

February 3, 2015

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**VIA ELECTRONIC FILING**

237669

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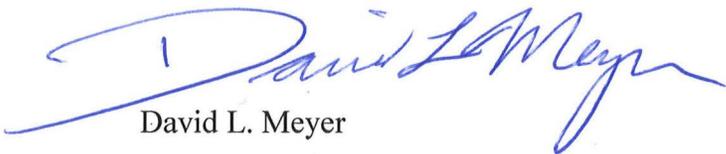
**Re: STB Docket EP 726**

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket is Norfolk Southern Railway Company's Reply in Support of the Association of American Railroads' Petition for Rulemaking.

Thank you for your assistance.

Sincerely,



David L. Meyer

Attachment

cc (with attachment): Greg E. Summy, Esq.  
Garrett D. Urban, Esq.

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**EX PARTE 726**

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

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**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY  
IN SUPPORT OF THE ASSOCIATION OF AMERICAN RAILROADS'  
PETITION FOR RULEMAKING**

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Dated: February 3, 2015

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**EX PARTE 726**

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**ON-TIME PERFORMANCE UNDER SECTION 213 OF THE PASSENGER RAIL  
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**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY  
IN SUPPORT OF THE ASSOCIATION OF AMERICAN RAILROADS'  
PETITION FOR RULEMAKING**

Norfolk Southern Railway Company (“Norfolk Southern”) hereby files this Reply to the Petition for Rulemaking filed by the Association of American Railroads (“AAR”) requesting that the Surface Transportation Board (“Board”) initiate a rulemaking proceeding to define “on-time performance” for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), 49 U.S.C. § 24308(f).

Norfolk Southern fully supports the AAR’s request. As the Board is aware, Norfolk Southern is one of the subjects of a complaint filed by Amtrak under Section 213 alleging substandard performance of Amtrak’s Capitol Limited service. *See* Complaint, *Nat’l R.R. Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (filed as corrected Nov. 19, 2014) (“*Amtrak/Capitol Limited*”). Norfolk Southern, like the AAR, Canadian National Railway Company (“Canadian National”),<sup>1</sup> and CSX Transportation, Inc. (“CSX”),<sup>2</sup> respectfully asserts that

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<sup>1</sup> *See* Canadian National’s Petition for Reconsideration, *Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry. Co. (“Amtrak/CN”)*, Docket No. 42134, at 12 (filed Jan. 7, 2015).

the Board has no authority to construe the meaning of “on-time performance” as used in 49 U.S.C. § 24308(f) and has filed a Motion to Dismiss the *Amtrak/Capitol Limited* proceeding. See Norfolk Southern’s Motion to Dismiss Amtrak’s Complaint, *Amtrak/Capitol Limited* (filed Jan. 7, 2015).

However, should the Board deny Norfolk Southern’s Motion to Dismiss, Norfolk Southern agrees with the AAR and Vice Chairman Begeman<sup>3</sup> that a rulemaking is the appropriate course to consider this issue. While Congress has specified 80 percent as the level of performance for triggering a Board investigation, it did not specify how to measure whether a service is “on time.” Notice-and-comment rulemaking would give all stakeholders an opportunity to participate in the development of a standard that will affect all users of the national rail system. It would also establish principles of general application for use in two pending proceedings and any future disputes, minimizing the time and resources that the parties (and the Board) must expend in those cases.

To that end, Norfolk Southern briefly highlights the two major issues on which the Board should seek comment in a rulemaking and on which different stakeholders may express different viewpoints. First, the Board should solicit input on the appropriate scope of on-time performance calculations. If the Board looks only to the overall performance of Amtrak services, which may span hundreds of miles and several different host railroads, it likely will find itself carrying out unnecessary investigations of host railroads for services that are performing well over their lines but are experiencing performance issues elsewhere along Amtrak’s route. On-time performance should be

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<sup>2</sup> See CSX Motion to Dismiss, *Amtrak/Capitol Limited* (filed Jan. 7, 2015).

<sup>3</sup> See *Amtrak/CN* (decision served Dec. 19, 2014) (Begeman, C., dissenting).

construed in a way that provides meaningful insight into the performance of an Amtrak service over *individual* host railroads.

