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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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

Dear Ms. Brown:

I am enclosing for filing in the above-captioned proceeding the reply comments of the Capitol Corridor Joint Powers Authority (CCJPA). We appreciate the opportunity to offer the CCJPA's views in this important rulemaking.

Thank you very much for your assistance in this matter.

Sincerely,

Charles A. Spitulnik

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 726

**ON-TIME PERFORMANCE UNDER SECTION 213 OF THE
PASSENGER RAIL INVESTMENT AND IMPROVEMENT ACT OF 2008**

**REPLY COMMENTS OF THE
CAPITOL CORRIDOR JOINT POWERS AUTHORITY**

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Dated: March 30, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 726

**ON-TIME PERFORMANCE UNDER SECTION 213 OF THE
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The Capitol Corridor Joint Powers Authority (CCJPA) strongly supports a definition of “on-time performance” (OTP) under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, div. B (Oct. 16, 2008), that accounts for intercity passenger trains’ performance at *all* intermediate stops, as well as its points of origin and destination. As set forth in these reply comments, CCJPA believes that such a measurement is the only way to adequately capture OTP as it is experienced by rail passengers, and accordingly the only way to carry out the policy objectives underlying Section 213. CCJPA also agrees with the States for Passenger Rail Coalition (SPRC) and numerous others that the Surface Transportation Board’s (the Board) definition of OTP must not in any way supplant or impede the performance metrics that have been established in separately negotiated agreements between state passenger rail authorities, host carriers, and Amtrak, which provide for performance-based financial incentives and/or penalties. However, CCJPA disagrees with the comments of the Association of American Railroads (AAR) and several of its members that the Board should defer entirely to these negotiated performance metrics for the purpose of Section 213. These reply comments are offered in response to (1) the arguments advanced principally by AAR, CSX

Transportation, Inc. (CSX) and others against the inclusion of intermediate stops, and (2) the comments of AAR and several of its members regarding the role of existing agreements.¹

I. Background

The Capitol Corridor is a state-supported intercity passenger train system that provides a convenient alternative to traveling along the congested I-80, I-680, and I-880 freeways by operating fast, reliable, and affordable intercity rail service to sixteen stations in eight Northern California counties: Placer, Sacramento, Yolo, Solano, Contra Costa, Alameda, San Francisco, and Santa Clara. Since August 2012, the Capitol Corridor has run thirty daily trains (twenty-two on weekends and holidays), with an annual ridership of nearly 1.5 million passengers. Of these, less than thirty percent of passengers ride from end to end.

Capitol Corridor operates over a 170-mile segment of rail line owned and dispatched by the Union Pacific Railroad (UPRR). The CCJPA has contracted with Amtrak to operate the Capitol Corridor trains. CCJPA, Amtrak, and UPRR have negotiated an Incentive Agreement for Operation of Capitol Corridor Trains among UPRR, Amtrak and CCJPA (the Agreement), which defines on-time performance as completing a route within route-specific scheduled running times defined by the Agreement, plus allowances for certain negotiated delays.

II. Measuring OTP by Intermediate Stops is Necessary to Carry Out the Policy Objectives of Section 213

Tellingly, the only entities that do not endorse a definition of OTP that accounts for

¹ AAR's argument that the Board lacks authority to pursue this rulemaking merits only brief response. Section 213 authorized the Board to investigate the cause of an intercity passenger train's "on-time performance" if it fell below a certain threshold, without defining what "on-time performance" meant in this context. See 49 U.S.C. § 24308(f). It is well-settled that "a vague statutory term in a regulatory statute can operate as a delegation to the regulatory agency to supply meaning." *United States v. Cinergy Corp.*, 458 F.3d 705, 711 (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–46 (1984)). This rulemaking is not only within the Board's authority, but appropriate to ensure its interpretation of OTP under Section 213 is the product of reasoned decision-making, with input from all stakeholders.

performance at all intermediate stops are those not directly accountable to railroad passengers. Although AAR, UPRR, the Norfolk Southern Railway Company (NSR), and the Canadian National Railway (CN) largely decline the Board's invitation to submit initial comments regarding an intermediate-stop OTP calculation, CSX advances arguments against such a definition. Specifically, CSX argues that consideration of intermediate stop performance is inappropriate because (1) it would not accurately reflect the overall performance of a train that was late in departing its station of origin or that encountered delays early in its run; (2) Amtrak schedules were not designed with performance at intermediate stops in mind; and (3) intermediate stops are used "lightly" by passengers. Each of these comments ignores the actual experience of passengers, and fails to appreciate the policy goals underlying Section 213.

