

SERVICE DATE – DECEMBER 19, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42134

NATIONAL RAILROAD PASSENGER CORPORATION–SECTION 213 INVESTIGATION
OF SUBSTANDARD PERFORMANCE ON RAIL LINES OF CANADIAN NATIONAL
RAILWAY COMPANY

Digest:¹ The Board grants the motion of the National Railroad Passenger Corporation (Amtrak) to limit its complaint against Canadian National Railway Company under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) to on-time performance issues with respect to a single route between Chicago and Carbondale, Illinois. Further, the Board concludes that pending court litigation involving the constitutionality of metrics and standards developed under PRIIA Section 207 does not preclude this case from moving forward. In addition, the Board seeks the parties' views regarding the term "on-time performance" under Section 213 in this case.

Decided: December 18, 2014

The National Railroad Passenger Corporation (Amtrak) seeks to amend its complaint, which was brought pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24308(f)(1), to initiate an investigation by the Board into service issues (including on-time performance issues) affecting Amtrak trains on rail lines owned by Canadian National Railway Company and its subsidiaries, Grand Trunk Western Railway Company and Illinois Central Railroad Company (collectively, CN). Originally, the complaint addressed service issues on eight lines, but the amended complaint would reduce the scope to a single route, the "Illini/Saluki service" between Chicago and Carbondale, Ill. Furthermore, Amtrak seeks to establish an independent basis to determine on-time performance under Section 213 of PRIIA, in light of the decision by the U.S. Court of Appeals for the District of Columbia Circuit, presently under review by the Supreme Court, holding Section 207 of PRIIA unconstitutional.² Unless the Supreme Court reverses the D.C. Circuit's decision, Amtrak cannot

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Ass'n of Am. R.Rs. v. DOT (AAR v. DOT), 721 F.3d 666 (D.C. Cir. 2013), rev'g 865 F. Supp. 2d 22 (D.D.C. 2012), cert. granted 134 S. Ct. 2865 (June 23, 2014) (No. 13-1080). In that case, the D.C. Circuit determined that Section 207 is an impermissible delegation of legislative power to Amtrak because it provides that Amtrak shall participate, along with the

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rely on the on-time performance metrics and standards promulgated under Section 207. Consequently, in its amended complaint, Amtrak relies solely on the portion of PRIIA Section 213 which mandates that the Board initiate an investigation where “the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters.” 49 U.S.C. § 24308(f)(1).

The critical question presented by Amtrak’s motion is whether the Board may investigate the Illini/Saluki service’s potential failure to achieve 80-percent “on-time performance” under Section 213 of PRIIA in the absence of an operative definition of “on-time performance” under Section 207 of PRIIA (due to the D.C. Circuit’s decision). Amtrak asserts that Section 213’s 80-percent on-time performance level is unaffected by the D.C. Circuit’s decision. CN disagrees and has moved to dismiss this proceeding on the ground that the D.C. Circuit’s decision entirely forecloses Amtrak’s ability to bring a complaint. In the alternative, CN has asked the Board to hold the proceeding in abeyance until the Supreme Court has completed its review of the D.C. Circuit’s decision.

The Board will grant Amtrak’s motion to amend its complaint and deny CN’s motion to dismiss the proceeding. As discussed below, even if the definition of “on-time performance” under Section 207 of PRIIA is inoperative due to the unconstitutionality of that section, we conclude that the Board nonetheless may initiate investigations of on-time performance problems under Section 213 of PRIIA because the less-than-80-percent on-time performance trigger in Section 213 is severable from the mechanism for promulgating standards of “on-time performance” under Section 207. Furthermore, we reject CN’s request to hold the proceeding in abeyance until the Supreme Court decides whether Section 207 is an unconstitutional delegation of legislative power. Even a Supreme Court decision upholding the constitutionality of Section 207 of PRIIA may not end the pending lawsuit, as the Court could remand the case to the D.C. Circuit for further proceedings on other unresolved challenges to the constitutionality of Section 207. Moreover, the Board believes that any further delay of the present proceeding would thwart Congress’s clear intent that the Board resolve disputes over Amtrak delays in an efficient manner.