Second, the Board should solicit comment on the transit time expectations and tolerances to apply to individual routes in assessing whether a service is on time. Importantly, for many services Amtrak’s public schedules have never been met consistently (*i.e.*, at or near an 80-percent benchmark) and, therefore, present an obstacle to crafting a realistic assessment of on-time performance. If the Board construes on-time performance based solely on Amtrak’s own schedules, Amtrak or other interested parties will be able to launch investigations for numerous services regardless of whether current performance is actually “substandard.” The Board’s definition of what it means to arrive “on time” should employ a *realistic* transit time expectation for each service, taking into account both the particular characteristics of each route – including the nature and volume of freight services, maintenance needs, and other line-specific factors – and the historic experience of Amtrak’s operations over the line.

Norfolk Southern looks forward to the opportunity to comment more fully on these matters in the course of a rulemaking proceeding.

**I. A RULEMAKING PROCEEDING IS THE PROPER APPROACH FOR DEFINING ON-TIME PERFORMANCE**

Should the Board proceed with construing the meaning of on-time performance as used in Section 213 of PRIIA, 49 U.S.C. § 24308(f), Norfolk Southern agrees with the AAR that the Board should open a rulemaking proceeding. To be clear, Norfolk Southern does not dispute Amtrak’s recent assertion that the Board has discretion in

choosing to proceed through adjudication or a rulemaking on this issue.<sup>4</sup> But efficiency, fairness, consistency, and regulatory certainty all weigh in favor of resolving the question of “on-time performance” through a rulemaking proceeding.

Norfolk Southern laid out three primary reasons that a rulemaking is the most appropriate course for the Board in its Petition to Intervene in the *Amtrak/CN* proceeding for the purpose of commenting on the construction of on-time performance:

(1) it is the only fair way to give all host railroads and other stakeholders an opportunity to participate in the development of the standards that will trigger Section 213 investigations; (2) it is how the Board has typically addressed threshold issues of statutory interpretation that will apply in an array of future regulatory disputes; and (3) it is the most efficient way for the Board to resolve the specific issue here for pending and future cases.<sup>5</sup>

Norfolk Southern incorporates its argument from its Petition to Intervene into this Reply.

Developments since Norfolk Southern’s filing in the *Amtrak/CN* case only further confirm these points. CSX’s decision to intervene in that proceeding and AAR’s separate petition for rulemaking demonstrate that the Board’s construction will directly affect several pending and potential future cases. Amtrak itself recognizes that these and other interested parties may desire to comment on the Board’s construction.<sup>6</sup>

Amtrak’s January 27th letter in the *Amtrak/CN* docket indicated its opposition to a rulemaking but, in so doing, only highlighted facts that strongly *support* the AAR’s petition. Amtrak argues that interested parties can comment through an adjudicatory

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<sup>4</sup> See Amtrak Letter, *Amtrak/CN* at 2 (filed Jan. 27, 2015).

<sup>5</sup> Norfolk Southern’s Petition to Intervene, *Amtrak/Capitol Limited* at 7 (filed Jan. 12, 2015), attached as Exhibit A hereto.

<sup>6</sup> See Amtrak Letter, *Amtrak/CN* at 2 (filed Jan. 27, 2015) (“Furthermore, handling the issue through an adjudicatory process would not, in any way, preclude interested parties from commenting.”).

process and that any conclusion in an adjudicatory process will not prevent a party from proffering a different definition in a later Section 213 investigation.<sup>7</sup> While true, proceeding through adjudication is vastly inferior to a rulemaking here for precisely those reasons.

First, recognizing that many parties may be interested in its definition, the Board should *solicit* their input through a rulemaking rather than forcing them to interject themselves into a litigation between unrelated parties over a particular service in order to be heard.

Second, “on-time performance” will be a necessary component of every complaint requesting investigation of a host railroad, and there is great value in all parties knowing ahead of time what performance may trigger an investigation rather than fighting over those standards after the fact in a litigation setting.

Third, though a rulemaking that develops the general principles governing on-time performance calculations would not avoid the need to apply those principles to the particular facts of individual adjudications, it makes sense to develop those general principles once in a setting that enables consideration of the full array of issues and enables the full and fair participation by all interested stakeholders. There would be no benefit for the Board to reconsider the core principles relating to the definition of on-time performance in every Section 213 case. Doing so would waste significant resources and invite inconsistent determinations, while providing no signal to the regulated entity – the host railroads – about the standards under which Amtrak service may be investigated. But if the Board instead attempted to address these shortcomings by placing a heavy

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<sup>7</sup> *Id.* at 1.

burden on parties seeking to alter the Board’s initial construction, it would force later litigants to live up to a de facto rule without the Board receiving the benefit of all possible input when constructing it.

