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**VIA E-FILING**

ENTERED  
Office of Proceedings  
January 27, 2015  
Part of  
Public Record

January 27, 2015

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

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

Dear Ms. Brown:

Enclosed for filing is the National Railroad Passenger Corporation's Response to the Motion to Dismiss filed by CSX Transportation, Inc. in the above proceeding.

If you have any questions, please contact me.

Respectfully submitted,

Linda J. Morgan  
*Attorney for National Railroad Passenger  
Corporation*

Enclosure

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. NOR 42141**

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

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**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN  
OPPOSITION TO MOTION TO DISMISS OF CSX TRANSPORTATION, INC.**

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January 27, 2015

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**NATIONAL RAILROAD PASSENGER CORPORATION -- INVESTIGATION OF  
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OPPOSITION TO MOTION TO DISMISS OF CSX TRANSPORTATION, INC.**

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The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel and pursuant to 49 C.F.R. § 1104.13, hereby replies in opposition to the CSX Transportation, Inc. (“CSX”) Motion to Dismiss Amtrak’s Complaint, filed on January 7, 2015 (“Motion to Dismiss”).

**INTRODUCTION**

On November 17, 2014, Amtrak filed a Complaint to Initiate Investigation of the Substandard Performance of the Capitol Limited (“Complaint”). In the Complaint, Amtrak requests that the STB initiate an investigation of the substandard performance of Amtrak’s Capitol Limited Service, which runs almost entirely on lines owned by CSX and Norfolk Southern Railway Company (“Norfolk Southern”). *Complaint*, 3. Amtrak seeks the investigation based on 49 U.S.C. § 24308(f)(1) and requests that if the Board determines in the investigation that preference violations have occurred, the Board award damages and other relief. *Complaint*, 3. On January 7, 2015, CSX filed the Motion to Dismiss Amtrak’s Complaint (“Motion to Dismiss”).

## ARGUMENT

Amtrak has asked the Board to investigate the substandard performance of the Capitol Limited service, pursuant to its authority under Section 213. In *Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Ry. Co.*, NOR 42134 (STB served Dec. 19, 2014) (“*Amtrak/CN*”), the STB held that Section 213 allows Amtrak to bring a complaint when the on-time performance of any intercity passenger train averages less than eighty percent. *Amtrak/CN*, 6. CSX says the Complaint must be dismissed because the Board has no authority to commence an investigation of the performance of the Capitol Limited service under that statutory provision because the Board’s interpretation of Section 213 in *Amtrak/CN* “contradicts the statutory language.” *Motion to Dismiss*, 4. None of CSX’s arguments in support of these assertions is persuasive. Accordingly, the Motion should be denied.

**A. Motions To Dismiss Are Disfavored And Only Granted If The Complaint Does Not State Grounds For Investigation And Action.**

Motions to dismiss are “disfavored and rarely granted.” *Cargill Inc. v. BNSF Ry.*, 2011 STB LEXIS 1, \*9 (STB served Jan. 4, 2011) (citing *Entergy Ark., Inc. v. Union Pac. R.R.*, NOR 42104, slip op. at 3 (STB served Dec. 30, 2009) and *Garden Spot & N. Ltd. P'ship & Ind. Hi-Rail Corp.--Purchase & Operate--Ind. R.R. Line Between Newton & Browns, Ill.*, FD 31593, slip op. at 2 (ICC served Jan. 5, 1993)). “In ruling on motions to dismiss, the Board assumes that all factors be viewed in the light most favorable to the complainant, including all factual allegations.” *Cargill Inc.*, 2011 STB LEXIS at \*9 (citing *AEP Texas N. Co. v. Burlington N. and Santa Fe Ry.*, NOR. 41191 (Sub-No. 1), slip op. at 2 (STB served Mar. 19, 2004)).

In the rare instance when the Board grants a motion to dismiss, it does so because the complaint “does not state reasonable grounds for investigation and action. 49 U.S.C. § 11701.”

*State of Montana v. BNSF Ry. Co.*, 2011 STB LEXIS 70, \*5-6 (STB served Feb. 14, 2011).

Indeed, to grant a motion to dismiss, the Board must find that the complaint “offers no reasonable basis for further Board consideration.” *Dairyland Power Cooperative v. Union Pac. R.R. Co.*, NOR 42105, slip op. at 5 (STB served July 25, 2008). This is not such a case. The Board should deny CSX’s Motion to Dismiss. Amtrak’s Complaint clearly sets forth statutorily-based grounds for an investigation.

