

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 728

**POLICY STATEMENT ON IMPLEMENTING INTERCITY
PASSENGER TRAIN ON-TIME PERFORMANCE AND
PREFERENCE PROVISIONS OF 49 U.S.C. § 24308(c) AND (f)**

**OPENING COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

*Counsel for Norfolk Southern Railway
Company*

Dated: February 22, 2016

Table of Contents

- I. Norfolk Southern Agrees that § 24308(f) Provides for Two Conceptually Distinct Determinations 4**
- II. Norfolk Southern Strongly Agrees that Preference Is Not “Absolute” 6**
 - A. Dispatching Decisions that Seem to Prefer Freight Traffic May Actually Minimize Specific Passenger Train Delay 8
 - B. Maximizing Network Fluidity Reduces Overall Passenger Train Delays 9
 - C. An Absolute View of Preference Is Contrary to Congressional Intent 12
 - D. An Absolute Approach to Preference Would Result in Other Unintended Consequences, Including Dramatically Increasing Amtrak’s Access Costs..... 13
 - E. The Board Should Provide Guidance that Preference is Situational..... 15
- III. Preference Violations Require an Affirmative and Specific Finding Involving Dispatcher-Avoidable Delays 16**
 - A. Preference Violations Require Systemic Failures 17
 - B. The Board Must Examine Root Causes of Individual Delays 18
 - C. The Board Should Focus Attention on Dispatcher-Avoidable Delays 20
 - D. The Board Should Require Affirmative and Specific Proof of a Preference Violation. 21
- IV. Evidence In Investigations Under § 24308(f)(1) 23**
- V. Effect of Policy Statement under the APA 25**
- VI. Conclusion 26**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 728

**POLICY STATEMENT ON IMPLEMENTING INTERCITY
PASSENGER TRAIN ON-TIME PERFORMANCE AND
PREFERENCE PROVISIONS OF 49 U.S.C. § 24308(c) AND (f)**

**OPENING COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company (“Norfolk Southern”) hereby submits these opening comments in response to the Surface Transportation Board’s (“Board’s”) *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, Ex Parte 728 (STB served Dec. 28, 2015) (hereinafter the “Policy Statement”) providing guidance regarding issues that may arise and the evidence to be presented in complaint proceedings under 49 U.S.C. § 24308(f). The Board’s authority under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), as codified in 49 U.S.C. § 24308(f), provides for a form of Board investigation of intercity passenger service. Further, although Amtrak’s statutory right to preference dates to 1973, the meaning of “preference” is not set out in 49 U.S.C. § 24308(c) or in any binding authority. Norfolk Southern welcomes the opportunity to provide its thoughts on the Board’s preliminary impressions of these issues. In addition to submitting these comments, Norfolk Southern joins in the Opening Comments of the Association of American Railroads.

Norfolk Southern agrees with the Board’s instinct to provide only general, non-binding guidance through this Policy Statement. The Board correctly identifies “the fact-specific nature of § 24308(c) preference issues.” Policy Statement at 3. Evaluation of an allegation of a

preference violation will require detailed consideration of the facts and dispatching decisions that a host railroad makes in handling an Amtrak train. Moreover, the outcomes of such evaluations have the potential to have profound impacts on all users of the rail system. Such concerns favor articulating only limited principles in the abstract while reserving further judgment for consideration with a full and informed record.

Norfolk Southern agrees with many of the ideas that the Board has expressed in its Policy Statement and focuses its comments on three primary points:

- 1) Norfolk Southern agrees that § 24308(f) contains two distinct concepts: a comprehensive investigation of performance under subsection (f)(1), and resolution of allegations of preference violations under subsections (f)(2)-(4).
- 2) Norfolk Southern strongly agrees that the preference obligation is not “absolute.” Not only would an absolute view of preference fail to “promote efficient passenger service” in many situations as well as in the long run, as the Board explains, *see* Policy Statement at 4, it would also have severe and unintended consequences for the freight system, other commuter operators, and even Amtrak itself. Norfolk Southern suggests that the Board provide guidance that preference is instead “situational.”
- 3) Norfolk Southern agrees with the Board’s focus on dispatching decisions when discussing preference in its Policy Statement. The Board also properly focuses on evidence of a “longstanding pattern of systemic failures,” *id.*, rather than isolated decisions that might be second-guessed. Norfolk Southern recommends that the Board clarify that it will require an affirmative finding arising out of “dispatcher-avoidable delays” when considering allegations of preference violations.

Norfolk Southern also provides some limited thoughts on the scope of investigations under § 24308(f)(1) and on the role of the Board’s Policy Statement in future proceedings.

I. Norfolk Southern Agrees that § 24308(f) Provides for Two Conceptually Distinct Determinations

Norfolk Southern agrees with the Board’s separation of issues involving preference from issues reached by the more comprehensive investigation under 49 U.S.C. § 24308(f)(1). *See, e.g.*, Policy Statement at 6. Congress gave the Board authority under § 24308(f) to carry out two related but conceptually distinct tasks. First, under § 24308(f)(1), the Board has authority to

oversee a general “Investigation of Substandard Performance” of intercity passenger trains if performance fails to meet certain statutory triggers.¹ The purpose of such an investigation is “to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier . . . Amtrak or other intercity passenger rail operators.” 49 U.S.C. § 24308(f)(1). Norfolk Southern agrees with the Board that this is meant to be a “comprehensive and impartial” investigation. *See* Policy Statement at 6. The statutory language evidences Congress’s intent that the Board seek to understand the root causes of all delays to determine if such delays could be addressed by Amtrak, the host railroad, or other parties. At the conclusion of an investigation, the statute authorizes the Board only to “identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.” 49 U.S.C. § 24308(f)(1).

Congress granted the Board additional authority if, and only if, the Board determines as a result of such an investigation that delays or failures to achieve minimum performance standards “are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation.” *Id.* § 24308(f)(2) (emphasis added). Importantly, this authority is much narrower than the Board’s general investigatory authority. Whereas an investigation under § 24308(f)(1) encompasses all delays, allegations under § 24308(f)(2) do not reach delays attributable to other parties or delays attributable to a host railroad but arising out of something

¹ The Board is considering issues related to defining on-time performance as one of those triggers in Ex Parte 726. Norfolk Southern has submitted comments in that proceeding regarding both the Board’s authority to define on-time performance and the substance of that definition. *See* Norfolk Southern Opening Comments, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Ex Parte 726 (filed Feb. 8, 2016) [hereinafter “NS Opening Comments EP 726”], attached as Appendix A. Norfolk Southern does not waive any argument it has made in that proceeding here.

other than a statutory preference violation. Only in the remaining limited circumstances does the Board have discretion to award damages against the host rail carrier. *Id.* § 24308(f)(2)-(4).

The Board should clarify in its Policy Statement that these two determinations are distinct in one other important respect. The Board has authority to investigate substandard performance of “any intercity passenger train” falling short of the statutory triggers. *Id.* § 24308(f)(1). However, Congress expressly extended the statutory preference obligation to cover only “intercity and commuter rail passenger transportation provided by or for Amtrak.” *Id.* § 24308(c) (emphasis added). When read together, the processes in § 24308(f)(2)-(4) thus are only available to intercity passenger trains operated by or for Amtrak. Even if the Board is correct in speculating that other parties may operate intercity passenger rail in the future, *see* Policy Statement at 6 n.5, the law provides them no statutory right of preference; therefore, the only portion of § 24308(f) that would be applicable to such services would be a general investigation under subsection (f)(1). Accordingly, the Board must change any general references to intercity passenger train movements when discussing preference issues to references to Amtrak alone. *See, e.g., id.* at 4 (favoring “a systemic approach to preference” that focuses on “total delays affecting intercity passenger train movements. . .”).

II. Norfolk Southern Strongly Agrees that Preference Is Not “Absolute”

Turning to the Board’s comments concerning allegations of preference violations pursuant to § 24308(f)(2), the Board is correct that the preference obligation is not “absolute.” Policy Statement at 3. Although Congress passed the original statute concerning the preference obligation in 1973, neither the statute nor any binding authority defines what the term “preference” means. *See id.* at 2. As a result, the scope of that obligation has been, and remains, undefined.

At the extreme, some parties may argue that the Board should adopt an absolute definition of preference. The Board characterizes absolute preference as a definition whereby a host railroad must “resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train.” Policy Statement at 3. In recent years, Amtrak has started to advance just such an interpretation. *See* Amtrak Comment, *Passenger Rail Investment and Improvement Act of 2008*, Ex Parte 683, at 4 (filed Feb. 23, 2009) (“[T]he meaning of preference has never been in any doubt: Subject to [emergencies and application to the Board for relief], it is an absolute right; passenger trains must be provided the right of way and freight trains must yield.”). *But see* Financial Assistance to Amtrak: Hearings Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce, 93d Cong. 32 (1973) (testimony of Amtrak president Roger Lewis) [hereinafter “Amtrak 1973 Testimony”] (“I feel, and I have felt, that to try to legislate that and say, ‘You will always give preference to the passenger train, or never let a freight train interfere,’ just is not a real-world approach.”). The Board rightly rejects the notion of absolute preference.

Such an approach would be detrimental to all users of the overall rail network, including Amtrak. The Board highlights exactly the problem with an absolute approach to preference – it does not promote efficient passenger service or freight service to prioritize passenger trains at the expense of network fluidity. Evaluating an allegation of a preference violation also requires consideration of individualized facts and context. *See* Policy Statement at 3 (highlighting the “the fact-specific nature of § 24308(c) preference issues”). Any inflexible mandates concerning preference will result in unintended consequences when applied in specific cases. Indeed, in prior years and contemporaneous with the adoption of the preference statute, Amtrak’s President himself recognized this fact:

Well, this question of freight train interference is complicated. There are cases in railroad operations, a number of them, where freight train interference might be justified. . . . I feel, and I have felt, that to try to legislate that and say, “You will always give preference to the passenger train, or never let a freight train interfere,” just is not a real-world approach.

Amtrak 1973 Testimony. As a result, the Board should provide only general guidance that preference is “situational.”

A. Dispatching Decisions that Seem to Prefer Freight Traffic May Actually Minimize Specific Passenger Train Delay

First, dispatching decisions that seemingly favor freight trains in using a rail line, junction, or crossing may actually minimize delay to the impacted passenger train. An illustrative example involves Amtrak’s Crescent service operating over Norfolk Southern between Washington, D.C., and New Orleans, LA. The Crescent operates over primarily single-track territory on Norfolk Southern’s Alabama Division through Alabama, Mississippi, and Louisiana. When the Crescent catches up to a freight train moving in the same direction and a second train is approaching in the opposite direction, the dispatcher sometimes must direct the preceding freight train and the Crescent into a siding to allow the opposing train to pass. The Crescent then reverses out of the siding and passes the freight train it had been trailing on the main line.

Even though these types of decisions – putting an Amtrak train in a siding to allow a freight train to pass, then forcing Amtrak to reverse – may seem inconsistent with preference to passengers sitting on the train or an Amtrak conductor looking out his or her windshield, this dispatching practice in fact minimizes the amount of delay to the Crescent within the constraints of the overall network. Sidings are fixed and finite (as are the locations of cross-overs in double-track territory), meaning dispatchers have limited options when dealing with multiple trains

using a heavily-trafficked main-line.² Moreover, sidings are rarely long enough to accommodate two freight trains, so a dispatcher cannot just move both freight trains off of the main line.

Although perhaps counterintuitive to some, these decisions illustrate Norfolk Southern affirmatively providing preference, a result that likely would be missed by an absolute definition.

B. Maximizing Network Fluidity Reduces Overall Passenger Train Delays

The Board is also correct that “a requirement of absolute preference might not, in the long run, promote efficient passenger service.” Policy Statement at 4. As the Board articulates, “[a]n individual dispatching decision involving two trains may have efficiency consequences for the network,” such that “a dispatching decision that may appear, in isolation, to favor freight over passenger efficiency may ultimately promote efficiency and on-time service for passenger trains on the network generally.” *Id.* Looking broadly, a dispatcher cannot simply hold every freight train in a siding far ahead of any potential conflict with a passenger train to ensure no delays occur. Such attempts to guarantee no delay to a single passenger train would harm network fluidity such that the overall costs to the system, including other passenger trains, far exceed the individual benefits.

As the Board rightly recognizes, history teaches that “congestion at one location can adversely affect the rail network at large.” Policy Statement at 4. The Department of Transportation (“DOT”) similarly explained:

The rail network operates 24 hours a day, 7 days a week. Delays in one part of the network can set off another type of delay later on in the network, which creates a

² Even when an Amtrak train comes directly upon an opposing freight train in single-track territory, it is sometimes quicker to direct the Amtrak train into a siding and allow the freight train to pass than having Amtrak hold the main line. Freight trains can be extremely heavy and approach two miles in length; therefore, they take significantly more time to slow down to enter a siding safely than shorter and lighter Amtrak trains. Or, there may not be an available siding of sufficient length or in sufficient proximity to hold a freight train. The Amtrak train will often incur less delay if it enters the siding, allowing the freight train to pass at speed, then resumes its journey.

“ripple” effect. As delays accumulate, the likelihood of unplanned meets between Amtrak trains and other trains increases It can take up to 5 days, and sometimes up to 1 month, to restore service to normal operations after an unplanned disruption. Unlike the aviation system, which allows planes to be repositioned overnight, there is no “down time” within which trains can be repositioned.

DOT, Office of Inspector General, CR-2008-076, “Root Causes of Amtrak Train Delays,” at 19 (Sept. 8, 2008) (“DOT OIG Report”). More recently, Amtrak’s Blue Ribbon Panel correctly noted that “even relatively small delays” in the Chicago terminal area “can have a ripple effect throughout the U.S. rail network.” Report of the Amtrak Chicago Gateway Blue Ribbon Panel, at 36 (Oct. 2015), *available at* <https://www.amtrak.com/ccurl/873/180/Chicago-Gateway-Amtrak-Blue-Ribbon-Panel-Final-Report.pdf> [hereinafter “Amtrak Blue Ribbon Report”].

Day-to-day dispatching decisions are not able to be dictated by some overall formula. Dispatchers work within the constraints of the infrastructure on their territory. Even if network fluidity would not suffer if every freight train were stopped well in advance of the passage of an Amtrak train, often there simply are not enough sidings and too many trains to assume every freight train can be held out of the way of Amtrak. Dispatchers have discretion to make decisions to ensure the fluidity of the network and avoid the inevitable unintended consequences of an absolute preference rule. “Each train dispatcher makes hundreds of decisions every day on how to handle the flow of train traffic. . . . While dispatchers operate within the policies set by their supervisors, they have significant autonomy in making decisions because the situations impacting their decisions are constantly changing.” DOT OIG Report at 5.

For example, on portions of Norfolk Southern’s Chicago Line, dispatchers must deal with over 100 freight trains in addition to 16 Amtrak trains every day. *See generally* Norfolk Southern Response to Amtrak Complaint, *Nat’l R.R. Passenger Corp. - Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141, at 7 (filed Jan. 7, 2015).

Holding up all traffic for one particular Amtrak train would result in lingering congestion that would then delay every other passenger train (and freight train) to pass through that area, and beyond. Indeed, the Amtrak Blue Ribbon Panel quoted Scott Haas, Vice President of UPS, the largest rail intermodal shipper, explaining just these impacts: “A lone train stopped in Chicago can force other trains to stop or slow as far away as Los Angeles or Baltimore. It’s a ripple effect – everything in my system backs up.” Amtrak Blue Ribbon Report at 36. Current operating conditions only make these concerns more acute. The Board correctly observed that “[d]ue to increased traffic density, the rail operating environment has become more complex since Congress first established a preference requirement in 1973.” Policy Statement at 4.

In some respects, an absolute view of preference would treat each Amtrak train like the presidential motorcade. District residents are all too familiar with the traffic snarls that result when local roads are shut down to ensure that the motorcade can travel without delay. When the President ventures out during periods of heavy traffic, or if the motorcade runs behind schedule, it may take hours for the resulting congestion to clear. “The impact of the happy hour decision by the president to go visit his friends... causes cascading delays that go throughout the entire city.” Luz Lazo, “D.C. Problems: Important People Motorcades Messing Up Traffic,” Washington Post (May 21, 2014), *available at* <https://www.washingtonpost.com/news/dr-gridlock/wp/2014/05/21/d-c-problems-important-people-motorcades-messing-up-traffic/> (quoting Jim Hamre, director of bus planning for Metro).³ An absolute view of preference would

³ The article goes on to note that “Buses on fixed routes can’t just decide to detour. . . ,” *id.*, a recognition that is even more acute in the context of the fixed rail system.

mandate dozens of Amtrak “motorcades” moving across the United States rail network at any given time, blocking all other traffic.⁴

Amtrak had admitted in the past that an absolute definition of preference would shut down the rail network in some circumstances. *See* DOT OIG Report at 4 (“In addition, AAR strongly believes that adhering strictly to Amtrak’s definition of preference would quickly shut down the rail network. Amtrak agrees that this could happen in some circumstances but takes issues with how frequently those circumstances would arise.”) (emphasis added). With little or no time to reset before the next Amtrak train came through, congestion would become constant in many areas, slowing the velocity of all trains and greatly decreasing overall network capacity.

C. An Absolute View of Preference Is Contrary to Congressional Intent

Norfolk Southern strongly agrees with the Board that an absolute approach to preference also would run contrary to congressional intent. Congress has tasked the Board with regulating “so as to promote efficiency in freight service” as part of the rail transportation policy. *See* Policy Statement at 3; 49 U.S.C. § 10101. Congress did not intend for the statutory preference obligation to “materially lessen the quality of freight transportation provided to shippers.” *See* 49 U.S.C. § 24308(c); Policy Statement at 3. Any approach to preference must weigh the real and important needs of Amtrak and its passengers alongside the equally real and vital needs of freight customers and the millions of consumers who rely on the services supported by the railroad industry. The Amtrak Blue Ribbon Panel also correctly notes that adverse impacts on the freight network can have a major impact on the overall U.S. economy and the environment.

