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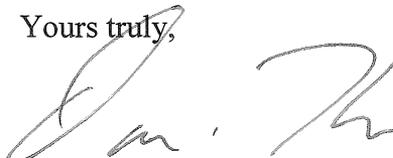
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

Re: Docket No. NOR 42134, *National Railroad Passenger Corporation – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding please find the response of Canadian National Railway Company, Grand Trunk Western Railroad Company, and Illinois Central Railroad Company to the Board's order served in this proceeding on November 5, 2012.

Yours truly,



David A. Hirsh

*Counsel for Canadian National Railway Company,
Grand Trunk Western Railroad Company, and
Illinois Central Railroad Company*

Enclosure

cc: William Herrmann, Esquire
David S. Molot, Esquire
David W. Ogden, Esquire

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42134

NATIONAL RAILROAD PASSENGER CORPORATION –
SECTION 213 INVESTIGATION OF
SUBSTANDARD PERFORMANCE ON RAIL LINES OF CN

**CN'S RESPONSE TO THE BOARD'S
NOVEMBER 5, 2012 ORDER**

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42134

NATIONAL RAILROAD PASSENGER CORPORATION –
SECTION 213 INVESTIGATION OF
SUBSTANDARD PERFORMANCE ON RAIL LINES OF CN

**CN’S RESPONSE TO THE
BOARD’S NOVEMBER 5, 2012 ORDER**

INTRODUCTION

Canadian National Railway Company (“CNR”) and its subsidiaries Grand Trunk Western Railroad Company (“GTW”) and Illinois Central Railroad Company (“IC”) (collectively, “CN”) hereby respond to the Board’s order served on November 5, 2012, in this proceeding (“Order”).¹ In that Order, the Board (1) reactivated this proceeding under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”) (codified at 49 U.S.C. § 24308(f)); (2) directed the parties to meet and confer and “submit to the Board in writing, jointly, if possible, a proposed procedural framework by November 26, 2012;” and (3) directed CN to “indicate whether it intends to press its abeyance motion during the pendency of the appeal” now before the U.S. Court of Appeals for the D.C. Circuit in the Association of American Railroads’ (“AAR”) challenge to PRIIA (“the AAR Case”).

¹ Amtrak operates over CN pursuant to an operating agreement with IC and GTW, two indirectly owned rail operating subsidiaries of CNR. CNR, however, is not a host railroad for any of the services operated by Amtrak that are identified in Amtrak’s Petition for Relief.

The parties met and conferred but did not agree on a joint proposal. As the Board noted in its Order, CN had “proposed a detailed procedural framework” as part of the response to Amtrak’s petition that CN filed in March. *See* Response to Amtrak Petition Under Section 213 of PRIIA (“Response”) at 73-78. Developments since March, outlined below, have only reinforced CN’s belief that the framework it proposed is appropriate. However, Amtrak informed CN that it does not endorse that framework, including, particularly, CN’s proposal that the proceeding be bifurcated.

CN further understands that Amtrak opposes holding the proceeding in abeyance during the pendency of the AAR Case. Given that opposition, CN is not at this stage moving the Board to do so. CN believes, however, that it would be reasonable and appropriate for the Board to order *sua sponte* that the proceeding be held in abeyance.

**BACKGROUND: CHANGES AND IMPROVEMENTS IN AMTRAK’S
PERFORMANCE ON CN’S LINES DURING THE PAST YEAR**

Amtrak filed its Petition for Relief (“Petition”) on January 19, 2012. The data and allegations in the Petition cover the period from October 2010 to September 2011. CN filed its Response on March 9, 2012. Accordingly, the filings before the Board address operations and performance data from more than a year ago and do not take into account more recent developments.

In its Response, CN had suggested Board-supervised mediation, and, after Amtrak agreed, the Board ordered mediation on April 4, 2012. The parties have not reached a settlement, although, despite the proceeding no longer being held in abeyance, discussions continue. Over the past year, through both joint and individual efforts, the parties have made significant progress in improving the performance of Amtrak’s trains on CN’s lines and in addressing and resolving issues raised in Amtrak’s Petition.

