

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

IN RE NATIONAL RAILROAD PASSENGER CORPORATION:  SECTION 213 INVESTIGATION OF SUBSTANDARD PERFORMANCE ON CANADIAN NATIONAL RAILWAY COMPANY RAIL LINES	Docket No. NOR 42134
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**NATIONAL RAILROAD PASSENGER CORPORATION’S OPPOSITION TO CN’S  
MOTION FOR LEAVE TO FILE RESPONSE TO ITS PROPOSED PROCEDURAL  
FRAMEWORK**

For the following reasons, the Board should deny CN’s motion for leave to file a response to Amtrak’s proposed procedural framework.

More than four years ago, Congress enacted the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), with the express purpose of “address[ing] on-time performance and service issues impacting intercity passenger trains operating over freight railroad trackage.”<sup>1</sup> A key element was the promulgation of metrics and standards against which to measure the on-time performance of Amtrak’s trains.<sup>2</sup> On May 12, 2010, after an extensive notice and comment period and statutorily-mandated stakeholder consultation, the Section 207(a) metrics and standards became effective.<sup>3</sup> Yet today, thousands of Amtrak passengers continue to arrive late at their destinations because of needless delays that can be reasonably addressed by the railroads over whose tracks Amtrak operates. As Senator Richard Durbin has recently said,

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<sup>1</sup> Pub. L. 110-432, 122 Stat. 4848 (2008) (codified in scattered sections of 49 U.S.C.); S. Rep. No. 110-67, at 11 (2007).

<sup>2</sup> Pub. L. 110-432, 122 Stat. at 4916-4917 (codified at 49 U.S.C. § 24101 note).

<sup>3</sup> Metrics and Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, 75 Fed. Reg. 26839 (May 11, 2012).

“consistent train delays caused by freight railroads cost Amtrak millions of dollars a year and threaten to turn passengers away from Amtrak.”<sup>4</sup>

As Senator Durbin also observed, “PRIAA gave the [Surface Transportation Board (the “Board”)] important new authorities placing it in a critical position to improve passenger rail [on-time performance.]”<sup>5</sup> Section 213 vests the Board with responsibility to investigate “whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier” and award damages if the Board “determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation.”<sup>6</sup> Congress entrusted the Board with this authority because the prior process was “cumbrous and . . . almost never used.”<sup>7</sup> In contrast, Congress expected the Board to conduct proceedings “in an *efficient* and evenhanded manner.”<sup>8</sup> On May 31, 2012, the United States District Court for the District of Columbia affirmed the Board’s authority and responsibilities to oversee the on-time performance of Amtrak’s trains.<sup>9</sup>

The Board is empowered to initiate investigations on its own, but despite disappointing on-time performance on the majority of Amtrak’s services operated on rails owned and dispatched by host freight railroads, the Board has not yet done so. Almost one year ago, on

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<sup>4</sup> Letter from United States Senator Richard Durbin to Chairman Daniel R. Elliott III, dated July 13, 2012.

<sup>5</sup> *Id.*

<sup>6</sup> 49 U.S.C. § 24308(f)(1), (2).

<sup>7</sup> S. Rep. No. 110-67, at 26 (2007).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> See Amtrak’s Notice of Relevant Authority, Exhibit A (June 4, 2012) (attaching *Ass’n of Am. R.R. v. Dep’t of Transp.*, --- F. Supp. 2d ----, No. 11-cv-1499 (D.D.C. May 31, 2012), *appeal docketed*, No. 12-5204 (D.C. Cir. docketed June 26, 2012)).

January 19, 2012, Amtrak filed a petition against CN,<sup>10</sup> a host freight railroad with a consistent history of failing to meet the statutory metrics. Despite CN's protestations at the time that it was impossible for it to improve performance,<sup>11</sup> since Amtrak's filing CN has achieved significant reductions of delays through operating improvements. Thus, contrary to its protestations, CN was capable of better performance, and the statutory structure has served as an inducement to do so, at least temporarily. Unfortunately, however, service shortfalls persist, and attempts to reach agreement through Board-sponsored mediation to make the operational improvements permanent and to achieve additional changes to rectify the remaining shortfalls have failed. Thus, Amtrak asked the Board to fulfill its statutory mandate to investigate the causes of the delays that gave rise to this proceeding, to develop recommendations (including whether the measures that have been taken to date should be made permanent and whether additional measures should be implemented), and to award damages for violations of preference sufficient to ensure that CN will comply with the law going forward.