BACKGROUND

On January 19, 2012, Amtrak filed a petition requesting that the Board initiate an investigation pursuant to Section 213 of PRIIA, 49 U.S.C. § 24308(f), regarding the alleged “substandard performance of Amtrak passenger trains” on rail lines owned by CN.³ Five months earlier, the Association of American Railroads (AAR) had filed a lawsuit in the United States

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Federal Railroad Administration (FRA), in “jointly” developing or improving metrics and standards for measuring passenger rail performance (including “on-time performance”).

³ Amtrak Complaint 2 (Jan. 19, 2012).

District Court for the District of Columbia challenging the constitutionality of Section 207 of PRIIA, which provides that Amtrak and the FRA shall “jointly” develop or improve metrics and standards for measuring the performance of passenger rail operations. AAR v. DOT, 865 F. Supp. 2d at 24-27. Therefore, when CN filed its answer to Amtrak’s petition on March 9, 2012, it also filed a motion to hold the proceeding in abeyance until after the District Court ruled on AAR’s constitutional challenge to Section 207.

On March 27, 2012, Amtrak and CN filed a joint motion requesting Board-supervised mediation regarding the issues raised in Amtrak’s complaint. On April 4, 2012, the Board granted that request and held the proceeding in abeyance until July 3, 2012. At the parties’ request, the Board extended the abeyance period three times to allow mediation to continue. The last of these extensions ended on October 4, 2012.

While Amtrak’s complaint before the Board was in abeyance, the District Court, on May 31, 2012, upheld the constitutionality of Section 207.⁴ After mediation failed, the Board, on November 5, 2012, issued a notice that agency proceedings had been reactivated. On January 3, 2013, the Board served a decision (January 2013 Decision) dismissing as moot CN’s motion to hold the proceeding in abeyance and setting a procedural schedule. The Board also directed the parties to develop a sampling method to provide a representative subset of evidence regarding all movements subject to the petition.

On January 23, 2013, CN filed a petition to reconsider, seeking clarity with respect to (or modification of) the Board’s January 2013 Decision.⁵ On February 6, 2013, the parties filed a joint motion to stay the proceeding and hold it in abeyance because the parties were in productive discussions towards addressing the issues raised in the complaint. The Board granted the request for abeyance, as well as later joint requests to extend the abeyance. The last of these extensions ended on July 31, 2014. On July 21, 2014, Amtrak filed notice with the Board that it intended to amend its complaint.

Meanwhile, on February 19, 2013, the D.C. Circuit reversed the District Court’s ruling, holding that Section 207 of PRIIA impermissibly delegated regulatory authority to a “private entity” (Amtrak) and therefore was an unconstitutional delegation of legislative power.⁶ The U.S. Department of Transportation petitioned the United States Supreme Court for a writ of

⁴ AAR v. DOT, 865 F. Supp. 2d 22. Shortly thereafter, AAR filed an appeal in the D.C. Circuit.

⁵ Because the Board is now granting Amtrak’s motion to amend its complaint, the procedural schedule established in the January 2013 Decision is moot. To the extent that CN’s January 23, 2013 petition to reconsider concerns that obsolete procedural schedule, it will be denied as moot.

⁶ AAR v. DOT, 721 F.3d 666.

certiorari, which the Court granted on June 3, 2014.⁷ Briefing before the Supreme Court is complete, and oral argument was held on December 8, 2014.

