



VIA E-FILING

November 10, 2016

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

Re: STB Docket NOR No. 42141 National Railroad Passenger Corporation –  
Investigation of Substandard Performance of the Capitol Limited

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is Amtrak's reply to the requests by CSX Transportation ("CSXT") and the Norfolk Southern Railway Company ("NSR") to place this proceeding in abeyance. Also enclosed is Amtrak's motion for leave to file a reply and Amtrak's reply to the All-Stations OTP responses of CSXT and NSR.

If you have any questions, please let me know.

Respectfully Submitted,

A handwritten signature in black ink that reads 'Justin J. Marks'.

Justin J. Marks  
Attorney for National Railroad Passenger  
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Enclosures

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. NOR 42141**

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**NATIONAL RAILROAD PASSENGER CORPORATION -- INVESTIGATION OF  
SUBSTANDARD PERFORMANCE OF THE CAPITOL LIMITED**

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**NATIONAL RAILROAD PASSENGER CORPORATION**

**MOTION FOR LEAVE TO FILE A SURREPLY TO THE ALL-STATIONS  
OTP EVIDENCE REPLIES OF CSX TRANSPORTATION AND NORFOLK  
SOUTHERN RAILWAY COMPANY**

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The National Railroad Passenger Corporation (“Amtrak”) hereby respectfully files this Motion for Leave to file a surreply to the replies filed by CSX Transportation (“CSXT”) and Norfolk Southern Railway Company (“NSR”) to Amtrak’s All-Stations On-Time Performance (“OTP”) evidentiary submission in this proceeding. Amtrak’s surreply is contained within Section 4 of Amtrak’s Reply to the Requests of CSX Transportation and Norfolk Southern Railway Company To Hold Proceeding In Abeyance and their Replies to All-Stations OTP Evidence (“Amtrak’s Reply”), which is being filed simultaneously herewith.

On September 15, 2016, the Board issued a decision removing the above-captioned proceeding from abeyance and directing Amtrak to provide evidence showing “that the OTP of its Capitol Limited 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.”<sup>1</sup> The September 15 Decision provided that any NSR and CSXT replies “to Amtrak’s evidence” were due by October 25, 2016. *Id.*

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<sup>1</sup> *National Railroad Passenger Corp. - Investigation of Substandard Performance of the Capitol Limited*, STB Docket NOR 42141, slip op. at 3 (STB served Sept. 15, 2016)(the “September 15 Decision”).

On October 17, 2016, Amtrak submitted the OTP evidence ordered by the Board's September 15 Decision. On October 25, 2016, CSXT and NSR separately submitted requests to hold this proceeding in abeyance and also replied to the Amtrak OTP evidence. See CSX Transportation's Request to Hold Proceeding In Abeyance and Response to Amtrak's All-Stations OTP Evidence of the Capitol Limited (STB filed Oct. 25, 2016); Norfolk Southern Railway Company's Reply to the National Passenger Railroad Corporation's On-Time Performance Evidence (STB filed Oct. 25, 2016)("NSR Reply"). In the sections of their responses that constituted replies to Amtrak's OTP evidentiary submission, both CSXT and NSR requested that the Board direct Amtrak to provide the railroads with the underlying train performance data supporting Amtrak's OTP evidentiary submission prior to the Board's initiation of the investigation in this proceeding. In addition, NSR asserted that Amtrak should be required to amend its complaint before the start of the Board's investigation.

### **REQUEST FOR LEAVE TO FILE A SURREPLY**

Amtrak respectfully requests leave to file a surreply to the replies of CSXT and NSR to Amtrak's October 17 submission of OTP evidence. Under 49 C.F.R. § 1104.13(c), a reply to a reply is prohibited. However, the Board frequently allows parties to file surreplies when good cause exists, no party will be prejudiced and the surreply would assist the Board in developing a complete record. *See Delaware and Hudson Railway Co. v. Consolidated Rail Corp.*, 9 I.C.C. 2d 989, 990 (I.C.C. decided Apr. 23, 1993)(waiving section 1104.13(c) prohibition on surreplies pursuant to 49 C.F.R. §§ 1100.3 and 1110.9 for good cause shown); *Petition of Union Pacific Railroad Company for Declaratory Order*, STB Finance Docket 35960 (STB served Sept. 30, 2016).