The Board ordered Amtrak and CN to submit a proposed procedural framework for the investigation by November 26, 2012.<sup>12</sup> It did not authorize any additional filings or order further briefing. Nevertheless, without any consultation or notice to Amtrak, CN has now filed a lengthy seventeen page "response" attached to a motion for leave, replete with factual and legal inaccuracies and mischaracterizations. Ironically for a railroad that imposes long delays on Amtrak's passenger service, CN continues to urge the Board to adopt a process that will delay any relief from the investigation for years. Indeed, reading through its multiplicity of phases,

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<sup>10</sup> Canadian National Railway Company and its subsidiaries, Grand Trunk Western Railway Company and Illinois Central Railroad Company are collectively referred to herein as "CN")

<sup>11</sup> See CN's Response to Amtrak Petition Under Section 213 of PRIIA, dated March 9, 2012 ("CN Response").

<sup>12</sup> Order, dated November 2, 2012.

steps, comment periods, and the like, it is difficult to avoid the suspicion that delay is a primary goal of CN's proposal. Certainly, whether or not by design, CN's proposal will maximize the costs to Amtrak and the Board, and thus of course—were the Board to acquiesce in CN's elaborate structure—it would erect enormous disincentives for either the Board or Amtrak to invoke the statute to remedy delays in passenger service. This obstructive proposal would defeat Congress's objectives in enacting PRIIA and should be rejected.

CN's motion for leave to file a response should thus be denied. Contrary to CN's suggestion, there is no Board rule or procedure that authorizes its surprise filing.<sup>13</sup> If, however, the Board authorizes CN's response, it should also consider that CN's criticisms of Amtrak's straightforward procedural framework lack merit.

1. CN's Notice Hurdles Should Be Rejected: CN's assertions that further briefing is required and evidentiary submissions are needed to provide notice to CN of the scope and nature of the investigation are disingenuous. Amtrak trains operate over defined segments of CN track: (a) The Texas Eagle and Lincoln services operate over 37 miles of CN track in Illinois; (b) The City of New Orleans runs over 930 miles of CN track between Chicago and New Orleans, and the Illini/Saluki shares 306 miles of that same track in the north; (c) in Michigan, the Blue Water operates on 159 miles of CN track and the Wolverine travels over 27 miles of CN track. Amtrak's Request in this matter makes clear that the excessive delays on those lines, and their failure to meet the PRIIA metrics throughout the period covered by the Request, is the

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<sup>13</sup> Neither provision cited by CN authorized it to file a response to Amtrak's proposed procedural framework. 49 C.F.R. § 1104.13(a) does not apply because that provision only authorizes responses to a "pleading." Amtrak's Proposed Procedural Framework was not a pleading, but instead a response to a Board Order. *See* 49 C.F.R. § 1104.12 (referring separately to "pleadings" and "papers" filed with the Board). Additionally, 49 C.F.R. § 1117.1 is plainly inapplicable: CN did not advance a claim, did not demand relief based upon that claim, did not set forth the basis for the Board's jurisdiction, and filed a motion rather than a petition.

subject of this proceeding. Thus, CN is well aware that the investigation will focus on the substandard on-time performance and excessive delays on these lines for the two calendar quarters preceding the filing of the Amtrak's petition (and earlier to the extent relevant to performance during that period) through the current date.<sup>14</sup> Under the statute, all that is required of Amtrak to trigger an investigation is the filing of a petition, 49 U.S.C. § 24308(f)(2), and, indeed, the Board may initiate an investigation based solely on failure to meet the metrics without any petition.<sup>15</sup> CN's suggestion that multiple rounds of additional briefing and evidentiary submissions are necessary before an investigation can get underway is indefensible. The process investigating Amtrak's detailed Request should begin immediately.

2. CN's Calls For A Repeat Of The Extended Notice And Comment Period Are Unfounded: CN's suggestion that a protracted formal rulemaking notice and comment period is needed concerning the "reliability and significance of the PRIIA metrics and standards and how best to ensure the co-existence of efficient long-distance passenger rail service and efficient freight rail service" is unsupportable: this has already taken place. On March 13, 2009, the FRA published proposed PRIIA metrics and standards in the *Federal Register*,<sup>16</sup> and public comments were received during a period ending more than a year later, on March 27, 2010. At the end of that process, the final metrics and standards were adopted on May 12, 2010. Thus,

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<sup>14</sup> There is no basis for CN's desire to "narrow[] . . . the investigation" in order to avoid accountability for its *pre*-Petition conduct.

<sup>15</sup> CN's repeated suggestions that the statute requires Amtrak to make "specific allegations" of preference violations is incorrect. CN Response at 5, 6, 7, 7 n. 6, 8, 10. The statute requires the Board to investigate the causes of delay if petitioned to do so, and provides that "[i]f the Board determines that delays . . . investigated under [the preceding paragraph] are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation . . . the Board may award damages [and other relief]." 49 U.S.C. § 24308.

<sup>16</sup> 74 Fed. Reg. 10983.

CN's suggestion that the public has been "shut out" of the process is simply false, and its request that the notice and comment period be repeated would achieve delay and nothing more.