PARTIES' POSITIONS AND ARGUMENTS

On August 29, 2014, Amtrak filed a motion to amend the complaint and an amended complaint under Section 213 of PRIIA, 49 U.S.C. § 24308(f). Amtrak states that it has narrowed the focus of the complaint to the performance of Amtrak's Illini/Saluki service, rather than all of the Amtrak services addressed in the original complaint. On September 19, 2014, CN filed a motion to dismiss or, in the alternative, to stay the proceeding. Amtrak filed a reply to CN's motion on October 7, 2014.⁸ CN filed a response to Amtrak's reply on October 14, 2014.⁹

The relevant portion of Section 207 of PRIIA states:

Within 180 days after the date of enactment of this Act, the Federal Railroad Administration 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 cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.¹⁰

The relevant portion of Section 213 of PRIIA, 49 U.S.C. § 24308(f), states:

If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards for 2 consecutive quarters, the Surface Transportation Board . . . may initiate an investigation, or upon the filing of a complaint by Amtrak . . . , the Board shall initiate such an investigation. . . .¹¹

⁷ See 134 S. Ct. 2865.

⁸ In addition to the parties' pleadings, the Board has received letters and support statements from U.S. Senator Richard J. Durbin, Governor Pat Quinn of Illinois, multiple cities, and a university.

⁹ Replies to replies, such as CN's October 14, 2014 pleading, are not permitted under 49 C.F.R. § 1104.13(c). However, in the interest of developing a full record, and because Amtrak has not objected to its filing, we will accept CN's response to Amtrak's reply.

¹⁰ Passenger Rail Investment & Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4916 (codified at 49 U.S.C. § 24101 note) (emphases added).

¹¹ 49 U.S.C. § 24308(f)(1) (emphases added).

Section 213 gives Amtrak a forum to enforce its access rights on the lines of rail carriers that host Amtrak service. Under 49 U.S.C. § 24308(c), which was in effect long before PRIIA, Amtrak’s intercity and commuter rail operations have “preference over freight operations using a rail line” Moreover, § 24308(c) allows the Board, after providing an opportunity for a hearing, to establish the rights of Amtrak and a complaining freight carrier if the Board determines that Amtrak’s preference “materially will lessen the quality of freight transportation provided to shippers.” In Section 213 of PRIIA, Congress gave the Board authority to enforce and regulate the statutory preference of § 24308(c). In a service investigation under Section 213, 49 U.S.C. § 24308(f)(2), the Board “may award damages against a host rail carrier” and may prescribe other relief if it finds that Amtrak’s failure to achieve the 80-percent minimum level of on-time performance for a particular route is “attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required by [49 U.S.C. § 24308(c)].” However, the Board cannot conduct an investigation and give Amtrak the opportunity to enforce its preference rights unless it first finds that Amtrak’s service failed to attain Section 213’s 80-percent on-time performance threshold.

Amtrak asserts that the Board has a statutory duty to initiate an investigation under Section 213 of PRIIA because the on-time performance of its Illini/Saluki service has fallen below 80 percent for two consecutive quarters.¹² CN responds that Amtrak’s complaint cannot move forward because, following the D.C. Circuit’s decision invalidating Section 207 of PRIIA, there remains no operative definition of “on-time performance” for purposes of assessing the below-80-percent investigation threshold under Section 213.¹³ CN argues that, without the definition for on-time performance that was developed under Section 207, “there is no trigger” or basis for a Board investigation under Section 213.¹⁴ CN further contends that even if Amtrak’s amended complaint is accepted, the Board should hold the proceeding in abeyance until the Supreme Court has ruled on the constitutionality of Section 207.¹⁵

Amtrak counters that Congress intended to create two distinct triggers for a Board investigation—(1) on-time performance below 80 percent “or” (2) the failure to meet Section 207’s minimum standards—and that the Board can independently construe the meaning

¹² Amtrak Motion to Amend the Complaint 6-7.

¹³ CN Motion to Dismiss 10-12.

¹⁴ Id.