Amtrak respectfully submits that good cause exists for allowing it to file its surreply because it will not delay this proceeding or otherwise prejudice NSR or CSXT and will assist the Board in creating a complete record on the issues raised in the CSXT and NSR replies and will not delay this proceeding.

Permitting CSXT and NSR to challenge the underlying train performance data may set a precedent for future Section 213 investigations under 49 U.S.C. § 24308(f). In their replies to Amtrak's October 17 OTP evidentiary submission, CSXT and NSR argue that Amtrak should be required by the Board to provide the railroads with the underlying train performance data supporting Amtrak's OTP evidentiary submission prior to the Board initiating an investigation. CSXT and NSR are asking the Board to add a procedural obligation beyond the requirements that the Board has established in the September 15 Decision and in the Final Rule. If granted, the CSXT and NSR requests effectively would add a requirement to the just-completed Final Rule and would cause further delay to this investigation.<sup>2</sup> The Board should grant Amtrak's motion for leave to file its surreply so that Amtrak may explain why this request is unnecessary at this stage of the proceeding and would only further delay the start of the investigation which is required by Section 213 and has been triggered by Amtrak's OTP evidentiary submission. The Board should allow Amtrak the right to respond to the CSXT and NSR request to create a pre-investigation right to "test" Amtrak's data which would require an investigation of the train performance data before the Board initiates its Section 213 investigation.

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<sup>2</sup> NSR also asks the Board to require Amtrak to amend its complaint to "enable Norfolk Southern to interpose any valid legal objections to the proposed scope of any investigation" and to "provide a foundation for the Board's framing of any investigation." NSR Reply at 4. This request too, adds a procedural obligation that was not contemplated in the Final Rule or in the September 15 Decision and therefore good cause exists to permit Amtrak to file a surreply to this NSR request.

In addition, the granting of Amtrak's motion for leave to file the surreply contained within Section 4 of Amtrak's Reply will not unduly delay this proceeding or prejudice any party because it is being filed in conjunction with Amtrak's reply to the requests of CSXT and NSR to hold this proceeding in abeyance, which reply is permitted as a matter of right.

### CONCLUSION

For the foregoing reasons, Amtrak respectfully requests that the Board grant Amtrak's motion to leave to file its surreply to the replies of CSXT and NSR to Amtrak's October 17 OTP evidentiary submission.

Respectfully submitted,



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Dated: November 10, 2016

## CERTIFICATE OF SERVICE

I certify that on November 10, 2016, a true copy of the foregoing National Railroad Passenger Corporation's Motion for Leave was served via email and first class mail upon the following counsel of record:

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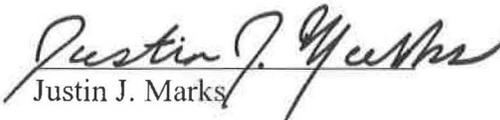
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On September 15, 2016, the Board issued a decision removing the above-captioned proceeding from abeyance and directing the National Railroad Passenger Corporation (“Amtrak”) to provide evidence showing “that the OTP of its Capitol Limited service has 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.” (“Final Rule”).<sup>1</sup> The September 15 Decision provided that any Norfolk Southern Railway Corporation (“NSR”) and CSX Transportation, Inc. (“CSXT”) replies “to Amtrak’s evidence” were due by October 25, 2016. *Id.*

On October 17, 2016 Amtrak submitted OTP evidence in compliance with the Board’s September 15 Decision. On October 25, 2016, CSXT and NSR submitted requests to hold this proceeding in abeyance (and other arguments unrelated to the Amtrak evidence) and also replied to the Amtrak evidence.

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<sup>1</sup> *National Railroad Passenger Corp. - Investigation of Substandard Performance of the Capitol Limited*. STB Docket NOR 42141, slip op. at 3 (Sept. 15, 2016)(“September 15 Decision”).

