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VIA E-FILING

January 28, 2015

237636

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

ENTERED
Office of Proceedings
January 28, 2015
Part of
Public Record

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

Dear Ms. Brown:

Enclosed for filing is Amtrak's Motion for Leave to File a Reply to CSX's and Norfolk Southern's Responses to the Complaint and Amtrak's Reply to CSX's and Norfolk Southern's Responses to the Complaint.

If you have any questions, please contact me.

Respectfully submitted,

Linda J. Morgan
Attorney for National Railroad Passenger Corporation

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42141

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

**NATIONAL RAILROAD PASSENGER CORPORATION'S
MOTION FOR LEAVE TO FILE A REPLY TO CSX'S AND
NORFOLK SOUTHERN'S RESPONSES TO THE COMPLAINT**

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**BEFORE THE
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The National Railroad Passenger Corporation (“Amtrak”) hereby respectfully files this Motion for Leave to File a Reply to CSX Transportation’s (“CSX”) and Norfolk Southern Railway Company’s (“Norfolk Southern”) Responses to Amtrak’s Complaint.

PROCEDURAL HISTORY

On November 17, 2014, Amtrak filed with the Surface Transportation Board (“Board” or “STB”) a Complaint to Initiate Investigation of the substandard performance of Amtrak’s Capitol Limited Service (“Complaint”) between Chicago, IL and Washington, DC, which runs on lines owned by CSX and Norfolk Southern. *Complaint*, 2. Amtrak also filed a Memorandum of Law in Support of Complaint to Initiate Investigation. On November 19, 2014, Amtrak filed a corrected copy of the attachment known as Exhibit B in order to correct an error in the data on Exhibit B.¹ On November 28, 2014, CSX filed a Request for Extension of Time to Respond to Amtrak’s Complaint to initiate investigation. CSX’s Request stated that Norfolk Southern consented to CSX’s Request for Extension “so long as any extended deadline applies to [Norfolk

¹ Original Exhibit B listed the Capitol Limited’s Endpoint on-time performance for the third quarter of fiscal year 2014 as 33.6 percent. The corrected Exhibit B accurately listed the Endpoint on-time performance figure of 16.5 percent.

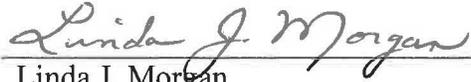
Southern] as well.” *CSX Request for Extension*, 1. In response, Amtrak filed notice with the Board that it did not oppose CSX’s request for an extension of time on December 2, 2014.

On December 4, 2014, the STB granted CSX’s request for an extension of time. *National Passenger Corporation—Investigation of Substandard Performance of the Capitol Limited*, NOR 42141, at 1 (STB served Dec. 4, 2014). CSXT and NS each filed Responses to the Complaint and Motions to Dismiss the Complaint on January 7, 2015.

REQUEST FOR LEAVE TO FILE A REPLY

The Board’s rules prohibit a “reply to a reply.” 49 C.F.R. § 1104.13(c). However, the Board’s acceptance of the Amtrak’s Reply to the Responses to the Complaint filed by CSX and Norfolk Southern will ensure that the Board has a complete record in this proceeding and will not delay the proceeding or prejudice any party. *National Railroad Passenger Corporation—Section 213 Investigation of Substandard performance on Rail Lines of Canadian National Railway Company*, NOR 42134, slip op. at 4 n. 9 (STB served Dec. 19, 2014); *McCloud Ry. Co. — Abandonment and Discontinuance of Service Exemption—In Siskiyou, Shasta, and Modoc Counties, CA, in the Matter of a Request to Set Terms and Conditions*, AB 914-X, slip op. at 3 (STB served Aug. 25, 2006). Accordingly, the Amtrak requests that the Board accept the following Reply.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 28, 2015, a true copy of the foregoing National Railroad Passenger Corporation's Motion for Leave to Reply to CSX's and Norfolk Southern's Responses to the Complaint, was served upon the following counsel of record:

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42141

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SUBSTANDARD PERFORMANCE OF THE CAPITOL LIMITED**

**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY TO CSX
TRANSPORTATION'S AND NORFOLK SOUTHERN RAILWAY COMPANY'S
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January 28, 2015

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RESPONSES TO AMTRAK'S COMPLAINT**

The National Railroad Passenger Corporation (“Amtrak”) hereby respectfully files this Reply to CSX Transportation, Inc.’s (“CSX”) and Norfolk Southern Railway Company’s (“Norfolk Southern”) Responses to Amtrak’s Complaint (“CSX Answer” and “Norfolk Southern Answer,” respectively).