**B. CSX Fails To Demonstrate That The Board Lacks Authority To Investigate The Performance Of The Capitol Limited Service.**

In order to prevail on its Motion, CSX must show that Section 213 does not permit a Board investigation of the Capitol Limited service. CSX has failed to do so. Section 213 contains two independent clauses, separated by the conjunction “or”. The first clause (also referred to herein as the “first trigger”) authorizes an investigation if “the on-time performance of any intercity passenger train averages less than 80 percent”; the second clause (or “second trigger”), alternatively authorizes an investigation if “the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards” 49 U.S.C. § 24308(f).<sup>1</sup> In *Amtrak/CN*, the STB applied the unambiguous language of the first trigger and held that it had authority to investigate the performance of Amtrak’s Illini/Saluki service.<sup>2</sup> The plain language in Section 213 allows investigations of Amtrak train on-time performance without regard to Section 207’s Metrics and

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<sup>1</sup> For both clauses the triggering condition must occur to 2 consecutive calendar quarters. *Id.*

<sup>2</sup> The STB held that:

The plain language of Section 213 allows Amtrak to bring a complaint either when “the on-time performance of any intercity passenger train averages less than 80 percent” “or” when “the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards” for any two consecutive calendar quarters.

*Amtrak/CN*, 6-7 (emphasis in original) (citation omitted).

Standards for Intercity Passenger Rail Service, Federal Railroad Administration, *Metrics and Standards for Intercity Rail Passenger Service* (May 12, 2010), Dkt. No. FRA-2009-0016, at 24-30, available at <https://www.fra.dot.gov/eLib/Details/L02875> (“Metrics and Standards”).

*Amtrak/CN*, 6. This is so irrespective of whether the Metrics and Standards are in force.

CSX asserts that “Amtrak’s claim that the Board may issue its own definition of On-Time performance is contrary to the statutory language and congressional intent”<sup>3</sup> and the Board’s interpretation of Section 213 in *Amtrak/CN* “contradicts the statutory language.” *Motion to Dismiss*, 4. In essence, CSX argues that Section 213 unambiguously *bars* a Board investigation of Amtrak intercity train performance except pursuant to the Metrics and Standards and that the Board’s construction of Section 213 in *Amtrak/CN* conflicts with the unambiguous language of Section 213. None of CSX’s arguments supports this assertion. Not only is CSX wrong, but quite the opposite is true. Section 213 unambiguously authorizes the Board to investigate if “the on-time performance of any intercity passenger train averages less than 80 percent.” 49 U.S.C. § 24308(f). The Board could not have construed the first trigger in *Amtrak/CN* any way other than the way it did. CSX wants the Board to ignore the first trigger based on the second trigger, but the presence of the second trigger does not negate the first trigger. In fact, CSX’s argument would render the entire first clause of Section 213 without any meaning.

**1. The First Clause of Section 213 Unambiguously Grants The Board Authority To Investigate Performance Of Amtrak Intercity Trains.**

Section 213 unambiguously authorizes the Board to investigate the performance of Amtrak intercity trains if “the on-time performance of any intercity passenger train averages less than 80 percent.” 49 U.S.C. § 24308(f). The Board could not have construed the first trigger any way other than the way it did.

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<sup>3</sup> *Motion to Dismiss*, 3.

**2. CSX Fails To Demonstrate That Section 213 Unambiguously Bars A Board Investigation Except Pursuant To The Metrics and Standards.**

CSX says “Section 213’s reference to On-Time Performance refers to the On-Time Performance standard issued pursuant to Section 207. It does *not* refer to another, unspecified On-Time Performance standard that the Board or another agency might create.” *Motion to Dismiss*, 4-5. CSX points out that Section 207 and 213 were enacted simultaneously, and both sections include the phrase “on-time performance,” and under canons of statutory construction both terms should be construed the same way. *Id.* at 5. The flaw in CSX’s argument is that the Board’s construction of Section 213 as set forth in *Amtrak/CN* does not depend on the use of two separate definitions of “on-time performance.”

Section 207 required Amtrak and FRA to jointly develop metrics “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.” 49 U.S.C. § 24101 note. In the next sentence, Section 207 uses the term “on-time performance” again, requiring that “[s]uch metrics, at a minimum, shall include ... measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier ...” *Id.* Critically, nothing in Section 207 required the mandatory “measures of on-time performance and delays” to be included under a rubric of “performance” metrics or “service quality” metrics. They could be either, which means they could have been designated as “service quality” metrics.<sup>4</sup>

In employing its loose “On-Time Performance” short-hand definition in the Motion to Dismiss, CSX is conflating the two independent clauses in Section 213 and ignoring the plain language of the first one. The Board’s “on-time performance” definition in first clause of

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<sup>4</sup> The language of Section 207 is dispositive, but it is worth noting that the Metrics and Standards do not divide into “performance” and “service quality” categories. *Metrics and Standards*, 24-30.

Section 213 (“if the on-time performance of any intercity passenger train averages less than 80 percent”) is distinct from on-time performance standards promulgated pursuant to the second clause (failure to meet “the service quality of intercity passenger train operations for which minimum standards are established under section 207”). As noted above, Section 213 contains two independent clauses, separated by the conjunction “or”; the first clause and the second clause provide separate and severable bases for an investigation under Section 213. CSX has not shown that Section 213 unambiguously bars a Board investigation except under the Metrics and Standards.