The requests to hold the case in abeyance are late-filed and deficient petitions for reconsideration of the September 15 Decision and should be denied.<sup>2</sup> CSXT and NSR both overstate the extent of the burden of a Board 213 investigation, understate the delay that would result if the Board puts the case back in abeyance pending final resolution of the Eighth Circuit appeal and ignore the public harm of further delay in the investigation required by Section 213 of the causes of the undeniably poor on-time performance of the Amtrak Capitol Limited service.

In reply to Amtrak's OTP evidence, CSXT and NSR assert that the Board should order Amtrak to provide the railroads with the underlying train performance data supporting Amtrak's OTP submission and NSR argues that Amtrak should be required to amend its complaint to allow NSR to assert any legal objections to the proposed scope of an investigation. Amtrak respectfully requests that the Board deny these requests, because Amtrak fully complied with the Board's September 15 Decision, CSXT and NSR have failed to provide a legitimate basis for their requests and the requests would only further delay the start of the Board's much-needed investigation of the poor on-time performance of the Capitol Limited service.

## **BACKGROUND**

By complaint filed on November 17, 2014, as amended on November 19, 2014, Amtrak requested that the Board initiate an investigation pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), 49 U.S.C. § 24308(f), of the performance of Amtrak's Capitol Limited service between Chicago, Illinois, and Washington, D.C.

On December 19, 2014, in NOR 42134 (a 213 investigation of Amtrak's Illini/Saluki service on the line of the Canadian National Railway Company), the Board issued a decision concluding that the "plain language" of PRIIA Section 213 allows Amtrak to bring a complaint

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<sup>2</sup> The same is true of NSR's and CSXT's assertions regarding retroactivity and reallocation of recovery time in schedules.

when the on-time performance of any intercity passenger train averages less than 80 percent for any two consecutive calendar quarters.<sup>3</sup> The Board denied CN's motion to dismiss the proceeding and CN's alternative request to hold that Section 213 proceeding in abeyance pending the outcome of the Supreme Court's decision regarding the validity of PRIIA Section 207, because "abeyance of [the Illini/Saluki] proceeding would unnecessarily delay a potential Board investigation of on-time performance issues, which runs directly contrary to Congressional intent."<sup>4</sup>

On May 15, 2015, in response to a petition filed by the Association of American Railroads (which Amtrak opposed), 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.<sup>5</sup>

Over seven months later, on December 28, 2015, the Board issued a Notice of Proposed Rulemaking and solicited comments with respect to its proposed on-time performance rule in Section 213 investigations. On the same date, the Board placed this proceeding into abeyance in light of the pending rulemaking. On July 28, 2016, the Board issued a Final Rule in Docket No. EP 726, which took effect on August 27, 2016 and which defined on-time performance ("OTP") for purposes of this proceeding. Petitions for judicial review of the Final Rule, including those filed by NSR and CSXT, have been consolidated in the U.S. Court of Appeals for the Eighth Circuit.

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<sup>3</sup> *National Railroad Passenger Corp. –Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, slip op. at 6-7 (STB served Dec. 19, 2014).

<sup>4</sup> *Id.* at 10-11.

<sup>5</sup> See *On-Time Performance Under Section 213 of the Passenger Rail Inv. & Improvement Act of 2008*, STB Docket EP 726 (STB served May 15, 2015).

As noted above, in the September 15 Decision, the Board removed this proceeding from abeyance and directed Amtrak to provide evidence “that the OTP of its Capitol Limited 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.”<sup>6</sup> The Board directed Amtrak to “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;” to “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; to verify the evidence per 49 C.F.R. § 1112.9; and to “be sure to use the *actual* number of arrivals and departures in both the denominator and the numerator.” *Id.* Neither NSR nor CSXT filed petitions for reconsideration of the Board’s September 15 Decision.

