



Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

May 5, 2016

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**Re: Docket No. EP 726 On-Time Performance under Section 213 of  
the Passenger Rail Investment and Improvement Act of 2008**

Dear Ms. Brown:

In a letter filed in this docket on May 3, 2016, the Association of American Railroads (“AAR”) asserts that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Association of American Railroads v. United States Department of Transportation*, No. 12-5204 (D.C. Cir. April 29, 2016) (“*AAR v. DOT II*”) supports AAR’s argument that the Surface Transportation Board has no authority to define “on-time performance” for purposes of triggering an investigation under PRIIA Section 213. AAR asks the Board to terminate this rulemaking and dismiss the 213 investigations in dockets NOR 42134 and NOR 42141. The discussion cited by AAR in the Court’s decision does not support AAR’s argument and provides no basis to terminate this rulemaking or dismiss the pending 213 investigations in dockets NOR 42134 and NOR 42141.

Before initiating this rulemaking, the Surface Transportation Board held that the “plain language of Section 213 allows Amtrak to bring a complaint *either* when ‘the on-time 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).” *National Railroad Passenger Corporation – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, Docket No. NOR 42134 (STB served December 19, 2014), slip op. at 6-7.

In the same decision, the Board rejected the argument that, because Congress had assigned to FRA and Amtrak the task of developing the metrics and standards, the Board lacked authority to construe the meaning of “on-time performance” as used in the independent 80% on-time performance trigger. The Board concluded that it had jurisdiction to define “on-time performance” in order to “further Congress’s purpose under another valid section of PRIIA, Section 213 (49 U.S.C. § 24308(f)(1)).” *Id.* at 9. The Board said its construction of the statute

Ms. Cynthia T. Brown  
May 5, 2016  
Page 2

was “necessary ... to effect Congress’s clear intent to facilitate the ‘efficient’ resolution of passenger rail delays.” *Id.* at 10.

In its opening comments on the STB’s proposed rule, AAR argued that there is but one 213 PRIIA investigation trigger – based on the 207 metrics and standards -- and that the Board has no authority to define on-time performance under that singular trigger because Congress delegated that authority to FRA and Amtrak. AAR Comments, February 8, 2016, at 5. AAR relies on *Bayou Lawn & Landscape Servs. v. Sec’y of Labor*, 713 F.3d 1080, 1084-85 (11<sup>th</sup> Cir. 2013), where the Court held that DOL had no rulemaking authority over the H-2B program because DHS was given “overall responsibility, including rulemaking authority” for the program. *Bayou Lawn & Landscape Servs. v. Sec’y of Labor*, 713 F.3d at 1084.

AAR’s argument regarding the Board’s rulemaking authority is inextricably linked to its argument that PRIIA 213 has one investigation trigger, based on the metrics and standards. AAR did not argue in its opening comments in this docket, and does not argue in the May 3 letter, that *if there is a second trigger* for on-time performance below 80 percent (as the Board has held), the Board has no authority to define *that* trigger.

More importantly, the AAR does not explain how the Court’s decision supports its argument, saying only that the Court (at pages 22-23) discusses the “interrelationship between [PRIIA] section 207 and [PRIIA] section 213.” AAR May 3 letter, at 1. The cited discussion does not support AAR’s argument. The decision does not reach the merits of 80 percent on-time performance trigger, because the issue was not before the Court.<sup>1</sup> However, when it does mention the triggers for a PRIIA 213 action the Court’s decision supports the Board’s holding that there are two independent triggers.

In its discussion of “whether the ‘metrics and standards’ force freight operators to alter their behavior,” *AAR v. DOT II*, slip op at 21, the Court said:

PRIIA permits the STB to “initiate an investigation” whenever Amtrak's on-time performance “averages less than 80 percent for any 2 consecutive calendar quarters, ... PRIIA *also* triggers STB investigation where the “service quality of intercity passenger train operations for which minimum standards are established under section 207 ... fails to meet those standards for 2 consecutive calendar quarters.”

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<sup>1</sup> As the Board noted in its December 19, 2014 decision in NOR 42134, “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.’” *Amtrak/CN 213 Investigation*, slip op at 6, citing *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).

Ms. Cynthia T. Brown  
May 5, 2016  
Page 3

*Id.* at 22 (emphasis added). The use of the word “also” indicates that the Court understood there were two independent triggers for a PRIIA 213 investigation. Similarly, the Court concluded that PRIIA “gives Amtrak the authority to develop metrics and standards ... that *increase* the risk that STB will initiate an investigation.” *Id.* at 23 (emphasis added). The Court’s statement that the metrics and standards merely increase the risk of a 213 investigation, as opposed to exclusively creating that risk, is an acknowledgement by the Court that something else can also trigger a 213 investigation – *i.e.*, the 80 percent on-time performance trigger.

Congress gave FRA and Amtrak no role in establishing the definition of on-time performance under the 80 percent investigation trigger. Thus, FRA and Amtrak were not given overall responsibility for triggering 213 investigations and AAR reliance on *Bayou Lawn & Landscape Servs. v. Sec’y of Labor, supra*, is misplaced.

The Board has authority define on-time performance for purposes of the 80 percent trigger and AAR has not demonstrated that any aspect of the Court’s decision supports termination of this rulemaking or dismissal of either of the pending 213 investigations.

Respectfully submitted,



William H. Herrmann  
Vice President and Managing Deputy General Counsel  
National Railroad Passenger Corporation