⁴ In addition, the mandate would have to be implemented in a constantly changing environment. The DOT OIG Report explains that dispatching must constantly take into account the unplanned events that happen on a daily basis throughout the freight rail system, “such as train derailments, unscheduled or late trains, or maintenance work [that] frequently require dispatchers to manually make last-minute traffic management decisions,” and requires that dispatchers do so in a way that maintains the network’s fluidity notwithstanding the effects of these events. DOT OIG Report at 6.

See Amtrak Blue Ribbon Report at 37. The Board articulated well the balance required by the Board's statutes. *See* Policy Statement at 4. An absolute approach would not allow the Board to balance these competing concerns.

D. An Absolute Approach to Preference Would Result in Other Unintended Consequences, Including Dramatically Increasing Amtrak's Access Costs

An absolute approach to preference would have other, unintended consequences. For example, Amtrak must compensate the host railroads for the incremental cost of its access. *See generally* 49 U.S.C. § 24308(a)(2)(B). This standard has been interpreted to require reimbursement of all costs incurred by a host railroad due solely to Amtrak's presence on a line. *See Nat'l R.R. Passenger Corp. v. Interstate Commerce Com.*, 610 F.2d 865, 868 (D.C. Cir. 1979) ("Incremental costs are costs that the supplier railroad would avoid if passenger service were discontinued. Non-incremental costs would remain even if Amtrak service were halted."). If the Board were to decide that the freight railroads have a statutory obligation to ensure that every dispatching decision is resolved in favor of Amtrak, even to the detriment of network fluidity, the financial costs of hosting Amtrak on a line would skyrocket. Amtrak would be required to reimburse the freight railroads far beyond current compensation for the significant capacity the freight railroads would lose in running a less efficient network to protect Amtrak's operations. The Board has already established that such capacity costs can be incremental costs:

We point out to Amtrak, however, that UP/SP may appropriately charge it for the use of its facilities. 49 U.S.C. 24308(a)(2)(B) permits freight railroads to recover from Amtrak their "incremental" costs--those costs that the carrier incurs as a result of Amtrak's use of its facilities--and that term is not as limiting as Amtrak may believe. Today, UP/SP and other railroads are facing significant capacity constraints and are making major investments to add the capacity and facilities necessary for handling increased freight traffic. Amtrak's plan to expand its express service at the same time--and thus its use of the freight carriers' facilities--could further strain that capacity, require additional infrastructure investment, and impose other substantial costs. We see nothing in the incremental cost standard

that would preclude the railroads' recovery of these and other costs that they incur if they are directly traceable to Amtrak's increased services.

Application of the Nat'l R.R. Passenger Corp. under 49 U.S.C. 24309(a) – Union Pac. R.R. Co. and S. Pac. Transp. Co., 3 S.T.B. 143 (1998).

And as the Board knows, such capacity costs are prohibitively expensive, especially through the major metropolitan areas where Amtrak operates. For example, over \$1 billion of public and private funding has been committed to CREATE projects in Chicago, and approximately \$2.6 billion in additional projects remain unfunded. *See* Jon Hilkevitch, “Study Takes Aim at Rail Gridlock in Chicago,” *Chicago Tribune* (Oct. 1, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-amtrak-rail-gridlock-met-1002-20151001-story.html>. Of the CREATE projects currently on the table to aid in the fluidity of Chicago, for example, Amtrak has identified 18 as ones that are to benefit it, and 20 are to benefit Metra. *See* Amtrak Blue Ribbon Report at 18. Amtrak operations, if provided absolute preference, would require even more infrastructure than is currently in place, which would increase the incremental costs for which Amtrak must compensate host railroads.

The freight railroads would also incur substantial additional delays to their freight traffic, along with costs resulting from reduced network velocity and increased congestion due to such an inflexible standard.⁵ Given Amtrak's financial limitations,⁶ Amtrak likely could not afford

⁵ These costs are difficult to quantify on an individual train basis, but no less real. *See, e.g.*, Alexander H. Lovett et al., “Determining Freight Train Delay Costs on Railroad Lines in North America,” Proceedings of the International Association of Railway Operations Research 6th International Conference on Railway Operations Modeling and Analysis, Tokyo, Japan (Mar. 2015) available at <http://railtec.illinois.edu/articles/Files/Conference%20Proceedings/2015/Lovett-et-al-2015-IAROR.pdf> (“There have been many attempts to determine the delay costs to railroads, and have resulted in values ranging from \$200 to over \$1,000 . . . but these do not appear to have considered all of the operational costs.”).

⁶ In the short term, Amtrak is facing budget cuts due in part to low fuel prices and weather-related disruptions. *See* Jason Laughlin, “Internal letter: Amtrak CEO to seek budget cuts,”

the cost of such operations. However, the combination of the statutory preference obligation (as Amtrak may interpret it) and the statutory incremental cost obligation would make those costs unavoidable.

An absolute definition of preference would have unintended impacts on commuter operations as well. Section 24308(c) speaks only of preference over freight transportation. But the congestion and network impacts caused by an absolute interpretation of preference would slow the rail network for commuter and other passenger services just as much as it would for freight, without any recourse for those passengers. It would stifle other, non-infrastructure based innovations driving freight railroad operation efficiencies such as the wider use of distributive power, which enables the freight carriers to operate longer trains with the infrastructure, equipment, and manpower currently available. Other, more granular negative consequences would no doubt arise when applying such an inflexible rule to specific factual circumstances.

E. The Board Should Provide Guidance that Preference is Situational

For all of these reasons, Norfolk Southern thinks that the most appropriate guidance that the Board can provide is that preference is “situational” and will be evaluated on a case-by-case basis. As the Board has already identified, the context of individual dispatching decisions is essential to evaluating their propriety. *See* Policy Statement at 3 (referencing the “the fact-specific nature of § 24308(c) preference issues”). Similar dispatching decisions may be permissible in one factual circumstance but impermissible in another. No pronouncement of an all-encompassing definition of preference, whether absolute or otherwise, will prove flexible

philly.com (Feb. 11, 2016), http://www.philly.com/philly/business/transportation/20160212_Internal_letter_Amtrak_CEO_to_seek_budget_cuts.html#A4Jwx1zEs3SjZu1.99. More broadly, Amtrak faces increasing opposition in Congress to securing funding, even as operating subsidies have declined somewhat in recent years. *See, e.g.*, Ashley Halsey III, “Amtrak President Joseph Boardman says he plans to step down next year,” *Washington Post* (Dec. 11, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/12/11/amtrak-president-joseph-boardman-says-he-plans-to-step-down-next-year/>.

enough to account for all of the factors and issues that may present themselves in an investigation or case.

Saying that preference is situational does not undercut the importance of the statutory obligation. Picking up the earlier analogy, no reasonable person would argue that emergency vehicles do not have “preference” over regular traffic because they do not receive their own Secret Service escorts. And no one would be surprised when it takes a fire truck or an ambulance longer to respond to a call when weaving through rush hour congestion or the backup from a highway accident than when few cars are on the road. Such ‘delays’ are not a result of regular citizens failing to provide preference. Rather, they are the natural outcome of attempting to move higher priority traffic through a capacity constrained system.

So too for the railroads, except that freight trains cannot just pull over onto the shoulder to get out of the way of Amtrak. Certainly the analogy is not perfect; Amtrak trains do not run on an emergency basis, either in terms of operations or purpose. And as the Board has recognized, it may be more appropriate for the overall fluidity of the rail system in certain cases for individual dispatching decisions to be resolved affirmatively in favor of a freight train. But the analogy does help to illustrate that a situational approach to preference simply recognizes that all traffic, Amtrak, commuter, and freight alike, benefits on whole from maintaining fluid operations, and that determining a preference violation requires a detailed understanding of the facts underlying the dispatching decisions at issue.

III. Preference Violations Require an Affirmative and Specific Finding Involving Dispatcher-Avoidable Delays

Norfolk Southern agrees with the Board’s guidance that it will target only systemic or longstanding patterns of failures in considering allegations of preference violations. The Board should speak more precisely when describing the type of affirmative finding necessary to support

a violation, focusing on the relevant category of “dispatcher-avoidable delays.” Additionally, the Board should clarify that a preference violation will require an affirmative finding of a specific violation on the facts, rather than implying or assuming a violation based on general data or practices.

The Board should abandon any statements in the Policy Statement that are inconsistent with this requirement. For example, the Board suggests that it will favor an approach “that focuses on minimization of total delays affecting intercity passenger train movements while on the host carrier’s network, consistent with the statute.” Policy Statement at 4 (emphasis added). Such a focus would be problematic and seems at odds with other parts of the Policy Statement, in which the Board correctly keys in on individual dispatching decisions when discussing the preference obligation.

A. Preference Violations Require Systemic Failures

Norfolk Southern agrees with the Board’s statements that it will look for evidence of an “identifiable and longstanding pattern” and “systemic failure” in assessing whether a host railroad has violated preference. *Id.* at 4. Although a preference violation can only be proven by examining a host railroad’s dispatching of individual trains, the Board should not fixate on isolated or occasional instances. Indeed, the statute restricts the Board’s discretion to assess damages to instances when Amtrak’s delays or failures to achieve performance standards triggering an investigation are attributable to the preference violation. *See* 49 U.S.C. 24308(f)(2). Isolated instances that do not materially impact Amtrak’s overall performance do not rise to that level. If the Board’s investigation of substandard performance identifies the primary causes of poor performance and delays as factors other than dispatching, the statute provides no path for the Board to pursue preference allegations.

B. The Board Must Examine Root Causes of Individual Delays

The Board must examine the root causes of individual delays in order to determine if any delay is evidence that would support a finding of a preference violation. Most categories of delays that may affect Amtrak cannot provide an evidentiary basis for a Board finding of a preference violation under § 24308(f)(2). Delays that are not attributable to the host railroad are expressly excluded from supporting such a finding by the statute. *See* 49 U.S.C. § 24308(f)(2) (reaching only delays “attributable to a rail carrier’s failure . . .”). Therefore, the Board cannot cite delays attributable to third parties, such as Amtrak equipment failures, or other causes, such as weather, as support for any allegation of a preference violation. *Cf.* Policy Statement at 6.

Nor is it enough that a delay may be attributable to the host railroad. Subsection (f)(2) specifies delays must be attributable to a host railroad’s “failure to provide preference.” Yet many delays that may be attributable to a host railroad, in the sense that the host railroad exerts control over at least some of the factors that influence those occurrences, are fundamentally unrelated to preference because they affect all users of the rail line equally. In other words, delays that do not evidence favoritism of Amtrak or the freight railroad relative to the other cannot form the basis for a preference violation.

Indeed, most delays attributable to host railroads will not rise to the heightened level of a supporting a potential preference violation. Instead, such delays are those inherent in operating and maintaining the railroad, keeping the flow of traffic on the entirety of the system moving, and adapting to changing and unforeseen circumstances. They are the providence of all carriers that own, operate, and maintain a railroad. *See, e.g.*, “Amtrak mechanical problems caused delays for New Jersey rail commuters,” NorthJersey.com (Feb. 12, 2016), <http://www.northjersey.com/news/amtrak-mechanical-problems-caused-delays-for-north-jersey-rail-commuters-1.1511249> (New Jersey Transit commuters experienced delays of up to two

hours on their commute home due to emergency repairs, “likely related to cold weather,” that were in addition to Amtrak’s regular maintenance that “also limit train service into New York City”). The only way for the Board to determine what category a delay falls into is to determine the root cause of the delay.

As the Board noted, Amtrak’s Conductor Delay Reports (“CDRs”) will be of limited use in this respect. *See* Policy Statement at 4 n.3. Conductors are instructed to record the directly observed cause of the delay. *See* DOT, Office of Inspector General, CR-2010-117, “Amtrak Cascades and Coast Starlight Routes: Implementation of New Metrics and Standards Is Key To Improving On-Time Performance,” at 16 (Sept. 23, 2010) (“Each conductor assigns a code based on his or her observations of the direct cause of the delay event.”). The fact that a delay is coded as Freight or Passenger Train Interference, for example, simply identifies the type of train that Amtrak was delayed behind. CDRs do not and cannot distinguish if a freight or passenger train is in Amtrak’s path due to a crossing accident, a mechanical failure, maintenance work, or for any other reason. Without knowing the actual cause, it is impossible to determine if a delay is attributable to the host railroad, or further, attributable to a failure to provide preference.

Finally, delays are inextricably dependent on Amtrak’s schedules. After all, a delay is just a measurement of time lost versus expectation. Norfolk Southern’s Opening Comments in Ex Parte 726 demonstrate that Amtrak’s schedules provide unrealistic indications of the expected transit times for most routes. *See* NS Opening Comments EP 726, at 10-22. Adjustments to schedules may result in greater or fewer delays for a particular train. However, any schedule-driven changes in the number or degree of delays again do not indicate anything about how the host railroad handles Amtrak trains relative to freight traffic.

C. The Board Should Focus Attention on Dispatcher-Avoidable Delays

Rather than total delays, the Board should direct any parties alleging a preference violation to submit affirmative evidence on specific delays that could have been avoided through different host railroad dispatching decisions, given the context in which those decisions were made. Much of the Board's Policy Statement already correctly keys in on host railroad dispatching decisions:

An individual dispatching decision involving two trains may have efficiency consequences for the network; therefore, a dispatching decision that may appear, in isolation, to favor freight over passenger efficiency may ultimately promote efficiency and on-time service for passenger trains on the network generally (including, for the long run, trains on the particular route at issue).

Policy Statement at 4; *see also id.* at 3 (“In other words, a host rail carrier need not resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train.”). Dispatching must be at the core of any allegation of any preference violation, because it is through dispatching that a host railroad exerts control over the relative handling of Amtrak and freight traffic. Violations may only arise from patterns of improper handling by the host railroad to Amtrak's detriment. To determine otherwise, and consider delays arising out of congestion or the presence of other freight traffic as potentially actionable even if a host railroad dispatcher had no ability to avoid the delay, would be contrary to congressional intent to balance the needs of passenger and freight traffic. In effect, freight railroads would be forced to choose between maintaining and growing their business or avoiding a preference violation.

As a result, Norfolk Southern proposes that the Board revise its Policy Statement to say that its approach to preference will “focus on dispatcher-avoidable delays while on the host carrier's network.” In this way, the Board will properly examine those delays that are both within a host railroad's control and may evidence improper decision-making prioritizing freight traffic over Amtrak trains. Of course, even Norfolk Southern's suggested construction itself is

overly broad. As the Board explained when distinguishing an absolute approach to preference, not all individual dispatching decisions should be expected or required to be resolved in favor of Amtrak. *See id.* at 4. And, as discussed above, the Board properly focuses on systemic or patterns of violations.

Further, a proper inquiry must take into account the totality of the facts surrounding dispatching decisions. Some delays are avoidable by the dispatcher only in hindsight due to unexpected developments. A dispatcher makes discretionary decisions using his or her experience, incorporating both the flood of information available and the judgment to consider potential outcomes from proceeding with one decision among the options presented. As such, a proper inquiry must only consider conditions known to the dispatcher at the time of the decision and focus on intended or foreseeable consequences. But starting from a focus on dispatcher-avoidable delays at least narrows the Board's concentration to potentially relevant actions by the host railroad.

D. The Board Should Require Affirmative and Specific Proof of a Preference Violation

From there, the Board has an obligation under the statute to require affirmative proof of a violation. As Norfolk Southern explained in Ex Parte 726, satisfaction of the statutory on-time performance trigger to initiate an investigation under § 24308(f)(1) establishes no presumption of a preference violation. *See* NS Opening Comments EP 726 at 6 (analogizing to the jurisdictional requirement of a R/VC ratio in excess of 180 percent in rate cases). Moreover, a preference violation has severe statutory consequences, including potential damages and other relief. *See* 49 U.S.C. § 24308(f)(2). The Board should clarify that it will not infer preference violations simply due to substandard performance or shift the burden to the host railroad to prove that delays are not due to a preference violation.

A few of the Board's statements might be read as implying that preference violations could be found solely through proof of something other than specific facts demonstrating the improper handling of individual trains, such as statistics regarding relative delays to freight and passenger trains. *See, e.g.*, Policy Statement at 5 ("For example, a party could hypothesize that Amtrak trains should be the least-delayed class of train on the host's system. . . . If Amtrak is, indeed, the least-delayed class of transportation on the host carrier, then the delays to Amtrak might not indicate a host carrier's failure to provide preference."). As a general matter, Norfolk Southern certainly agrees that statistical analysis could be a useful tool in a general investigation under § 24308(f)(1), and may well tend to rule out the presence of preference violations.

But if a complainant or the Board cannot point to specific decisions a host railroad should have made in handling specific Amtrak trains that would have resulted in less delay to those trains, and further point to evidence that the specific decision was more than just an imperfect exercise of discretion in hindsight, the Board cannot satisfy the statutory requirement that a violation only occurs when poor performance is a result of failure to provide preference. *See* 49 U.S.C. § 24308(f)(2). The Board's suggestion to develop statistical correlations between performance and policies (in the form of forensic economics) cannot overcome this, because a host railroad may be abiding by its preference obligation during times of lesser overall performance or violating preference on specific trains during times of improved performance.

Put more concisely, the statutory preference obligation does not entitle Amtrak to any particular level of train performance. Instead, the statute provides a relative indication of how Amtrak trains should be handled in comparison to freight traffic, in light of relevant conditions at the time. Focusing on the quantity of delays is inconsistent with the qualitative and relative nature of the preference obligation. Indeed, without proof that different dispatching decisions

would have had direct and foreseeable impacts on the amount of delays to specific Amtrak trains, the Board cannot find that a preference violation is the actual cause of any delays. The burden of providing that proof rightly falls to a complainant alleging a preference violation.