Further the specific factual context of a particular adjudication might also provide an unsuitable environment for rafting a rule of general application, possibly leading the Board to craft an initial standard that would be ill-suited for later cases (for example, due to differences in operations between single- and double-tracked lines).

Amtrak also argues against a rulemaking because on-time performance is only a trigger as opposed to “an industry-wide legal standard.”<sup>8</sup> Norfolk Southern agrees that on-time performance has no bearing on the actual investigation once started. Nonetheless, such a characterization has no relevance to the desirability of the Board proceeding via rulemaking. The trigger will apply to all carriers hosting Amtrak, including six Class I railroads and many commuter and short line railroads, with potential consequences for other stakeholders and customers that rely on those lines. Although on-time performance will not dictate the Board’s decision in any investigation, it is the statutory prerequisite to the Board’s jurisdiction to launch an investigation in the first instance and as such will have an important industry-wide impact.

## **II. ISSUES THAT THE BOARD SHOULD CONSIDER WHEN CONSTRUING ON-TIME PERFORMANCE**

Eighty percent on-time performance serves a gatekeeping role for purposes of Section 213 “Investigations of Substandard Performance” over the host railroads. 49 U.S.C. § 24308(f)(1). Although Congress set 80 percent as the level of performance for

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<sup>8</sup> *Id.*

triggering a Board investigation, the statute does not specify how to measure whether a service is “on-time.” This question subsumes several complex issues on which parties may have different views. Norfolk Southern urges the Board to seek comment on two primary issues when it commences a rulemaking to construe on-time performance.

**A. Scope of On-time Performance Calculations**

First, the Board should seek comment on what data will be evaluated and set the scope of on-time performance calculations. The Board’s decision will guide whether on-time performance provides only a general indication as to the overall outcomes of Amtrak services or instead provides meaningful insight into how specific Amtrak trains are performing on particular host railroads. This distinction is important because most Amtrak services operate over two, three or more host railroads. Yet each host railroad is properly accountable only for its own performance. Any measure of on-time performance that looks solely to the overall performance of an Amtrak service may frequently expand investigations beyond the host railroads over which Amtrak’s performance is actually substandard. Only by separately assessing each host railroad for performance on its segment of the route over which Amtrak operates will the Board be able to discern meaningful information about a railroad’s performance and trigger appropriately tailored investigations.

**B. Transit Time Expectations and Tolerances to Assess Whether a Train is “On Time”**

Second, the Board should solicit comment on the transit time expectations and tolerances that should be employed for individual routes in assessing whether a service is on time. In doing so, the Board must consider seriously the matter of Amtrak’s schedules, many of which impose transit times that are unrealistic in light of real-world

conditions and do not fulfill their purpose of providing the traveling public with reliable expectations of anticipated travel time. As a result, for many services, uncritical acceptance of Amtrak schedules likely would result in measures of on-time performance that provide no insight into whether the actual performance of an Amtrak service over a host railroad fell short of a realistically achievable level. Such an approach would also leave a host railroad's on-time performance at least partially within Amtrak's control, through Amtrak's decisions about whether and how to adjust its schedules.

Instead, the Board should provide that any measure of on-time performance uses transit time standards and tolerances that account for all of the individual characteristics and conditions affecting a particular Amtrak service, including but not limited to the length of the route, topography, traffic levels, traffic mix, infrastructure, crossings with other carriers, time of day that the Amtrak service operates, and maintenance needs. The Board can accomplish this by construing on-time performance in such a way that past experience demonstrates is *realistically achievable* at 80 percent for each Amtrak service in light of real-world conditions. Such an approach would ensure that a Section 213 investigation is only triggered when service is, in fact, "substandard."