As examples of the parties’ cooperative efforts, (1) they have established specific points of contact for a variety of issues; (2) they have improved communications concerning the location of Amtrak’s trains; (3) they have developed and implemented a new e-mail-based system for distribution of CN operating bulletins to Amtrak; (4) operating personnel of CN and Amtrak are now holding regular bi-weekly calls; (5) Amtrak is now providing CN with PRIIA performance data that CN has integrated into its management systems; (6) the parties have agreed upon and implemented certain schedule adjustments; and (7) Amtrak has begun working to reduce delays to its trains that are caused by other carriers that control interlockings on CN’s lines (which Amtrak attributes to CN as host-responsible delays in its PRIIA reporting).

Due in part to such efforts, the performance of Amtrak’s trains on CN’s lines has improved significantly since the period covered by Amtrak’s Petition. For example, delays reported by Amtrak as “host-responsible” have decreased significantly, as reflected in the following table.²

CN “Host-Responsible Delay” per 10,000 train miles, as reported by Amtrak					
Amtrak Service	FY 2011	Q1 FY2012	Q2 FY2012	Q3 FY2012	Percent change FY 2011 – Q3 FY2012
City of New Orleans	1336.3	1233	1151	1016	-31.53%
Illini/Saluki	1325	1179	1123	1044	-26.92%
Texas Eagle	1905.6	4757	2202	1330	-43.28%
Lincoln	2554.2	3508	1508	1555	-64.26%
Blue Water	1457.7	1370	1364	1227	-18.80%
Wolverine	2581.7	1847	2003	2147	-20.25%

² By displaying Amtrak’s reported “host-responsible delays” here, CN is not waiving arguments concerning the inaccuracy of Amtrak’s reporting, such as its failure to report root causes of delays and its mislabeling of delays as “host-responsible” even if beyond the host carrier’s reasonable control.

These positive developments over the past year are highly significant to this proceeding, because the tasks Congress assigned to the Board are largely forward-looking in nature: (1) making “recommendations to improve the service, quality, and on-time performance of the train” in the future, *see* 49 U.S.C. § 24308(f)(1); and (2) considering relief, if preference violations are proven, for purposes of “deter[rence of] future actions,” *see* 49 U.S.C. § 24308(f)(3)(B). Accordingly, the Board should be fully apprised of the parties’ progress. CN’s proposed framework provides appropriate opportunities, including an initial briefing stage, for the parties to fully inform the Board. *See* Response at 76-77, ¶ 5(b) (proposing initial briefing); Appendix ¶ 3(b) (attached hereto) (same; also suggesting updates as part of the initial briefing).

I. IT WOULD BE REASONABLE AND APPROPRIATE FOR THE BOARD TO HOLD THIS PROCEEDING IN ABEYANCE PENDING DISPOSITION OF THE AAR CASE, BUT, GIVEN AMTRAK’S OPPOSITION, CN IS NOT MOVING FOR ABEYANCE AT THIS TIME

On February 19, 2013, the D.C. Circuit will hear oral argument on AAR’s appeal challenging the constitutionality of PRIIA, which provides the authority for this proceeding.³ The D.C. Circuit will review the matter *de novo*. If AAR prevails, the statutory basis for this proceeding will be eliminated.

The Board clearly has authority to hold this proceeding in abeyance pending resolution of the AAR Case, and it would be reasonable and appropriate to do so in order to avoid what would be a substantial waste of time, effort, and expense for the Board and the parties were AAR to prevail. *See* CN Motion for Abeyance at 4-6. Accordingly, the Board may wish to hold the proceeding in abeyance *sua sponte*. However, CN understands that Amtrak opposes further abeyance of this proceeding, and CN has chosen not to move for abeyance at this time.

³ *See Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, No. 12-5204 (D.C. Cir.), Doc. #1405157, Order (Nov. 15, 2012) (setting AAR’s appeal for argument). Briefing in the D.C. Circuit is scheduled to be completed on November 30, 2012.