IV. Evidence In Investigations Under § 24308(f)(1)

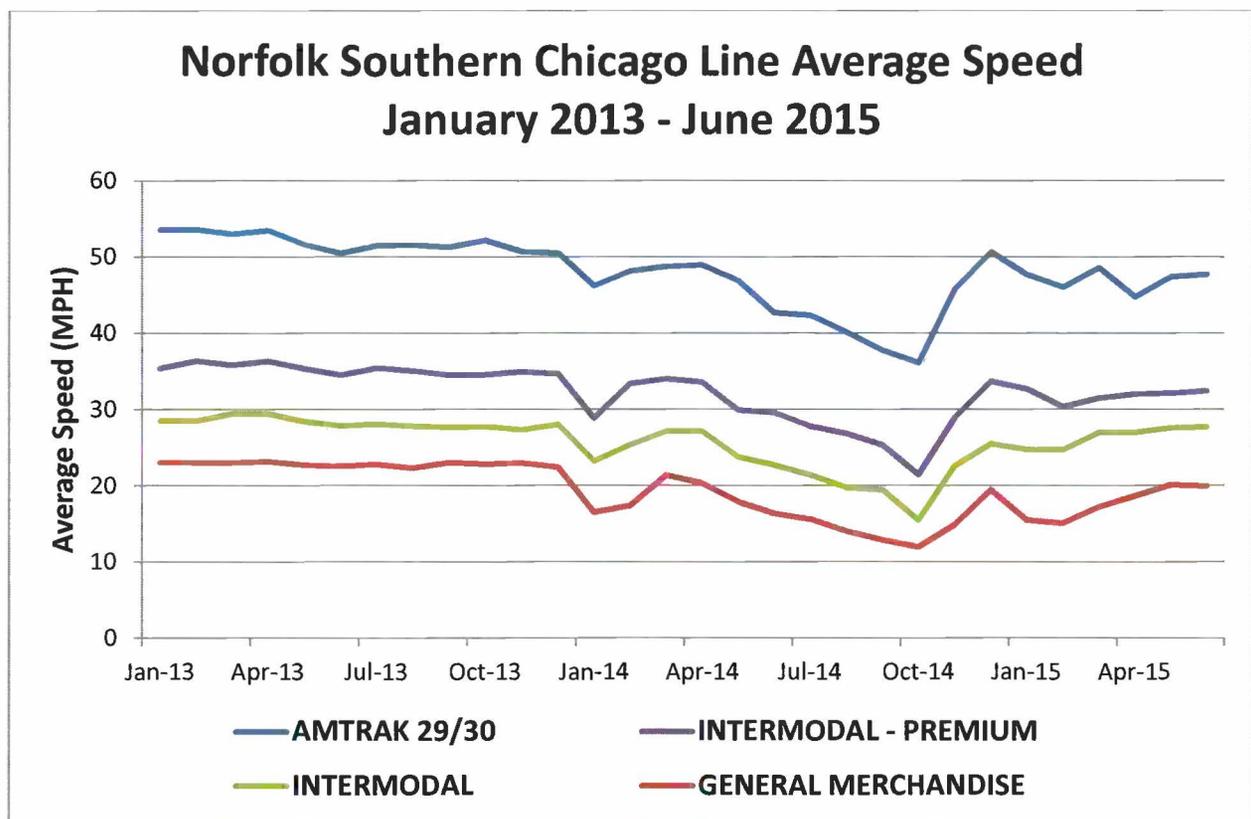
Norfolk Southern provides some limited additional thoughts on the evidence that the Board might consider in a broad investigation of substandard performance under 49 U.S.C. § 24308(f)(1). Many of the items that the Board has identified are precisely the types of evidence that are properly within the scope of such an investigation. Data on delays, timetables, weather, handoffs of trains between multiple host railroads, etc. all may provide insights into the performance of particular Amtrak trains under different factual circumstances. *See* Policy Statement at 5-6. Other items that may prove insightful could include historical performance of the train at issue, traffic volumes on the relevant lines, route characteristics (such as the number of tracks or if foreign railroads control relevant interlockings or station tracks), capacity, network fluidity, seasonal variations in traffic or maintenance needs, and more. Of course, the particular facts will drive what evidence is most relevant in individual investigations.

Norfolk Southern does note that the Board's suggestion of entertaining comparisons of on-time performance and delays between passenger and freight trains presents conceptual issues. *See* Policy Statement at 5. Freight train schedules are constructed differently than passenger schedules; for example, the concept of "pure running time" has no relevance for most freight schedules, which are built and adjusted using historical performance. Consequentially, freight delays may not always be measured in the same way as for passenger trains. Further, Norfolk Southern considers most of its freight trains to be on-time if they arrive within hours, not minutes, of schedules that are much longer than Amtrak services. Freight traffic also may run at

varying times and under different conditions than the passenger trains with which they might be compared.

Other comparative measures, such as speed, may provide greater insight into relative performance between freight and passenger trains. Indeed, comparisons of the relative speeds of passenger and freight traffic over a line may reveal important information about the underlying reasons for variations in performance. For example, the following graph depicts average train speed over Norfolk Southern's Chicago Line between January 2013 and June 2015 for the Capitol Limited and different types of Norfolk Southern freight traffic:

Figure 1: Norfolk Southern Chicago Line Average Speed (January 2013 – June 2015)



The graph clearly shows that performance of all trains exhibited similar trends over the relevant time period, and that all trains experienced notable, corresponding reductions in performance between April of 2014 and November of 2014. Such trends create a strong presumption that the

changes in performance (including Amtrak's performance) over this time period were attributable to root causes impacting the entire line, rather than any cause unique to Amtrak or any change in Norfolk Southern's handling of the Capitol Limited. Any party alleging that reductions in Amtrak's performance are attributable to a host railroad's violation of preference during time periods when Amtrak's performance mirrors trends in freight performance on the same line would have a very high burden to overcome.

V. Effect of Policy Statement under the APA

Lastly, Norfolk Southern supports the Board's decision to share its initial thoughts on these issues through a policy statement. Under the Administrative Procedure Act, a policy statement is non-binding. *See Pac. Gas & Elec. Co. v. Fed. Power Com.*, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that the only methods for formulating policy that has the force of law are rulemaking and adjudication). "A general statement of policy . . . is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Id.* "The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy." *Id.* at 39. Therefore, the Board is correct in explaining that "[p]arties are still free to present any arguments or evidence they could have presented before the Board issued this policy statement." Policy Statement at 3. Similarly, the Policy Statement will not relieve the Board of its need to support any decision it makes in any subsequent individual proceeding. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 32 (D.C. Cir. 2014) ("And when an 'agency applies [a general statement of] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.") (quoting *Pac. Gas*, 506 F.2d at 38).

VI. Conclusion

In conclusion, Norfolk Southern strongly supports the Board's expressions indicating that the statutory preference obligation is not absolute. The Board can further improve its Policy Statement by clarifying that only Amtrak is entitled to preference and that interested parties should focus on dispatcher-avoidable delays in seeking to prove any allegation of a preference violation. Norfolk Southern will review other parties' opening comments in this proceeding and comment as necessary on reply.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "James A. Hixon", written over a horizontal line.

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

*Counsel for Norfolk Southern Railway
Company*

February 22, 2016

APPENDIX A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 726

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

**OPENING COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

*Counsel for Norfolk Southern Railway
Company*

Dated: February 8, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE 726

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

OPENING COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY

Norfolk Southern Railway Company (“Norfolk Southern”) hereby submits these opening comments in response to the Surface Transportation Board’s (“Board’s”) Notice of Proposed Rulemaking in *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Ex Parte 726 (STB served Dec. 28, 2015) (hereinafter the “Board’s Notice”) concerning the definition of the term “on-time performance” in Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), as codified in 49 U.S.C. § 24308(f). In addition to submitting these comments, Norfolk Southern joins in the Opening Comments of the Association of American Railroads.

I. Introduction

Congress instructed that on-time performance would serve a gatekeeping or triggering role for the initiation by the Board of an “Investigation of Substandard Performance” of intercity passenger trains operated over host railroads. *See* 49 U.S.C. § 24308(f)(1). Specifically, if the on-time performance of a passenger service falls below 80 percent for two consecutive calendar quarters, Amtrak, the host railroads, or other categories of interested parties may file a complaint and require the Board to initiate an investigation. *Id.* Although 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.”

Norfolk Southern respectfully reiterates its previously stated position¹ that the Board lacks the authority to interpret on-time performance for purposes of triggering a Section 213 investigation and incorporates those comments into this filing, which are attached as Exhibit A. To the extent that the Board has the power to establish a definition of on-time performance, Norfolk Southern strongly supports the Board’s decision to address the important issues related to defining on-time performance through a rulemaking, rather than attempting to craft a definition through determinations in individual cases. Acting through rulemaking is vastly superior to attempting to resolve these issues through piecemeal litigation, of which there are already two cases pending. Proceeding via this rulemaking proceeding will “conserve[e] party and agency resources.” Board’s Notice at 7. Norfolk Southern is currently a subject of a complaint, along with CSX Transportation, Inc. (“CSX”), filed under Section 213 of PRIIA 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 also has an ongoing proceeding against Canadian National Railway Company (“CN”). *See Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry., Co.*, Docket No.

¹ Norfolk Southern previously raised this issue in Norfolk Southern’s Motion to Dismiss Amtrak’s Complaint, *Nat’l R.R. Passenger Corp. - Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (filed Jan. 7, 2015), and in Reply of Norfolk Southern Railway Company in Support of AAR’s Petition for Rulemaking, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Ex Parte 726 (filed Feb. 3, 2015).

42134.² Therefore, it is clearly “efficient to obtain the full range of stakeholder perspectives in one docket, rather than piecemeal on a case-by-case basis.” Board’s Notice at 7.

Regarding the substance of the standard proposed in the Board’s Notice, Norfolk Southern does not believe that the “minutes within scheduled arrival” standard set forth in the Interstate Commerce Commission’s (“ICC’s”) 1973 decision addressing passenger train performance provides the proper starting point for defining on-time performance under Section 213 of PRIIA. The fundamental problem is that, as the ICC itself recognized in 1973, the 10-30 minute tolerances are only meaningful if the underlying train schedules themselves provide standards that are realistically capable of being consistently met. The 1973 definition of “on-time” that the Board re-proposes in its Notice accepts Amtrak’s published schedules and applies a sliding scale of end-point tolerances based on the length of the route. Yet, as Norfolk Southern demonstrates below, Amtrak’s published schedules are flawed measures of the expected transit time of most services due to their formulaic creation (often years ago) and Amtrak’s ongoing unwillingness to modify them to take into account changing real world conditions.

Defining on-time performance in the manner proposed in the Board’s Notice would do little to serve Section 213’s purpose of focusing Board investigations (and limited resources) on those services experiencing performance that is actually “substandard” – that is, performance has deviated from normal, realistically achievable levels. Instead, as we show below, it would allow a potential complainant to require the initiation of a full-blown investigation against nearly every railroad participating in nearly every Amtrak service simply because the schedules are unrealistic.

² The Board has held both proceedings in abeyance in light of this rulemaking proceeding. See *Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry., Co.*, Docket No. 42134 (STB served Dec. 28, 2015).

To address this shortcoming, and pursuant to the Board's explicit request, Norfolk Southern provides two concrete recommendations to define on-time performance in a way that is reasonable and realistic, reflects actual rail operations, and is workable from the perspective of the Board and potential parties to a complaint. First, the Board must define on-time performance in such a way that a train can realistically and consistently achieve at least 80 percent on-time performance during periods of normal performance. The Board can accomplish this either by: (1) measuring on-time performance against a reasonable and realistically achievable baseline or schedule, as demonstrated by readily available information on the historical performance of the Amtrak trains or other evidence; or (2) measuring on-time performance for each service using tolerances or deviations from existing schedules, based again on readily available information on historical performance. Second, the Board must define on-time performance with respect to transit times over individual host railroads, rather than the entire route, to focus attention and investigations on specific areas experiencing substandard performance. In this way, the definition of on-time performance will serve its statutory purpose of being a jurisdictional gatekeeper.

II. Definition of On-Time Performance Should Be Crafted with Respect to its Statutory Role

Norfolk Southern proposes that the statutory framework of Section 213 of PRIIA should guide the Board's approach to defining on-time performance. Under PRIIA, on-time performance serves as an important gate-keeper in determining whether intercity passenger trains are experiencing substandard performance and, therefore, whether the Board must commence an investigation. That role cannot be served by a metric that is not consistently achievable at an 80 percent level for a majority of trains due to unrealistic schedules, regardless of actual

performance. The Board's proposed reversion to a definition established in 1973 under a different statutory scheme, during different operating conditions, and for a very different purpose is not appropriate, and the Board should look at other alternatives in defining on-time performance.

Pursuant to Section 213 of PRIAA, 80 percent on-time performance operates as a trigger or gateway for an investigation of passenger train performance that is substandard. *See* 49 U.S.C. § 24308(f)(1). Whatever definition the Board selects, performance for two consecutive calendar quarters below 80 percent of that metric will allow Amtrak or other interested parties to demand an investigation upon filing a complaint. That is all. In this way, 80 percent on-time performance functions as a jurisdictional requirement only – much in the same way as a 180 revenue-variable cost percentage in rate cases. *See* 49 U.S.C. § 10707(d). It is intended to screen for situations in which Amtrak trains are experiencing substandard performance.

Importantly, the on-time performance metric does not provide any insight or indication as to the outcome of a subsequent investigation. Thus, again like the market dominance thresholds in rate reasonableness cases, two consecutive quarters of on-time performance less than 80 percent permit the filing of a complaint but do not establish any presumption that substandard performance is attributable in any way to a host railroad, let alone that a host railroad violated preference.

Given the jurisdictional role of on-time performance in triggering an investigation under PRIIA, the Board's purpose in this proceeding should be to develop a metric that provides meaningful insight into whether a given passenger service might actually be experiencing substandard performance during the measurement period. To serve the statute, then, the Board's definition of on time performance must be realistically and consistently achievable at 80 percent

for each passenger service during periods of normal performance. In that way, an investigation will be triggered only during times when service provided in the then current rail operating environment is, in fact, “substandard.” In contrast, any definition of on-time performance that always permits investigations of most passenger services provides no screen at all.

The Board’s proposed definition of on-time performance draws from a previous definition crafted by the ICC in 1973 in *Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. 758 (1973). *See* Board’s Notice at 7. Although the proceeding offers insights that bear on the appropriate approach to defining on-time performance for purposes of PRIIA, the definition the ICC crafted in 1973 does not provide the proper starting place for defining on-time performance in Section 213.

As a threshold matter, the Board quoted only a portion of the ICC’s discussion concerning on-time performance. Even in 1973, when the industry faced significant overcapacity, the ICC recognized the important role of schedules when considering on-time performance. The ICC began its examination with an express admonition that “carriers should establish realistic schedules and make a determined effort to meet them” and repeatedly referenced the critical role that “realistic scheduling” plays in evaluating on-time performance. *Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. 758, 776-77 (1973); *see also id.* at 776 (“We believe carriers should establish realistic schedules and make a determined effort to meet them.”); *id.* (“Moreover, where trains are late repeatedly, either operational efficiency is lacking, or the timetable needs revision.”). As the ICC said, “If [a carrier] cannot, for example, complete a scheduled 230-mile, 3-hour trip within 10 minutes of the posted time (barring some unforeseen safety hazard which requires slow operation on a one-time basis), it should not publish such a schedule.” *Id.* at 777.

This focus on the importance of realistic schedules is also consistent with the ICC's statements a few years later when considering the measurement of passenger train performance for the purposes of incentive payments in a host railroad's private operating agreement with Amtrak. See *Amtrak & the Texas & Pacific Ry., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 645 (1976) ("T&P"). In its decision, the ICC noted that the "preferable system" of assessing passenger train performance "would [] encourage and reward superior performance while encompassing a realistic standard." *Id.* at 672. In arriving at the baseline schedule in *T&P*, the ICC rejected the schedule advanced by Amtrak because it was "not convinced that *T&P* could consistently meet the 80 percent on-time performance baseline with such abbreviated schedules without adversely affecting its freight operations." *Id.* at 671. Route-specific factors, including increases in traffic over the heavily used line, informed this decision. As the ICC recognized, performance should be measured using a realistic standard that the host railroad can consistently meet at an 80 percent level.

Further, in 1973, the ICC considered the issue of on-time performance in the context of the rail system as it existed then. The ICC expressly took into account the then "present conditions" of the industry in 1973 when settling on the specifics of its definition. *Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. at 776-78. Such conditions have changed dramatically over the past 43 years. With the revolution in railroading sparked by the Staggers Act, in furtherance of Congress's national transportation policies (*see, e.g.*, 49 U.S.C. § 10101 (directing the Board to regulate so as to promote efficiency in freight service)), the rail system today is very different from the rail system in which Amtrak and the freight railroads operated in 1973. Railroads rationalized extensive redundancy, generated massive efficiencies, including through a focus on greater density on key mainlines, and achieved significant increases in freight traffic

levels on the remaining lines.³ The mix of traffic carried over those lines has changed significantly as well.⁴ The FRA notes that the changes have “increased traffic density by concentrating traffic over a smaller network.” *See* FRA, “Freight Railroads Background” at 4. These changes are not all in one direction – rail capital spending has increased far beyond inflation, and the railroads have “reversed the trends of the 80s and 90s whereby railroads now expand capacity in their highest density corridors.” *Id.* Indeed, the Board itself recognized on the same day it issued its notice in this rulemaking that “[d]ue to increased traffic density, the rail operating environment has become more complex since . . . 1973.” *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, Ex Parte 728, slip op. at 4 (STB served Dec. 28, 2015).

Finally, the ICC crafted its 1973 definition of on-time performance to serve a very different statutory role. The Railroad Passenger Service Act of 1970 authorized the ICC to prescribe regulations covering a wide range of factors bearing on “the adequacy of intercity passenger train service.” *Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. at 759. “In the words of the Senate Committee, it was to be a ‘complete and comprehensive jurisdiction over all aspects of standards of service on and relations to railroad passenger trains.’” *Id.* at 763. The ICC further had the “power to prescribe both ameliorative and compensatory remedies when aimed at improving service.” *Id.* at 764. The ICC’s definition of on-time performance was just one regulation among many aimed at the overall passenger experience, including provisions for

³ The Federal Railroad Administration (“FRA”) notes that Class I revenue ton-miles has increased 89 percent since 1980, but the freight network itself has shrunk 42 percent. FRA, Office of Rail Policy and Development, “Freight Railroads Background,” at 4 (Apr. 2015), *available at* <https://www.fra.dot.gov/eLib/Details/L03011>.