### **III. ON-TIME PERFORMANCE MEASURES PLAY NO MEANINGFUL ROLE IN DETERMINING THE OUTCOME OF ANY INVESTIGATION THE BOARD MIGHT COMMENCE**

Finally, irrespective of the Board's method of proceeding, the Board should also remind all parties that once a Section 213 investigation is triggered, the Board will set aside general statistics and examine the specific root causes of any issues affecting Amtrak's service as required by the statute. The end result of such a process is recommendations by the Board "to improve the service, quality, and on-time

performance” of the passenger service, 49 U.S.C. § 24308(f)(1), which would necessarily be based on the underlying facts and *not* the calculated level of on-time performance that triggered the investigation in the first place. Similarly, the meaning and calculation of “on-time performance” has no impact on any consideration the Board might be asked to give to whether a host railroad has provided Amtrak “preference over freight transportation” pursuant to 49 U.S.C. § 24308(c). As Amtrak itself stated, on-time performance will not “dictate the final outcome of the proceeding.”<sup>9</sup>

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<sup>9</sup> See Amtrak Letter, *Amtrak/CN*, at 1-2 (filed Jan. 27, 2015).

#### IV. CONCLUSION

The construction of “on-time performance” for purposes of Section 213 of PRIIA is an important matter deserving of a rulemaking. Norfolk Southern understands that other interested parties – including perhaps many that are not freight railroads – may have different thoughts and perspectives on the issues highlighted in this filing and on other issues. Norfolk Southern urges the Board to grant the AAR’s Petition for Rulemaking and looks forward to providing fuller comments on a schedule to be determined by the Board.

Respectfully submitted,

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Dated: February 3, 2015

**EXHIBIT A:**  
**NORFOLK SOUTHERN'S PETITION TO INTERVENE**

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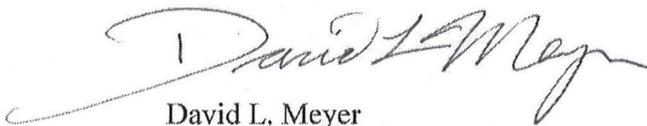
**Re: STB Docket NOR 42134, National Railroad Passenger Corporation – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company**

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket is Norfolk Southern Railway Company's Petition to Intervene in the above captioned proceeding.

Thank you for your assistance.

Sincerely,



David L. Meyer

Attachment

cc (with attachment):

Greg E. Summy, Esq.  
Garrett D. Urban, Esq.

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. 42134**

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**NATIONAL RAILROAD PASSENGER CORP. –  
SECTION 213 INVESTIGATION OF SUBSTANDARD  
PERFORMANCE ON RAIL LINES OF CANADIAN  
NATIONAL RAILWAY COMPANY**

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**NORFOLK SOUTHERN'S PETITION TO INTERVENE**

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Dated: January 12, 2015

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. 42134**

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**NATIONAL RAILROAD PASSENGER CORP. –  
SECTION 213 INVESTIGATION OF SUBSTANDARD  
PERFORMANCE ON RAIL LINES OF CANADIAN  
NATIONAL RAILWAY COMPANY**

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**NORFOLK SOUTHERN’S PETITION TO INTERVENE**

Pursuant to 49 C.F.R. § 1112.4, Norfolk Southern Railway Company (“Norfolk Southern”) submits this Petition to Intervene in the above captioned proceeding so that it may participate in the process by which the Board intends to “construe the term ‘on-time performance’” as used in PRIIA Section 213, 49 U.S.C. § 24308(f). *Nat’l R.R.*

*Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry. Co. (“Amtrak/CN”),* Docket No. 42134 (served Dec. 19, 2014) (“December 19 Decision”). Norfolk Southern does not intend to participate with respect to the question of whether 80 percent “on-time performance” is met on the facts of the case, or as to the substance of Amtrak’s complaint.

In its December 19 Decision, the Board ruled that it may “independently set forth and implement a definition” of on-time performance under PRIIA Section 213 “for purposes of this proceeding,” and ordered the parties to submit opening arguments on how to define “on-time performance” by January 20, 2015, with replies due by February 2, 2015. *See* December 19 Decision at 9, 11. The Board declined Vice-Chairman (then-Commissioner) Begeman’s suggestion that it address the definition of “on-time

performance” in a rulemaking affording all interested stakeholders an opportunity to offer comment. *Id.* at 12.

For reasons discussed below, Norfolk Southern should be permitted to intervene as to the limited issue of the definition of “on-time performance.” Further, Norfolk Southern agrees with Vice Chairman Begeman that a rulemaking process would be the appropriate course to consider on this issue. If the Board were to reconsider its procedural approach and commence a rulemaking outside the *Amtrak/CN* proceeding, Norfolk Southern would no longer have any desire to participate in this case.