1. The Board's measure of OTP should account for passenger experience.

CSX argues that "an Amtrak train departing late from its origin or encountering an impediment early in its journey will result in an all-stations On-Time Performance measurement that will not accurately reflect the actual performance of the train." Initial Comments of CSX, STB Docket No. EP-726, at 18 (Filed Feb. 8, 2016). As cogently stated by the Environmental Law and Policy Center (ELPC) however, "[T]he public policy goal is not that a *train* arrives at its destination on time, but that the *passengers* do." Initial Comments of the ELPC, STB Docket No. EP-726 (Filed Feb. 8, 2016). CSX's argument fails to recognize that the calculation of OTP based on both endpoint and intermediate stops affords a *more* accurate measure of OTP as it is experienced by passengers. A train that is chronically delayed early in its route and unable to recover and meet OTP at subsequent intermediate stops may warrant more attention from the Board in determining whether and to what extent it should investigate the cause of delay than a

train in which passengers at a smaller number of stops are inconvenienced.² Furthermore, calculation of OTP on this basis will help to localize the Board's investigation of the cause of delay, especially where a train is chronically delayed early in its journey.

The inadequacy of measuring OTP based only on end-to-end performance was also recognized by the Interstate Commerce Commission (ICC). Just one year after the ICC promulgated the rule selected as the Board's starting point in this proceeding, *see* Notice of Proposed Rulemaking, STB Docket No. EP-726 (Service Date Dec. 28, 2015) (NPRM) (citing former 49 C.F.R. § 1124.6), the ICC commenced a proceeding to further "inquire into and determine the quality of intercity rail passenger service with a view towards determining whether the Commission should prescribe additional rules and regulations, recommend additional legislation or take other appropriate action as is deemed to be in the public interest." 351 I.C.C. 883, 883 (Mar. 29, 1976). As a result of that proceeding, the ICC adopted a proposal to amend the definition of OTP to require a train to "arrive at its final terminus *and at all intermediate stops* no later than 5 minutes after the scheduled arrival time per 100 miles of operation, or 30 months after scheduled arrival time, whichever is the less."³ *Id.* at 997. Just as is true today, the ICC recognized that "the public should be able to rely upon train schedules at intermediate stops

² Because the calculation of OTP based on intermediate stops may obscure chronic delays encountered by a train toward the *end* of its route (because fewer, if any, intermediate stops are impacted), CCJPA supports Amtrak's comment that the Board might measure OTP both in terms of endpoint-to-endpoint and All Stations. *See* Initial Comments of Amtrak, STB Docket No. EP-726, at 7 n.4 (Filed Feb. 8, 2016). If only one measure is adopted, however, then it should be All Stations OTP. *Id.*

³ CCJPA does not mean to suggest that the ICC's method of calculating OTP at intermediate stops should be adopted. Rather, CCJPA agrees with Amtrak (as well as the Virginia Rail Policy Institute (VPRI) and the Oregon Department of Transportation (ODOT) and others) that intermediate-stop OTP should be based on the existing "All Stations OTP metric." Thus, a train would arrive "on-time" if it arrives at each station within fifteen minutes of its scheduled arrival time and the train's overall OTP for the purpose of Section 213 is calculated by dividing the number of "on-time" station arrivals by the total number of station arrivals. *See* Initial Comments of Amtrak, STB Docket No. EP-726, at 6–9 (Filed Feb. 8, 2016).

as well as the ‘final terminus’ of a route.” *Id.* at 910. Only a definition that measures OTP at all intermediate stops can account for the adequacy and reliability of rail passenger service.

2. *Calculation of OTP using intermediate stops may discourage schedule padding, and enhance the reliability of intercity passenger train schedules.*

CSX also argues that “existing Amtrak schedules were not designed to meet an all-stations [OTP] metric. These schedules often place most of the limited recovery time included therein at the end of a segment.” Initial Comments of CSX, STB Docket No. EP-726, at 18 (Filed Feb. 8, 2016). Similarly, AAR and several of its members claim that Amtrak’s schedules are inherently unrealistic, and should not therefore be used as basis to measure a trains’ OTP. *See* Initial Comments of AAR, STB Docket No. EP-726, at 13 (Filed Feb. 8, 2016). To the extent that these comments have merit, calculation of OTP based on intermediate stops will likely enhance, not degrade, the reliability of Amtrak’s schedules. Indeed, measuring OTP from endpoint to endpoint only encourages “schedule padding,” where the majority of recovery time is built into schedules at the very end of a route and a train may be considered “on-time” even if it has arrived at the majority of intermediate stops behind schedule. A definition of OTP based on intermediate stops would incentivize all parties to ensure schedules are realistic, with adequate recovery time distributed throughout the route.