⁴ See, for example, the data posted on the AAR website showing the movement of US rail operations from 2005 through 2014. AAR, Freight Rail Traffic Data, <https://www.aar.org/Pages/Freight-Rail-Traffic-Data.aspx> (last accessed Feb. 2, 2016).

toll-free reservation systems, baggage delivery, prohibitions on early departures, etc. *Id.* at 767-94.

In sum, the standard the ICC adopted in 1973 does not support the Board's adoption here of any definition of on-time performance that is unconnected to any evaluation of the reasonableness of the underlying schedule. Congress repealed the ICC's authority over the adequacy of passenger service in 1979. *See* Amtrak Reorganization Act of 1979, Pub. L. 96-73 § 111(b); 93 Stat. 537, 541 (1979). And Congress has not tasked the Board with the ICC's former responsibility for providing for the adequacy of passenger services. Instead, Congress gave the Board a very specific focus under 49 U.S.C § 24308(f) to investigate only substandard performance. Whereas the ICC was motivated by broad public concerns inherent in its since-repealed authority, the Board's definition should reflect current conditions and the role on-time performance plays in its own governing statute.

III. Board Should Not Rely on Amtrak's Schedules to Define Standard for On-Time Performance

Any definition of on-time performance must include two main components: (1) the standard or schedule against which performance is measured; and (2) the permissible tolerance for deviation from that standard. In considering the Board's proposed rule, Norfolk Southern focuses its comments on the first element. The Board should not use Amtrak's published schedules as the standard for measuring performance. Many Amtrak schedules are antiquated, and Amtrak has been unwilling to adjust its schedules even when they consistently are proven unrealistic over long periods of operation in normal conditions. Instead, Norfolk Southern suggests that the Board define on-time performance in a way that is realistically and consistently achievable at 80 percent for each passenger train during periods of normal performance.

The Board, by re-proposing the ICC's definition of on-time performance, assumes without discussion that Amtrak's published schedules should be the standard for measuring performance. *See* Board's Notice at 7-9 (repeatedly referencing "scheduled arrival time"). But many of Amtrak's current schedules set forth a flawed baseline for assessing performance. Amtrak crafted most of its schedules by using a simple mathematical formula that bears no relation to actual performance, does not take into account the presence of freight traffic, and is simply divorced from reality. Moreover, Amtrak has steadfastly refused to modify its schedules in any meaningful manner in response to changing conditions in the industry.

Because Amtrak's schedules are not meaningful representations of transit time expectations for many, if not most, passenger services, any definition of on-time performance based on an uncritical acceptance of those schedules as the standard of performance will similarly fail to provide meaningful insight into performance levels. Rather than being a filter for instances in which passenger performance deviates below normal, realistically achievable levels, the on-time performance trigger (less than 80 percent on-time performance for two consecutive quarters) will be an open door.

Allowing Amtrak to demand investigations for failures to meet unrealistic schedules – or permitting host railroads to commence investigations to have the Board recommend Amtrak lengthen its unrealistic schedules – will not incentivize more productive discussions about schedule revisions. Indeed, Amtrak may continue to reject scheduling adjustments that would improve reliability lest it lose the ability to threaten a host railroad with launching an investigation. Thus, it is critical that the Board not use these flawed schedules as the sole standard when defining an on-time performance metric.

A. Amtrak's Schedules Set Unrealistic Expectations of Performance

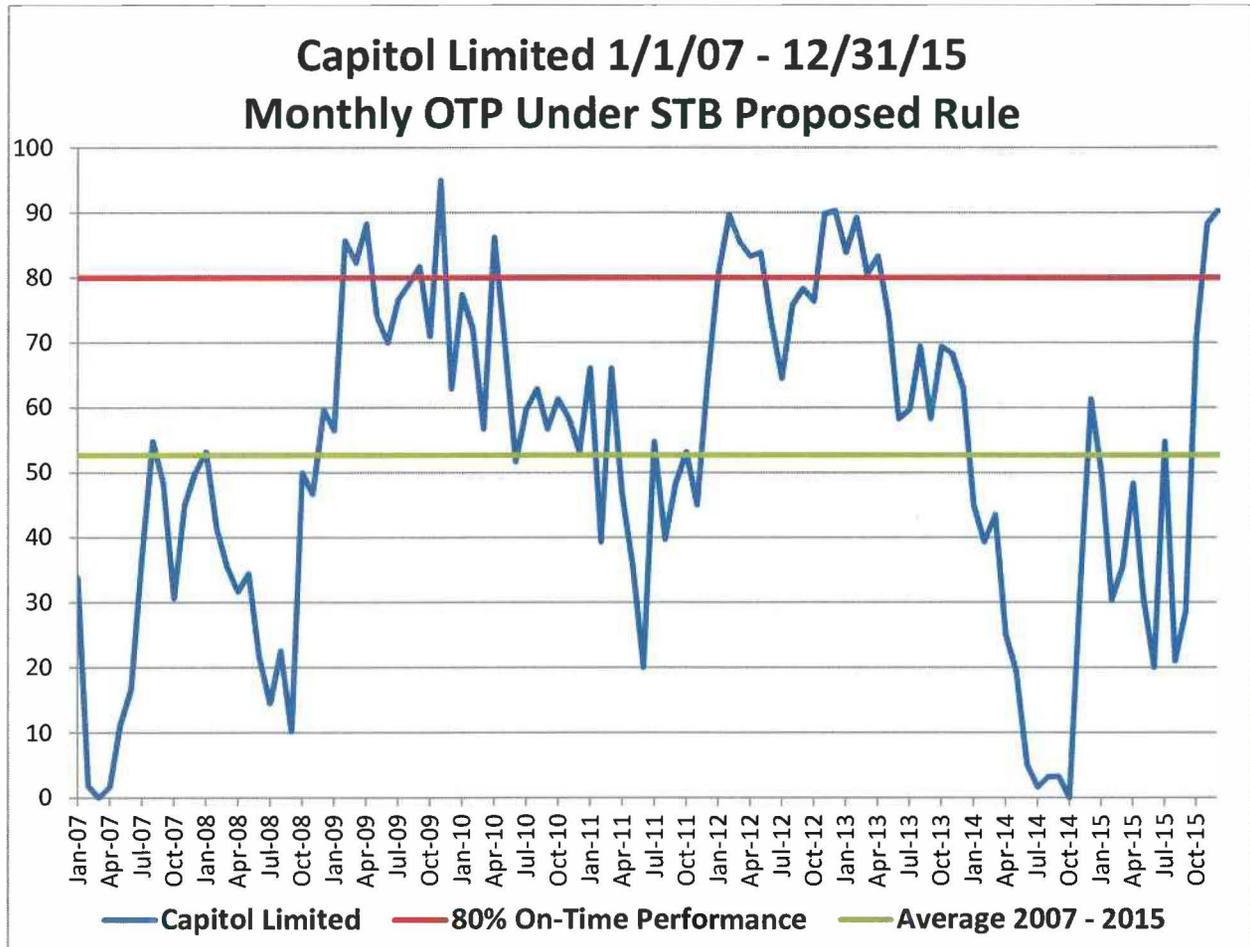
Norfolk Southern's experience demonstrates without doubt that Amtrak's schedules are in most cases highly unrealistic and incapable of being met consistently at an 80 percent level (as set forth in PRIIA) under the Board's proposed standard regardless of the performance of train. As we explain below, Amtrak's schedules fail to reflect real world conditions for two primary reasons: (1) Amtrak set most schedules formulaically based on the concept of "pure running time," rather than to reflect actual infrastructure and freight conditions on the line; and (2) Amtrak is unwilling to adjust those schedules despite experience demonstrating that they cannot reliably be achieved.

1. *The Data Show that Amtrak's Schedules Are Unrealistic*

The facts provide stark evidence that Amtrak's schedules are not a proper baseline for measuring the performance of Amtrak's service. Although Amtrak's schedules can be achieved some of the time, the conditions that allow such performance are exceptional and prove that existing schedules are unrealistic most of the time. Any serious examination of performance must consider all trains over a significant and representative sample period, including a full range of operating conditions, not just performance when conditions are ideal.

To illustrate this point, Norfolk Southern has undertaken a serious examination of the Capitol Limited service. Amtrak operates two Capitol Limited trains a day, one in each direction between Washington, D.C., and Chicago, IL. Starting broadly, Norfolk Southern examined performance data over the entire route from January 1, 2007, through December 31, 2015. The on-time performance of the full Capitol Limited service, as measured under the Board's

proposal,⁵ averaged approximately 53 percent during that time period. As the chart below depicts, of the 108 calendar months during that timeframe, on-time performance averaged at least 80 percent during just 19 months.



Thus, Amtrak’s schedule has not been a reasonable and realistic baseline for this train.

⁵ These statistics come from FRA’s and Amtrak’s reporting of on-time statistics. See Federal Railroad Administration, Rail Service Metrics and Performance Reports, <http://www.fra.dot.gov/Page/P0532> (last accessed Feb. 2, 2016); Amtrak, Monthly Performance Reports, <https://www.amtrak.com/servlet/ContentServer?c=Page&pagename=am%2FLayout&cid=1241245669222> (last accessed Feb. 2, 2016). For the Capitol Limited, which operates over a distance of 780 miles, Amtrak and the FRA applied the same 30 minute tolerance for measuring on-time performance as proposed by the Board in this proceeding. See Board’s Notice at 8.

On a more granular level, Norfolk Southern analyzed Amtrak’s arrival and departure data for the Norfolk Southern portion of the Capitol Limited route between Chicago, IL, and Pittsburgh, PA, from January 1, 2007, through April 31, 2015. Of the 3,042 possible train records in each direction, Norfolk Southern was able to examine the transit times for 2,765 westbound trains and 2,694 eastbound trains.⁶

	<u>Current Scheduled Transit Time over Norfolk Southern</u>	<u>Average Actual Transit Time over Norfolk Southern</u>
Westbound (Train 29)	594 Minutes	632 Minutes (+38)
Eastbound (Train 30)	585 Minutes	613 Minutes (+28)

The analysis shows that the Capitol Limited averaged 33 minutes in excess of scheduled transit time on just the Norfolk Southern portion of the route. This study clearly demonstrates that under real world conditions, Amtrak’s current schedule sets unrealistic expectations of performance for the Capitol Limited. When Amtrak’s historical performance is examined for other services, the data similarly show that Amtrak’s schedules have long been, and continue to be, at most aspirational for many of its services.

2. *Amtrak’s Formulaic Approach to Schedule Creation Hinders Achievability*

That many of Amtrak’s schedules historically have not been met reliably in practice is unsurprising given Amtrak’s approach to building its schedules. Amtrak constructs schedules using a simple mathematical formula. The formula starts with the calculation of the ideal, “pure running time” or “PRT” – the amount of time it would take a passenger train to move uninhibited over a line at speed – and the expected dwell at each station stop. Amtrak then adds a certain amount of recovery time, typically around 7 to 8 percent of the pure running time, to account for

⁶ Data for the remaining trains was either missing, incomplete, or unable to be verified.

limited unexpected occurrences and sometimes makes minor miscellaneous adjustments, typically to reflect meets with other Amtrak trains. For example, Amtrak's Cardinal service, operating from New York, NY, to Chicago, IL, has {{ }} of total recovery time added to a PRT of {{ }}, {{ }} of miscellaneous adjustments, and 200 minutes of dwell for station stops. In the opposite direction, the same service has {{ }} of total recovery time added to a PRT of {{ }}, {{ }} of miscellaneous adjustments, and 147 minutes of dwell for station stops.

It is easy to see that PRT is simply a mathematical formula that is divorced from the concerns of the then-current rail operating environment – most significantly, the actual volume of rail traffic moving over the same lines as the Amtrak service. Moreover, PRT does not reflect that different routes and lines have different traffic levels (both passenger and freight), traffic mix, the character of the route (e.g., double-track versus single-track), other infrastructure, crossings with other carriers, and other conditions that have major impacts on performance. Nor does it take into account maintenance needs,⁷ infrastructure projects, and other variables that directly impact train performance. As a result, the underlying concept of PRT is illusory. By comparison, no bus operator would schedule for a trip on Interstate 95 through Washington D.C. to take the same amount of time as a trip on an uncrowded rural highway just because the routes had the same maximum speed limit and total travel distance.⁸ Although the resulting Amtrak

⁷ For example, program maintenance on a single track railroad segment has a significantly greater impact on operations than it does on a double tracked or triple tracked railroad segment. Routes that have convenient detour alternatives are better able to recover from incidents than routes that do not.

⁸ Furthermore, bus operators often vary their schedules significantly just on the basis of departure time, as is shown by the Megabus schedules between Washington, D.C. and New York City differing nearly 20 minutes on a four hour trip depending upon whether the bus departs at

schedules may end up being achievable for some shorter services using lines with little freight traffic, the same approach can and does produce completely unrealistic schedules that cannot be, and have not been, consistently met for high density and congested lines.

3. *Amtrak Schedules Are Not Periodically Reviewed and Updated*

Additionally, even if Amtrak's schedules were initially set at a realistically achievable level, many other factors influence the expected performance of a particular train service over time. Amtrak does not adjust its schedules to account for such changes.

Changes in traffic volume (both growth and reduction), traffic mix, available infrastructure, and other characteristics of a route all have real impacts on the expected performance of passenger trains. Some adjustments are predictable; certain commodities of rail traffic experience seasonal variation in demand, and scheduled maintenance is typically carried out during the summer months, especially in the North. Other changes might be less foreseeable, but are no less real when they develop. As common carriers, the freight railroads are obligated to respond to reasonable requests for service for certain traffic, and trends within the greater economy or individual markets like the energy sector can have profound and unforecasted impacts on the volume on particular lines.

Even a realistically crafted schedule must be constantly monitored and updated in response to these changes to remain accurate. Yet Amtrak rarely adjusts its schedules. Many schedules have remained largely static for years, despite drastic changes in condition on the routes at issue. Amtrak's westbound Capitol Limited service has had the same scheduled transit time for its operations over Norfolk Southern since September of 2007, despite significant

10:30 pm or midnight. See Megabus, <http://us.megabus.com/Default.aspx> (last accessed Feb. 2, 2016). The schedule is based on historic run times, not the posted speed limits.

changes in traffic volume and commodity mix over Norfolk Southern's Chicago Line. *See generally* Norfolk Southern Response to Amtrak Complaint, *Nat'l R.R. Passenger Corp. - Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (filed Jan. 7, 2015) [hereinafter, "Capitol Limited Response"]. Amtrak has maintained or reduced schedules over the past decade for other services transiting the increasingly congested Chicago gateway.⁹ Amtrak's scheduled 57 minutes to travel from Hammond-Whiting, IN, into Chicago in October of 2003 (via the Capitol Limited service).¹⁰ Now, that schedule is 48 or 49 minutes (via the Wolverine service), a 14 to 15 percent reduction.¹¹ These Amtrak decisions concerning whether and how to adjust its schedules in the face of changing conditions have a significant impact on a train's performance relative to Amtrak's schedule.

Recognizing the importance of dynamic scheduling, Norfolk Southern has repeatedly requested that Amtrak adjust certain schedules for passenger trains operating over Norfolk Southern lines. Although many of these discussions occur during meetings or calls between the parties, Norfolk Southern has attached a sample of such correspondence in Exhibit B. For example, in the following excerpt from an email from Mark M. Owens, then-Director of Joint Facilities at Norfolk Southern, to Barbara A. Bruce, Director – Scheduling, Amtrak, on April 10, 2013, Norfolk Southern sought to address the discrepancy in Amtrak's schedule for the

⁹ At the same time, Amtrak publicly recognizes the increasing congestion in and around Chicago. *See* Amtrak Press Release, "Amtrak Establishes Blue Ribbon Panel to Address Chicago Rail Gridlock: Congestion Causing Major Delays for Passengers and Freight Shipments" (Oct. 28, 2014) at 1, *available at* <http://www.amtrak.com/ccurl/209/554/Amtrak-Blue-Ribbon-Panel-Chicago-Rail-Congestion-ATK-14-097.pdf>.

¹⁰ Historic timetable information is available through Amtrak's October 27, 2003, Timetable, <http://www.timetables.org/full.php?group=20040426&item=0069> (last accessed Feb. 2, 2016).

¹¹ Current timetable information is available through Amtrak's Reservation System, <https://tickets.amtrak.com/itd/amtrak> (last accessed Feb. 2, 2016).

Wolverine service between Pontiac, MI, and Chicago, IL, whereby Amtrak significantly padded the schedule over Amtrak's passenger-only high-speed line between Kalamazoo, MI, and Porter, IN, while providing little recovery time over Norfolk Southern's heavily congested Chicago Line between Porter and Chicago:

{{

}}

Those requests have been constantly rejected despite the objective evidence based on historical performance that the schedules are unrealistic.¹² In fact, Amtrak frequently requests that Norfolk Southern consent to reductions to the same schedules, despite the fact that those schedules already have not been reliably met over a meaningful period of time. And the host railroads have no ability to require that Amtrak adjust a particular passenger schedule, even one that has proven clearly unrealistic, because Amtrak must approve any schedule change.

4. *Amtrak's Scheduling Practices Are Contrary to the Practices and Requirements of Other Transportation Providers*

Amtrak's scheduling practices are contrary to those employed by Norfolk Southern. For Norfolk Southern train schedules serve two primary purposes: (1) schedules provide a plan for internal operations and required resources, as well as the demands placed on the rail system; and (2) schedules inform customer expectations about the service they are requesting. Unrealistic schedules frustrate both of these purposes, repeatedly disrupting planned operations and

¹² Amtrak's choice to maintain many schedules that are not consistently achievable is contrary to its core mission of "striving to deliver a high quality, safe, on-time rail passenger service that exceeds customer expectations." See About Amtrak, <https://www.amtrak.com/about-amtrak> (last accessed Feb. 2, 2016).

impacting other traffic as well as failing to provide an understanding of the level of service customers should reasonably expect from Norfolk Southern. As a result, Norfolk Southern monitors and frequently adjusts its individual freight schedules in response to changing conditions so that transit times remain realistic.