**I. NORFOLK SOUTHERN’S PETITION TO INTERVENE SHOULD BE GRANTED**

The Board may grant a petition to intervene if intervention will not unduly disrupt the schedule for filing verified statements; and would not unduly broaden the issues raised in the proceeding. 49 C.F.R. § 1112.4(a) (2013); *see also V&S Railway, LLC – Petition for Declaratory Order—Railroad Operations in Hutchinson, Kan.*, Docket No. 35459 (served Feb. 17, 2011) at 2. Norfolk Southern’s Petition to Intervene comports with these standards: (1) Norfolk Southern has a legitimate interest in the matters to be addressed in this proceeding; (2) its participation would not “broaden the issues,” and (3) its participation would not “disrupt the schedule.”

***Norfolk Southern Has a Legitimate Interest.***

As the Board is aware, Norfolk Southern is a party to a complaint filed by Amtrak under PRIIA Section 213 alleging substandard performance of Amtrak’s Capitol Limited service. *See Complaint, Nat’l R.R. Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (filed as corrected Nov. 19, 2014) (“*Amtrak/Capitol Limited*”). In its supporting Memorandum of Law, Amtrak requested

that the Board undertake an investigation under PRIIA Section 213 predicated on the Capitol Limited's alleged poor "on-time performance," and urged the Board to develop and apply some definition of "on-time performance" that would trigger such an investigation. Mem. of Law, *Amtrak/Capitol Limited*, at 2-3. Consequently, Norfolk Southern has an interest in whatever definition of "on-time performance" the Board may arrive at in *Amtrak/CN*. This case appears to be the vehicle by which the Board will consider the issue for the first time, and it seems likely to set important regulatory precedent. *See Gov't of the Territory of Guam v. Sea-Land Service, Inc.*, Docket No. WCC-101 (served Nov. 15, 2001) ("*Guam*") (granting intervention by Caribbean Shippers Association to address "matters of general regulatory policy" that may affect rights of its members in future rate reasonableness cases).

As in *Guam*, Norfolk Southern has a keen interest in the "general regulatory polic[ies]" the Board appears to have in mind developing in the *Amtrak/CN* case. By setting – or at least *affecting* – the bar Amtrak must clear to commence a Section 213 investigation, the definition of "on-time performance" established by the Board could have a significant bearing on Norfolk Southern's litigation with Amtrak. *See* December 19 Decision at 11-12 (Begeman, C., dissenting) ("[E]stablish[ing] a Section 213 standard that will most assuredly be used in all other current and future cases, and have a far-reaching impact on the entire industry.").

***Norfolk Southern's Participation Will Not Broaden the Issues***

Norfolk Southern's participation for the limited purpose of addressing the definition of "on-time performance" will not broaden the issues under consideration in this case. Indeed, the only reason Norfolk Southern seeks intervention is to address the very issue the Board has decided to consider at the threshold of this proceeding. *See*

*Canexus Chemicals Canada L.P. v. BNSF Railway Company—Emergency Service Order*, Docket No. 35524 *et. al.* (served Oct. 14, 2011) (granting request to intervene: “CP’s comments are in direct response to issues already raised by the parties in this case. Thus, CP’s participation will not unduly broaden the issues presented.”).

***Norfolk Southern’s Participation Will Not Disrupt the Schedule.***

Norfolk Southern believes it would be appropriate for the Board to allow more time for interested parties to develop and present their views on the definition of “on-time performance.” The Board could (and Norfolk Southern believes should) accomplish this by establishing a separate, *ex parte* proceeding in which to solicit comment on on-time performance definitions. *See infra* pp. 7-11. If the Board nonetheless proceeds via adjudication in this docket, the Board should revise the schedule for submission of opening and reply briefs, perhaps by 20-30 days, to allow interested parties to develop and communicate their perspectives.

That step would not, however, be necessitated by Norfolk Southern’s intervention, but by principles of basic fairness and the Board’s interest in developing a fully-informed record. If the Board does not adjust the schedule, Norfolk Southern would endeavor to submit its views by the current deadlines for opening and reply briefs herein. As such, Norfolk Southern’s intervention will not delay this proceeding.

