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SERVICE DATE – JANUARY 3, 2012

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: January 2, 2013

On January 19, 2012, the National Railroad Passenger Corporation (Amtrak) filed a petition requesting that the Board initiate an investigation pursuant to § 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24308(f), regarding the alleged “substandard performance of Amtrak passenger 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).

On March 9, 2012, following a Board-granted extension of time, CN filed its answer to Amtrak’s petition and proposed a detailed procedural framework for investigating and ruling on Amtrak’s complaint. Also on March 9, 2012, CN filed a motion to hold the proceeding in abeyance until after the United States District Court for the District of Columbia ruled on the pending cross-motions for summary judgment in Association of American Railroads v. Department of Transportation, No. 11-cv-1499 (D.D.C. filed Aug. 19, 2011), a case challenging the constitutionality of PRIIA. On May 31, 2012, the District Court issued a ruling finding PRIIA constitutional, and on June 22, 2012, the Association of American Railroads (AAR) appealed that decision to the United States Court of Appeals for the District of Columbia Circuit. That appeal is currently pending.

On March 27, 2012, Amtrak and CN filed a joint motion requesting Board supervised mediation. On April 4, 2012, the Board granted that request and held the proceeding in abeyance until July 3, 2012, for that purpose. 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.

On November 5, 2012, the Board served a decision (November Decision) giving notice that agency proceedings had been reactivated and directing the parties to confer on an appropriate procedural framework to govern the adjudication of this case. As part of that discussion, given that AAR’s challenge to PRIIA is no longer before the U.S. District Court but rather the U.S. Court of Appeals (and thus the relief requested in CN’s motion for abeyance technically is moot), CN was directed to indicate whether it intends to press its abeyance motion during the pendency of the appeal.

Amtrak and CN filed separate responses to the November Decision on November 26, 2012, each noting that the parties were unable to agree on a procedural framework.<sup>1</sup> CN further states that it no longer seeks abeyance of this proceeding, though it suggests that the Board may want to hold the proceeding in abeyance on its own motion.<sup>2</sup> The Board declines this suggestion, and, as CN is no longer pressing its motion for abeyance, that motion will be denied as moot.

Amtrak's proposed procedural framework involves two processes: a fact-gathering investigation period resulting in initial Board findings, followed by a period for party comments on those findings before the Board issues its final ruling.<sup>3</sup> CN's suggested approach is more involved. It would bifurcate the proceeding into two phases: In the first phase, the Board would conduct an investigation, make findings on the causes of delay on Amtrak routes, and make recommendations to address those causes; in the second phase, the Board would decide how and whether to proceed with an adversarial proceeding to determine whether CN has violated its statutory obligation to give Amtrak preference on its lines, and if the Board decides to continue, adjudicate that proceeding and possibly grant binding remedial measures.<sup>4</sup>

A significant point of disagreement between the parties is CN's suggestion to bifurcate the proceeding. The Board believes it is not necessary to do so. While PRIIA does task the Board with two actions—making recommendations to improve the service, quality, and on-time performance of Amtrak trains, and possibly awarding damages pursuant to 49 U.S.C. § 24308(f) for delays caused by a host railroad—there is a common basis for those actions. Should the Board find that Amtrak is entitled to damages, that determination would also inform the Board's recommendations to improve the service, quality, and on-time performance of Amtrak's trains. Making the same findings in two distinct phases would be redundant and would cause unnecessary delay.

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<sup>1</sup> On December 12, 2012, CN filed a motion for leave to file a response to Amtrak's proposed procedural framework and simultaneously filed a response. On December 20, 2012, Amtrak filed an opposition to CN's motion, arguing that the Board should reject CN's December 12 response. As Amtrak had the opportunity to review and respond to the procedural framework CN proposed in its March 9, 2012 filing, the Board will grant the motion and accept CN's response to Amtrak's proposal. On December 21, 2012, the Association of American Railroads, on behalf of its freight railroad members, filed a letter in support of CN's proposed procedural framework that would allow for third party participation.

<sup>2</sup> CN November Response 4.

<sup>3</sup> Amtrak Response 3-4.

<sup>4</sup> CN November Response 5-6.

CN also argues that the case should be bifurcated to allow for public comment on the meaning of “preference” within the context of PRIIA.<sup>5</sup> The parties will have a full and adequate opportunity to represent their own interests in their arguments in this proceeding regarding how the Board should interpret PRIIA. Therefore, the Board declines CN’s suggestion to bifurcate the case.

