

44377
DO

SERVICE DATE – SEPTEMBER 15, 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

Decided: September 14, 2016

This decision removes this proceeding from abeyance and orders the National Railroad Passenger Corporation (Amtrak) to submit evidence demonstrating that the on-time performance (OTP) of its Illini/Saluki service has averaged less than 80% for any two consecutive calendar quarters under the definition of, and the formula for calculating, on-time performance adopted by the Board in On-Time Performance Under Section 213 of the Passenger Rail Investment & Improvement Act of 2008, EP 726 (STB served July 28, 2016) (to be codified at 49 C.F.R. Part 1040).

BACKGROUND

On January 19, 2012, Amtrak filed a petition requesting that the Board initiate an investigation into service issues (including on-time performance) 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, first for mediation and later to facilitate settlement discussions, until July 31, 2014. Ultimately, however, the discussions were unsuccessful. On August 29, 2014, Amtrak moved to amend its complaint to narrow the focus to only the performance of Amtrak's Illini/Saluki service, rather than all of the Amtrak services on lines owned by CN addressed in the original complaint. By decision served December 19, 2014, the Board (with Board Member Begeman dissenting) granted that motion and denied a motion by CN to dismiss the proceeding, in which CN had argued that the Board lacks the authority to establish an OTP standard itself and adjudicate OTP cases absent a valid OTP standard established under the mechanism provided under Section 207 of PRIIA.¹

¹ On January 7, 2015, CN petitioned for reconsideration of the Board's denial of CN's motion to dismiss the proceeding. The Board addressed the issue of its authority to promulgate OTP rules in its decision adopting the Final Rule in Docket No. EP 726. The Board will address CN's petition in a subsequent decision.

On May 15, 2015, in response to a petition filed by the Association of American Railroads, 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. 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 rulemaking 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, 2016.² Petitions for judicial review of the Final Rule have been filed in the U.S. Courts of Appeals for the Eighth Circuit³ and the District of Columbia Circuit,⁴ and have been consolidated in the Eighth Circuit.

DISCUSSION AND CONCLUSIONS

Under Section 213(a) of PRIIA, 49 U.S.C. § 24308(f)(1), if the OTP of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the Board, upon complaint by Amtrak, must initiate an investigation to determine whether and to what extent delays are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or by Amtrak or other intercity passenger rail operators. Following the investigation, should the Board determine that Amtrak’s substandard performance is “attributable to” the rail carrier’s “failure to provide preference to Amtrak over freight transportation as required” by 49 U.S.C. § 24308(c), the Board may “award damages” or other appropriate relief from a host railroad to Amtrak. 49 U.S.C. § 24308(f)(2).

Under the Final Rule adopted in Docket No. EP 726, an intercity passenger train’s arrival at, or departure from, a given station is “on time” if it occurs no later than 15 minutes after its scheduled time. 49 C.F.R. § 1040.2. Calculation of the quarterly OTP is based on a train’s actual departures from its origin and arrivals at all intermediate stations and its destination—i.e., an “All-Stations OTP” calculation (as opposed to arrivals at endpoint termini only, i.e., an “Endpoint OTP” calculation). 49 C.F.R. § 1040.3.

² On January 12 and 13, 2015, Norfolk Southern Railway Company (NSR) and CSX Transportation, Inc. (CSXT), respectively, filed petitions to intervene in this proceeding for the limited purpose of determining how to define “on-time performance” under PRIIA Section 213. On January 14 and 15, 2015, CN and Amtrak, respectively, replied to the petitions to intervene. Because the Board has defined “on-time performance” under PRIIA Section 213 in Docket No. EP 726, NSR’s and CSXT’s petitions to intervene here for that purpose will be denied as moot.

³ Union Pac. R.R. v. STB, No. 16-3307 (8th Cir. filed Aug. 5, 2016).

⁴ Ass’n of Am. R.R.s v. STB, Nos. 16-1279 et al., (D.C. Cir. filed Aug. 8-9, 2016 (consolidated)).

Before the Board may initiate an investigation under § 24308(f) in this proceeding, Amtrak must show that the “less than 80 percent” threshold for bringing an OTP complaint for its Illini/Saluki service has been met. Although containing evidence to that effect,⁵ Amtrak’s amended complaint preceded the Final Rule, which prescribes a calculation method that is more detailed than the definition of All-Stations OTP used by Amtrak. Furthermore, seven calendar quarters have elapsed since Amtrak’s August 2014 evidentiary submission.

Therefore, notwithstanding the evidence already submitted in its amended complaint, Amtrak will be 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 OTP Final Rule adopted by the Board in Docket No. EP 726. Amtrak shall indicate which two (or more) consecutive calendar quarters now serve as the basis for its complaint, as well as the specific train numbers to which its complaint applies. Amtrak shall also provide, and explain its calculation of, the denominator, the numerator, and the resulting OTP percentage, as described in 49 C.F.R. § 1040.3, for each applicable quarter, and shall include a verification under 49 C.F.R. § 1112.9. In calculating the OTP percentages, Amtrak should be sure to use the *actual* number of arrivals and departures in both the denominator and the numerator.

Amtrak’s submission will be due by October 17, 2016. Should CN wish to reply to Amtrak’s filing, it may do so by October 25, 2016.

It is ordered:

1. This proceeding is removed from abeyance.
2. Amtrak is directed to provide, by October 17, 2016, the information described above.
3. CN’s reply, if any, to Amtrak’s evidence is due by October 25, 2016.

⁵ Amtrak’s original complaint asserted that an investigation was warranted under the OTP metrics and standards jointly developed by Amtrak and the Federal Railroad Administration, pursuant to Section 207 of PRIIA. However, the constitutionality of those standards has been challenged in court, and they are currently invalid. See Ass’n of Am. R.R.s v. Dep’t of Transp., 821 F.3d 19 (D.C. Cir. 2016), petition for reh’g and reh’g en banc denied mem. In its amended complaint, Amtrak submitted OTP statistics for its Illini/Saluki service “based on the 80 percent standard under PRIIA Section 213.” (Amtrak Amended Complaint 6.) Amtrak submitted both All-Station OTP and Endpoint OTP quarterly statistics, from the quarter beginning in July 2011 through the quarter ending in June 2014, to demonstrate that OTP for its Illini/Saluki service had been below the 80% investigation threshold under either method of calculation for three years (with the exception of a single quarter in which Endpoint OTP exceeded 80 percent). Amtrak defined All-Station OTP as “the percentage of times Amtrak trains departed their origin station and arrived at each other station . . . within 15 minutes of the times on the public schedule.” (Id. at 1 n.1.) Similarly, Endpoint OTP was defined as “the percentage of times Amtrak trains arrived at their terminal station within 15 minutes of the arrival time on the public schedule.” (Id. at 4 n.8.)

4. NSR's and CSXT's petitions to intervene are denied as moot.
5. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.