.” OTP Rule at 7. Accordingly, just as in the Amtrak-MBTA proceeding, it would “not be an efficient allocation of resources for the Board to go through the resource-

intensive exercise” of moving forward in the interim. *Petition of the Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, 2016 WL 5904759, at \*3.

Indeed, Commissioner Begeman has already recognized that abeyance would be the “best course of action” here, explaining in a parallel matter that waiting is preferable to the “risk [of] wasting the resources of Amtrak, [the railroads], and the Board by processing this case while our authority to do so is being resolved.” *See Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry. Co.*, No. NOR 42134, at 3 (STB served Oct. 21, 2016) (Begeman, dissenting).

Such an approach is also entirely consistent with precedent: The Board has routinely suspended proceedings when pending litigation had significant potential to render the case largely unnecessary, if not entirely moot.<sup>1</sup>

Nor is the wait likely to be particularly lengthy in this proceeding. The Eighth Circuit case is already well underway: the petitioners filed their joint opening brief on October 14, 2016, and the final brief is due on December 20, 2016. *See* Order, No. 16-3307 (8th Cir. Sept. 26, 2016). Moreover, the Eighth Circuit is generally among the fastest of the federal circuit

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<sup>1</sup> *See, e.g., Brookhaven Rail Terminal & Brookhaven Rail, LLC – Petition for Declaratory Order*, No. FD 35819, 2014 WL 4253048, at \*3 (STB served Aug. 28, 2014); *Consol. Rail Corp. – Abandonment Exemption – In Hudson Cty., N.J.*, No. AB 167 (Sub. 1189X), 2010 WL 1558981, at \*1 (STB served Apr. 20, 2010); *Ariz. Elec. Power Coop., Inc. v. BNSF Ry. Co.*, No. NOR 42113, 2009 WL 1101776, at \*3 (STB served Apr. 23, 2009); *Ariz. Pub. Serv. Co. & Pacificorp v. Burlington N. & Santa Fe Ry. Co.*, No. NOR 42091, 2005 WL 79208, at \*1 (STB served Jan. 14, 2005); *Green Mountain R.R. Corp. – Petition for Declaratory Order*, No. FD 34052, 2001 WL 1244023, at \*1 (STB served Oct. 18, 2001); *Psi Energy, Inc. v. CSX Transp., Inc.*, No. NOR 42034, 1998 WL 608254, at \*2 (STB served Sept. 11, 1998); *Kan. City Terminal Ry. Co. & the Atchison, Topeka & Santa Fe Ry. Co. – Contract to Operate Exemption – in Kan. City, Mo.*, No. FIN 32896, 1996 WL 668204, at \*3 (STB served Nov. 20, 1996); *W. Res., Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, No. NOR 41604, 1996 WL 288330, at \*1 (STB served May 31, 1996).

courts in resolving cases. *See generally U.S. Court of Appeals Summary – 12-Month Period Ending June 30, 2016*, at 2, <http://www.uscourts.gov/file/20174/download>.

This approach is particularly sensible in light of the growing demands on the Board’s limited resources. As the Board informed Congress earlier this year, its resources are already stretched thin, with its ability to process existing “large, complex . . . matters . . . impacted by limited staffing and resources.” STB, *Budget Request for FY2017*, at 1. At the same time, the Board is anticipating an “an increase in workload” in the new fiscal year “due to the increased responsibilities under the Reauthorization Act, including the new investigative authority and new, shortened rate case processing timelines,” and the “growing complexity of rate cases.” *Id.*

Finally, there is no appreciable harm in ordering abeyance. The proceeding could resume should the rule be upheld. To the contrary, CSXT, the other parties, and the Board would be materially harmed by being forced to expend resources on a proceeding that may prove entirely unnecessary in short order.

**AMTRAK’S EVIDENTIARY SUBMISSION  
UNDERScores THE NEED FOR AN ABEYANCE**

The nature of Amtrak’s evidentiary submission underscores the appropriateness of waiting to see whether the Eighth Circuit upholds the OTP Rule before starting an investigation.

In response to the Board’s Procedural Decision, Amtrak submitted a short table listing the purported total number of arrivals (plus origin-station departures) for Trains 29 and 30 for eleven quarters (the denominator). Each quarter’s total was divided by the number of times that the Capitol Limited arrived “on-time” (or departed the origin station “on-time”) in that quarter, as determined by Amtrak, given 15 minutes of tolerance (the numerator). Amtrak also provided a brief explanation of how it calculated All-Stations OTP. Although Amtrak’s arithmetic appears accurate, it is not possible for CSXT to respond substantively to Amtrak’s evidentiary

submission at this stage without the underlying work papers, the data showing how Amtrak rolled-up train performance into the summary chart, and the opportunity to test the accuracy of its data.

Regardless of whether the limited information submitted by Amtrak meets the initial burden of proof required by the statute and the Board's OTP Rule, it demonstrates the burden of an investigation and further supports holding the matter in abeyance.