On October 17th, Amtrak filed the OTP evidence required by the Board in the September 15th Decision. On October 25, 2016, CSXT and NSR submitted requests to hold this proceeding in abeyance once again. CSXT requested that the Board hold the proceeding in abeyance “pending resolution of the judicial challenge to the All-Stations On-Time Performance (“OTP”) rule.”<sup>7</sup> Likewise, NSR argued that the Board should hold this proceeding in abeyance because the “parties should not be required to undertake significant discovery and other burdens associated with an investigation before the Eighth Circuit has an opportunity to rule on the legality of the Board’s OTP rule.”<sup>8</sup> The railroads also replied to the Amtrak OTP evidence.

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<sup>6</sup> September 15 Decision, slip op at 3.

<sup>7</sup> CSX Transportation Request to Hold Proceeding in Abeyance and Response to Amtrak’s All-Stations OTP Evidence for the Capitol Limited (“CSXT Reply”) at 2.

<sup>8</sup> NSR Reply to National Railroad Passenger Corporation’s On-time Performance Evidence (“NSR Reply”) at 3.

## ARGUMENT

The Board has “broad discretion to determine whether to hold a proceeding in abeyance, and its decision “to do so in any particular situation is highly dependent on the facts and circumstances of the case.”” *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125 et al., slip op. at 4 (STB served Nov. 29, 2012). The Board should not do so in this case, because the public harm of further delay in the investigation of the causes of the poor on-time performance of the Amtrak Capitol Limited service outweighs the burdens of a 213 investigation. Moreover, the Board is in a position to minimize the burdens of an investigation.

CSXT’s assertions regarding retroactivity are unfounded, because the Final Rule has no impermissible retroactive effect. Finally, NSR and CSXT failed to even allege that reallocation of schedule recovery time would deprive the Board of jurisdiction to investigate the poor on-time performance of the Amtrak Capitol Limited service.

Amtrak’s October 17 submission of OTP evidence fully complied with the Final Rule and the Board’s September 15 Decision requiring Amtrak to provide the OTP evidence supporting Amtrak’s request for an investigation in this proceeding. The Board should not require Amtrak to provide any additional supporting evidence or amend its complaint. Granting either request would only further delay commencement of this investigation.

### **1. The Board Should Deny The Requests For Abeyance**

#### **a. NSR’s And CSXT’s Abeyance Requests Are Late And Deficient.**

The Board’s September 15 Decision took this proceeding out of abeyance. The deadline for reconsideration of that decision was October 5, 2016, so the NSR and CSXT requests to hold

the case in abeyance are late.<sup>9</sup> Neither railroad has shown that the Board's decision to remove the case from abeyance was based on material error or should be changed because of new evidence or changed circumstances, so the requests for abeyance are deficient as well. 49 C.F.R. §§ 1115.3(b), (e).

**b. Abeyance Is Not Justified Because The Board Can Take Steps To Ensure That The Investigation Does Not Cause Unreasonable Burdens And The Public Interest In Determining The Cause Of Poor Capital Limited OTP Overrides Any Burden Issues.**

CSXT and NSR both overstate the extent of the burden of a Board 213 investigation on the Board and the parties, understate the delay that would result if the Board puts the case back in abeyance pending final resolution of the Eighth Circuit appeal and ignore the public harm of further delay in the investigation of the causes of the undeniably poor on-time performance of the Amtrak Capitol Limited service. For these reasons, the Board should deny the requests for abeyance.

*Agency/Party Burden.* NSR argues that the case should be returned to abeyance because the Board's and the parties' resources would be wasted if the Eighth Circuit were to invalidate the Final Rule. NSR Reply at 4. NSR also asserts that Amtrak's October 17 submission "vastly expands the scope of the investigation it seeks and magnifies immeasurably the burdens that such an investigation will entail." NSR Reply at 5. CSXT says the Board "should hold this proceeding in abeyance to avoid a waste of considerable resources by both the agency and the parties should the Eighth Circuit vacate the OTP Rule." CSXT Reply at 2.