¹⁵ CN Motion to Dismiss 13-14. CN also requests that it be given 20 days to respond to Amtrak’s motion and amended complaint, if the Board denies CN’s motion to dismiss. Id. at 1 n.2. To the extent that CN has reply arguments to the motion to amend the complaint, those arguments should have been addressed in its motion to dismiss. Because the amended complaint is not accepted into the record until the Board grants Amtrak’s motion to amend, CN will be given 20 days from the service date of this decision to answer the amended complaint.

of “on-time performance” for purposes of implementing Section 213.¹⁶ CN responds that, because Congress expressly assigned to FRA and Amtrak the task of developing the metrics and standards (including “on-time performance”), Congress could not have intended to allow the Board to separately define that term.¹⁷

DISCUSSION AND CONCLUSIONS

The primary dispute between the parties is whether Section 213’s below-80-percent on-time performance trigger for Board investigations is rendered inoperative by the D.C. Circuit’s invalidation of Section 207 and the definition of on-time performance developed thereunder.¹⁸ We conclude that it is not and will deny CN’s motion to dismiss the proceeding and grant Amtrak’s motion to amend its complaint.

Section 213’s 80-percent trigger for Board investigations is not rendered inoperative by the D.C. Circuit’s decision, which held that the Section 207 metrics and standards are unconstitutional due to Amtrak’s participation in their development. Generally, courts refrain from invalidating more of a statute than is necessary on grounds of unconstitutionality by severing any problematic portions while leaving the remainder of the statute intact. Free Enter. Fund v. Pub. Accounting Oversight Bd., 561 U.S. 477, 508 (2010).¹⁹ Accordingly, when a court invalidates a portion of a statute based on unconstitutionality, it “must retain those portions of the Act that are constitutionally valid, capable of functioning independently, and consistent with Congress’ basic goals in enacting the statute.” U.S. v. Booker, 543 U.S. 220, 258-59 (2005). See also Regan v. Time, Inc., 468 U.S. 641, 652-53 (1984) (plurality opinion). Here, although “on-time performance” is listed as a metric to be improved under Section 207, Congress expressly prioritized the enforcement of Amtrak’s on-time performance by making it a separate basis, apart from “service quality,” for a Board investigation under Section 213. The plain language of Section 213 allows Amtrak to bring a complaint either when “the on-time

¹⁶ Amtrak Reply 5-9.

¹⁷ CN October 14, 2014 Reply 3-6.

¹⁸ See CN October 14, 2014 Reply.

¹⁹ See also Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328-29 (2006) (Because the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of the remaining portions, the “normal rule” is that partial, rather than facial invalidation is the “required course.”); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (“[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.”); Champlin Ref. Co. v. Corp. Comm’n of State of Okla., 286 U.S. 210, 234 (1932) (“The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”).

performance of any intercity passenger train averages less than 80 percent” “or” when “the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards” for any two consecutive calendar quarters. 49 U.S.C. § 24308(f)(1); see also id. (titled “Passenger Train Performance and Other Standards”). In addition, Congress deemed on-time performance to be so important that, as CN acknowledges,²⁰ it expressly established a statutory minimum level (80%) with respect to the on-time performance metric. 49 U.S.C. § 24308(f)(1).²¹

Section 207 also acknowledges that certain metrics and standards were already “existing” at the time of PRIIA’s passage. 49 U.S.C. § 24101 note (calling for FRA and Amtrak to “develop new or improve existing metrics and minimum standards”). Standards for on-time performance fall into this category. In the 1970s, the Board’s predecessor, the Interstate Commerce Commission (ICC), adopted rules defining end-point on-time performance. See, e.g., Adequacy of Intercity Rail Passenger Serv., 344 I.C.C. 758, 809 (1973) (prescribing, under former 49 C.F.R. § 1124.6, that “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”); Adequacy of Intercity Rail Passenger Serv., 351 I.C.C. 883, 910, 988 (1976) (same).²² Under that standard, a 15-minute arrival window would have applied for the Illini/Saluki route at issue here. Moreover, since 1981, Congress has explicitly set an all-stations on-time performance goal, which states that “Amtrak shall . . . operate Amtrak trains, to

²⁰ CN October 14, 2014 Reply 6 n.10.