PROCEDURAL HISTORY

On November 17, 2014, Amtrak filed with the Surface Transportation Board (“Board” or “STB”) a Complaint to Initiate Investigation of the substandard performance of Amtrak’s Capitol Limited Service (“Complaint”) between Chicago, IL and Washington, DC, which runs on lines owned by CSX and Norfolk Southern. *Complaint*, 2. Amtrak also filed a Memorandum of Law and a Memorandum of Law in Support of Complaint to Initiate Investigation. On November 19, 2014, Amtrak filed a corrected copy of the attachment known as Exhibit B in order to correct an error in the data on Exhibit B.¹ On November 28, 2014, CSX filed a Request for Extension of Time to Respond to Amtrak’s Complaint to initiate investigation. CSX’s Request stated that Norfolk Southern consented to CSX’s Request for Extension “so long as any extended deadline

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applies to [Norfolk Southern] as well.” *CSX Request for Extension*, 1. In response, Amtrak filed notice with the Board that it did not oppose CSX’s request for an extension of time on December 2, 2014.

On December 4, 2014, the STB granted CSX’s request for an extension of time. *National Passenger Corporation—Investigation of Substandard Performance of the Capitol Limited*, NOR 42141, at 1 (STB served Dec. 4, 2014). CSX and Norfolk Southern each filed Responses to the Complaint and Motions to Dismiss the Complaint on January 7, 2017.

INTRODUCTION

CSX’s Answer takes issue with Amtrak’s filing of the complaint and its substance. In particular, CSX states that Amtrak’s complaint came without warning and without any discussion about the concerns raised in the complaint. *CSX Answer*, 2. It also disputes any suggestion that performance issues are due to CSX’s failure to give Amtrak’s trains preference, and responds to certain allegations made in the complaint.²

The specific counter-arguments made by CSX in response to Amtrak’s Complaint, including its claim about preference, are best addressed during the course of the investigation that Amtrak is seeking. However, Amtrak must take issue here with the suggestion that CSX was somehow caught completely off-guard by the filing of the Complaint, and that Amtrak had not discussed substandard performance issues with CSX prior to the filing of the complaint. Amtrak and CSX have been in ongoing discussions, as CSX itself suggests in its Answer, *CSX Answer*, 4, regarding performance issues throughout the CSX network where Amtrak operates.

² CSX and Norfolk Southern repeat their argument that the Board does not have the authority to initiate an investigation without valid Metrics and Standards. *CSX Answer*, 2, *Norfolk Southern Answer*, 5-6. Amtrak has already addressed this argument in its Replies to the Motions to Dismiss filed by CSX and Norfolk Southern. See *National Railroad Passenger Corporation’s Reply to Motion to Dismiss of CSX Transportation*, at __ filed Jan. 27, 2015 and *National Railroad Passenger Corporation’s Reply to Motion to Dismiss of Norfolk Southern Railway Company*, at __ filed Jan. 27, 2015.

To suggest that CSX was so taken by surprise belies reality. In any event, Amtrak has the right under the law to file a complaint requesting the Board to investigate substandard performance of its trains. The performance of the Capitol Limited continues to be substandard, and Amtrak has sought relief accordingly.

Norfolk Southern's Answer reviews the statutory predicate for Amtrak's complaint, the issues it believes should be addressed if the Board initiates an investigation, and how the Board might consider addressing them. *Norfolk Southern Answer*, 5-7, 29-37. Amtrak's complaint is well-grounded in the law and speaks for itself. Any further discussion of the performance issues it addresses and steps to be taken to remedy them will be addressed during the course of the investigation Amtrak seeks. In its discussion of the law and Amtrak's complaint, however, Norfolk Southern makes certain statements that are misleading and without foundation and to which Amtrak must reply to clarify the record.

In its Answer Norfolk Southern discusses the performance issues that have surfaced on its network and the steps it has taken to address those issues. Apparently, in an effort to set what it views as the proper stage for this discussion, it states the following: "Norfolk Southern's freight arteries are not Amtrak's private playground . . ." *Id.* at 12. This statement suggests a reality very different from the one in which Amtrak is operating, making light of Amtrak's effort to address issues of substandard performance and denigrating the entire Congressional framework established in the law with the creation of Amtrak. The freight railroads were relieved of their obligation to operate rail passenger service in exchange for the grant of access to Amtrak for passenger operation over their lines. Amtrak is not an interloper on a joy ride. Its mission as established by Congress is to provide quality rail passenger service, using rights of access to the freight rail lines where needed and seeking relief at the Board in accordance with

the statute when performance is substandard. It is simply misleading for Norfolk Southern to suggest otherwise.