If the Board chooses not to hold the proceeding in abeyance, the potential for the D.C. Circuit’s decision to eliminate the statutory basis for this proceeding, including the authority for any binding relief against CN, is a factor that the Board should consider as it determines the appropriate procedural framework. If PRIIA is overturned, non-binding Board “recommendations” under 49 U.S.C. § 24308(f)(1) could still be constructive, but there would be no legal basis for any binding relief under 49 U.S.C. § 24308(f)(2). Bifurcation of the proceeding into two phases, which CN has proposed for other reasons (*see* Response at 72-73, 76-78; *see generally infra* & Appendix attached hereto), could have the added benefit of allowing the D.C. Circuit’s decision to precede any Board decision on binding relief under 49 U.S.C. § 24308(f)(2), thereby avoiding the potential harm CN could suffer if binding relief were granted before issues concerning the statutory basis for that relief had been resolved.⁴

II. THE BOARD SHOULD ADOPT CN’S PROPOSED PROCEDURAL FRAMEWORK

A. CN’s Proposed Procedural Framework

As the Board noted in its Order, CN “proposed a detailed procedural framework” last March. Now that Board-ordered mediation has taken place, the remaining relevant portion of that framework is that which appears at paragraphs 3-6 of CN’s Response (at pages 76-78). For ease of reference, CN has set forth its proposal again in the Appendix attached hereto, with paragraphs renumbered to begin at 1 (and with a few minor updates and typographic corrections, all shown in italics).

By way of summary, the key points of CN’s proposal are as follows:

⁴ CN reserves the right to file a new or renewed request for abeyance should this proceeding advance to a stage at which there is a significant and more imminent risk of CN being subjected to an order granting binding relief prior to resolution of the AAR Case.

- Board publication of proposed procedural order based on CN’s framework, with opportunity for public comment thereon;⁵ and
- Division of the proceeding into two phases: (1) Board investigation of delays and recommendations; and (2) to the extent necessary and appropriate in light of Phase I, adversarial proceedings regarding preference violation allegations and potential binding remedies against CN.

Phase I

- Initial simultaneous briefing in Phase I, with evidentiary support, on PRIIA data, delays, updates, causes of delay, and proposed recommendations;
- Board investigation in Phase I, collecting evidence from CN, Amtrak, and other sources, including, as necessary, through use of its subpoena power, as informed by initial briefing and party suggestions;
- Briefing opportunity in light of evidentiary development in Phase I;
- Board publication of proposed recommendations, with opportunity for public comment thereon; and
- Opportunity for Amtrak and CN to implement, negotiate on the basis of, or otherwise respond to Board recommendations.

Phase II

- Briefing in light of Phase I to inform Board discretionary decision whether to proceed with Phase II;
- If the Board determines to proceed with Phase II, briefing, public comment, and Board decision on the issue of whether and how to define “preference;”
- Opportunity for CN to seek relief under 49 U.S.C. § 24308(c), as necessary, in light of Board’s definition or stated view of “preference;” and
- Formal adversarial proceedings, including Board-supervised discovery, cross-examination, formal adjudicatory hearing, and sequential briefing, on preference and remedial issues.

⁵ If the Board adopts CN’s two-phase structure, it may prefer to defer decision on the details for the procedures in any Phase II (the last four bullet points below) until the completion of Phase I.

B. Amtrak's Response: Apparent Areas of Agreement and Disagreement

As noted above, CN set out its proposed detailed procedural framework over eight months ago. While Amtrak has not shared any written response or alternative written proposal with CN, CN understands from its discussions with Amtrak that Amtrak agrees with CN on one point: the Board should use its subpoena powers, and not permit party discovery or employ formal adversarial procedures, to discharge its investigation and recommendation functions under 49 U.S.C. § 24308(f)(1) – *i.e.*, in CN's terms, during Phase I. Amtrak has not, however, agreed with other aspects of CN's proposed framework, including CN's proposal for a two-phase structure with adversarial procedures and party discovery in Phase II.