3. CN's Suggestions That A Bifurcated Investigation Will Be More Efficient Than A Single Investigation Are Manifestly Incorrect: CN's suggestions that it would be faster and more efficient to divide the Board's investigation into a recommendation phase and a preference violation phase make little sense. The causes of delay on CN track are necessarily intertwined and interrelated; the witnesses and documents relevant to those inquiries are the same. To make recommendations, the Board will need to determine the extent to which the failures to meet PRIIA metrics stem from CN's violating of its legal obligation to give Amtrak passenger trains preference for the use of CN's rails, crossings, and junctions. Thus, CN's rhetoric notwithstanding, Amtrak's proposed framework of a single investigation into all of the causes of delay is manifestly more efficient and likely to result in a prompt resolution than the drawn-out, bifurcated process suggested by CN, which will delay until after the recommendations phase an inquiry—preference violations—essential to the recommendations themselves. Amtrak's proposed process is thus both more efficient and more consistent with the statute's structure and congressional intent.

4. CN's Due Process Claims Lack Merit. CN insists that due process requires an investigation laden with a panoply of lengthy and expensive formal procedures, some of which are drawn from on-the-record agency hearings and others which are of CN's own invention. These claims have no basis in law. CN fails to cite investigations by other government agencies that employ the many burdensome stages that CN asserts are mandated by the Constitution. Indeed, agencies throughout the federal government routinely use informal procedures far less

burdensome than CN claims is constitutionally required, and courts have upheld those procedures.<sup>17</sup> Due process “is flexible and calls for such procedural protections as the situation demands.”<sup>18</sup> The process proposed by Amtrak would provide for interaction between the Board and affected parties to advance the investigation and would afford CN ample opportunity to review and respond to the Board’s preliminary findings before they become final.<sup>19</sup> Moreover, CN would have the opportunity to seek judicial review of any order from the Board. This process would meet Congress’s intent for an “efficient” investigation into the prior two quarters of poor on-time performance.<sup>20</sup> CN’s proposal, in contrast, is exactly the sort of “cumbersome” and lengthy process that is “almost never used,”<sup>21</sup> which Congress sought to replace when it gave the Board responsibility for the on-time performance of Amtrak’s trains. *See supra* at 2 (explaining legislative history).

5. CN’s Suggestion That An Investigation Cannot Be Completed In Nine Months Is Untrue and Inconsistent with Congress’s Intent: Contrary to CN’s protestations, the Board can and should complete this investigation in nine months. Congress intended PRIIA to be a meaningful tool to improve the on-time performance of Amtrak’s trains and vested the Board with oversight responsibility to step in when the metrics and standards have not been met for two

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<sup>17</sup> See, e.g., *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 114-115, 117-119 (D.C. Cir. 2010) (rejecting due process challenge to EPA authority to impose “unilateral administrative order” issued following agency investigation and notice and comment on remedial plan, where pre-enforcement judicial review available); *Capitol Mortg. Bankers, Inc. v. Cuomo*, 222 F.3d 151, 155-156 (4th Cir. 2000) (upholding termination of mortgage broker’s authority to originate Federal Housing Administration mortgages where agency initiated investigation, notified broker of its intention to terminate, and provided opportunity for written submissions and informal meeting with agency officials); *Doolin Sec. Sav. Bank, F.S.B. v. F.D.I.C.*, 53 F.3d 1395, 1404 (4th Cir. 1995) (finding due process satisfied where FDIC afforded supervised bank 30 days to challenge in writing risk classification made by FDIC following FDIC assessment of bank and where judicial review was available); see also *Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992) (holding that opportunity to rebut officially noticed facts satisfies due process).

<sup>18</sup> *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (citations and internal quotation marks omitted).

<sup>19</sup> The statute envisions a report of the Board’s investigation results that includes “the findings, conclusions, and the order of the Board and, if damages are awarded, the findings of fact supporting the award.” 49 U.S.C. § 706(a).

<sup>20</sup> S. Rep. No. 110-67, at 26 (2007).

<sup>21</sup> *Id.*

consecutive calendar quarters. Amtrak's proposed timeframe envisions that for this first investigation, three additional calendar quarters will pass before the investigation concludes. Amtrak anticipates that once the Board gains experience with these sorts of investigations the time frame can be further shortened. Any longer period could delay unacceptably the improvements in service the American public expects and deserves, and would render largely useless the new statutory mechanism intended to rectify the situation. Congress understood that unless Board oversight and imposition of fines is prompt and achievable in appropriate cases, there will be little incentive for host railroads to improve Amtrak's on-time performance. CN's protracted years-long procedural framework would defeat that Congressional intention and frustrate the Board's exercise of the responsibilities entrusted to it by Congress.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2012, I served the following Opposition To CN's Motion For Leave To File Response To Its Proposed Procedural Framework on counsel for Canadian National Railway Corporation by electronic mail.

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