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SERVICE DATE – OCTOBER 21, 2016

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 denies as moot the petition for reconsideration of a December 2014 decision that denied Canadian National Railway Company's motion to dismiss this proceeding.

Decided: October 19, 2016

On January 19, 2012, the National Railroad Passenger Corporation (Amtrak) filed a petition requesting that the Board initiate an investigation into service issues (including on-time performance (OTP)) affecting Amtrak trains on several rail lines owned by Canadian National Railway Company and its subsidiaries, Grand Trunk Western Railway Company and Illinois Central Railroad Company (collectively, CN), pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24308(f). At the request of the parties, the Board held Amtrak's complaint in abeyance until July 31, 2014, first for mediation and later to facilitate settlement discussions and provide additional time for final resolution of pending federal court litigation challenging the constitutionality of Section 207(a) of PRIIA.² Under PRIIA,

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 See Ass'n of Am. R.R.s v. Dep't of Transp. (AAR I), 721 F.3d 666 (D.C. Cir. 2013) (finding Section 207 of PRIIA an unconstitutional delegation of power to Amtrak, a private entity). The Supreme Court subsequently reversed the D.C. Circuit's decision and found that Amtrak is a governmental entity for purposes of determining the constitutionality of Section 207, but remanded the case to the D.C. Circuit for consideration of issues the D.C. Circuit had not resolved. See Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225 (2015). On remand, the D.C. Circuit held Section 207 unconstitutional under the Due Process Clause and the Appointments Clause. See Ass'n of Am. R.R.s v. Dep't of Transp., 821 F.3d 19 (D.C. Cir. 2016) (AAR II), pet. for reh'g and reh'g en banc denied mem. As a result, the metrics and standards promulgated by Amtrak and FRA under Section 207 are currently invalid.

Amtrak and the Federal Railroad Administration (FRA) jointly developed metrics and standards for measuring passenger rail performance, including on-time performance.

By decision served December 19, 2014 (December 2014 Decision), the Board (with Board Member Begeman dissenting) granted Amtrak's motion to amend its complaint (to narrow the focus to only the performance of Amtrak's Illini/Saluki service) and denied CN's motion to dismiss the proceeding. In that motion, CN had argued that, because the D.C. Circuit invalidated Section 207 in AAR I (thus invalidating the metrics and standards promulgated under Section 207), the Board could not adjudicate OTP cases in the absence of a valid OTP standard. However, the Board concluded, based on the statutory language, legislative history, and purpose of Section 213 of PRIIA, that it may investigate deficient on-time performance of Amtrak trains under Section 213 notwithstanding the court's invalidation of Section 207. See December 2014 Decision, slip op. at 6-10.

On January 7, 2015, CN petitioned for reconsideration of the Board's denial of CN's motion to dismiss the proceeding. CN requested that the Board grant CN's motion to dismiss or stay this proceeding pending the Supreme Court's then-pending review of the D.C. Circuit's 2013 decision in AAR I.

On May 15, 2015, in response to a petition filed by the Association of American Railroads following the December 2014 Decision, the Board instituted a rulemaking proceeding in Docket No. EP 726 to define when Amtrak trains are "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. See On-Time Performance Under Section 213 of the Passenger Rail Inv. & Improvement Act of 2008, EP 726 (STB served May 15, 2015). On December 28, 2015, the Board issued a Notice of Proposed Rulemaking and solicited comments in Docket No. EP 726. Also on December 28, 2015, the Board held this proceeding in abeyance pending further Board order, in light of the pending rulemaking proceeding in EP 726 and its relevance to the issues raised in this proceeding.

On July 28, 2016, the Board issued a Final Rule in Docket No. EP 726, which took effect on August 27, 2016.³ See On-Time Performance Under Section 213 of the Passenger Rail Inv. & Improvement Act of 2008 (EP 726 Final Rule), EP 726 (STB served July 28, 2016). In EP 726 Final Rule, the Board again addressed its authority to promulgate rules defining OTP, noting that "the invalidation of Section 207 of PRIIA leaves a gap that the Board has the delegated authority to fill by virtue of its authority to adjudicate complaints brought by Amtrak against host freight railroads for violations of

³ By order of the Director of Proceedings, served September 15, 2016, this proceeding was removed from abeyance, and Amtrak was directed to show that the OTP of its Illini/Saluki service has averaged less than 80% for any two consecutive calendar quarters, as calculated under the EP 726 Final Rule.

Amtrak’s statutory preference and to award damages where a preference violation is found.” EP 726 Final Rule, slip op. at 5. Petitions for judicial review of the EP 726 Final Rule were filed in the U.S. Courts of Appeals for the Eighth Circuit⁴ and the District of Columbia Circuit⁵ and have been consolidated in the Eighth Circuit.

In promulgating its own OTP rule in Docket No. EP 726, as noted, the Board addressed its authority to do so, and this issue will be litigated on judicial review of EP 726 Final Rule. Therefore, further discussion in this case of the same issue concerning the Board’s authority is unnecessary. CN’s petition for reconsideration therefore will be denied as moot.

It is ordered:

1. CN’s petition for reconsideration is denied as moot.
2. 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:

I began my December 2014 dissent in this case by stating that a rulemaking establishing clear standards for On-Time Performance (OTP) would be the best way for the Board to fulfill its statutory obligations “[a]ssuming Section 213 of [PRIIA] is severable from the Section 207 provisions”^{*} The Board initiated such a rulemaking and issued final rules on July 28, 2016. Those rules are now subject to challenge before the United States Court of Appeals for the Eighth Circuit.

Both Amtrak and Canadian National Railway Company (CN) are active participants in that pending litigation, which will determine whether the Board has authority to define OTP given that the standard developed by Amtrak and the Federal Railroad Administration is invalid. I believe the best course of action here is to let the court answer that question rather than risk wasting the resources of Amtrak, CN, and the Board by processing this case while our authority to do so is being resolved.

⁴ Union Pac. R.R. v. STB, No. 16-3307 (8th Cir. filed Aug. 5, 2016).

⁵ Ass’n of Am. R.R.s v. STB, Nos. 16-1279 et al., (D.C. Cir. filed Aug. 8-9, 2016 (consolidated)).

^{*} Nat’l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry., NOR 42134 (STB served Dec. 19, 2014).