In discussing what it believes the Board must address in any investigative process, Norfolk Southern states: “Congress thus made very clear that PRIIA Section 213 did not provide Amtrak or the Board with license to conduct a fishing expedition for potential ‘preference’ violations.” *Norfolk Southern Answer*, 30. The implication is that the investigation trigger should not be employed for more than a determination of whether there is sufficient basis of substandard performance to trigger an investigation. *Id.* at 31. Amtrak has nowhere suggested that the trigger should be used to conduct a “fishing expedition” of anything. The statute gives Amtrak the right to seek an investigation of substandard performance based on an on-time performance trigger. Once an investigation is initiated, the statute provides direction regarding what the Board will consider during the investigatory process, including whether delays are attributable to a railroad’s failure to provide preference. *See* 49 U.S.C. § 24308(f)(2). Amtrak is seeking what the statute provides, nothing more and nothing less.

Turning to other parts of the CSX and Norfolk Southern’s Answers, each asked the Board to direct the parties to mediation. *CSX Answer*, 3, *Norfolk Southern Answer*, 31-33. Amtrak explains herein why it does not believe that this matter is appropriate for mediation and urges the Board not to order it here.

Finally, each railroad has asked the Board to develop an on-time performance definition through a notice-and-comment rulemaking. *CSX Answer*, 4, *Norfolk Southern Answer*, 35. Amtrak briefly explains herein why it opposes this request, but will make a complete response on this point in reply to the Association of American Railroad’s Petition for Rulemaking. *See On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of*

2008—Conditional Petition for Rulemaking of the Association of American Railroads, EP 726 (STB served Jan. 15, 2015). The Board has the discretion to decide how to arrive at the definition of on-time performance in determining when an investigation is triggered, and there are valid and sound reasons for the Board to pursue the matter through the adjudication process, receiving comments from interested parties along the way.

ARGUMENT

I. Mediation Would Not Be Appropriate For This Matter.

Amtrak certainly appreciates the value of private-sector resolution where possible, and understands the Board's interest in that approach as reflected in its regulations regarding Alternative Dispute Resolution ("ADR"). *See* 49 CFR § 1109.1 ("The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible."). However, Amtrak does not believe mediation should be ordered here. While the Board has the authority under 49 CFR 1109.2 to order mediation where a party requests it, the Board also has the discretion not to grant the request. The Board should not grant the requests of CSX or Norfolk Southern. Mediation would not be appropriate nor serve any useful purpose in this case.

Amtrak and CSX have been in ongoing discussions about substandard performance of Amtrak trains on CSX lines. The fact is that the Capitol Limited on-time performance remains substandard, and Amtrak does not see that further discussion through mediation would be productive. CSX cites the CN mediation as an example of where the Board directed mediation. *CSX Answer*, 3. But, in fact, as the Board is aware, the CN mediation, which continued for quite some time, was not successful in resolving the performance issues raised in that proceeding, and as the Board is well aware, Amtrak's Amended Complaint against CN is pending before the

agency. See *Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Service on the Rail Lines of Canadian Nat'l Ry. Co.*, NOR 42134 (STB served Dec. 19, 2014) (“*Amtrak/CN*”).

While Amtrak and Norfolk Southern have also been in ongoing discussions about substandard performance of Amtrak trains on Norfolk Southern lines, the Capitol Limited on-time performance as already mentioned remains substandard, and Amtrak does not see that further discussion through mediation would be productive, particularly in light of the extensive list of issues that Norfolk Southern suggests would need to be addressed through mediation. *Norfolk Southern Answer*, 10. Furthermore, the Capitol Limited involves two carriers, not just one. NS has suggested bilateral mediation without CSX. See *NS Answer*, 33 at n. 31. Separate mediation would serve only to delay final resolution of this matter. The breadth of the performance issues related to the Capitol Limited would thus be handled more efficiently through an investigation by the Board.

In its response, Norfolk Southern claims that its Counsel suggested to Amtrak’s Counsel non-binding mediation as an alternative to pursuing the complaint, but that Amtrak’s Counsel “indicated that Amtrak likely would not be amenable to such a path, in part because of the need to build a record through discovery.” *Id.* at 32. Norfolk Southern then speculates that Amtrak is not interested in pursuing mediation because it is interested in an inappropriate “fishing expedition through the discovery process.” *Id.* at 32-33. Amtrak is not on a fishing expedition. It has indicated to the Board that the agency should seek whatever information it needs to conduct the investigation Amtrak has requested, but nowhere has Amtrak suggested anything close to a fishing expedition. *Memorandum of Law*, 3. Amtrak is simply exercising its statutory rights to pursue an investigation of substandard performance.