Amtrak's scheduling practices are also in stark contrast to the airline industry, in which refusal to adjust unrealistic schedules is considered an unfair or deceptive practice and an unfair method of competition. *See* 14 C.F.R. § 399.81. The Department of Transportation monitors on-time performance and has the ability to fine air carriers if they undertake "unrealistic scheduling of flights," defined to include setting and maintaining schedules that prove unable to be met at least 50 percent of the time over four consecutive months. *See id.* (defining "chronically delayed flights" as those that arrive more than 30 minutes late more than fifty percent of the time and making the holding out of such schedules a form of unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. § 41712). Such an approach ensures that passengers have a reasonable basis to rely on the published schedules and that initially realistic schedules do not become outdated due to changing conditions. By comparison, Amtrak's unwillingness to consider revisions to schedules proven unreasonable and unrealistic based on historical data over a long period of time simply misrepresents to customers the service level that they should reasonably expect.

As frequent travelers no doubt recognize, in response to this incentive airlines have lengthened their schedules in recent years to ensure more flights are on-time. The approach has proven successful. The Office of Inspector General stated in late 2013 that "Air carrier scheduling practices also have had a major impact on reducing the number of flight delays both nationwide and at specific airports. To help reduce reported delays, air carriers expanded their

schedules (that is, gate-to-gate times) on many of their routes between 2000 and 2012.” Office of Inspector General, Audit Report No. AV-2014-016, “More Comprehensive Data Are Needed to Better Understand the Nation’s Flight Delays and Their Causes,” at 2 (Dec. 18, 2013).

B. Any Proposed Definition of On-Time Performance Using Amtrak Schedules Is Unworkable in Practice

Historical performance data demonstrates that the Board’s proposal to use the 1973 ICC definition of on-time performance is unworkable in practice as well as theory. The Board must initiate investigations for any services failing the 80 percent trigger upon complaint by “Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service.” 49 U.S.C. § 24308(f)(1). If the Board adopts the ICC definition, and assumes the reasonableness of Amtrak’s existing, unrealistic schedules without question, an overwhelming number of services will be eligible for investigation at any time not because service is substandard, but because those schedules are unrealistic. Not only is this contrary to the statutory concept of investigating substandard service, but Section 213 would potentially overwhelm the Board’s docket with cases.

For example, based on Amtrak’s unreasonable and unrealistic, formulaic schedules, 34 of Amtrak’s 39 services failed to arrive within Amtrak’s chosen tolerance of the scheduled endpoint arrival time at least 80 percent of the time for (at least) two consecutive calendar quarters and would have been eligible for investigations during Amtrak’s 2015 Fiscal Year.¹³ Going back a year, 35 of Amtrak’s 39 services failed to meet 80 percent performance for at least two consecutive calendar quarters and would have been eligible for investigations during Amtrak’s

¹³ Norfolk Southern sets out these monthly statistics in Exhibit C. Generally speaking, the tolerances reported by FRA and Amtrak are slightly more forgiving than the Board’s proposal for routes under 100 miles, slightly more restrictive for some routes between 150 and 550 miles, and identical for routes over 550 miles. In no case is the difference greater than 5 minutes.

2014 Fiscal Year. Lest those totals be attributed solely to difficult operating conditions in recent years, two-thirds of Amtrak services still would have been eligible for investigations during Amtrak's 2013 Fiscal Year, a year of strong service performance when Norfolk Southern's composite service metric reached its highest ever levels.¹⁴ Such numbers are consistent with Amtrak's historical performance under similar definitions of on-time. Examining Amtrak's long-distance train network, Amtrak services of over 400 miles in length were "on-time" according to Amtrak's definition only 60 percent of the time between 1972 and 1992, and just 51 percent between 1995 and 2005. *See* Carl D. Martland, "Developing Achievable Schedules for Passenger Trains Operating on Freight Routes," *Journal of Transportation Research Forum*, Vol. 47, No. 4 (Fall 2008), at 66-67, *available at* <http://ageconsearch.umn.edu/bitstream/206974/2/1126-1276-1-SM.pdf>.

Tallying all of these possibilities, and again using Amtrak's tolerances, Amtrak or other interested parties could have launched 472 separate investigations concerning substandard performance between the 1st quarter of Amtrak's 2011 Fiscal Year and the 4th quarter of Amtrak's 2015 Fiscal Year. That works out to nearly 8 new investigations every month. Adopting the ICC's 1973 definition of on-time performance, or something close to it triggering off of Amtrak's unrealistic schedules, will sweep an overwhelming number of Amtrak services into near constant eligibility for mandatory investigation by the Board in contravention of the purpose of the statute.

¹⁴ Norfolk Southern's then-Chief Operating Officer Mark Manion highlighted this achievement in early 2014. "Moving on to service performance, our composite service metric reflects a consistently high performance through the year. For 2013, the service composite was a best ever 83.3%." *See* Transcript, Q4 2013 Norfolk Southern Corp. Earning Conference Call, at 5 (Jan. 22, 2014), *available at* http://www.nscorp.com/content/dam/QuarterlyEventFiles/4q-2013/4q2013_transcript.pdf.

But the point is not the number of investigations that could have been launched. The point is that these data demonstrate that Amtrak's schedules are unrealistic and using them produces results that do not filter the circumstances under which an investigation must be launched to address periods of abnormal service performance. In fact, using Amtrak's unreasonable and unrealistic schedules is no filter at all – virtually every service may be eligible for investigation at any given time. Thus, starting with Amtrak's schedules does not fulfill the purpose of Section 213.

Because the process for creating and maintaining such schedules is flawed, the Board cannot rely on any particular Amtrak schedule to set the standard for assessing on-time performance without employing some other method to ensure that the metric represents a meaningful or realistic measure. Further, if the Board adopts a metric, such as the 1973 ICC definition of on-time performance, that uncritically accepts all Amtrak schedules as the standard of performance, the host railroads, Amtrak, and the Board faces two overlapping possibilities: (1) dealing with cases brought by Amtrak (or other interested third parties) potentially investigating nearly every Amtrak service; and (2) dealing with cases brought by the host railroads against Amtrak alleging that unrealistic schedules are the cause of the metric falling below 80 percent. Either way, such litigation and expenditure of resources by the parties and the Board would be destructive to the working relationship between Amtrak and the host railroads. In the face of such an outcome, Norfolk Southern suggests that the Board consider an alternative approach.

IV. The Board Should Define On-Time Performance in Manner that Is Consistently Achievable at 80 Percent During Periods of Normal Performance

To carry out the intended statutory purpose of Section 213, Norfolk Southern proposes that the Board revise its proposed definition of on-time performance so as to yield a metric that

each intercity passenger train can realistically and consistently achieve at least 80 percent of the time during periods of normal performance, in light of the operating conditions affecting the rail system today. The Board can craft such a definition either through: (1) measuring performance against a reasonable and realistically achievable standard, rather than Amtrak's unrealistic public schedules, using a single tolerance; or (2) retaining Amtrak's public schedules as the standard of performance, but setting permissible tolerances for each individual service that reflect reasonable and realistically achievable performance. Norfolk Southern proposes specific definitions for each approach below. These approaches are essentially two sides of the same coin; whether the Board focuses on a realistic standard or realistic tolerances, the resulting metric will identify only those cases of abnormal or substandard performance. In this way, the definition of on-time performance will serve its statutory purpose of being a jurisdictional gatekeeper.

1. *Define On-Time Performance To Require a Realistically Achievable Standard of Performance*

The most direct way to tailor the definition of on-time performance to serve its statutory purpose is to require that the standard against which on-time performance is measured is realistically achievable. To that end, Norfolk Southern proposes the following definition:

“A train is deemed to be “on time” with respect to an individual host railroad if the actual transit time over that individual host railroad is within 30 minutes of a realistically achievable transit time over that individual host railroad.”

This approach is consistent with both the ICC's guidance that passenger train performance must be assessed by a realistic standard, *see Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. at 776, and the ICC's statements a few years later when considering the measurement of passenger train performance for the purposes of incentive payments in a host railroad's private operating

agreements with Amtrak, *see Amtrak & the Texas & Pacific Ry., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. at 671-72.

By requiring that the transit time standard for on-time performance be realistically achievable, Norfolk Southern's proposal ensures that any service that falls below 80 percent is actually experiencing substandard performance warranting an investigation. Importantly, a transit time would not be considered realistically achievable just because a given service has met it occasionally or irregularly. Instead, the standard would be one that a service has the potential to meet consistently at an 80 percent threshold during periods of normal performance, as demonstrated through historical performance or other evidence. Of course, for most Amtrak trains there are years of data showing the actual performance of these trains during normal operations. Thus, a sound starting point for what is a reasonable and realistic schedule is the actual transit times over history that result in the Amtrak train being on-time 80 percent of the time for that host railroad.

Norfolk Southern is mindful that the gate-keeping function of the on-time performance metric should not be overly burdensome or contentious in its own right. Norfolk Southern believes that these objectives can be achieved by giving the complainant the opportunity to present targeted evidence regarding a realistically-achievable schedule based on historical performance data, or possibly other limited concrete and probative facts. But such a showing may not be based solely Amtrak's current published schedules, as to which substantial evidence demonstrates that they are affirmatively unlikely to represent realistically achievable transit times for Amtrak passenger trains.

If the Board selects a realistically achievable standard for measuring on-time performance, the question of tolerances becomes far simpler. The ICC's decision to tier

tolerances based on distance is largely the type of issue that should be addressed through realistic scheduling. The longer the route, the more time that Amtrak should provide for in the schedule due to the increased likelihood of some unforeseen occurrence. The same principle holds true for other route characteristics, such as line capacity, congestion, etc. As a result, when paired with a realistically achievable standard, Norfolk Southern proposes that the Board apply a single tolerance to all services. Norfolk Southern suggests that thirty minutes provides a single, reasonable tolerance for determining if a given service is on-time with respect to an individual host railroad.

2. *Define On-Time Performance To Include Realistically-Achievable Tolerances Tailored to Individual Routes*

As an alternative to the approach outlined above, Norfolk Southern suggests that the Board could achieve a comparable result while still adopting Amtrak's unrealistic schedules as the standard for assessing on-time performance by using tailored tolerances. To that end, Norfolk Southern proposes the following definition:

"A train is deemed to be "on time" with respect to an individual host railroad if the transit time over that host railroad is within a tolerance of the scheduled transit time that historical performance shows has been met 80 percent of the time over that individual host railroad during the previous five years."

In this way, Amtrak's schedule would still form the base of the on-time performance calculation, but the tolerance for each service would vary to take into account the real-world conditions facing that route. The period for calculating such tolerances must provide insight into performance over a range of performance conditions. Norfolk Southern suggests that a measuring period of five years would both accomplish this goal and exclude older data that may no longer reflect current industry conditions.

For services over some host railroad segments, the 10 to 30 minute tolerances in the 1973 ICC calculation may end up being a close approximation of the tolerance demonstrated by historical performance. For other routes and segments, such a tolerance has never been met consistently, meaning Amtrak’s schedules are unrealistic and a longer tolerance is needed to assess whether trains are “on time” and performance is actually “substandard” for the purpose of triggering an investigation under Section 213.

For parties like Amtrak that have access to train performance data, determining the permissible tolerance for each service merely requires some simple math. As an example, Norfolk Southern has undertaken this calculation for its segment of the Capitol Limited route,¹⁵ albeit over an eight-plus year timeframe between January 1, 2007, and April 30, 2015.

	<u>Current Scheduled Transit Time over Norfolk Southern</u>	<u>80 Percent Historical Tolerance</u>
Westbound (Train 29)	594 Minutes	+ 75 Minutes
Eastbound (Train 30)	585 Minutes	+ 52 Minutes

The permissible tolerance for Train 29 would be 75 minutes versus Amtrak’s published schedule, and the permissible tolerance for Train 30 would be 52 minutes.

Importantly, this approach does not filter out periods of abnormal performance that may warrant further Board investigation. By way of illustration, Norfolk Southern fully expects that using the tolerances above, Amtrak would satisfy the jurisdictional trigger with respect to its complaint concerning substandard performance on the Norfolk Southern portion of the Capitol Limited route in 2014. During 2014, the average actual transit times over the Norfolk Southern

¹⁵ Norfolk Southern does not have access to historical Amtrak transit time data in a format that is easy to manipulate, but with such data similar calculations could be undertaken for other services.

portion of the Capitol Limited route exceeded the scheduled transit time plus the tolerances calculated above, meaning the overall on-time performance calculation must be below 80 percent. As noted earlier, meeting the trigger does not imply that substandard performance must be attributable to the host railroad. Norfolk Southern explained in its Capitol Limited Response how unanticipated volume increases and significant congestion, among other factors, impacted the performance of all trains, passenger and freight alike, on Norfolk Southern's Chicago, Cleveland, and Fort Wayne Lines during that period. *See* Capitol Limited Response at 11-21.

Going forward, the Board would need to calculate the tolerance for a particular route to determine if it meets the 80 percent on-time performance threshold for triggering an investigation. Such calculations could be done on a case-by-case basis in response to a complaint, or Amtrak just as easily could calculate and publish such tolerances periodically. Historically-based tolerances will not prevent the Board from initiating investigations when performance slips below levels consistently achieved in the past, but such a construction will prevent parties from launching litigation and wasting the time and resources of the host railroad(s) and the Board investigating performance in line with historical levels.

V. The Board Should Calculate On-Time Performance Separately for Each Host Railroad

Ensuring that the on-time performance standard serves its gate-keeping role also requires that host railroads not be swept into investigations when they bear no potential responsibility for performance problems. Thus, the Board should calculate on-time performance separately for each host railroad's segment of a route when an Amtrak service travels over multiple host railroads. The Board can accomplish this by comparing the actual transit time over the individual host railroad against whatever transit time the Board selects as the standard of

performance. In this way, the Board will obtain more informative and accurate performance data, leading to more meaningful and streamlined investigations.

A request to initiate an investigation should not have to name each and every host carrier along a route. Rather, such a global view of on-time performance would hinder the identification of particular segments or routes where train performance is actually abnormal. This concern is not trivial. Although some Amtrak services operate entirely over one host railroad, such as the Piedmont which operates over Norfolk Southern leased track between Charlotte and Raleigh, North Carolina, the far greater proportion of Amtrak services operate over multiple host railroads.

In sum, two-thirds of Amtrak's corridor routes and 80 percent of the long distance routes operate over multiple host railroads, as shown in Exhibit D.¹⁶ But even these calculations understate the complexity because the breakdowns exclude host railroads that carry Amtrak for fewer than 15 route miles on a particular service.¹⁷ For example, the Crescent service, listed as hosted by Norfolk Southern, also operates over CSX from Alexandria, VA, into Washington, D.C., as well as to access the passenger station in Birmingham, AL. The Hoosier State service, listed as hosted by CSX, also operates over Amtrak, Canadian National, Metra, Norfolk Southern, and Union Pacific trackage between Dyer, IN, and Chicago, IL. If the Board defines on-time performance based on the entire route, multi-party suits will be the norm regardless of differences in performance over different host railroads, greatly increasing the scope and administrative burden of such investigations.

¹⁶ Information drawn from Amtrak's Monthly Performance Report for December 2015, at E-16 (Jan. 29, 2016), *available at* <https://www.amtrak.com/ccurl/747/108/Amtrak-Monthly-Performance-Report-December-2015.pdf>.

¹⁷ Amtrak notes this exclusion in its Monthly Performance Reports. *See, e.g., id.*

Measuring on-time performance separately for individual host railroads will also ensure that the determination of whether the jurisdictional trigger has been met for a particular host carrier is not impacted by delays that occur prior to an Amtrak service departing its originating station or before being received from another host carrier. These delays have nothing to do with the host railroad but can have a substantial impact on a train's adherence to the relevant schedule. An extreme example of a late departure was the eastbound Lakeshore Limited service scheduled to leave Chicago the night of Wednesday, January 8, 2015, and operate over Norfolk Southern to Cleveland, OH, on its way to New York, NY, and Boston, MA. Due to mechanical problems, including frozen brakes on the Amtrak train, the train departed ten and a half hours late, only to have to return to the station to recrew.¹⁸ According to the 1973 ICC definition of on-time performance, such a train would count as late against all three host railroads along the route (Norfolk Southern, CSX, and Metro North Railroad), even though the train was half-a-day behind schedule before it finally left its originating station.

Similar examples exist for trains arriving late (or "out of slot") from other host railroads. On January 5, 2015, the westbound Capitol Limited service arrived to Norfolk Southern from CSX in Pittsburgh, PA, more than four hours late versus Amtrak's schedule. The train made up three minutes versus schedule over the Norfolk Southern segment of the route, but still pulled into Chicago more than four hours late. A majority of the delays on CSX originated from a trespasser incident involving a MARC train, halting train operations on the Brunswick Line used by Amtrak. See Krista Brick, "Teen Struck and Killed by MARC Train in Gaithersburg," Montgomery Community Media (Jan. 6, 2015), <http://www.mymcmedia.org/man-struck-and->

¹⁸ The train ended up finally departing the station two hours later. See Ralph Ellis and John Newsome, "A long, cold wait: Amtrak passengers finally depart Chicago 13.5 hours late," CNN.com (Jan. 8, 2015), <http://www.cnn.com/2015/01/08/us/long-amtrak-delay/>.

killed-by-marc-train-in-gaithersburg/. Again, according to the 1973 ICC definition of on-time performance, such a train would count as late against both CSX and Norfolk Southern, despite transiting the Norfolk Southern segment of the route faster than scheduled (after experiencing delays outside of the control of CSX).¹⁹ By separately assessing the on-time performance of an Amtrak service for each segment of its route hosted by a different host railroad, the Board will avoid improperly attributing these delays to uninvolved host carriers.

Of course, parties could still initiate Board investigations for the entire route of an Amtrak service if each host railroad did not meet the 80 percent on-time performance trigger. But defining on-time performance for each carrier's segment of a route with respect to transit time will both aid the Board's diagnosis of areas of substandard performance and streamline any resulting investigations.