²¹ As Amtrak notes, Congress also took care to separate the consequences of delays from the consequences of failure to meet other Section 207 metrics, using the phrase “delays or failure[s] to achieve minimum standards” several times in 49 U.S.C. § 24308(f). See Amtrak October 7, 2014 Reply 8-9.

²² Although these rules were repealed by the Amtrak Reorganization Act of 1979, in which Congress decided to assign to Amtrak the task of evaluating and reporting on its own performance, Amtrak continued to use the 5-minutes-per-100-miles standard long afterward, and that standard was used by the FRA and Amtrak as a basis for the Section 207 standards. See Amtrak Reorganization Act of 1979, at § 111(b), Pub. L. 96-73, 96 Stat. 537; United States Government Accountability Office, INTERCITY PASSENGER RAIL: National Policy and Strategies Needed to Maximize Public Benefits from Federal Expenditures (November 2006), at 38 n.51 (discussing Amtrak’s delay tolerances); Federal Railroad Administration, Department of Transportation, Final Metrics and Standards for Intercity Passenger Rail Service: Response to Comments and Issuance of Metrics and Standards (May 12, 2010), at 26 n.16, available at <http://www.fra.dot.gov/eLib/Details/L02875> (last visited Nov. 21, 2014) (“A train is considered ‘late’ if it arrives at its endpoint terminal more than 10 minutes after its scheduled arrival time for trips up to 250 miles; 15 minutes for trips 251-350 miles; 20 minutes for trips 351-450 miles; 25 minutes for trips 451-550 miles; and 30 minutes for trips of 551 or more miles. These tolerances are based on former ICC rules.”).

the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables.”²³ See 49 U.S.C. § 24101(c)(4) (originally codified at 45 U.S.C. § 501a(6), see Amtrak Improvement Act of 1981, at § 1172, Pub. L. 97-35, 95 Stat. 357, 688). Given the importance of on-time performance and the existence of such metrics prior to PRIIA’s passage, it is highly likely that Congress would have intended for Section 213’s below-80-percent investigation trigger to remain fully operative in the event the Section 207 procedures were declared unconstitutional.²⁴

Legislative history further supports the enforceability of Section 213’s below-80-percent on-time performance trigger under the present circumstances. The Senate Report discussing the nearly identical provision to Section 213 in the Senate bill (then-numbered Section 209) states that this provision was intended to allow parties to “petition STB directly for an investigation of Amtrak delays” and to determine whether such delays resulted from “the failure of a freight railroad to provide preference to Amtrak” under existing 49 U.S.C. § 24308(c). S. Rep. 110-67, at 25-26 (May 22, 2007). The Senate Report stated further that the “intent of this section is to provide a forum” (and a less “cumbersome” process) “for the adjudication of service disputes, including on-time performance problems.” *Id.* at 26 (emphasis added). Congress intended for the Board to resolve on-time performance disputes between Amtrak and host carriers because of “increasing frustration” under the prior dispute resolution process, “while passenger train performance continues to decline or remain dismal on certain routes.” *Id.* Section 213 was to address both “on-time performance and service issues impacting intercity passenger trains,” and Congress specifically intended for either to be the trigger for a Board investigation. *Id.* at 11 (emphases added). Thus, Congress made it a priority to facilitate, and to separately provide for, the investigation of on-time performance problems. Congress also stated that it expected the Board to “consider [such] disputes in an efficient and evenhanded manner.” *Id.* at 26. Given the importance Congress placed on the efficient adjudication of on-time performance, the Board is persuaded that Congress would have intended for the below-80-percent on-time performance trigger of Section 213 to be severable from the specific definition of “on-time performance” developed under Section 207.

CN, however, argues that because on-time performance is not defined in Section 213, the Board must rely on the on-time performance metric developed under Section 207, which is currently inoperative.²⁵ However, nothing in PRIIA requires the below-80-percent on-time

²³ This comports with the measure of on-time performance used by the Federal Aviation Administration for the on-time performance of commercial passenger airlines, against which Amtrak competes. See 14 C.F.R. § 234.2 (“On-time means a flight that arrives less than 15 minutes after its published arrival time.”).