The Board's ADR rules reflect the agency's interest in resolving disputes within its jurisdiction in the most expeditious and constructive way possible. Here, mediation would not further that objective, and should not be ordered. *See City of Peoria and the Village of Peoria Heights—Adverse Discontinuance—Pioneer Industrial Railway Company*, AB 878, slip op. at 3 (STB served Aug. 9, 2005) (Board denied party's request for mediation because the other party did not consent to mediation and the Board saw "no indication that [mediation] would be fruitful."). Mediation would not be fruitful here. The Board should proceed promptly to initiate an investigation.

II. The Board Has Clear Discretion To Determine By Adjudication The Definition Of On-Time Performance For Purposes Of Triggering An Investigation Under Section 213 .

CSX and Norfolk Southern argue that the Board should define on-time performance through a rulemaking. Amtrak urges the Board not to proceed with a rulemaking here. The on-time performance trigger that would be the subject of such a rulemaking is just that: a trigger for an investigation. The on-time performance definition would not constitute an industry-wide legal standard replacing another legal standard and with broad applicability to an expansive universe of activity. Nor would it dictate the final outcome of the investigation. Furthermore, defining on-time performance through an adjudicatory process would not, in any way, preclude interested parties from commenting on the issues in the subsequent adjudication.³ Nor would proceeding with an adjudication here prejudice other host railroads from proffering a different definition of on-time performance based on a different factual predicate in a later Section 213 adjudication. *See Shell Oil v. Federal Energy Regulatory Comm'n*, 707 F.2d 230, 236 (5th Cir.

³ CSX and Norfolk Southern are already intervenors in *Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Service on the Rail Lines of Canadian Nat'l Ry. Co.*, NOR 42134 (STB served Jan. 16, 2015), the case in which the Board has sought input from the parties on the definition of on-time performance.

1983) (Fifth Circuit noted that an agency may establish a general rule in an adjudication but that does not preclude a “later challenge to the validity of the rule by one who was not a party to the proceeding in which it was announced.”).

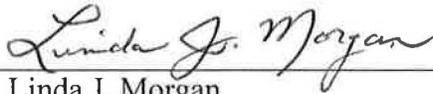
The Board has clear discretion to choose adjudication in this case. *See Securities and Exchange Comm’n v. Chenery*, 332 U.S. 194, 203 (1946), and *National Labor Relations Board v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293 (1974) (endorsing agency authority to resolve issues on a case-by-case basis). “Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.” *Chenery*, 332 U.S. at 202. And the Board has noted that in enacting Section 213, Congress “expected the Board to ‘consider [such] disputes in an efficient and evenhanded manner.’” *Amtrak/CN*, slip op. at 8 (quoting S. Rep. 110-67, at 26 (May 22, 2007)). Choosing adjudication would not be inconsistent with Board precedent.⁴ And the mandate for a rulemaking in Section 207 is in no way a mandate for a rulemaking here. The on-time performance definition can and should be developed through the adjudication process.

⁴ *See e.g. Arkansas Power and Light Co., et. al. Petition to Institute Rulemaking Proceeding—Implementation of Long-Cannon Amendment to Staggers Rail Act*, 1982 ICC LEXIS 19, **11, 13-14 (ICC served Aug. 27, 1982) (ICC denied a Petition for a Rulemaking after weighing “the congressionally mandated regulatory role of the Commission, the information . . . that likely would result from the desired proceeding, and the frequency with which it would be used, as well as the cost of the proceeding to the Commission, rail carriers, and other interested parties.”); *see also Total Petrochemicals & Refining U.S.A., Inc. v. CSX Transp., Inc.*, NOR 42121, slip op. at 7 n. 20 (STB served Dec. 18, 2013) (Board denied CSX’s Petition for Reconsideration and rejected CSX’s argument that the Board should have decided one of the issues of the case issue in a rulemaking rather than an adjudication. The Board quoted *W. Coal Traffic League v. United States*, 719 F.2d 772, 780 (5th Cir. 1983), for the fact that “courts must remain cognizant of the Supreme Court’s direction that the formulation of procedures is basically to be left within the discretion of the agencies to which Congress has confided the responsibility of substantive judgments.”).

CONCLUSION

For the foregoing reasons, Amtrak asks the Board to deny both CSX's and Norfolk Southern's request for mediation and request for a rulemaking. The Board should promptly initiate an investigation into the substandard performance of the Capitol Limited.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 28, 2015, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to CSX's and Norfolk Southern's Responses to the Complaint, was served upon the following counsel of record:

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