As CN understands Amtrak's position, Amtrak contemplates a single, undifferentiated investigatory process, with no specific provision for opportunities for briefing, evidentiary presentation, responses, or comments by the parties or the public. Such a proposal would not guarantee any process to enable the parties to focus, narrow, and prioritize issues for the Board's investigation, any opportunity for discovery and adjudicatory hearings at any stage, or any opportunities for public comment. As elaborated below, failing to provide for public comment and minimizing party participation would deprive the Board of important perspectives in this potentially precedent-setting proceeding, place an undue burden on the Board, and provide no real framework or guidance. At the same time, it would deprive third parties of the opportunity to be heard on important, precedential, and controversial issues with serious implications for the freight railroad industry and the communities and shippers that rely upon it, as well as other passenger rail carriers (*e.g.*, Metra in Chicago) that share rail lines with freight carriers and Amtrak.

Moreover, by omitting the traditional adversarial procedural protections that attend formal adjudicatory proceedings (and that CN has proposed as part of its Phase II procedures), Amtrak's proposal would deny CN basic fairness and constitutional due process rights. In a proceeding in which CN is accused of violating statutory obligations and at risk for significant binding relief (damages or otherwise), due process requires that CN be given full and fair notice and opportunity to respond to specific allegations under a known legal standard, and the opportunity to obtain and adduce evidence in defense.

C. The Board Should Adopt CN's Proposed Procedural Framework

Subject to constitutional constraints, the Board has broad discretion as to the procedures it adopts. PRIIA does not specify any particular procedure; no regulations specify procedures for Section 213 investigations; and this is the first case of its kind, ungoverned by precedent. There is, therefore, no legal impediment to the Board adopting CN's proposed procedural framework.⁶

Above and in its Response, CN has explained why CN's proposed procedural framework makes sense as a matter of sound discretion and fair and efficient discharge of the Board's statutory responsibilities under PRIIA, and why what CN understands to be Amtrak's alternative approach fails to provide guidance and fails to assure fairness and due process. Whether or not the Board decides to adopt CN's proposal verbatim, there are three aspects of CN's proposal, each rooted in PRIIA, that are of critical importance and merit further elaboration.⁷

⁶ Unlike Amtrak's proposal, which CN understands would make no provision for party participation beyond responding to Board requests, CN's proposed procedural framework is consistent with the active role for parties prescribed by the Board's rules for the general conduct of complaint and investigation proceedings. *See* 49 C.F.R. Part 1111 (complaint and investigation procedures).

⁷ CN has proposed that, after adopting CN's procedural framework, the Board consider public comments on the specifics of the procedure to be followed in this case (for example, the timing and nature of third-party participation). *See* Appendix ¶ 1 (attached hereto).

First, CN's proposed two-phase approach would enable the Board to perform its investigation and recommendation functions in an efficient, constructive, targeted manner, consistent with the structure and purpose of the statute. PRIIA makes the petition a trigger for the Board to investigate all the causes of relevant delays, regardless of who is responsible for them, and, if appropriate, to make reasonable forward-looking recommendations. 49 U.S.C. § 24308(f)(1). Given the changes that have taken place over the last year relating to Amtrak's services on CN's lines, it would be inefficient and wasteful for the Board to request information or issue subpoenas indiscriminately covering all the routes and all the issues touched on by Amtrak's Petition. Instead, the Board can collect information in a more efficient, discriminating manner by first obtaining briefing from the parties on the progress that has been made over the past year, the issues that have been resolved, the facts that have been clarified, and the main priorities and points of contention that remain.

Second, the nature and stakes of the proceeding make public participation especially important. This is the first proceeding of its kind, under a new statute that is the subject of differing interpretations and considerable industry interest and concern, in particular because its premise – failure to meet the PRIIA standards – is by no means unique to this case or to CN. Amtrak trains run on the lines of every Class I railroad other than Kansas City Southern Railway, and most of Amtrak's services running on the lines of Class I carriers fail to meet the PRIIA standards for delays and for on-time performance – in many cases, by larger margins than the Amtrak services at issue in this proceeding. This case is therefore likely to establish initial precedents for both procedural and substantive issues with important industry-wide implications. For example, the reliability and significance of Amtrak's PRIIA metrics and standards is highly controversial, as exemplified by the AAR Case and the issues raised in CN's Response. And

Amtrak's Petition necessarily implies an understanding of the "preference" obligation applicable to all freight carriers that is contrary to the understanding of the AAR and all the Class I railroads and would, absent broad statutory relief, result in tremendous inefficiency and losses of effective freight network capacity at a time of growing shipper demand.⁸ Given the serious potential implications of precedents that may be established in this case for host railroads, connecting carriers, shippers, other traffic on host carrier lines (including commuter and other passenger rail), and on the workers and communities who rely on freight rail and freight rail-related businesses, it is essential that the Board provide opportunities for public comment at critical stages of the proceeding.