²⁴ We therefore disagree with CN that the term “on-time performance” has “no legal meaning under Section 213 apart from [the Section 207] standards.” CN Motion to Dismiss 9.

²⁵ CN Motion to Dismiss 8-11.

performance threshold of Section 213 to be defined pursuant to Section 207 where, as here, Section 207 has been declared unconstitutional. To hold otherwise would thwart Congress's purpose in enacting Section 213 by significantly delaying the resolution of preference disputes like this one until the constitutionality of Section 207 is finally resolved and/or a new Section 207 definition for "on-time performance" is developed—outcomes that may be years away. Even if the Supreme Court rules that Section 207 did not improperly delegate legislative authority to a private entity, the Court may nevertheless remand the case back to the Court of Appeals to resolve the additional question of whether Section 207 is unconstitutional under the Due Process Clause—an issue that was identified but not resolved by the D.C. Circuit. Furthermore, there are no pending legislative actions suggesting that Congress intends to revise Section 207. The Board finds no persuasive reason to disregard Section 213's below-80-percent on-time performance trigger because of ongoing litigation regarding Section 207's metrics and standards, when reasonable definitions of "on-time performance" already exist or may be crafted by the Board to further Congress's clear desire for an "efficient" resolution of on-time performance disputes.²⁶

CN also argues, in its response to Amtrak's reply, that the Board lacks authority to construe the meaning of "on-time performance" here because Congress has expressly assigned to FRA and Amtrak the task of developing such metrics and standards.²⁷ However, the statute is silent, or at least ambiguous, regarding whether the Board may independently define "on-time performance" for the purpose of determining whether the on-time performance of Amtrak trains falls below Section 213's 80-percent standard for two consecutive calendar quarters, under the circumstances of this case. Here, where the definition of on-time performance under Section 207 is presently inoperative due to an ongoing court challenge regarding the constitutionality of Amtrak's role in the standard-setting process, the Board concludes that it may independently set forth and implement a definition, in order to further Congress's purpose under another valid section of PRIIA, Section 213 (49 U.S.C. § 24308(f)(1)). See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (unless "Congress has directly spoken to the precise question at issue" a court must affirm the agency's interpretation as long as it is "based on a permissible construction of the statute," even if it is not the only permissible one, and even if it is not the one that the court would prefer). The Board believes that its position is a

²⁶ CN claims the D.C. Circuit concluded that Section 213 is not independent from Section 207, citing the court's statement that the Section 207 "metrics and standards lend definite regulatory force to an otherwise broad statutory mandate." CN Motion to Dismiss 10-11 (quoting AAR v. DOT, 721 F.3d at 672). However, the D.C. Circuit was merely responding to the Government's argument that the Section 207 metrics themselves impose no liability. That issue is distinct from the issue of whether the 80-percent on-time performance standard in Section 213 is severable from the Section 207 metrics in the event Section 207 is deemed unconstitutional. The D.C. Circuit never addressed the latter question. AAR v. DOT, 721 F.3d at 672.

²⁷ CN October 14, 2014 Reply 4-5.

permissible construction of the statute. See id. In fact, such a construction is necessary (given the present cloud over Section 207's constitutionality) to effect Congress's clear intent to facilitate the "efficient" resolution of passenger rail delays. See supra pp. 8-9. Adopting CN's position that the Board cannot define the meaning of on-time performance under any circumstances (even the invalidity of Section 207)²⁸ would mean that the Board is unable to initiate investigations under Section 213 or enforce the long-established statutory preference in favor of Amtrak trains under 49 U.S.C. § 24308(c). CN's position also disregards the legislative history of Section 213 and the Board's historic role in defining on-time performance.

