



VIA E-FILING

November 10, 2016

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

Re: STB Docket NOR No. 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 Amtrak's reply to the request by the Canadian National Railway Company to place this proceeding in abeyance.

If you have any questions, please let me know.

Respectfully Submitted,

A handwritten signature in black ink that reads 'Justin J. Marks'.

Justin J. Marks
Attorney for National Railroad Passenger
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Enclosures

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**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

**REPLY TO THE REQUEST OF THE ILLINOIS CENTRAL RAILROAD
COMPANY TO HOLD PROCEEDING IN ABEYANCE**

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**NATIONAL RAILROAD PASSENGER CORPORATION--SECTION 213
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**REPLY TO THE REQUEST OF THE ILLINOIS CENTRAL RAILROAD
COMPANY TO HOLD PROCEEDING IN ABEYANCE**

On September 15, 2016, the Board issued a decision removing the above-captioned proceeding from abeyance and directing the National Railroad Passenger Corporation (“Amtrak”) to provide evidence showing “that the OTP of its Illini/Saluki service has averaged less than 80% for any two consecutive calendar quarters as calculated under the OTP Final Rule adopted by the Board in Docket No. EP 726.” (“Final Rule”).¹ The September 15 Decision provided that any Canadian National Railway Company (“CN”) reply “to Amtrak’s evidence” was due by October 25, 2016. *Id.*

On October 17, 2016 Amtrak submitted OTP evidence in compliance with the Board’s September 15 Decision. On October 25, 2016, CN’s rail operating subsidiary Illinois Central Railroad Company (the host for the subject Illini/Saluki service) submitted a Response to Amtrak’s On-Time Performance Evidence and Request to Hold Proceeding in Abeyance. Amtrak hereby replies to the CN request to hold this proceeding in abeyance.

¹ *National Railroad Passenger Corp., - Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Co.*, STB Docket NOR 42134 (STB served Sept. 15, 2016)(“September 15 Decision).

The request to hold this case in abeyance is a late-filed and deficient petition for reconsideration of the September 15 Decision and should be denied. CN overstates the extent of the burden of a Board 213 investigation, understates the delay that would result if the Board puts the case back in abeyance pending final resolution of the Eighth Circuit appeal and ignores the public harm of further delay in the investigation required by Section 213 of the causes of undeniably poor on-time performance of the Illini/Saluki Amtrak service.

BACKGROUND

By petition filed on January 19, 2012, Amtrak requested that the Board initiate an investigation pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), 49 U.S.C. § 24308(f) regarding the performance of Amtrak passenger trains on rail lines owned by CN and its subsidiaries, Grand Trunk Western Railway Company and Illinois Central Railroad Company. On April 4, 2012, the Board issued a decision granting the joint request to place the proceeding in abeyance so that the parties could pursue mediation. The Board granted the joint request and subsequent extensions until November 5, 2012 when the Board issued a decision reactivating the proceeding. On February 8, 2013 the Board issued a decision granting the parties a joint request to place the proceeding into abeyance while the parties tried to reach a settlement.

On December 19, 2014, the Board issued a decision concluding that the “plain language” of PRIIA Section 213 allows Amtrak to bring a complaint when the on-time performance of any intercity passenger train averages less than 80 percent for any two consecutive calendar quarters.² The Board denied CN’s motion to dismiss the proceeding and CN’s alternative request to hold that Section 213 proceeding in abeyance pending the outcome of the Supreme

² *National Railroad Passenger Corp. – Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, slip op. at 6-7 (STB served Dec. 19, 2014).

Court’s decision regarding the validity of PRIIA Section 207, because “abeyance of [the Illini/Saluki] proceeding would unnecessarily delay a potential Board investigation of on-time performance issues, which runs directly contrary to Congressional intent.”³

On May 15, 2015, in response to a petition filed by the Association of American Railroads (which Amtrak opposed), the Board instituted a rulemaking proceeding in Docket No. EP 726 to define “on time” and specify the formula for calculating “on-time performance” for purposes of determining whether the “less than 80 percent” threshold that Congress set for bringing an on-time performance complaint has been met under Section 213 of PRIIA.⁴

Over seven months later, on December 28, 2015, the Board issued a Notice of Proposed Rulemaking and solicited comments with respect to its proposed on-time performance rule in Section 213 investigations. On the same date, the Board placed this proceeding into abeyance in light of the pending rulemaking. On July 28, 2016, the Board issued a Final Rule in Docket No. EP 726, which took effect on August 27, 2016 and which defined on-time performance (“OTP”) for purposes of this proceeding. Petitions for judicial review of the Final Rule, including a petition filed by CN, have been consolidated in the U.S. Court of Appeals for the Eighth Circuit.