Furthermore, the Board may employ adequate safeguards to protect the interest of host carriers in the event a schedule is unrealistic. Importantly, the measurement of OTP under Section 213 serves only as a basis to invoke the Board’s jurisdiction to investigate the cause of delays or a failure to achieve minimum standards. *See* 49 U.S.C. 24308(f)(1). If the OTP of an intercity passenger train falls below the threshold required to initiate such an investigation, then “the Board has authority to review the accuracy of the train performance data and the extent to which *scheduling* and congestion contribute to delays.” *Id.* (emphasis added).

Accordingly, CCJPA believes that the reasonableness of a schedule is best considered within the context of an investigation, and not as a jurisdictional prerequisite thereto. However, should the Board adopt the recommendation of AAR or its members that the reasonableness of Amtrak's schedules be determined before the Board commences an investigation, CCJPA believes there are two essential components to ensuring integrity of the Board's pre-investigatory procedures. First, Section 213 clearly contemplates that the failure of a train to achieve 80% or greater OTP in two consecutive calendar quarters is, in and of itself, prima facie evidence of avoidable delay. Accordingly, the burden should be placed on the host carrier to demonstrate the unreasonableness of the schedule. Second, as discussed below, Amtrak and many state agencies have existing agreements with host carriers that provide for financial penalties and incentives based on compliance with negotiated performance metrics. CCJPA believes that a host carrier should be estopped from challenging the reasonableness of a schedule if, through these agreements, it has already agreed to dispatch a train pursuant to the challenged schedule.

3. *The overwhelming majority of passengers use only intermediate stops.*

CSX's statement that "intermediate stations are used lightly by passengers" is patently incorrect. On the Capitol Corridor alone, over seventy percent of its nearly 1.5 million riders annually do not travel over the entire route. As numerous commenters point out, the overwhelming majority of railroad passengers in the United States use *only* intermediate stops. *See, e.g.*, Initial Comments of U.S. Sens. Wicker and Booker, STB Docket No. EP-726, at 1 (Filed Feb. 25, 2016) ("[M]ore than two-thirds of Amtrak passengers do not travel to the final destination of a route."); Initial Comments of the National Association of Railroad Passengers (NARP), STB Docket No. EP-726, at 2–3 (Filed Feb. 8, 2016) ("Three out of every four passengers using Amtrak's trains depart from and arrive at stations strung between end point

cities, and never set foot in an end point station”); Initial Comments of SPRC, STB Docket No. EP-726, at 3 (Filed Feb. 8, 2016) (“The proposed rule would not measure OTP in 24 states which have intercity passenger rail services [but only intermediate stops].”); Initial Comments of the California State Transportation Agency (CalSTA) STB Docket No. EP-726, at 1 (Filed Feb. 8, 2016) (“[M]ore than 73% of the 5.5 million passengers traveling on state-supported trains in California completed their journey at a station other than the endpoint in Federal Fiscal Year 2015.”). Rather than “misdirect the Board’s focus,” Initial Comments of CSX, at 18, inclusion of all intermediate stops in the calculation of OTP will help the Board ensure that all passengers arrive at their destinations on time, not just the small percentage using only stations at the very end of a route.

4. Measuring OTP at all intermediate stops would render several other host carrier concerns moot.

Finally, adoption of an OTP definition based on intermediate stops would resolve ancillary concerns raised by commenters. Notwithstanding their support for an endpoint-to-endpoint-based measure, AAR and NSR argue that OTP must be measured separately over each host carrier’s territory for train routes that traverse multiple railroads. Measuring OTP by intermediate stops obviates this concern. Similarly, measuring OTP by intermediate stops also addresses the New York Department of Transportation’s (NY DOT) concern regarding the calculation of OTP for international passenger rail service, where one endpoint may lie outside the United States.

III. The Board Should Clarify That The Definition of OTP Is Not Intended to Supplant or Impede Performance Metrics in Existing or Future Negotiated Agreements, But Should Not Defer To Those Metric Under Section 213

CCJPA agrees with SPRC and numerous others that the Board’s definition of OTP must not in any way supplant or impede the performance metrics that have been established in

separately negotiated agreements between state passenger rail authorities, host carriers, and Amtrak, which provide for performance-based financial incentives and/or penalties. However, CCJPA strongly disagrees with the comments of the AAR and several of its members that the Board should defer entirely to these negotiated performance metrics for the purpose of Section 213. The metrics contained in negotiated performance agreements serve an entirely different purpose from the Board's definition of OTP under Section 213, and in most cases are from "clear and relatively easy to apply." NPRM at 6. Deference to these negotiated performance standards would not only frustrate the Board's jurisdiction to investigate the cause of delay in some instances, but also make provide much less public transparency.