**II. A NOTICE-AND-COMMENT RULEMAKING IS APPROPRIATE TO ADDRESS THE BOARD’S DEVELOPMENT OF ON-TIME PERFORMANCE METRICS**

As noted above, Norfolk Southern believes that a notice-and-comment rulemaking is the only appropriate process by which the Board could exercise whatever authority it might have (and Norfolk Southern respectfully believes it has none) to define “on-time performance” for purposes of making the threshold determination of whether an

investigation may commence under PRIIA Section 213.<sup>1</sup> Norfolk Southern would no longer seek intervention in this case if the Board undertook such a process in place of adjudicating the issue.

A notice-and-comment rulemaking is the appropriate course for at least three reasons: (1) it is the only fair way to give all host railroads and other stakeholders an opportunity to participate in the development of the standards that will trigger Section 213 investigations; (2) it is how the Board has typically addressed threshold issues of statutory interpretation that will apply in an array of future regulatory disputes; and (3) it is the most efficient way for the Board to resolve the specific issue here for pending and future cases.

**A. A Notice-And-Comment Rulemaking Is the Only Process that Would Afford All Interested Stakeholders a Meaningful Opportunity to Participate**

There is a broad and diverse group of stakeholders interested in the definition of “on-time performance,” as evidenced by the wide participation in the FRA/Amtrak metrics and standards-development process. Those parties include not only Amtrak and its many host railroads, but numerous others with an interest in passenger trains and the freight-carrying capacity they consume.<sup>2</sup> Moreover, the definition the Board chooses will

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<sup>1</sup> That position is shared by every defendant to a pending Amtrak complaint. See CSXT’s Response to the Nat’l R.R. Passenger Corp.’s Complaint, *Nat’l R.R. Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (filed Jan. 7, 2015) at 6; CN’s Petition for Reconsideration of the Board’s Order of December 19, 2014, *Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of CN*, Docket No. 42134 (filed Jan. 7, 2015) at 8.

<sup>2</sup> During the development of the PRIIA Section 207 Metrics and Standards, stakeholders such as State Departments of Transportation, State and regional passenger railroad agencies, railroad-related associations and one labor organization submitted comments. See FRA & Amtrak, *Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of the Passenger Rail Investment and Improvement Act of 2008*, 75 Fed. Reg. 26,839 (May 11, 2009);

affect all users of the national rail system through its potential impacts on scheduling and service performance.

These concepts and issues cannot be addressed adequately by just two parties in the context of a single adjudication. The comments before FRA on the proposed metrics reveal extensive debate and controversy regarding the definition of on-time performance. *See, e.g. Metrics and Standards* at 11-22 (“The largest number of comments on the Proposed Metrics and Standards concerned the measures for on-time performance and train delays.”).<sup>3</sup> A notice-and-comment rulemaking is the only realistically feasible way to enable all affected parties and interested stakeholders to participate and express their views on the proposals for the definition of “on-time performance.”

**B. The Board Has Undertaken Notice-And-Comment Rulemaking in Analogous Situations**

Second, a notice-and-comment process here would be consistent with the Board’s past practice. To be sure, the Board routinely interprets and applies statutes in the course of its regulatory responsibilities. But when it has considered issues of first impression or great controversy that will affect the behavior and rights of numerous parties potentially within the Board’s regulatory jurisdiction, the Board has consistently done so in proceedings open to broad public participation affording a meaningful opportunity to comment on the proposals put forward by the Board and others. Among the many such examples are: *Demurrage Liability*, Ex Parte No. 707 (served May 7, 2012) (addressing

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FRA, *Metrics and Standards for Intercity Rail Passenger Service* (May 12, 2010), Docket No. FRA-2009-0016, at 3, available at <http://www.fra.dot.gov/Elib/Details/L02875>.

<sup>3</sup> See also, e.g., Kevin M. Sheys, “Amtrak’s Metrics-Making Power Hangs in the Balance,” NOSSAMAN LLP ALERT (July 28, 2014) (“Host railroads took issue with many aspects of the draft metrics and especially those formulated to measure on-time performance.”), available at <http://www.nossaman.com/AmtraksMetricsMakingPowerHangsInTheBalance>.

standards for determining who may be held responsible for paying demurrage charges); *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Ex Parte No. 669 (served Mar. 29, 2007) (addressing definition of statutory term relevant to scope of Board's rate regulatory jurisdiction); *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1) (served Oct. 30, 2006) (addressing important issues in stand-alone cost cases); *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) (served June 11, 2001) (adopting new regulations governing procedures for major rail merger proposals); *Market Dominance Determinations—Product and Geographic Competition*, Ex Parte No. 627 (served Dec. 21, 1998) (addressing the role of evidence concerning product and geographic competition in market-dominance determinations in rate reasonableness cases); *Central Power & Light Co. v. Southern Pacific Transportation Co.*, 1 S.T.B. 1059, 1062-63 (1996) (addressing, in cases consolidated for purposes of soliciting broad public comment, extent of a carrier's obligation to quote rates over so-called "bottleneck" segments).