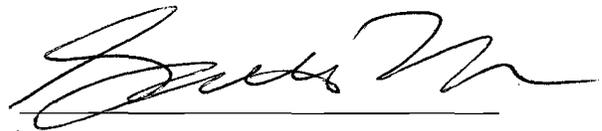
VI. Conclusion

The Board should define on-time performance in Section 213 of PRIIA in a way that is realistically and consistently achievable at 80 percent for each passenger service during periods of normal performance in light of the operating conditions affecting the rail system today. As demonstrated above, Amtrak's public schedules do not accomplish this purpose, due to Amtrak's formulaic approach to schedule creation and unwillingness to consider needed schedule modifications. As a result, the Board's proposal to readopt the 1973 ICC definition of on-time performance relying on Amtrak's public schedules as the standard of performance would render an overwhelming percentage of Amtrak services eligible for investigation at any time.

¹⁹ Norfolk Southern knows that similar examples can be generated for trains delayed on Norfolk Southern for reasons outside of Norfolk Southern's control, impacting the perceived performance of CSX and other carriers.

Norfolk Southern proposes that the Board should instead either require that the standard against which on-time performance is measured is realistic, or use tolerances for each individual service that reflects the real world conditions on that route. Additionally, the Board should examine the transit time performance over each individual host railroad to focus attention and resources on the portion(s) of a route actually affecting performance. In this way, the Board will craft a system that triggers investigations of services for which performance truly is “substandard.”

Respectfully submitted,

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

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

*Counsel for Norfolk Southern Railway
Company*

February 8, 2016

Exhibit A

MORRISON | FOERSTER

2000 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.
20006-1888

TELEPHONE: 202.887.1500
FACSIMILE: 202.887.0763

WWW.MOFO.COM

PUBLIC VERSION

MORRISON FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.
NORTHERN VIRGINIA, DENVER,
SACRAMENTO, WALNUT CREEK
TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

January 7, 2015

Writer's Direct Contact
(202) 887-1519
DMeyer@mofocom

VIA ELECTRONIC FILING

237397

Cynthia T. Brown
Chief, Section of Administration
Office of Procedures
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
January 7, 2015
Part of
Public Record

Re: STB Docket NOR 42141

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket is Norfolk Southern Railway Company's Motion to Dismiss the Complaint filed by the National Railroad Passenger Corporation.

Thank you for your assistance.

Sincerely,

/s/ David L. Meyer

Attachment

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42141

**NATIONAL RAILROAD PASSENGER CORP. –
INVESTIGATION OF SUBSTANDARD
PERFORMANCE OF THE CAPITOL LIMITED**

NORFOLK SOUTHERN'S MOTION TO DISMISS AMTRAK'S COMPLAINT

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: January 7, 2015

TABLE OF CONTENTS

INTRODUCTION5

I. THE BOARD LACKS AUTHORITY TO PROCEED WITH A FORMAL INVESTIGATION UNDER SECTION 24308(F) SO LONG AS THE PRIIA METRICS AND STANDARDS ARE NULL AND VOID5

A. The Plain Words and Architecture of the Statute Make Clear that Congress Intended Section 213 to Use a Single Definition of On-Time Developed Via the Section 207 Process8

B. The Legislative History of Section 213 Confirms that the Only Trigger Is One Based on Section 207 Metrics13

C. Until the Board’s December 19 Decision, Section 213 Was Consistently Viewed as Containing a Single On-Time Performance Trigger Predicated on the Section 207 Metrics and Standards17

D. The FRA/Amtrak Section 207 Metrics and Standards Development Process Itself Confirms that Congress Could Not Have Intended for Section 213 to Make Use of a Separate Set of Metrics Developed by the Board.....20

E. It Would Be Especially Inappropriate to Interpret Section 213 as Containing a Stand-Alone On-Time Performance Trigger Applicable to Individual Routes Where Host Railroad Performance Is Already Governed by Binding Contractual Metrics22

II. DISMISSAL IS THE APPROPRIATE COURSE24

CONCLUSION.....26

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42141

**NATIONAL RAILROAD PASSENGER CORP. –
INVESTIGATION OF SUBSTANDARD
PERFORMANCE OF THE CAPITOL LIMITED**

NORFOLK SOUTHERN’S MOTION TO DISMISS AMTRAK’S COMPLAINT

Norfolk Southern Railway Company (“Norfolk Southern”) hereby moves to dismiss¹ the Complaint filed by the National Railroad Passenger Corporation (“Amtrak”) on November 17, 2014, as corrected on November 19, 2014.²

Norfolk Southern acknowledges the Board’s decision served December 19 in Docket No. 42134,³ which held that “the invalidity of Section 207 does not preclude the Board from construing the term ‘on-time performance’ and initiating an investigation under Section 213 if we determine that the on-time performance with respect to [a particular Amtrak train] service has fallen below 80 percent for two or more consecutive

¹ Norfolk Southern has filed this motion as Appendix II to its Response to Amtrak’s Complaint, and, out of an abundance of caution, is filing this motion in a separate docket entry.

² Norfolk Southern’s Motion to Dismiss is being filed pursuant to the Board’s order granting CSXT’s Request for Extension of Time to Respond to the National Railroad Passenger Corporation’s Complaint to Initiate Investigation. *See* Decision served Dec. 4, 2014.

³ *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 (decision served Dec. 19, 2014) (“December 19 Decision”).

calendar quarters.” *Amtrak/CN* December 19 Decision at 10. Norfolk Southern respectfully disagrees with the Board’s conclusion and requests that the Board dismiss Amtrak’s Complaint for the reasons set forth below.

INTRODUCTION

Amtrak’s Complaint requests that the Board initiate an investigation under PRIIA Section 213, codified at 49 U.S.C. § 24308(f), into the alleged “substandard performance” of the Capitol Limited. However, the formal mechanism of a Section 24308(f) investigation is not among the options currently available to Amtrak or the Board. Such an investigation cannot begin so long as the Metrics and Standards adopted pursuant to PRIIA section 207 remain “null and void” as a result of court orders currently under review by the Supreme Court. Norfolk Southern therefore requests that the Board dismiss this proceeding. If and when valid Metrics and Standards are in place and Norfolk Southern’s performance is determined to not satisfy those standards, Amtrak may file a new Complaint. Until then, the initiation of a Section 24308(f) investigation is premature and not authorized by PRIIA.

I. THE BOARD LACKS AUTHORITY TO PROCEED WITH A FORMAL INVESTIGATION UNDER SECTION 24308(F) SO LONG AS THE PRIIA METRICS AND STANDARDS ARE NULL AND VOID

Norfolk Southern is aware of the Board’s recent conclusion in the *Amtrak/CN* proceeding that the unconstitutionality of the PRIIA Section 207 Metrics and Standards⁴

⁴ 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 (footnote continued on next page ...)

does not preclude an investigation under PRIIA Section 213. *Amtrak/CN* December 19 Decision at 6. Norfolk Southern respectfully disagrees with that conclusion, and urges the Board to correct its error by ruling that – at least where a host railroad operates under a valid and binding operating agreement providing for performance incentives and penalties – Congress did not intend for Section 213 to authorize the Board to develop and apply “on-time performance” metrics separate and apart from the uniform set of Metrics and Standards⁵ it required be promulgated under PRIIA Section 207.

As Norfolk Southern explains, the plain and common sense reading of the statute is that Congress (1) intended there to be a single set of metrics that might serve as triggers for a potential investigation under Section 213, and (2) felt strongly enough about on-time performance that it specified that such an investigation could be triggered whenever on-time performance – however defined through the Section 207 metric- and standard-setting process – fell below 80 percent.

Any interpretation of the triggers established by Section 213 must begin with an analysis of the statutory text. As the Board’s December 19 Decision concludes, the plain

(... footnote continued from previous page)

(May 11, 2009); FRA, *Metrics and Standards for Intercity Rail Passenger Service* (May 12, 2010), Dkt. No. FRA-2009-0016, at 11, 26-27, available at <http://www.fra.dot.gov/Elib/Details/L02875> (hereinafter “Metrics and Standards”).

⁵ As the Board is aware, the U.S. Court of Appeals for the D.C. Circuit has ruled that Section 207 of PRIIA is unconstitutional. *AAR v. DOT*, 721 F.3d 666, 677 (D.C. Cir. 2013). Amtrak has acknowledged that the Metrics and Standards developed pursuant to Section 207 are thus “null and void.” See Amtrak’s Reply to Canadian National Ry.’s Motion to Dismiss, *Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of CN*, Docket No. 42134 (filed Oct. 7, 2014), at 10-11 n. 8; see also *Amtrak/CN* December 19 Decision at 9-10 (triggers based on Section 207 are invalid and inoperative).

terms of Section 24308(f), which codified Section 213 of PRIIA, provide that there can be no investigation under that provision unless:

the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under Section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters.

49 U.S.C. § 24308(f).

This much is uncontroversial. But the Board interpreted the triggers in Section 213 incorrectly when it concluded that Section 213 establishes two *separate* on-time performance triggers – one involving “on time performance” as used in Section 213 and not linked to the Section 207 Metrics and Standards and the other treating on-time performance as part of “service quality ... for which standards are established under Section 207.” *See, e.g.*, December 19 Decision at 9 (concluding that, in addition to the Section 207-based trigger, the Board “may independently define ‘on-time performance’”). Having read Section 213 as containing two separate on-time performance prongs, the Board proceeded to devote most of its analysis to the question whether the supposed “on-time performance” trigger of the first clause can be “severed” from the rest of Section 213, which all agree depends entirely on the now-void Section 207 Metrics and Standards.

Respectfully, the premise of the Board’s analysis, and thus its conclusion, is incorrect. Section 213 contains only one “on-time performance” trigger, linked to the Section 207 Metrics and Standards, and there is nothing that can be “severed” from the null and void Section 207 metrics. This is clear from the statutory text and architecture,

legislative history, the consistent views of Amtrak, the Board, and the U.S. Government prior to December 19, and the nonsensical implications of the Board's contrary interpretation.

A. The Plain Words and Architecture of the Statute Make Clear that Congress Intended Section 213 to Use a Single Definition of On-Time Developed Via the Section 207 Process

First and foremost, a fair reading of the text of PRIIA precludes the interpretation of Section 213 as creating a stand-alone “on-time performance” trigger. Reading Sections 213 and 207 of PRIIA together, as the Board must,⁶ it is clear that Congress meant for the “on-time performance” Metrics and Standards developed under Section 207 to govern the application of Section 213 in cases where Amtrak’s “on-time performance” was alleged to fall below 80 percent. Section 207, like Section 213, treats separately the “performance” and “service quality” of Amtrak’s trains.⁷ In Section 207, Congress was clear that Amtrak and the FRA were to develop metrics addressing, on the one hand, “performance” (meaning “measures of on-time performance and delays incurred”) and,

⁶ See, e.g., *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (“[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”).

⁷ Section 207 provides, in pertinent part: “Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly ... develop new or improve existing metrics and minimum standards for measuring *the performance and service quality* of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, *measures of on-time performance and delays* incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation.” (emphasis added).

on the other hand, separate metrics relating to a laundry list of “service quality” attributes. “Performance” was distinct from “service quality,” not a subset of it.

Section 213 picked up on this distinction between “performance” and “service quality” by spelling out that an investigation could be commenced only if Amtrak’s “on-time performance” fell below 80 percent or, with respect to the array of other “*service quality*” attributes, Amtrak’s performance fell short of the specific standards developed under Section 207.

Reading Section 213’s reference to “on-time performance” as outside the Metrics and Standards process contradicts the unambiguous plain language of the statute, makes no sense, and cannot be squared with Congress’s statutory architecture. The Board’s interpretation reads entirely out of the statute Congress’s express command that “on-time performance” metrics be among those developed under Section 207. Since “on-time performance” is not a subset of “service quality,” as Congress used the terms in Section 207, the reference to “service quality” in Section 213 cannot be read inconsistently to *include* on-time performance within its scope. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”).

But, if “on-time performance” is not a subset of “service quality,” then the Board’s interpretation of Section 213 as giving it “independent” authority to define “on-time performance” would eliminate the “on-time performance” metrics developed under Section 207 as a basis for triggering a Section 213 investigation. Instead, under the Board’s reading, the only “on-time performance” trigger would be the one defined and applied independently by the Board. This directly contradicts Congress’s express

command in Section 207 that the Metrics and Standards would address “on-time performance.” See PRIIA § 207 (“[s]uch metrics, at a minimum, shall include ... measures of on-time performance”). The Board’s reading would mean FRA’s and Amtrak’s efforts to develop measures of on-time performance had no purpose.

For the Board’s reading to be plausible, Congress would have had to refer to “on-time performance” at least twice in Section 213: once to enable the Board to construe the term without regard to the Metrics and Standards, and again (along with “service quality”) in the second clause of Section 213 where Congress refers explicitly to the metrics developed under Section 207. But Congress consciously and expressly used the term *only once* – showing that it intended for investigations to be commenced under Section 213 only based on the metrics to be developed under Section 207.

More fundamentally, even if one could find room in Section 213 for an interpretation embracing two separate on-time performance triggers, the result would be nonsensical and inconsistent with the broader architecture of the statute.⁸ If the Board were correct, Section 213 would allow an investigation to be triggered by the Section 207 on-time performance metrics, and *also allow* one to be triggered by whatever

⁸ See, e.g., *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)) (rejecting FDA’s assertion of the authority to regulate tobacco products); see also *id.* at 132-33 (“court must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme’”) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

interpretation of “on-time performance” the Board might apply in a particular adjudication. This cannot be squared with Congress’ statutory scheme for two reasons:

First, the notion that Congress could have intended two separate and potentially inconsistent measures of on-time performance, each of which could trigger a Section 213 investigation, is belied by the core purpose underlying Congress’s enactment of the PRIIA Metrics and Standards, which was to stimulate development of a *single set* of “new or improve[d] existing metrics and minimum standards.” PRIIA, § 207. Congress expressly provided in Section 207 that the process for developing metrics and standards might well improve upon “existing metrics” in addition to developing entirely “new” ones, thus indicating that the outcome of the Section 207 process was to be *a single set of uniform* Metrics and Standards, not both a new one and another new one cobbled together by the Board partially in reliance on “pre-existing” (as implied by the Board’s December 19 Decision at 7).

Second, and separately, the notion that Congress left the definition of “on-time performance” to case-by-case adjudication by the Board is inconsistent with Congress’ quite conscious decision to have investigation under Section 213 *triggered* by a set of new standards that would have only *prospective* application. Congress gave FRA and Amtrak the responsibility for developing, with broad public participation, a set of metrics and standards that would be used to judge the future performance of Amtrak trains. FRA in turn submitted its proposed metrics and standards for public comment and then revised

them in response to that comment.⁹ FRA recognized that its “final” Metrics and Standards could not be applied retroactively, for purposes of investigations under Section 213 or otherwise, precisely because those Metrics and Standards – including metrics defining “on-time performance” – were “*new performance measures.*” *See Metrics and Standards* at 4-5 (emphasis added).

That decision to proceed via notice-and-comment rulemaking reflects a proper recognition that the railroads should know what is expected of them before they act (and have input into the establishment of those expectations), and only be subjected to an onerous regulatory investigation if they fail to comply with those previously-known standards.

The Board’s December 19 Decision would supplant the regime Congress desired with a *retroactive* system, in which Board would decide what “on-time performance” means in the course of judging performance that *has already occurred*.¹⁰ Notwithstanding the Board’s broad general authority to construe ambiguous phrases in the statutes it administers, here we know that Congress wanted something very different – standards developed with broad public participation that would govern prospectively

⁹ See Proposed Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110-432, 74 Fed. Reg. 10983 (proposed Mar. 13, 2009) at 1, *available at* <https://www.fra.dot.gov/eLib/Details/L02876> (“In accordance with Section 207 of the Passenger Rail Investment and Improvement Act of 2008, the Federal Railroad Administration (FRA) and Amtrak are jointly submitting for stakeholder comment the following proposed metrics and standards for intercity passenger rail service.”).

¹⁰ The Board’s December 19 Decision makes this clear. The Board will be deciding the meaning of “on-time performance” at the same time as it has in hand data reflecting the performance of Amtrak’s trains on CN’s lines. *Id.* at 11.

only. The Board's plan to construe the term in the course of deciding whether to commence investigations has no valid basis in this statute.

B. The Legislative History of Section 213 Confirms that the Only Trigger Is One Based on Section 207 Metrics

The Board's December 19 Decision rests heavily and repeatedly on legislative history, asserting that the "guiding principle of Congress's intent in enacting the statute" was to authorize the Board to define "on-time performance" for purposes of Section 213. December 19 Decision at 10. The Board's reliance on legislative history is misplaced.

Resort to legislative history is neither necessary nor appropriate given the plain language of Section 213. But a proper reading of the legislative history shows that Congress in fact did intend for "on-time performance" metrics and standards to be developed solely via the Section 207 process.

The Board correctly observed that Congress's enactment of Section 213 was motivated at least in part by its "intent to facilitate the 'efficient' resolution of passenger rail delays." December 19 Decision at 10; *see also id.* at 8-9. But this intent does not support the Board's reading of Section 213. Instead, it merely explains why Congress included Section 213 in the statute in the first place. That Congress wanted to enable the Board to conduct investigations in some circumstances does not speak to the question whether it intended also to enable the Board, on the basis of its own definitions of on-time performance, to supplant or supplement the triggering effect of the metrics to be developed under Section 207.