The proposed definition of OTP under Section 213 is for the limited purpose of invoking the Board's jurisdiction to investigate the cause of poor OTP performance, either on its own initiative or upon complaint. Relying on the standards articulated in privately negotiated agreements is inappropriate for this purpose. These agreements tie penalties and/or incentives to compliance with *negotiated* standards that, by their nature, reflect only what the host carrier and Amtrak are willing to provide, but not necessarily what they are *able* to provide. Thus, it is possible that a host carrier may not be subject to performance penalties under a negotiated performance agreement, even though the intercity passenger train is not being dispatched with the preference it is entitled to by law. Deferring to negotiated performance standards in such cases would wrench a train that *ought* to be performing better outside of the Board's jurisdiction "to identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *See* 49 U.S.C. § 24308(1). Negotiated performance agreements should not in this way impede the Board's ability to objectively evaluate and investigate instances of poor OTP. Conversely, the Board's definition of OTP under Section 213

should not in any way supplant or impede mechanisms to secure superior OTP through negotiated performance agreements between host carriers, State agencies, and Amtrak. As CalSTA remarked in its opening comments, negotiated performance agreements “have resulted in nation-leading on-time performance and significant on-going investment in the rail corridors in [California].” Initial Comments of CalSTA, at 1. Although nothing in Section 213 could be construed to negate these agreements, CCJA urges the Board to expressly state that its definition is not intended to and does not abrogate metrics in negotiated performance agreements, or limit the negotiation of route-specific standards in future agreements.

CCJPA also believes deference to the standards contained in negotiated performance agreements would significantly hinder the Board’s administration of its obligations under Section 213. CCJPA’s agreement with Amtrak and UPRR, for example, measures on-time performance by reference to the agreed-upon, scheduled running time for each of nine routes. A train is considered on-time if it completes the route within the scheduled running time, plus sixteen negotiated delay additives ranging from excess station dwell time to the delay attributable to a moveable bridge’s opening. On top of these regular delay additives, the on-time performance expectation is further adjusted for construction or track improvement work being conducted. *See* Incentive Agreement for Operation of Capitol Corridor Trains, available at <http://www.capitolcorridor.org/hsipr/docs/CA-CC-Amtrak-CCJPA-UP-OTPAgmt.pdf>. It would be extraordinarily burdensome for the Board to have to regularly apply not just these provisions, but the separate and equally complex metrics established under every other applicable negotiated performance agreement. Apart from the administrative burden in calculating OTP, the Board would also be unable to make meaningful comparisons between intercity passenger rail routes (i.e. for the purpose of determining how best to utilize limited investigatory resources).

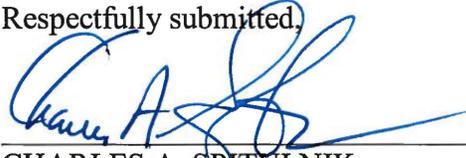
Deference to negotiated performance standards would also jeopardize the important procedural rights afforded by Section 213. State sponsors of Amtrak-operated intercity passenger trains may not be party to agreements between host carriers and Amtrak, and may not have access to detailed performance data maintain pursuant to their provisions. This would impede “an entity for which Amtrak operates intercity passenger rail service” from exercising its right to invoke the Board’s jurisdiction upon filing a complaint. *See* 49 U.S.C. § 23408(f)(1).

Finally, contrary to the arguments of AAR, UPRR, CN and other host carriers, deference to negotiated performance agreements is not necessary to ensure that parties do not evade their contractual commitments thereunder. As discussed above, the proposed definition of OTP under Section 213 is essentially jurisdictional; it does not define route-specific performance expectations or commitments, and compliance with one standard does not preclude application of the other. While CCJPA recognizes several host carriers’ concern that this may result in their being assessed penalties under the performance agreements *in addition to* damages pursuant to a proceeding under Section 213, this result is not preordained. Rather, if the Board concludes that poor OTP is through failure to provide preference, the Board may “award damages against the host rail carrier [or] prescribe[e] such other relief to Amtrak *as it determines to be reasonable and appropriate* . . . [including] what reasonable measures would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.” 49 U.S.C. § 23408(f)(2)–(3). Thus, it would be appropriate for the Board to consider the penalties assessed pursuant to a negotiated performance agreement in determining whether Amtrak has already been compensated for financial loss, but the Board is not precluded from awarding damages where it is warranted. Even in situations where further damages are not warranted, the Board must be able to examine “what reasonable measures would adequately

deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.” 49 U.S.C. § 23408(f)(3)(B).

CCJPA appreciates the opportunity to submit the foregoing reply comments and looks forward to continuing to work with the Board in implementing its authority under Section 213.

Respectfully submitted,



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