The examples are legion and varied. Some addressed topics that – like the "triggering" role of "on-time performance" in Section 213 – determine when and how a potential complainant will be entitled to seek redress at the Board. *E.g.*, Ex Parte No. 669 (rates established in "contracts" as defined by the Board may not be challenged); Ex Parte No. 627 (limiting scope of substantive issues the Board will consider when making threshold market-dominance determinations); Ex Parte No. 657 (Sub-No. 1) (addressing availability of movement-specific adjustments to URCS for purposes of statutory 180 R/VC market-dominance threshold).

Others addressed the proper interpretation to be given an operative term or phrase in a governing statute – akin to the Board’s need to define “on-time performance” in Section 213. *E.g.*, Ex Parte No. 669 (construing the term “contract” as used in 49 U.S.C. §10709 to resolve “the lack of any clear demarcation between contract and common carrier rates because of the boundaries on our jurisdiction”); Ex Parte No. 707 (construing 49 U.S.C. § 10743).

But the common denominator typically is – as here – a set of “common issues of industry-wide significance for rail carriers and shippers [or other stakeholders]”<sup>4</sup> that would have important bearing on the future regulatory implications of the parties’ conduct.

**C. Notice and Comment Rulemaking Provides the Most Efficient Method of Addressing this Issue for Pending and Future Cases**

Finally, the definition of “on-time performance” is already expressly at issue in two cases (involving three host railroads) pending before the Board. The standard for triggering a Section 213 investigation will likewise be a necessary element in any future proceeding filed by Amtrak or other interested parties alleging substandard performance of passenger service. If the Board proceeds within the context of the *Amtrak/CN* proceeding, the Board will be forced to reconsider this issue repeatedly, because any holding in the *Amtrak/CN* proceeding will not bind subsequent parties. A rulemaking proceeding, in contrast, will establish principles of general application for future disputes, minimizing the time and resources that the parties (and the Board) must expend in those cases.

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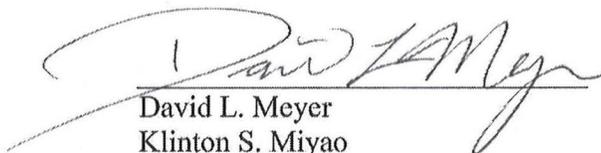
<sup>4</sup> *Central Power & Light*, 1 S.T.B. at 1062-63.

**CONCLUSION**

Norfolk Southern respectfully requests that the Board grant its Petition to Intervene so that it may participate in the Board's development of a definition for on-time performance metrics in the *Amtrak/CN* proceeding, unless the Board instead commences a rulemaking as suggested by Vice Chairman Begeman.

Respectfully submitted,

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Dated: January 12, 2015

**CERTIFICATE OF SERVICE**

I, Aaron D. Rauh, certify that on this date a copy of Norfolk Southern's Petition to Intervene, filed on January 12, 2015, was served by email and by first-class mail, postage prepaid, on all parties of record, as follows:

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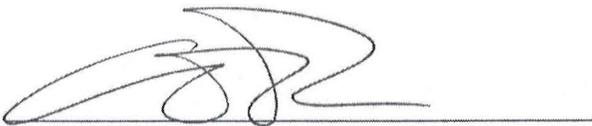
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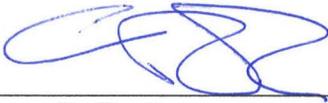
Aaron D. Rauh

Dated: January 12, 2015

**CERTIFICATE OF SERVICE**

I, Aaron D. Rauh, certify that on this date a copy of the Norfolk Southern Railway Company's Reply in Support of the Association of American Railroads' Petition for Rulemaking, filed on February 3, 2015, was served by email and by first-class mail, postage prepaid, on all parties of record in Ex Parte No. 726, as follows:

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