The purpose of a 213 investigation is for the Board to "determine whether and to what extent [Amtrak] delays ... are due to causes that could reasonably be addressed" by host rail

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<sup>9</sup> The Board gave NSR and CSXT until October 25, 2016 to reply to Amtrak's evidence, but it did not extend the deadline for Petitions for Reconsideration of the September 15 Decision.

carriers or Amtrak and then to “identify reasonable measures and make recommendations” to improve OTP. 49 U.S.C. § 24308(f). In carrying out its investigation, “the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the ... on-time performance of the train.” *Id.* “Congress ... expected the Board to ‘consider [such] disputes in an efficient and evenhanded manner.’”<sup>10</sup> Thus, the Board has the authority to determine the scope of the investigation and conduct the investigation efficiently and evenhandedly. It can decide what information it needs to determine whether Amtrak delays can be addressed by the host railroads or Amtrak and to identify reasonable measures and make recommendations to improve Amtrak on-time performance. Since the Board controls the scope of the investigation, it can take steps to ensure that the investigation does not burden the Board or unreasonably burden the parties.

NSR and CSXT acknowledge none of these Board powers and choose instead to characterize a 213 investigation as if it necessarily involves the level of burden of more typical discovery-centric, model-driven Board litigation. A 213 investigation need not be like a coal rate case or a merger of two Class I railroads. The Board has indicated that 213 investigations will be “resource intensive” and expressed an intention to have the parties develop evidence in 213 investigations through discovery.<sup>11</sup> However, the extent of the Board’s reliance on evidence developed through discovery remains subject to Board discretion. Reliance to some extent on discovery does not preclude the Board from using other means, including technical conferences on key issues related to Amtrak delays to narrow the focus of the investigation; directing parties

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<sup>10</sup> *National Railroad Passenger Corp. – Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, (STB served Dec. 19, 2014), slip op. at 8 (internal citations omitted).

<sup>11</sup> *On-Time Performance Under Section 213 of the Passenger Rail Inv. & Improvement Act of 2008*, STB Docket EP 726, slip op. at 7 (STB served May 15, 2015). *National Railroad Passenger Corp. – Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, slip op. at 3 (STB served Jan. 2, 2013).

to provide answers to specific questions; directing parties to provide information on specific points; or holding public hearings and calling witnesses from Amtrak, NSR and CSXT or other stakeholders to testify. CSXT and NSR overstate the extent of the burden of a Board 213 investigation on the Board and the parties. The Board can ensure that the investigation is conducted efficiently and without a burden on the Board or an undue burden on the parties.<sup>12</sup>

*Likely Time For Appeal Disposition.* NSR says the appeal is well advanced and predicts “the matter [will be] argued in early 2017.” NSR Reply at 5. Similarly, CSXT predicts that the delay is not “likely to be particularly lengthy in this proceeding” because the appeal case is already well underway and the Eighth Circuit is among the fastest of the federal circuit courts. CSXT Reply at 3.

The Eighth Circuit has not scheduled oral argument in the appeal and no one knows how long thereafter it will be before a substantive decision will be issued. Moreover, if the Eighth Circuit dismisses the appeal, the appellants (or any one of them) could seek *en banc* review and/or petition for writ of certiorari to the Supreme Court. NSR’s and CSXT’s forecast for the timing of the ultimate disposition of their appeal is incomplete and speculative. If the Board puts this case back into abeyance, there is a distinct possibility it will be an additional year or more before the appeal is fully exhausted and resolved.

*Public Interest Considerations.* In any case, the agency/party burdens associated with commencing the investigation required by Section 213 must be weighed against the harms of putting the case in abeyance yet again and waiting an additional, indefinite amount of time until

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<sup>12</sup> CSXT and NSR both rely on *Petition of the National Railroad Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, STB Finance Docket 36048 (STB served Oct. 3, 2016)(“*Amtrak – MBTA*”), but the case is distinguishable. In *Amtrak – MBTA*, the Board concluded “the proceeding would ... likely involve extensive discovery by the parties (and related discovery motions filed before the Board) prior to briefing and review of a large record.” *Amtrak – MBTA*, slip op. at 3. Here, even though the Board has indicated that 213 investigations will be “resource intensive,” it has the authority to ensure that the investigation is conducted efficiently and without a burden on the Board or an undue burden on the parties.

the challenge by the freight railroad industry to the Final Rule has run its course. Although the *reasons* are a matter of differing opinion, it is *undeniable* that the on-time performance of the Capitol Limited Amtrak service is poor.