Moreover, third parties are directly implicated by this proceeding since, under 49 U.S.C. § 24308(f)(1), the Board is required to investigate all potential causes of delay, whether attributable to Amtrak, the host carrier, or a third party, and is authorized to "obtain information from all parties involved" before making recommendations. Because the Amtrak services at issue in this proceeding do not just run over CN's lines, but have multiple host carriers, if the Board chooses to investigate the causes of the failures of on-time performance cited in Amtrak's Petition, it cannot sensibly do so without considering the nature and extent of delays on the entirety of the services. And, even if the Board confines its investigation to delays that occur while CN is the host carrier, late and unpredictable arrivals of Amtrak trains from other hosts' lines and Amtrak's own lines to the CN lines and delays at crossings and interlockings controlled

⁸ See, e.g., Supplemental Comments of the Association of American Railroads, *Passenger Rail Investment and Improvement Act of 2008*, STB Ex Parte No. 683, at 8-10 (filed March 13, 2009); see also Report of the U.S. Department of Transportation Inspector General to FRA on the Root Causes of Amtrak Train Delays at iv (Sept. 8, 2008) (describing the potential for gridlock implicit in Amtrak's notion of absolute "preference").

by third parties will be significant. Accordingly, provision for third party participation will be essential.

Finally, CN's proposed framework provides an essential second phase incorporating appropriate procedural protections for any Board determinations regarding preference, alleged statutory violations, and/or binding monetary or other remedies against CN. Reasonable and proper administrative practice may employ informal, non-adversarial procedures insofar as the outcome of the investigation will be non-binding recommendations. However, it would be unreasonable, unfair, and unconstitutional to find a host railroad guilty of statutory violations and to impose what amount to fines – damages for violations based on deterrence considerations – or to require other burdensome remedial action, without fair notice of the legal standard and specific allegations at issue as well as a fair opportunity to gather and adduce evidence and make arguments in the host railroad's defense in a formal adversarial proceeding.

CN's proposed two phases would enable the Board to employ the different procedures that are appropriate for each of its different statutory tasks, and allow the Board to defer judgment on the details of how Phase II should be implemented unless and until it becomes necessary. Proceeding in two phases would be most consistent with the logic of the statute and is apt to avoid wasteful effort. The Board's identification under 49 U.S.C. § 24308(f)(1) (*i.e.*, in Phase I) of delays that could reasonably be addressed by the host carrier is the necessary premise of Phase II, and 49 U.S.C. § 24308(f)(2) only authorizes remedies for preference violations insofar as they cause delays identified under subsection (f)(1). Moreover, the Board's overall conclusions and recommendations under 49 U.S.C. § 24308(f)(1), and the parties' responses thereto, would illuminate whether proceedings for deterrence purposes under 49 U.S.C. § 24308(f)(2) and (f)(3)(B) should be pursued. A two-phase approach would also allow the

Board and the parties to concentrate all of their efforts in Phase I on constructive, forward-looking recommendations and solutions, which is the portion of the Board's statutory mandate that holds the most promise of serving the public interest.

CONCLUSION

The Board should structure its investigation consistent with the two-phase framework proposed by CN in its Response and restated in the Appendix attached hereto.

Respectfully submitted,



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November 26, 2012

APPENDIX – CN’S PROPOSED PROCEDURAL FRAMEWORK

1. Following mediation, or, if such is not ordered, immediately upon resolving the Motion for Abeyance, the Board publishes a proposed procedural order for comment, providing 20 days for public comments (including but not limited to Amtrak and CN comments), and encouraging comments outlining topics to be addressed and suggestions for initial narrowing of the investigation for purposes of manageability (e.g., focus on one or more test segment(s) first).