Both parties request that the Board issue subpoenas to initiate an investigation.<sup>6</sup> The Board finds that such a step would not be productive or appropriate at this juncture. Rather, the Board believes that this case should be adjudicated using the established procedures governing complaints and the encompassing discovery and motion practice guidelines set forth in Parts 1112 and 1114 of our rules. These procedures have been thoroughly developed and interpreted through numerous litigations before the agency, and therefore provide a complete and ascertainable structure for the parties in moving forward in this type of litigation. This proceeding was begun by Amtrak, and the Board’s standard practice in complaint-type proceedings is to have the record built through party-directed discovery. Amtrak and CN are best positioned to know what information is relevant to the possible causes of delay. For that reason, it is appropriate to provide for the development of relevant information through the parties’ own discovery. In developing the record through discovery, the parties may, as our existing rules allow, petition the Board for a protective order should the parties need to submit confidential information on the record.<sup>7</sup> The Board expects both parties to be forthcoming and to make full disclosure in responding to reasonable requests for discovery.

Both parties suggest in different forms that the Board should make initial findings with a subsequent round of comments or arguments before final findings are rendered.<sup>8</sup> However, under the standard procedures adopted here, the parties will have ample opportunity to shape the evidence, suggest certain findings, and argue for or against damages and their scope.

In its response to the November Decision, CN states that Amtrak performance on its lines has improved over the last year, and provides seven specific examples of cooperative actions that the parties have taken to achieve this improvement.<sup>9</sup> The Board is interested in hearing from the

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<sup>5</sup> CN Answer 77.

<sup>6</sup> Amtrak Response 3, CN November Response 6.

<sup>7</sup> Both Amtrak and CN suggest that the Board should subpoena third parties. Amtrak Response 3, CN November Response 6. Should the parties find that they need information that third parties are unwilling to provide, they may file a petition for subpoena with the Board.

<sup>8</sup> Amtrak Response 4, CN November Response 6.

<sup>9</sup> CN November Response 2-3.

parties, in their filings on the merits, on (1) the details about these actions and their effect, as well as other actions by either or both parties that have precipitated these improvements, and (2) whether such actions should be included in any performance improvement recommendations by the Board.

A procedural schedule for this proceeding is set forth in the Appendix to this decision. The Board encourages the parties to work together to limit the evidence submitted to the most relevant information. It is in the parties' interest, as well as the Board's, to develop a thorough but manageable record to resolve this dispute while keeping litigation costs as low as possible.

To this end, the parties are directed to collaborate to develop a sampling method across all of the relevant route data that would provide a representative subset of evidence to represent all movements subject to the petition. CN has suggested that initially the Board should limit the investigation to a subgroup of the routes, instead of all eight routes included in Amtrak's petition, in order to make the investigation more manageable.<sup>10</sup> Amtrak argues that the Board should decide the entire proceeding at once.<sup>11</sup> The Board agrees with Amtrak, and believes that all of the routes should be addressed to provide resolution as expeditiously and efficiently as possible. However, the Board acknowledges the issues underlying CN's suggested approach—that reviewing all of the evidence associated with every untimely train movement on all of the routes could result in a large, unwieldy record. Recognizing the large amount of data and records that could potentially be submitted on the record in this proceeding, the Board is ordering the parties to confer on devising a methodology to limit the quantity of data by sampling a subset of the evidence applicable to the investigation period. Under this approach, the parties would include all of the routes at issue, but would sample the movements over each route in a manner that would limit the evidence submitted to a representative subset of all of the movements subject to the petition. Sampling is a valid, statistically accurate approach that will make the record more manageable while ensuring that the parties' interests are adequately represented, and that the Board will still have sufficiently complete information to make its determination.

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

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<sup>10</sup> CN Answer 72.

<sup>11</sup> Amtrak Response 5.

It is ordered:

1. CN's motion to hold the proceeding in abeyance is denied as moot.
2. CN's motion for leave to file a response to Amtrak's proposed procedural framework is granted.
3. Amtrak and CN shall consult to develop a methodology for sampling the movements on each of the relevant Amtrak routes to provide a representative subset of evidence to represent all subject movements and shall report to the Board on such a sampling methodology by January 23, 2013.
4. A procedural schedule for this proceeding is established as set forth in the Appendix to this decision.
5. This decision is effective on its service date.

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

APPENDIX  
Procedural Schedule

Joint Report on Sampling Method	January 23, 2013
Discovery Closes	April 3, 2013
Amtrak's Opening	June 3, 2013
CN's Reply	July 17, 2013
Amtrak's Rebuttal	August 16, 2013
Closing Briefs	September 16, 2013
Oral Argument (if required)	To Be Determined