Congress enacted PRIIA Section 213 so that the Board could “resolve on-time performance disputes between Amtrak and host carriers because of ‘increasing frustration’ under the prior dispute resolution process....Congress made it a priority to facilitate ... the investigation of on-time performance problems.”<sup>13</sup> Determining the cause of the poor Amtrak on-time performance and Board recommendations to improve it are in the public interest and any further delay in commencing the investigation would harm the public.

In the Illini/Saluki service 213 case, the Board denied CN’s request to hold the case in abeyance pending the outcome of the Supreme Court’s decision regarding the validity of PRIIA Section 207, because “abeyance of [the] proceeding would unnecessarily delay a potential Board investigation of on-time performance issues, which runs directly contrary to Congressional intent.”<sup>14</sup> CSXT and NSR both ignore the public harm of further delay in the investigation of the causes of the poor on-time performance of the Amtrak Capitol Limited service.<sup>15</sup> To hold this case in abeyance pending the outcome of the Eight Circuit appeal would unnecessarily delay the

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<sup>13</sup> *National Railroad Passenger Corp. –Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, slip op. at 8 (STB served Dec. 19, 2014)(internal citations omitted).

<sup>14</sup> *Id.* at 10-11. Over a year later, the Board put the case in abeyance pending the rulemaking, but that rulemaking obviously has now been completed. *National Railroad Passenger Corp. – Section 213 Investigation Of Substandard Performance On Rail Lines Of Canadian National Railway Company*, STB Docket NOR 42134, slip op. at 10-11 (STB served Dec. 28, 2015).

<sup>15</sup> Again, *Amtrak – MBTA* is distinguishable. There, the Board concluded that Amtrak did not demonstrate that abeyance would cause material harm. *Amtrak – MBTA*, slip op. at 3-4. (“Although Amtrak claims that MBTA’s share of [operating and maintenance] costs would be passed on to Amtrak ... MBTA explains that [the relevant] agreement terminates in February 2017, [and thereafter] those costs would not be passed on to Amtrak ... Amtrak has also not identified or explained how other entities could be required to pay for capital expenditures on the Attleboro Line, or even that capital needs on that Line exist at this time.”) Here, the evidence Amtrak submitted on October 17 demonstrates that the public suffers delay and poor on-time performance on the Capitol Limited service and until the Board commences the investigation and begins to “identify reasonable measures and make recommendations” to improve on-time performance, the public will continue to suffer delays and poor service.

Board investigation of the undeniably poor on-time performance of the Amtrak Capitol Limited service and would be contrary to Congressional intent.

## **2. CSXT's Assertions Regarding Retroactivity Are Late And Unpersuasive**

CSXT argues that applying the Final Rule to calendar quarters that predate the rule “raises serious fairness concerns.” CSXT Reply at 5. Amtrak’s Amended Complaint is based on calendar quarters that pre-date the Final Rule. While it is true that Amtrak’s October 17 evidence adds quarters to the potential scope of the investigation, CSXT’s concerns regarding retroactivity should have been raised in a petition for reconsideration of the September 15 Decision.

In any case, the argument is unpersuasive, because the Final Rule has no impermissible retroactive effect.<sup>16</sup> The Final Rule clarifies a PRIIA statutory term (“on-time performance of any intercity passenger train averages less than 80 percent”). *See On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, STB Docket No. EP 726, at 3 (STB served July 28, 2016) (the rulemaking “would provide clarity regarding the ‘less than 80 percent’ OTP threshold in all applicable cases and allow the Board to obtain the full range of stakeholder perspectives in one docket and avoid the potential relitigation of the issue in each case, thereby conserving party and agency resources”); *see also Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (“concerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law.”). Moreover, the fact that the enforcement of a regulation requires the agency to draw on facts that existed from a time before the regulation’s enactment does not render the regulation impermissibly retroactive. *See*,

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<sup>16</sup> For this reason, CSXT has failed to show the Board’s decision to remove the case from abeyance was based on material error. 49 C.F.R. §§ 1115.3(b).