2. After considering comments, the Board issues a procedural order, setting procedure for Phase I (issues regarding PRIIA data, nature and causes of delays, and recommendations) and deferring Phase II (preference and compulsory remedies).

3. Phase I: delays, causes, recommendations, and negotiations:

- a. At all stages, Board encourages Amtrak and CN to negotiate, either to resolve whole proceeding or to narrow issues, and Board makes stays and/or mediation services available for that purpose.
- b. Amtrak, CN (and other parties, either to the extent they have a view of matters affecting Amtrak operations or delays on CN’s segments or the Board has specified that its inquiry will extend to the entire route at issue *or will otherwise address their operations*) simultaneously brief, with appropriate evidentiary support:
 - (i) the accuracy and significance of PRIIA data and metrics generally and as applicable to the routes at issue;
 - (ii) other measures and indications of the extent and location of delays and OTP failures along the routes at issue;
 - (iii) *operational improvements, new areas of cooperation, agreements, and other relevant developments since October 1, 2011, and the extent to which they should be considered to have resolved issues raised by Amtrak’s Petition;*
 - (iv) *changes in PRIIA performance data since October 1, 2011, and their causes;*
 - (v) causes of *remaining* delay that could reasonably be addressed by CN alone;
 - (vi) causes of *remaining* delay that could reasonably be addressed by Amtrak alone;
 - (v) causes of *remaining* delay that can only be addressed by mutual cooperation;
 - (vi) other causes of *remaining* delay by Amtrak, CN, and third parties; and

- (vii) proposed recommendations.
- c. Board exercises subpoena power in furtherance of causal investigation, as appropriate and on an even-handed basis; CN and Amtrak and other commenting parties have an opportunity to recommend (but not independently pursue) investigatory efforts by the Board; CN and Amtrak (and, as appropriate, other carriers in any routes at issue) have the opportunity to negotiate.
- d. Amtrak and CN simultaneously file replies, with appropriate evidentiary support.
- e. Either by agreement of the parties or order of the Board, Amtrak, CN, and Board engage in confidential mediation proceedings before and/or after Board publishes recommendations.
- f. If necessary, Board publishes proposed recommendations for public comment; Amtrak, CN, and public have 30 days to comment.
- g. If necessary, Board publishes final recommendations pursuant to 49 U.S.C. § 24308(f)(1).
- h. Parties have 60 days to negotiate in light of/otherwise respond to Board's recommendations.

4. Phase II (preference and compulsory remedies):

If the D.C. Circuit has not ruled in the AAR Case by the time Phase I concludes, the Board should consider whether to hold any Phase II proceedings in abeyance pending the D.C. Circuit's ruling.

- a. If no agreement regarding Phase II has been reached by Amtrak and CN, Amtrak reports to the Board whether it believes proceeding to Phase II is appropriate, and, if so, states specific bases therefor (which may require a new pleading).
- b. CN has 30 days to respond/move to dismiss.
- c. The Board determines whether to proceed with Phase II.
- d. If Phase II proceeds, the Board provides for comments and briefs from CN, Amtrak, and interested third parties on whether and how to define "preference."
- e. If it wishes to in light of the Board's "preference" decision, CN has 20 days to seek relief under 49 U.S.C. § 24308(c).
- f. Parties may obtain Board-supervised discovery regarding Amtrak's "preference" allegations.

- g. Formal adjudicatory hearing, including cross-examination, on Amtrak's "preference" allegations.
- h. Briefing on (i) alleged "preference" violations; (ii) relief/justification under 49 U.S.C. § 24308(c); (iii) remedies: Amtrak first, then, after 30 days, CN.
- i. Board's 49 U.S.C. § 24308(f)(2) ruling.

CERTIFICATE OF SERVICE

I certify that I have this 26th day of November, 2012, caused a true copy of the foregoing
Response to the Board's November 5, 2012 Order to be served upon:

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A handwritten signature in black ink, appearing to read "Christine A. Mellen", written over a horizontal line.

Christine A. Mellen