If anything, the legislative history strongly supports the conclusion that Congress did not intend such a result. First of all, the Board repeatedly emphasizes Congress's

desire that the Board conduct investigations “efficiently.” *Id.* at 8-9. But efficiency would not be served by reading Section 213 as implementing two potentially inconsistent triggers. The only plausible path towards “efficiency” within the statutory framework Congress put in place was that charted in Section 207: a notice-and-comment rulemaking pursuant to which a single set of Metrics and Standards would be developed and then used as the sole basis for triggering investigations under Section 213. Under the Board’s view, every potential investigation would instead involve a battle over the proper definition of “on-time performance.”¹¹

Second, the available legislative history strongly confirms that “on-time performance” as used in Section 213 was specifically intended by Congress to refer to the Section 207 Metrics and Standards. The Board relies on Senate Report 110-67 for the proposition that Section 213 was designed “to address ‘on-time performance *and* service issues impacting intercity passenger trains,’ and Congress specifically intended for *either* to be the trigger for a Board investigation.” December 19 Decision at 8 (citing S. Rep. 110-67 at 11 (May 22, 2007)) (emphasis in original). Again, this much is obvious from the text of Section 213 itself, which (as discussed above) refers to both “on-time performance and “service quality.” The question is whether Congress intended the

¹¹ If the Board instead contemplates devising in the *Amtrak/CN* case a one-size-fits-all definition that would be applicable in all Section 213 cases, such a process should be conducted with the participation of all potentially interested parties. *Cf.* December 19 Decision at 11-12 (Begeman, C., dissenting) (“[T]he Board would best fulfill its obligations under the law by initiating a rulemaking to establish clear standards by which on-time performance cases could be fairly processed.”). From the standpoint of “efficiency,” however, such a process would still inefficiently duplicate the notice-and-comment rulemaking already undertaken under Section 207.

reference to “on-time performance” to create a separate, Board-construed trigger untethered to the Section 207 metrics.

On this question, the legislative history on which the Board relies explains quite clearly that Congress *did not* so intend. The Senate Report completed the sentence quoted in the December 19 Decision as follows: “To address on-time performance and service issues service issues impacting intercity passenger trains, *the bill would direct FRA to issue a quarterly on-time service report.*” S. Rep 110-67 at 11 (May 22, 2007) (emphasis added). The draft bill accomplished this in what was then Section 208, entitled “Metrics and Standards” and the direct predecessor of Section 207. As the Senate Report summarizes, that provision mirrored the enacted version of Section 207 by calling for the development of “metrics and standards for measuring the performance and service quality of intercity train operations.” Two sentences later, the Report explains that the same provision would “require FRA to publish a quarterly report on train performance and service quality.” *Id.* at 25. Given this symmetry, there can be no serious question that at all times in connection with the enactment of PRIIA, Congress had in mind that both “on-time performance” and “service quality” would be governed by the Section 207 Metrics and Standards, and not by some set of definitions that the Board might arrive at in case-by-case adjudication.

At times the Board’s December 19 Decision appears to rely on Congress’s obvious intention that Section 213 provide a basis for conducting investigations to support a very different conclusion about what Congress *would have enacted* had it known that the Section 207 metrics would be ruled unconstitutional. *See* December 19 Decision at 8 (“highly likely that Congress *would have intended* ... in the event Section

207 procedures were declared unconstitutional”; “Congress *would have intended* for the below-80-percent on-time performance trigger of Section 213 to be severable”) (emphases added). This flight of “what if” speculation about what Congress *would have* legislated is impermissible agency action. By its plain terms, Section 213 does not contain the alternative that the Board believes that Congress *might have enacted* had it known that a “cloud” of constitutional uncertainty would hang over the Section 207 path, and the Board is not free to fill in the statutory void.

As the Supreme Court recently reminded, “an agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2445 (U.S. 2014). In *Utility Air Regulatory Group*, the EPA purported to define its own set of thresholds under the Clean Air Act after concluding that those spelled out in the statute were unworkable in practice. The Supreme Court specifically rejected the agency’s attempt to take refuge in *Chevron* deference because Congress makes laws, not the agency. As in the *Utility Air Regulatory Group*, the Board may not craft a new trigger for investigations under Section 213 just because the courts have ruled that the ones that Congress spelled out in the statute is not currently viable. As the Supreme Court explained, “recogniz[ing such] authority ... would deal a severe blow to the Constitution’s separation of powers.” *Id.* at 2446.

That is so “[r]egardless of how serious the problem an administrative agency seeks to address,” *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125-26 (agency “may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” (internal citation omitted)). Likewise, statutes may not be “rewritten” by courts or by agencies – including via the severance of one

portion of the text from the whole -- when Congress' goals are necessarily thwarted by a judicial determination that some part of the structure put in place by Congress is unconstitutional. *See United States v. Stevens*, 559 U.S. 460, 481 (2010) (“We ‘will not rewrite a ... law to conform it to constitutional requirements,’ for doing so would constitute a ‘serious invasion of the legislative domain.’”) (citations omitted); *Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992) (explaining, in rejecting a proposed severance of the invalid portion of the statute, that “it is clearly not this Court’s province to rewrite a state statute.”); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (explaining that, in analyzing proposed severance of the invalid portion of the statute, that “we restrain ourselves from ‘rewrit[ing] state law to conform it to constitutional requirements’”) (citations omitted).

C. Until the Board’s December 19 Decision, Section 213 Was Consistently Viewed as Containing a Single On-Time Performance Trigger Predicated on the Section 207 Metrics and Standards

In light of the analysis above, it is not surprising that until the Board’s December 19 Decision (and apart from Amtrak’s self-serving advocacy in this proceeding and its briefing in support of its amended complaint in *Amtrak/CN*), Section 213 was consistently read as establishing a single trigger based on the on-time performance and service quality Metrics and Standards developed under Section 207.

Until the court of appeals invalidated the Section 207 Metrics and Standards, Amtrak had no difficulty understanding that any potential Section 213 investigation based on on-time performance issues would require application of the Section 207 metrics. Testifying before the Board in Ex Parte No. 683, Amtrak explained that the metrics and standards developed by it and the FRA *pursuant to Section 207* were

intended to provide a single set of *uniform* metrics and standards: “Section 207 requires that Amtrak and the Federal Railroad Administration, in consultation with the STB and others, work together to establish *uniform* metrics and standards.”¹² And its initial complaint in *Amtrak/CN* was predicated entirely on those Metrics and Standards. Complaint, *Amtrak/CN* (filed Jan. 19, 2012).

Similarly, when the validity of the Section 207 standards was presented to the court of appeals, the court had no difficulty concluding that the now-unconstitutional Metrics and Standards “*define the circumstances in which the STB will investigate whether infractions are attributable to a freight railroad’s failure to meet its preexisting statutory obligation to accord preference to Amtrak’s trains.*” *AAR v. DOT*, 721 F.3d 666, 672 (D.C. Cir. 2013) (emphasis added), *cert. granted* 134 S. Ct. 2865 (June 23, 2014).

And when the Department of Justice defended the constitutionality of the Section 207 Metrics and Standards in its reply brief before the Supreme Court, it likewise explained that *those metrics* were the door through which a Section 213 investigation would have to proceed:

Congress could have given Amtrak the ability to initiate such a proceeding whenever it believed the statutory requirement had been violated. Instead, it provided that *the metrics and standards* would, in addition to providing useful information to Congress and the public, help determine when Amtrak could—and when it could not—trigger a governmental investigation.

¹² STB Ex Parte No. 683, Hearing Tr. at 17 (Feb. 11, 2009) (quoting Amtrak witness Crosbie) (emphasis added).

Reply Brief for Petitioner, *DOT v. AAR*, 2014 WL 5395799 at *6 (U.S. Oct. 22, 2014) (emphasis in original and added). At oral argument before the Supreme Court, the Assistant to the Solicitor General again made clear that the Metrics and Standards play a vital “triggering and gatekeeping role,” with any Section 213 “investigation by the Surface Transportation Board ... triggered by their [sic] having been a failure by Amtrak to satisfy the metrics and standards.” Oral Argument, *DOT v. AAR*, 2014 WL 6882757 at *8 (U.S. Dec. 8, 2014). Violation of the Metrics and Standards is “a threshold determination, ... limiting the circumstances in which an investigation can begin.” *Id.* at *13. The Metrics and Standards could not have this dispositive role if Section 213’s definition of “on-time performance” offered an entirely separate path to open an investigation.

The same view was shared by the Board until the December 19 Decision. In former-Chairman Nottingham’s remarks introducing the Board’s 2009 hearing to address the Board’s role in implementing PRIIA Section 213, he perceptively explained that the standards governing the Board’s “power to investigate, in certain circumstances, failures by Amtrak to meet on time performance standards” would be those “established by Amtrak and the Federal Railroad Administration, in consultation with the Board and others” under Section 207 of PRIIA. Ex Parte No. 683, Hearing Tr. at 5 (Feb. 11, 2009) (remarks of Chairman Nottingham).

Later that same year, when the Board filed comments before the FRA on the proposed Metrics and Standards, it again expressed its understanding that PRIIA would

not give the Board any responsibilities in connection with Section 213 unless and until the “the metrics and standards are finalized.”¹³ The Board urged the FRA and Amtrak to move quickly to develop those Metrics and Standards, because, in the Board’s view, doing so was “an *essential step* in order for the processes put in place by PRIIA to be effective.”¹⁴

D. The FRA/Amtrak Section 207 Metrics and Standards Development Process Itself Confirms that Congress Could Not Have Intended for Section 213 to Make Use of a Separate Set of Metrics Developed by the Board

The Board’s interpretation of Section 213 also cannot be reconciled with the extraordinary lengths to which Amtrak and the Federal Railroad Administration went to develop – drawing from a wide array of possible alternatives and over the objection of numerous host railroads – the definitions of on-time performance that would be included in the Metrics and Standards promulgated pursuant to Section 207.

From the beginning, FRA and Amtrak understood that the Section 207 process would need to devote significant attention to the development of “on-time performance” measures, separate from the “service quality” issues that would also need to be addressed

¹³ See Comments of the Surface Transportation Board (April 1, 2009), available at <http://www.regulations.gov/#!documentDetail;D=FRA-2009-0016-0014>. The Board’s complete statement was as follows: “*Once the metrics and standards are finalized*, PRIIA gives STB new responsibilities with respect to the performance and service quality of Amtrak trains. Section 213 of PRIIA establishes a process for investigation by STB in certain circumstances *when the new metrics and standards are not met. ...*” (emphases added).

¹⁴ *Id.* (emphasis added).

under Section 207.¹⁵ The record from Amtrak and FRA’s development of the Section 207 Metrics and Standards shows that measuring “on-time performance” raises complex issues, and that there are many different and potentially inconsistent ways to measure this aspect of performance. The comments 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.”).¹⁶

If and when valid metrics are ultimately promulgated, it is impossible to know how different they will be from the definition of on-time performance that Amtrak would propose to advance for the Board’s adoption in this proceeding. But it is inconceivable that Congress would have provided in Section 207 for an arduous process of arriving at a single set of metrics, only to leave Amtrak free to argue whatever position it wished before this Board in an effort to trigger a Section 213 investigation. Were that so, the

¹⁵ *See Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110-432*, 74 Fed. Reg. 10983 (proposed Mar. 13, 2009) at 6, *available at* <https://www.fra.dot.gov/eLib/Details/L02876>.

Like the two statutory provisions at issue here (Sections 207 and 213), the Metrics and Standards themselves divide the universe of Amtrak service metrics into two categories: on-time performance and various “service quality” metrics. *See Metrics and Standards* at 11, 22.

¹⁶ *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>.

consideration of “on-time performance” in the Metrics and Standards process would have been a colossal and unnecessary waste of time.¹⁷

E. It Would Be Especially Inappropriate to Interpret Section 213 as Containing a Stand-Alone On-Time Performance Trigger Applicable to Individual Routes Where Host Railroad Performance Is Already Governed by Binding Contractual Metrics

Interpreting Section 213 as providing for a set of Board-developed on-time performance metrics separate from those developed under Section 207 would be particularly inappropriate in a context where the host railroad is already subject to agreed-upon contractual incentives and penalties driven by Amtrak’s on-time performance. As discussed above, Section 207 spells out a process by which the FRA and Amtrak would develop a single and uniform set of on-time performance metrics having general application to all Amtrak trains and all host railroads. Norfolk Southern does not doubt that Congress intended for those Metrics and Standards potentially to trigger investigations under Section 213 even when the Amtrak service in question was operated pursuant to a contract entered consensually between Amtrak and its host railroad.

But it would defy logic and common sense to conclude that Congress intended, in addition, to give the Board the authority to apply its own “on-time performance” metrics to particular Amtrak services operated under contract with host railroads whenever

¹⁷ Moreover, the Metrics and Standards could not establish the “new” forward-looking, uniform metrics Congress intended if the Board were free to construe “on-time performance” in a manner different from that arrived at under Section 207, including based on potential measures that – unlike the Metrics and Standards – were “*already* ‘existing’ at the time of PRIIA’s passage,” as the Board’s December 19 Decision implies at 7.

Amtrak chose to complain. Doing so would supplant the train performance metrics embodied in binding operating agreements between Amtrak and the host railroad over whose tracks those services operate.

To be sure, Congress, the Board and Amtrak have over the years referred to a variety of “metrics and standards” relating to on-time performance. As the Board’s December 19 Decision notes, many of these have long since been repealed by Congress. *See* December 19 Decision at 7 n.22. And as Amtrak’s Memorandum of Law supporting its Complaint here recites, the Board’s own past definitions of on-time performance have arisen in “the context of terms and compensation cases under 49 U.S.C. § 24308(a).” Memorandum of Law at 1. Those cases, of course, involve the Board’s setting of *contractual terms* governing Amtrak’s operation over a host railroad when the parties fail to agree, and cannot be a basis for addressing the terms that should govern here, where Norfolk Southern and Amtrak have *agreed* to terms.

But all of these other measures are beside the point. If there is to be a single, uniform definition of on-time performance for purposes of Section 213, Congress provided a pathway to arrive at one – the now-invalid Section 207 Metrics and Standards. If there is to be a metric developed for the specific purposes of judging the performance of the Capitol Limited’s operation over Norfolk Southern’s trackage, Amtrak’s agreement with Norfolk Southern must govern, and the Board has no authority to interpret or apply that definition. That contract in fact spells out detailed performance standards and provides for both incentive payments and monetary penalties based on how

well Norfolk Southern performs in enabling the train to move across the railroad without undue delay caused by Norfolk Southern.¹⁸ If Amtrak wishes to enforce those standards, its remedy is under the Agreement, which is subject to binding arbitration, not Board review. *See* Norfolk Southern-Amtrak Operating Agreement, Art. 6 (“any claim or controversy . . . concerning interpretation, application or implementation of this Agreement shall be submitted to binding arbitration.”).¹⁹ PRIIA did not authorize Amtrak to invoke, or the Board to apply, such contractual provisions for purposes of Section 24308(f).²⁰

II. DISMISSAL IS THE APPROPRIATE COURSE

Because the Board lacks authority to proceed with the investigation pursuant to Section 24308(f) that Amtrak’s Complaint seeks, the Board should dismiss the

¹⁸ In recent months Norfolk Southern has incurred penalties pursuant to these provisions relating to its operation of the Capitol Limited.

¹⁹ In the interest of filing this Response in the public docket, Norfolk Southern has not filed a copy of its Operating Agreement, which is confidential vis-à-vis third parties. Amtrak, of course, has access to the agreement, and Norfolk Southern would be prepared to provide pertinent portions of the agreement under seal pursuant to an appropriate Board protective order if the Board so requires.

²⁰ To do so would likewise ignore the well-established principle that the Board lacks authority to interpret and apply private contracts. *See, e.g., PSI Energy, Inc. v. CSX Transportation, Inc. & Soo Line R.R.*, Docket No. 42034 (served Sept. 11, 1998) at 3 (“It is well established that, where there is a genuine dispute regarding the scope of a railroad transportation contract, the interpretation of which is necessary to resolve essential issues in a railroad rate complaint, we do not interpret the contract ourselves, but instead suspend proceedings in the rate complaint until the contract is interpreted in court.”); *New England Central R.R. – Trackage Rights Terms & Conditions – Pan Am Southern LLC*, Finance Docket No. 31250 (Sub-No. 1) (served Dec. 23, 2014) at 5 n.29 (“Board leaves enforcement of private contracts to the courts”); *Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc.*, Finance Docket No. 33905 (served Oct. 22, 2001) at 6 (“it is not our place to interpret the contracts that appear to be at the heart of this dispute”).

Complaint. Dismissal is appropriate where a complaint “does not state reasonable grounds for investigation and action.” *See Bell Oil Terminal, Inc. v. Norfolk Southern Ry*, Finance Docket No. 35302 (decision served Nov. 4, 2011), at 3; *see also* 49 U.S.C. § 11701(b). Here, the only relief sought by Amtrak is an investigation under Section 24308(f), but that relief is foreclosed by the invalidity of the Metrics and Standards. As such, “there is no basis upon which [the Board] could grant the relief sought” and the Complaint should be dismissed. *Bell Oil*, at 3. Of course, if and when valid Metrics and Standards subsequently become effective, the Board’s dismissal of Amtrak’s Complaint would pose no obstacle to Amtrak’s filing of a new complaint seeking to commence an investigation in the event the Capitol Limited’s performance or service quality fails to satisfy the metrics and standards then in effect.

CONCLUSION

Because a formal investigation under Section 24308(f) cannot be commenced at this time, Norfolk Southern requests that the Board dismiss Amtrak's Complaint.