*e.g. Administrators of Tulane Educ. Fund v. Shalala*, 987 F.2d 790, 798 (D.C. Cir. 1993)

(regulations that alter the information an agency may use to determine future conditions “add nothing further that is retroactive: the regulations contemplate only the use of past information for subsequent decision-making”).

### **3. CSXT’s And NSR’s Assertions Regarding Reallocation Of Recovery Time In Schedules Are Late And Unrelated To The Amtrak Evidence**

CSXT and NSR both refer to the Board’s discussion in the Final Rule of possible reallocation of recovery time in Amtrak schedules.<sup>17</sup> However, neither railroad suggests that reallocation of recovery time in the *Capitol Limited schedules* would deprive the Board of jurisdiction to investigate the causes of delay on the Capitol Limited. Thus, the NSR and CSXT discussion of schedule issues does not relate to Amtrak’s October 17 evidence and is yet another issue that should have been raised in a petition for reconsideration of the September 15 Decision.

In the Final Rule, the Board said:

*[s]ome* schedules, particularly for long-distance trains, may need to be modified to more realistically distribute *recovery time* in light of an all-stations threshold. For example, as CSXT notes, considerable care must be exercised in distributing recovery time along a route, to avoid site-specific operational concerns. Moreover, a number of current passenger rail schedules insert a very large share of recovery time between the last stations on a route. To support all stations OTP on such a route could require a reevaluation and potential reallocation of recovery time across the entire route.

Final Rule, slip op. at 6 (emphasis added; internal citations omitted).<sup>18</sup>

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<sup>17</sup> CSXT Reply at 1, 5; NSR Reply at 9.

<sup>18</sup> Neither railroad acknowledges that the Board’s discussion was narrowly focused on potential reallocation of recovery time in some Amtrak schedules. CSXT refers to “the Board’s agreement that Amtrak’s current public schedules are not designed for a metric focusing on intermediate stations.” CSXT Reply at 1. CSXT later refers to “the Board’s previous conclusion that Amtrak train schedules were constructed in a manner that makes compliance with an All-Stations OTP metric difficult.” *Id.* at 5. NSR refers to “the Board’s own observation that schedules would need to be adjusted to address the Board’s all-stations OTP metric.” NSR Reply at 9.

All Amtrak schedules include recovery time. Some Amtrak schedules have a relatively large share of recovery time just before the destination station. To the extent that recovery is just before the destination station, this may or may not have anything to do with how performance has historically been measured; in many cases it may be due to “site-specific operational concerns.” Neither CSXT nor NSR even allege that the Capitol Limited schedules need to be modified to re-distribute recovery time; neither railroad cites even a single example of re-distribution to avoid “site-specific operational concerns;” and neither railroad identifies a single example of potential reallocation of recovery time on the route of Capitol Limited Service.<sup>19</sup>

**4. Amtrak’s October 17 Submissions Fully Complied With The Final Rule And The September 15 Decision**

**a. The Board Should Deny CSXT’s And NSR’s Requests For The Underlying Train Performance Data**

NSR and CSXT also assert that Amtrak should be required to provide them with the underlying train performance data supporting Amtrak’s OTP evidentiary submission before the Board initiates its investigation. The Board should deny these requests, because Amtrak’s October 17 submission complied with the Final Rule and the September 15 Decision, NSR and CSXT have access to the individual train data underlying Amtrak’s OTP evidence, and allowing the hosts a pre-investigation right to raise unspecified questions before the Board begins its Section 213 investigation would serve no purpose other than to delay commencement of the investigation.

NSR argues that “Amtrak should be required to supplement its evidence with the underlying data from which its calculations were derived so that Norfolk Southern can have a full and fair opportunity to test that evidence prior to the initiation” of the Board’s investigation.

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<sup>19</sup> CSXT’s and NSR’s discussion of recovery time adjustment is yet another general argument which should have been raised in a timely-filed petition for reconsideration.