For one, Amtrak lengthened the time period that serves as the basis of its complaint from two quarters to *eleven* quarters. Originally, Amtrak sought an investigation for the second and third quarters of 2014. The basis of its complaint is now more than five-fold longer, extending back to the first quarter of 2014 through the third quarter of 2016.<sup>2</sup> Given that “§ 24308(c) preference issues are fact-specific in nature,” the enlarged breadth of the complaint period meaningfully escalates the potential burdens on the parties during an investigation. *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 48 U.S.C. § 24308(c) and (f)*, No. EP 728, at 3 (STB served July 28, 2016) (“Policy Statement”). Even a statistical sampling of dispatching decisions over almost three years of activity—an approach Amtrak has advocated—could be a momentous undertaking for the parties and the Board. *See, e.g., Amtrak Comments at 20, Policy Statement* (filed Feb. 22, 2016).

Amtrak also acknowledged that it was forced to extrapolate arrival times for stations where its public schedules did not provide one, highlighting the Board's previous conclusion that Amtrak train schedules were constructed in a manner that makes compliance with an All-

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<sup>2</sup> CSX objects to Amtrak's inclusion of the first quarter of 2014 in its request for investigation. This quarter preceded the time period of its original complaint, and could have been included at that time. It violates fundamental tenets of fair notice and equity to allow Amtrak to expand its complaint backwards in time two years later.

Stations OTP metric difficult. *See* OTP Rule at 6 (recognizing that the All-Stations metric “could require a reevaluation and potential reallocation of recovery time across the entire route”). Thus, a retroactive application of the OTP Rule may not correctly measure a train’s actual performance.

Applying the OTP Rule to calendar quarters that predate the rule raises serious fairness concerns and runs counter to the strong presumption that “administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The language of the OTP Rule does not provide for its application retroactively, and the statutory authority relied upon by the Board to promulgate the rule contains no express authority to promulgate retroactive rules. Holding this matter in abeyance through the pendency of the legal challenge to the rule may partially ameliorate concerns over retroactivity, as it is likely that more than two calendar quarters will have passed before the eventual resolution of the legal challenge.

Finally, the brevity of the Amtrak evidentiary submission masks the multitude of complex and time-intensive disputes that will be raised during the investigation. The Board deferred addressing the parties’ schedule disputes, finding that they “may enter into the investigation stage of the two-stage process contemplated in the statute.” OTP Rule at 6. The precedence of the host railroads’ operating agreements and the trains’ contract performance are also relevant during an investigation. *See id.* at 7 (finding that “contracts could be relevant in the investigation stage”). The Board must also develop its own approach to and definition of “preference” in the context of an investigation. Policy Statement at 3 (“[H]ost carrier and passenger rail parties hold very different views on fundamental issues concerning the relevant statute, including the interpretation of ‘preference.’”).

\* \* \*

To put it simply, the proposed investigation should not be initiated lightly. Amtrak's complaint now covers multiple years, and involves several complex factual and legal issues. It therefore makes no sense to force the host railroads, Amtrak, and the Board to expend significant resources in an investigation authorized by a rule that very well may be invalidated within the year. Doing so is out of step with prior practice and common sense. The fair and equitable approach would be to wait for the outcome of the rule challenge before deciding to proceed.

### CONCLUSION

The Board should hold the proceeding in abeyance pending the outcome of the judicial review of the OTP Rule.

Respectfully submitted,

Peter J. Shudtz  
CSX TRANSPORTATION, INC.  
1331 Pennsylvania Avenue, N.W.  
Suite 560  
Washington, D.C. 20004  
Tel. (202) 783-8124  
peter\_shudtz@csx.com

Paul R. Hitchcock  
Cindy Craig Johnson  
Sean M. Craig  
CSX TRANSPORTATION, INC.  
500 Water Street, J150  
Jacksonville, FL 32202-4423  
Tel. (904) 359-1192  
paul\_hitchcock@csx.com

/s/ Michael K. Murphy \_\_\_\_\_  
Thomas H. Dupree, Jr.  
Michael K. Murphy  
David Fotouhi  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Tel. (202) 955-8500  
tdupree@gibsondunn.com

Charles D. Nottingham  
CHARLES D. NOTTINGHAM PLLC  
1701 Pennsylvania Avenue, N.W.  
Suite 300  
Washington, D.C. 20006  
Tel. (202) 215-5456  
chip@chipnottingham.com

*Counsel for CSX Transportation, Inc.*

Dated: October 25, 2016

**CERTIFICATE OF SERVICE**

I certify that, on this 25th day of October, 2016, I have caused a true and correct copy of the foregoing to be served upon the parties listed below by electronic mail.

William H. Herrmann  
Christine E. Lanzon  
Managing Deputy General Counsel  
National Railroad Passenger Corporation  
60 Massachusetts Avenue, N.E.  
Washington, D.C. 20002

Kevin M. Sheys  
Justin J. Marks  
Nossaman LLP  
1666 K Street N.W., Suite 500  
Washington, D.C. 20006

*Counsel for National Railroad Passenger Corporation*

James A. Hixon  
John M. Scheib  
Greg E. Summy  
Garrett D. Urban  
Norfolk Southern Railway Company  
Three Commercial Place  
Norfolk, VA 23510

David L. Meyer  
Morrison & Foerster LLP  
2000 Pennsylvania Avenue, N.W., Suite 6000  
Washington, D.C. 20006

*Counsel for Norfolk Southern Railway Company*

/s/ Michael K. Murphy  
Michael K. Murphy