Respectfully submitted,

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

/s/ David L. Meyer
David L. Meyer
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: January 7, 2015

CERTIFICATE OF SERVICE

I, Aaron D. Rauh, certify that on this date a copy of the Norfolk Southern Railway Company's Motion to Dismiss Amtrak's Complaint, filed on January 7, 2015, was served by email and by first-class mail, postage prepaid, on all parties of record, as follows:

Linda J. Morgan
Kevin M. Sheys
Katherine C. Bourdon
Nossaman LLP
1666 K Street NW, Suite 500
Washington, DC 20006
lmorgan@nossaman.com

Charles D. Nottingham
Charles D Nottingham PLLC
1701 Pennsylvania Ave., NW
Suite 300
Washington, DC 20006
chipnottingham@verizon.net

William H. Herrmann
Managing Deputy General Counsel
National Rail Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Peter J. Shutz
CSX Transportation, Inc.
1331 Pennsylvania Ave., NW, Suite 560
Washington, DC 20004
Peter_shutz@csx.com

Thomas H. Dupree, Jr.
John Christopher Wood
Michael K. Murphy
Gibson, Dunn & Crutcher LLP
1059 Connecticut Ave., NW
Washington, DC 20036-5306
TDupree@gibsondunn.com

Paul R. Hitchcock
Cindy Craig Johnson
Sean Craig
CSX Transportation, Inc.
500 Water Street, J150
Jacksonville, FL 32202-4423
Paul_hitchcock@csx.com

/s/ Aaron D. Rauh
Aaron D. Rauh

Dated: January 7, 2015

February 3, 2015

Writer's Direct Contact
(202) 887-1519
DMeyer@mofocom

VIA ELECTRONIC FILING

237669

Cynthia T. Brown
Chief, Section of Administration
Office of Procedures
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
February 3, 2015
Part of
Public Record

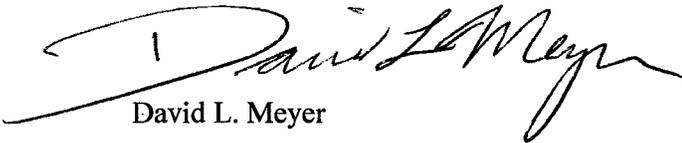
Re: STB Docket EP 726

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**

EX PARTE 726

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

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

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: February 3, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 726

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

**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”),¹ and CSX Transportation, Inc. (“CSX”),² respectfully asserts that

¹ *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 Begeman³ 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

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

³ 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.⁴ 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.⁵

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.⁶

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

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

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

⁶ 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.⁷ 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

⁷ *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."⁸ 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

⁸ *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.”⁹

⁹ 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,

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: February 3, 2015

EXHIBIT A:
NORFOLK SOUTHERN'S PETITION TO INTERVENE

MORRISON | FOERSTER

2000 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.
20006-1888

TELEPHONE: 202.887.1500
FACSIMILE: 202.887.0763

WWW.MOFO.COM

MORRISON FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.
NORTHERN VIRGINIA, DENVER,
SACRAMENTO, WALNUT CREEK
TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

January 12, 2015

237445

ENTERED
Office of Proceedings
January 12, 2015
Part of
Public Record

Writer's Direct Contact
(202) 887-1519
DMeyer@mofocom

VIA ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Procedures
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

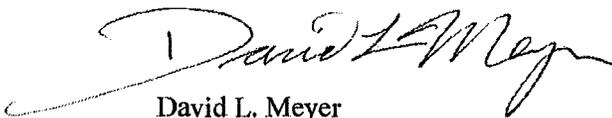
**Re: STB Docket NOR 42134, National Railroad Passenger Corporation – Section
213 Investigation of Substandard Performance on Rail Lines of Canadian
National Railway Company**

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.

dc-781036

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42134

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

NORFOLK SOUTHERN'S PETITION TO INTERVENE

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: January 12, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42134

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

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 213.¹ 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.² Moreover, the definition the Board chooses will

¹ 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.

² 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.”).³ 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

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>.

³ 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]”⁴ 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.

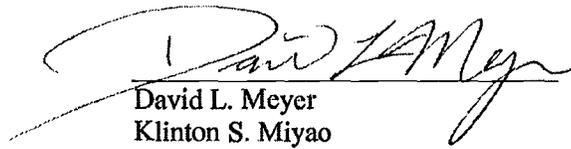
⁴ *Central Power & Light*, 1 S.T.B. at 1062-63.

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,

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510



David L. Meyer
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

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:

Linda J. Morgan
Kevin M. Sheys
Nossaman LLP
1666 K Street NW, Suite 500
Washington, D.C. 20006
lmorgan@nossaman.com

William H. Herrmann
Managing Deputy General Counsel
National Rail Passenger Corporation
60 Massachusetts Avenue, NE
Washington, D.C. 20002

Paul A. Cunningham
David A. Hirsh
Harkins Cunningham LLP
1700 K Street, NW, Suite 400
Washington, D.C. 20006
Pac@Harkinscunningham.com

Donald R. Gerard
102 North Neil Street
Champaign, IL 61820

David W. Ogden
Jonathan E. Paikin
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006

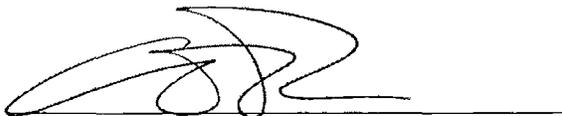
Phyllis Wise
601 East John Street
Champaign, IL 61820

Rex Duncan
466
Du Quoin, IL 62832

Honorable Richard J. Durbin
United States Senate
Washington, D.C. 20510

Louis P. Warchot
Association of American Railroads
425 3rd Street, SW, Suite 1000
Washington, DC 20024

Tim Grover
City of Mattoon, IL
208 N 19th St.
Mattoon, IL 61938



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:

Timothy J. Strafford
Association of American Railroads
425 3rd Street, SW, Suite 1000
Washington, DC 20024



Aaron D. Rauh

Dated: February 3, 2015

Exhibit B

{{

}}

{

.....
..
..

}

{

}

{{

}}

{

}

Exhibit C

	Amtrak Endpoint OTP						
	Q1 Fiscal Year 2011	Q2 Fiscal Year 2011	Q3 Fiscal Year 2011	Q4 Fiscal Year 2011	Q1 Fiscal Year 2012	Q2 Fiscal Year 2012	Q3 Fiscal Year 2012
Capitol Corridor	95.5	95.4	94.4	94.2	94.1	93.8	93.3
Carolinian	59.2	75.6	61	57.8	76.1	83	69.8
Cascades	77	55.1	71.3	74.8	77.6	69.3	75.8
Downeaster	84.8	76.5	81.8	58.4	80.8	91	89.8
Andironack	78.3	68.9	51.1	46.4	74.5	86.8	79.7
Ethan Allan Express	62	62	70.3	47.7	69	82.4	68.7
Maple Leaf	67.4	72.2	52.7	38.3	78.3	82.4	61
New York - Albany	85.4	85.5	88.5	78.6	92.2	96.4	89.8
New York - Niagara Falls	79.3	73.6	81.9	75.8	95.4	95.1	83.8
Heartland Flyer	84.2	91.5	83	42.4	75.5	68.7	62.6
Hiawatha	86.2	87.3	91.8	88	91.6	92.6	91.8
Hoosier State	59.4	65.7	52.4	61.8	63.5	70.2	72.1
Carl Sandburg / Illinois Zephyr	88.6	94	90.4	81.4	87.2	93.7	96.1
Illini / Saluki	44.6	59.8	49.6	66	74.7	76.4	75.5
Lincoln Service	64.8	72.6	65.1	53.3	75.3	88.7	70.5
Blue Water	66.8	60.2	50.5	40.8	58.5	76.9	81.3
Pere Marquette	54.4	64.4	42.5	44.8	51.6	60.2	48.9
Wolverine	41.3	24.9	9.9	2.8	30.8	49.2	44.9
Kansas City - St. Louis	91.6	87.4	89.8	72.2	89.1	96.4	89
Pacific Surfliner	77.8	81.8	81	69.7	76.9	75.1	80.4
Pennsylvanian	89.7	92.8	76.9	81	92.9	95.6	94
Piedmont	78.8	79.6	81.2	81.4	73.1	76.1	68.5
San Joaquin	91.4	90.2	88.5	86	88.4	89.1	88.6
Vermont	83.2	71.1	81.3	77.7	81	95.6	79.7
Auto Train	90.2	93.9	87.9	87.4	90.8	83	78.6
California Zephyr	51.1	52.5	49.5	10.2	32.6	57.7	54.4
Capitol Limited	57.6	57.8	34.1	47.8	54.3	85.2	80.2
Cardinal	41.8	52.6	25.6	35.4	54.4	47.4	25.6
City of New Orleans	69.6	86.1	64.3	86.4	84.8	86.8	91.8
Coast Starlight	78.1	65	77.3	84.2	85.9	78	79.7
Crescent	76.6	75.6	65.4	70.5	88	82.4	81.9
Empire Builder	51.8	33.8	46.7	42.5	66.2	73.8	69
Lake Shore Ltd	69.8	55.2	57.1	36.5	65.9	89	69.5
Palmetto	75.5	91.7	75.8	56.2	85.3	79.6	70.9
Silver Meteor	79.9	85.4	79.1	61.8	78.3	64.8	64.8
Silver Star	73.9	66.1	70.3	70.7	76.6	65.4	65.9
Southwest Chief	83.2	77.8	81.9	50.5	69	89	69.8
Sunset Limited	89.9	83.1	82.1	64.6	73.1	53.8	62.8
Texas Eagle	70.1	77.2	45.6	30.4	78.8	84.1	53.8
Total Investigations Per Quarter	22	22	20	21	23	15	15
Data drawn from Federal Railroad Administration, Rail Service Metrics and Performance Reports, http://www.fra.dot.gov/Page/P0532 (last accessed Feb. 1, 2016).							
Amtrak's Fiscal Year runs from October through September.							
Red = OTP Below 80% During that Quarter							
Highlighted = 2 Consecutive Quarters of OTP Below 80%, Eligible for Investigation							

	Amtrak Endpoint OTP						
	Q4 Fiscal Year 2012	Q1 Fiscal Year 2013	Q2 Fiscal Year 2013	Q3 Fiscal Year 2013	Q4 Fiscal Year 2013	Q1 Fiscal Year 2014	Q2 Fiscal Year 2014
Capitol Corridor	94.2	93.8	94.6	96.4	95.3	96.3	94.9
Carolinian	65.8	70.7	72.2	62.1	60.9	67.2	72
Cascades	73.4	81.2	72.5	84.4	79.5	85.8	67.9
Downeaster	83.7	81.2	85.1	77.7	60.4	74.4	77
Andironack	62.5	69.6	75	59.9	35.3	64.7	48.3
Ethan Allan Express	69	77.8	87.8	79.1	64.1	78.3	73.9
Maple Leaf	46.7	70.7	68.9	57.7	47.3	62.5	56.1
New York - Albany	83.3	92.3	94.8	93	87.2	85.1	81.7
New York - Niagara Falls	79.3	88.6	88.1	78.3	70.1	81.8	47.8
Heartland Flyer	29.9	61.2	82.2	28.7	36.5	68.3	75
Hiawatha	84.5	88.5	94	87.3	88.5	88.3	76.7
Hoosier State	70.8	79	83.3	72.8	72.1	55.8	39.6
Carl Sandburg / Illinois Zephyr	84.2	91.3	91.1	87.9	89.9	68.6	61.2
Illini / Saluki	58.7	70.4	80.5	78.6	75	64.1	41.6
Lincoln Service	67.2	87.1	90.6	85.3	80.4	70.1	50
Blue Water	79.9	73.4	66.7	57.1	52.7	44	35.4
Pere Marquette	38	63.6	65.9	42.2	34.2	50.8	30.7
Wolverine	54.2	54.9	47.9	14.8	15.2	33	30.7
Kansas City - St. Louis	79	93.2	96.4	90.7	95.9	91.6	86.9
Pacific Surfliner	69.9	85.7	89.2	85	79.1	73.3	78.2
Pennsylvanian	90.8	96.6	95	95.1	90.8	92.4	86.7
Piedmont	72.1	76.1	79.3	70.1	75.2	71.2	71.3
San Joaquin	86.5	87.3	81.2	61.3	80.8	79.7	80.9
Vermont	85.3	92.6	91.6	82.4	62	77.2	73.3
Auto Train	93.8	77.5	75.9	82.4	88.6	86.4	60.9
California Zephyr	62	75.5	85.6	58.8	62	58.7	48.3
Capitol Limited	72.7	85.8	84.4	72	62.5	66.8	42.7
Cardinal	44.3	65.4	70.5	44.9	43.6	45.6	45.5
City of New Orleans	89.1	85.9	90.6	89	86.4	82.6	55.6
Coast Starlight	72.3	73.9	91.7	82.4	80.4	77.2	77.2
Crescent	76.6	83.3	78.9	76.4	59.2	67.9	52.8
Empire Builder	33.1	60.6	72.8	67.1	41.4	33.5	20.4
Lake Shore Ltd	56.9	81.5	77.5	65.3	54.1	56.8	32.7
Palmetto	72.8	79.5	77.9	66.1	69.6	59.8	72.7
Silver Meteor	55.4	61.7	48.3	61.5	53.3	56	48.9
Silver Star	59.2	61.2	58.9	61.5	58.7	58.2	59.4
Southwest Chief	73.4	91.8	92.8	82.4	73.4	71.7	70
Sunset Limited	78.8	85.9	78.2	70.5	74.4	72.2	63.6
Texas Eagle	46.7	84.8	75	71.4	76.1	54.3	45.5
	23	18	13	16	24	26	30
Data drawn from Federal Railroad Administration, Rail Service Metrics and Performance Reports, http://www.fra.dot.gov/Page/P0532 (last accessed Feb. 1, 2016).							
Amtrak's Fiscal Year runs from October through September.							
Red = OTP Below 80% During that Quarter							
Highlighted = 2 Consecutive Quarters of OTP Below 80%, Eligible for Investigation							

Amtrak Endpoint OTP							
	Q3 Fiscal Year 2014	Q4 Fiscal Year 2014	Q1 Fiscal Year 2015	Q2 Fiscal Year 2015	Q3 Fiscal Year 2015	Q4 Fiscal Year 2015	
Capitol Corridor	95.5	95.3	91.7	93.5	93.2	93.6	
Carolinian	58.8	60.2	57.8	66.7	45.1	44	
Cascades	74.6	75.7	70.3	70.1	79.9	76.4	
Downeaster	20.9	57.2	34.8	23.1	12.4	52.8	
Andironack	35.7	49.7	71.2	66.3	52.7	27.2	
Ethan Allan Express	70.9	72.5	79.9	73.7	69.2	54.3	
Maple Leaf	51.6	48.4	53.8	52.2	50.5	43.5	
New York - Albany	76.2	79.6	82.3	79	72.7	68.6	
New York - Niagara Falls	55.2	59.7	53.3	48.9	42	34	
Heartland Flyer	28.6	48.8	82.6	43.9	27.3	55.7	
Hiawatha	91.3	87.7	83.1	85.3	84.3	92.2	
Hoosier State	63.5	54.1	58.5	75.5	65.4	67.7	
Carl Sandburg / Illinois Zephyr	77.1	73	85.7	91.3	94	90.2	
Illini / Saluki	57.7	56.1	17.4	39.7	21.2	30.2	
Lincoln Service	61.3	57.1	65.2	72.4	49	46	
Blue Water	42.3	39.8	48.4	55	53.3	49.5	
Pere Marquette	35.7	35.1	24.3	31.7	46.2	61.4	
Wolverine	40.9	33	26.8	37.3	50.4	43.3	
Kansas City - St. Louis	67	81.9	79.6	91.6	82.7	86.4	
Pacific Surfliner	79.7	77	72.9	80.5	80	78.2	
Pennsylvanian	92.3	89.7	81.5	91.7	85.2	82.6	
Piedmont	70.8	66.9	65.1	69.2	50.3	55.8	
San Joaquin	69.4	75.4	67.7	74.8	72.3	79.7	
Vermont	85.7	79.3	76.1	78.1	91.2	85.3	
Auto Train	65.6	74.2	85.3	76.7	59.9	66.3	
California Zephyr	19.8	33.8	52.7	73.3	37.2	42.3	
Capitol Limited	16.5	32.1	31	38.9	33	35	
Cardinal	43.6	40.9	40.5	57.1	56.4	48.1	
City of New Orleans	76.9	74.5	70.1	65.6	81.9	88.6	
Coast Starlight	79.7	76.2	69	90.8	84.1	68.6	
Crescent	51.1	55.9	50	62.8	44.5	49.5	
Empire Builder	21.3	26.6	31.9	70	48.8	45.4	
Lake Shore Ltd	38.5	36.7	46.5	43.3	37.9	32.8	
Palmetto	69.8	66.6	84.8	75.3	58.3	58.2	
Silver Meteor	58.2	52.9	69	61.5	51.1	49.5	
Silver Star	47.8	54.2	66.3	52.2	35.2	38.6	
Southwest Chief	64.3	61.6	45.1	53.3	46.7	46.7	
Sunset Limited	56.4	62	67.1	62.3	38.5	67.1	
Texas Eagle	44.5	46.8	53.3	44.4	21.4	27.7	
	32	34	30	28	30	30	

Data drawn from Federal Railroad Administration, Rail Service Metrics and Performance Reports, <http://www.fra.dot.gov/Page/P0532> (last accessed Feb. 1, 2016).
 Amtrak's Fiscal Year runs from October through September.
 Red = OTP Below 80% During that Quarter
 Highlighted = 2 Consecutive Quarters of OTP Below 80%, Eligible for Investigation

Exhibit D

Non-NEC Corridor Routes

Capitol Corridor	UP
Carolinian	CSX NS
Cascades	BNSF UP
Downeaster	MBTA PanAm
Empire Corridor	
Adirondack	CN CP Amtrak MNRR
Ethan Allen Express	CP Amtrak MNRR VTR
Maple Leaf	CSX Amtrak MNRR
New York - Albany	Amtrak MNRR
New York - Niagara Falls	CSX Amtrak MNRR
Heartland Flyer	BNSF
Hiawatha	CP Metra
Hoosier State	CSX
Illinois	
Carl Sandburg / Illinois Zephyr	BNSF
Illini / Saluki	CN
Lincoln Service	CN UP
Michigan	
Blue Water	Amtrak CN MIDOT NS
Pere Marquette	CSX NS
Wolverine	Amtrak CN MIDOT NS
Missouri River Runner	UP
Pacific Surfliner	BNSF SCRRA SDNRR UP
Pennsylvanian	NS
Piedmont	NS
San Joaquin	BNSF UP
Vermont	MNRR MASSDOT NECR

All Other NEC Corridor Routes

Northeast Regional		
Richmond/Newport News/Norfolk	CSX MNRR NS	
Lynchburg	MNRR NS	
All Other Northeast Regional	MNRR	

Long Distance Routes

Auto Train	CSX CFRC
California Zephyr	BNSF UP
Capitol Limited	CSX NS
Cardinal	BBrRR CSX NS
City of New Orleans	CN
Coast Starlight	BNSF SCRRA UP
Crescent	NS
Empire Builder	BNSF CP Metra
Lake Shore Ltd.	CSX MNRR NS
Palmetto	CSX
Silver Meteor	CSX CFRC Fla DOT
Silver Star	CSX CFRC Fla DOT NS
Southwest Chief	BNSF NMDOT
Sunset Limited	BNSF UP
Texas Eagle	BNSF CN UP