NSR Reply at 3-4; see also 6-7. CSXT seems to go further arguing that “[i]t is not possible for CSXT to *respond substantively* to Amtrak’s evidentiary submission at this stage” without “the opportunity to test the accuracy of [Amtrak’s] data.” CSXT Reply at 4-5 (emphasis added).

Amtrak’s October 17 submission fully complied with the Final Rule and the Board’s September 15 Decision order requiring Amtrak to provide the OTP evidence supporting Amtrak’s request for an investigation in this proceeding. NSR and CSXT do not even claim the October 17 submission failed to so comply. The Final Rule and the Board’s September 15 Decision do not require Amtrak to provide the underlying train performance data supporting its OTP evidence to the Board or to NSR and CSXT. As CN noted in its response to Amtrak’s OTP evidence in NOR 42134, the proper time for the railroads to “test” Amtrak’s train performance data is during the investigation.<sup>20</sup>

Amtrak’s October 17 OTP evidence was calculated from data in Amtrak’s OTP Monitor Report System, to which NSR and CSXT have access. The OTP Monitor Report System allows NSR and CSXT to review the individual train operational data underlying Amtrak’s October 17 OTP evidence and test the accuracy of the Amtrak calculations.

CSXT’s argument seems to contemplate even more than testing the accuracy of the Amtrak calculations. CSXT would have the Board to add a procedural step beyond the requirements of the September 15 Decision and in the just-completed Final Rule. It would allow CSXT the pre-investigation right to raise unspecified questions about Amtrak’s verified data and effectively require an investigation of the train performance data even before the Board begins its

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<sup>20</sup> “If and when the Board proceeds with the factual investigation in this proceeding, the basis for, and accuracy of, Amtrak’s OTP data should be among the many issues to be investigated.” Illinois Central Railroad Company Response to Amtrak’s On-Time Performance Evidence and Request to Hold Proceeding in Abeyance in *National Railroad Passenger Corp. - Section of Substandard Performance of Rail Lines of Canadian National Railway Co.*, STB Docket NOR. 42134 at 1-2.

Section 213 investigation. This would serve no purpose other than to delay commencement of the investigation and therefore the request should be denied.

**b. The Board Should Not Require Amtrak To Amend The Complaint**

NSR also contends that before any investigation by the Board is commenced, Amtrak should be required to amend its complaint to “enable Norfolk Southern to interpose any valid legal objections to the proposed scope of any investigation” and to “provide a foundation for the Board’s framing of any investigation.” *See* NSR Reply at 4. This argument elevates form over substance. In response to the Board’s September 15 Decision, Amtrak submitted OTP evidence demonstrating that the on-time performance of the Capitol Limited has been less than 80% for more than two consecutive quarters. The Board’s statutory authority to initiate the investigation in this proceeding has been triggered by the submission of that evidence, and the Board has the authority to determine the scope of its investigation in this matter. NSR has already responded in its reply to Amtrak’s OTP evidentiary submission and has expressed its concerns about the scope of the Board’s investigation and the relevant time periods to be covered in that investigation. There is no need for Amtrak to amend its complaint in order for NSR to repeat those concerns in another round of pleadings and further delay the commencement of the 213 investigation.

## CONCLUSION

For the foregoing reasons, Amtrak respectfully asks that the Board deny the CSXT and NSR requests to place this proceeding in abeyance. Amtrak further requests that the Board deny the CSXT and NSR request for Amtrak to provide the underlying train performance data supporting Amtrak's OTP submission and deny NSR's request that the Board should order Amtrak to amend its complaint to allow NSR to assert any legal objections to the proposed scope of an investigation. Abeyance or additional submissions in advance of the Board's issuance of a procedural schedule would only cause further delay in commencement of this much-needed investigation.

Respectfully submitted,



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Dated: November 10, 2016

## CERTIFICATE OF SERVICE

I certify that on November 10, 2016, a true copy of the foregoing National Railroad Passenger Corporation's reply to the requests of CSX Transportation and Norfolk Southern Railway Company to hold the proceedings in abeyance and to the replies to all-stations OTP evidence was served via email and first class mail upon the following counsel of record:

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