On October 17th, Amtrak filed the OTP evidence required by the Board in the September 15th Decision. On October 25, 2016, CN submitted a request to “return this proceeding to abeyance, pending the decision” of the Eighth Circuit. Illinois Central Railroad Company Response to Amtrak’s On-Time Performance Evidence and Request to Hold Proceeding In Abeyance (“CN Reply”) at 1.

³ *Id.* at 10-11.

⁴ See *On-Time Performance Under Section 213 of the Passenger Rail Inv. & Improvement Act of 2008*, STB Docket EP 726 (STB served May 15, 2015).

ARGUMENT

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.’” *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125 et al., slip op. at 4 (STB served Nov. 29, 2012). The Board should not do so in this case, because the public harm of further delay in the investigation of the causes of the poor on-time performance of the Illini/Saluki Amtrak service outweighs the burdens of a 213 investigation. Moreover, the Board is in a position to minimize the burdens of an investigation.

1. The Board Should Deny The Requests For Abeyance

a. CN’s Abeyance Request Is Late And Deficient.

The Board’s September 15 Decision took this proceeding out of abeyance. The deadline for reconsideration of that decision was October 5, 2016, so the CN request to hold the case in abeyance is late.⁵ CN has not shown that the Board’s decision to remove the case from abeyance was based on material error or should be changed because of new evidence or changed circumstances, so the request for abeyance is deficient as well. 49 C.F.R. §§ 1115.3(b), (e).

b. Abeyance Is Not Justified Because The Board Can Take Steps To Ensure That The Investigation Does Not Cause Unreasonable Burdens And The Public Interest In Determining The Cause Of Poor Illini/Saluki OTP Overrides Any Burden Issues.

CN overstates the extent of the burden of a Board 213 investigation on the Board and the parties, understates the delay that would result if the Board puts the case back in abeyance pending final resolution of the Eighth Circuit appeal and ignores the public harm of further delay in the investigation of the causes of the undeniably poor on-time performance of the Illini/Saluki Amtrak service. For these reasons, the Board should deny the request for abeyance.

⁵ The Board gave CN until October 25, 2016 to reply to Amtrak’s evidence, but it did not extend the deadline for Petitions for Reconsideration of the September 15 Decision.

Agency/Party Burden. CN argues that the case should be returned to abeyance because the Board's and the parties' resources would be wasted if the Eighth Circuit were to invalidate the Final Rule. CN Reply at 3-4. CN also asserts that the "process of fact development will likely be arduous." CN Reply at 5. And CN states, "[t]he 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." CN Reply at 5 n. 3.

The purpose of a 213 investigation is for the Board to "determine whether and to what extent [Amtrak] delays ... are due to causes that could reasonably be addressed" by host rail carriers or Amtrak and then to "identify reasonable measures and make recommendations" to improve OTP. 49 U.S.C. § 24308(f). In carrying out its investigation, "the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the ... on-time performance of the train." *Id.* "Congress ... expected the Board to 'consider [such] disputes in an efficient and evenhanded manner.'"⁶ Thus, the Board has the authority to determine the scope of the investigation and conduct the investigation efficiently and evenhandedly. It can decide what information it needs to determine whether Amtrak delays can be addressed by the host railroads or Amtrak and to identify reasonable measures and make recommendations to improve Amtrak on-time performance. Since the Board controls the scope of the investigation, it can take steps to ensure that the investigation does not burden the Board or unreasonably burden the parties.

CN acknowledges none of these Board powers and chooses instead to characterize a 213 investigation as if it necessarily involves the level of burden of more typical discovery-centric, model-driven Board litigation. A 213 investigation need not be like a coal rate case or a merger

⁶ *National Railroad Passenger Corp. – Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, (STB served Dec. 19, 2014), slip op. at 8 (internal citations omitted).

of two Class I railroads. The Board has indicated that 213 investigations will be “resource intensive” and expressed an intention to have the parties develop evidence in 213 investigations through discovery.⁷ However, the extent of the Board’s reliance on evidence developed through discovery remains subject to Board discretion. Reliance to some extent on discovery does not preclude the Board from using other means, including technical conferences on key issues related to Amtrak delays to narrow the focus of the investigation; directing parties to provide answers to specific questions; directing parties to provide information on specific points; or holding public hearings and calling witnesses from Amtrak and CN or other stakeholders to testify. CN overstates the extent of the burden of a Board 213 investigation on the Board and the parties. The Board can ensure that the investigation is conducted efficiently and without a burden on the Board or an undue burden on the parties.⁸

Likely Time For Appeal Disposition. CN states “[b]riefing before the Eighth Circuit is due to be completed in under two months...so the period of abeyance should not be unduly long and would not unreasonably burden or prejudice any party.” CN Reply at 5.