Finally, CN argues that FRA and Amtrak have previously stated that Section 207's on-time performance metric would operate as the on-time performance trigger under Section 213.²⁹ CN also points to a comment from Board staff acknowledging that issuance of the Section 207 standards was an essential step for PRIIA to become effective.³⁰ However, even if the quoted statements could be interpreted as CN proposes,³¹ nothing in those statements suggests that Section 213's below-80-percent on-time performance trigger should become a nullity if the Section 207 definition is rendered inoperative. In any event, when determining the severability of Section 213's below-80-percent trigger from Section 207's definition of on-time performance, the guiding principle is Congress's intent in enacting the statute, which supports the Board's determination here.

CONCLUSION

For the foregoing reasons, we 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 if we determine that the on-time performance with respect to Amtrak's Illini/Saluki service has fallen below 80 percent for two or more consecutive calendar quarters. We will deny CN's motion to dismiss this proceeding and grant Amtrak's motion to amend its complaint. We will also deny CN's alternative request to hold this proceeding in abeyance pending the outcome of the Supreme Court's decision regarding Section 207. Because the Supreme Court's decision will not necessarily resolve the question of Section 207's constitutionality or affect our conclusions here, an abeyance of this proceeding would

²⁸ CN Motion to Dismiss 8-11.

²⁹ Id. at 9.

³⁰ Id. at 11 n.10.

³¹ The cited passage from the FRA's Section 207 rulemaking states more generally that "percent on-time standards" (not necessarily as defined under Section 207) will "be used by the STB as a basis for initiating investigations" under Section 213. Federal Railroad Administration, Department of Transportation, Final Metrics and Standards for Intercity Passenger Rail Service: Response to Comments and Issuance of Metrics and Standards (May 12, 2010), at 17, available at <http://www.fra.dot.gov/eLib/Details/L02875> (last visited Nov. 21, 2014).

unnecessarily delay a potential Board investigation of on-time performance issues, which runs directly contrary to Congressional intent.

Further, the Board seeks the parties' views regarding how to construe the term "on-time performance" in this case, as the term is used in PRIIA Section 213, 49 U.S.C. § 24308(f). By January 20, 2015, the parties shall provide opening arguments on how to construe the term "on-time performance" for purposes of this proceeding. Replies will be due by February 2, 2015. In their pleadings, the parties should include Amtrak arrival time data so that the Board can apply whatever standard is ultimately adopted to the Illini/Saluki service. CN may also file an answer to Amtrak's amended complaint by January 8, 2015.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CN's January 23, 2013 petition to reconsider is denied as moot.
2. Amtrak's motion to amend the complaint is granted.
3. CN's motion to dismiss the proceeding is denied.
4. CN's alternative request to hold the proceeding in abeyance is denied.
5. CN may answer Amtrak's amended complaint by January 8, 2015.
6. Opening arguments on how to define on-time performance for the purpose of this proceeding are due by January 20, 2015.
7. Replies to opening arguments on how to define on-time performance for the purpose of this proceeding are due by February 2, 2015.
8. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman dissented with a separate expression.

COMMISSIONER BEGEMAN, dissenting:

Assuming Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) is severable from the Section 207 provisions currently under review by the U.S. Supreme Court, I believe the Board would best fulfill its obligations under the law by initiating a

rulemaking to establish clear standards by which on-time performance cases could be fairly processed. The initiation and completion of a rulemaking is especially appropriate here (rather than using the case-by-case adjudicatory process) because we have *two* pending on-time performance cases brought by Amtrak to consider.

All 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. A notice and comment rulemaking would provide that inclusive approach, and allow the development of a complete record that would not only address the legality of the Board's basic assumptions (e.g., severability), but also present the Board with a wide-ranging analysis of the potential standards. The Board could then use that complete rulemaking record as sound support for its ultimate decision. Instead, the majority will use a much more limited record assembled by only two parties—Amtrak and a single carrier—to establish a Section 213 standard that will most assuredly be used in all other current and future cases, and have a far-reaching impact on the entire industry.

As Amtrak previously suspended this case, and is now seeking to greatly narrow its scope, there is no compelling reason to bypass the most appropriate method of determining the Section 213 standard by saddling this case with that significant challenge. I dissent.