The Eighth Circuit has not scheduled oral argument in the appeal and no one knows how long thereafter it will be before a substantive decision will be issued. Moreover, if the Eighth Circuit dismisses the appeal, the appellants (or any one of them) could seek *en banc* review and/or petition for writ of certiorari to the Supreme Court. CN’s forecast for the timing of the

⁷ *On-Time Performance Under Section 213 of the Passenger Rail Inv. & Improvement Act of 2008*, STB Docket EP 726, slip op. at 7 (STB served May 15, 2015). *National Railroad Passenger Corp. – Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, slip op. at 3 (STB served Jan. 2, 2013).

⁸ CN relies on *Petition of the National Railroad Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, STB Finance Docket 36048 (STB served Oct. 3, 2016)(“*Amtrak – MBTA*”), but the case is distinguishable. In *Amtrak – MBTA*, the Board concluded “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.” *Amtrak – MBTA*, slip op. at 3. Here, even though the Board has indicated that 213 investigations will be “resource intensive,” it has the authority to ensure that the investigation is conducted efficiently and without a burden on the Board or an undue burden on the parties.

ultimate disposition of the appeal is incomplete and speculative. If the Board puts this case back into abeyance, there is a distinct possibility it will be an additional year or more before the appeal is fully exhausted and resolved.

Public Interest Considerations. In any case, the agency/party burdens associated with commencing the investigation required by Section 213 must be weighed against the harms of putting the case in abeyance yet again and waiting an additional, indefinite amount of time until the challenge by the freight railroad industry to the Final Rule has run its course. Although the *reasons* are a matter of differing opinion, it is *undeniable* that the on-time performance of the Illini/Saluki Amtrak service is poor.

Congress enacted PRIIA Section 213 so that the Board could “resolve on-time performance disputes between Amtrak and host carriers because of ‘increasing frustration’ under the prior dispute resolution process....Congress made it a priority to facilitate ... the investigation of on-time performance problems.”⁹ Determining the cause of the poor Amtrak on-time performance and Board recommendations to improve it are in the public interest and any further delay in commencing the investigation would harm the public.

In a decision issued December 19, 2014, the Board denied CN’s request to hold the case in abeyance pending the outcome of the Supreme Court’s decision regarding the validity of PRIIA Section 207, because “abeyance of [the] proceeding would unnecessarily delay a potential Board investigation of on-time performance issues, which runs directly contrary to Congressional intent.”¹⁰ CN ignores the public harm of further delay in the investigation of the

⁹ *National Railroad Passenger Corp. – Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, slip op. at 8 (STB served Dec. 19, 2014)(internal citations omitted).

¹⁰ *Id.* at 10-11. Over a year later, the Board put the case in abeyance pending the rulemaking, but that rulemaking obviously has now been completed. *National Railroad Passenger Corp. – Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, slip op. at 10-11 (STB served Dec. 28, 2015).

causes of the poor on-time performance of the Illini/Saluki Amtrak service.¹¹ To hold this case in abeyance pending the outcome of the Eight Circuit appeal would unnecessarily delay the Board investigation of the undeniably poor on-time performance of the Illini/Saluki Amtrak service and would be contrary to Congressional intent.

CONCLUSION

For the foregoing reasons, Amtrak respectfully asks that the Board deny the CN request to place this proceeding in abeyance. An abeyance would only cause further delay in commencement of this much-needed investigation.

¹¹ Again, *Amtrak – MBTA* is distinguishable. There, the Board concluded that Amtrak did not demonstrate that abeyance would cause material harm. *Amtrak – MBTA*, slip op. at 3-4. (“Although Amtrak claims that MBTA’s share of [operating and maintenance] costs would be passed on to Amtrak ... MBTA explains that [the relevant] agreement terminates in February 2017, [and thereafter] those costs would not be passed on to Amtrak ... Amtrak has also not identified or explained how other entities could be required to pay for capital expenditures on the Attleboro Line, or even that capital needs on that Line exist at this time.”) Here, the evidence Amtrak submitted on October 17 demonstrates that the public suffers delay and poor on-time performance on the Illini/Saluki service and until the Board commences the investigation and begins to “identify reasonable measures and make recommendations” to improve on-time performance, the public will continue to suffer delays and poor service.

Respectfully submitted,



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Dated: November 10, 2016

CERTIFICATE OF SERVICE

I certify that on November 10, 2016, a true copy of the foregoing National Railroad Passenger Corporation's Reply to the CN request to place this proceeding in abeyance, was served via email and first class mail upon the following counsel of record:

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