**3. CSX’s Construction Of Section 213 Would Leave The First Clause Of Section 213 Without Any Meaning Or Purpose.**

CSX’s argument that the only trigger in Section 213 is the one related to the Section 207 Metrics and Standards would render Section 213 inoperative even if the Metrics and Standards are held to be constitutional. The on-time performance metrics developed under Section 207 – which CSX argues constitutes the sole basis for triggering a Section 213 investigation – actually consists of three separate tests: endpoint on-time performance, all-stations on-time performance, and effective speed. Both the endpoint and all-stations on-time performance metrics vary in percentage over time for non-Northeast Corridor routes from 80 percent in Fiscal Year 2010 to 85 percent or 90 percent by Fiscal Year 2014, depending on the length of the route. *Metrics and Standard*, 26-27. The “change in effective speed” metric is not even expressed as an on-time percentage, but instead is measured by dividing a train’s mileage by the sum of the scheduled end-to-end running time plus the average endpoint terminal lateness, and comparing that to the effective speed to the average effective speed during FY 2008. *Metrics and Standards*, 24-30. CSX never explains how in actual practice the STB could trigger an investigation based on performance of less than 80% of two different metrics and one measurement that is not

expressed as a percentage. Nor is it conceivable that Congress – which did not know what the Metrics and Standards would provide in 2008 when PRIIA was passed – could have intended such an absurd result.

CSX applies a tortured construction of Sections 207 and 213 in order to render the Congressionally-mandated 80% trigger a nullity, a result which violates well-settled principles of statutory construction. *See Corley v. United States*, 556 U.S. 303, 314 (U.S. 2009) (“[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”) (citations omitted).

**4. Even If Section 213 Were Ambiguous, CSX Has Failed To Show That The Board’s Construction Of Section 213 Is An Impermissible One.**

Having failed to demonstrate that Section 213 unambiguously bars a Board investigation except under the Metrics and Standards, CSXT’s Motion to Dismiss must be denied unless it can show that the STB’s construction of Section 213 is not a permissible one.<sup>5</sup> This has not been done.<sup>6</sup>

CSX argues that the district court and the D.C. Circuit in *Ass’n of Am. R.R. v. U.S. Dept. of Trans.*, 721 F.3d 666 (D.C. Cir. 2013) commented that a Section 213 investigation could be triggered by violation of the Metrics and Standards. *Motion to Dismiss*, 3-4. Neither of the

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<sup>5</sup> “[I]f Congress has not unambiguously addressed the specific issue before us, then [the Court] must determine whether the agency’s construction of the statute is permissible.” *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1076 (9th Cir. 2013) (quoting *Chevron, U.S.A. Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 842-43). “In this second step, the court must accord considerable weight to the agency’s construction of the statute and it may not substitute its own construction of the statute for the agency’s reasonable interpretation.” *Ass’n of Amer. R.R.s v. Surface Transp. Bd.*, 161 F. 3d 58, 68 (D.C. Cir. 1998) (citations omitted).

<sup>6</sup> As noted above, Section 213 unambiguously authorizes the Board to investigate the performance of Amtrak intercity trains if “the on-time performance of any intercity passenger train averages less than 80 percent.” 49 U.S.C. § 24308(f). For purposes of rebutting Norfolk Southern’s arguments, Amtrak will assume in this section of the reply that Section 213 is ambiguous.

courts, however, decided whether there was a separate trigger under Section 213. CSX also notes that in the argument before the Supreme Court, the Assistant Solicitor General said that a Section 213 investigation could be triggered by violation of the Metrics and Standards. *Motion to Dismiss*, 4. This is not the same as saying that the Metrics and Standards were the only way an investigation could be triggered under Section 213, and it is worth noting that during oral argument Mr. Gannon twice informed the High Court that the Board’s authority to conduct a 213 investigation *absent* the 207 Metrics and Standards was before the Board. Transcript of Oral Argument at 10-11, 23-24, *Dep’t of Transp., et. al. v. Ass’n of Am. R.R.s*, S. Ct. No. 13-1080, (Dec. 8, 2014).

Interspersed throughout the Motion, CSX makes the argument that Congress did not give the Board authority to promulgate *rules* regarding investigations under Section 213. *Motion to Dismiss*, 5 (“When Congress intends to delegate authority to the Board to promulgate *rules* and defines statutory terms, it does so explicitly.”); *id.* at 6 (“Congress... plainly vested the *rulemaking* authority in Amtrak and the FRA”); *id.* (“Grants of *rulemaking* power are necessarily exclusive: by vesting one entity with separate *rulemaking* power, Congress implicitly precludes other entities from wielding the *same* power”); *id.* at 7-8 (“The Board is wrong in concluding that the statute is ‘silent’ on the question of who may issue *regulations* defining On-Time Performance.”).

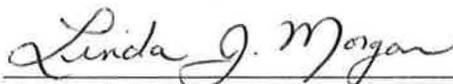
CSX’s assertion is incorrect. Congress frequently leaves definitions open for agency interpretation, through adjudication or rulemaking. *See e.g. United States v. Cinergy Corp.*, 458 F.3d 705, 711 (7th Cir. 2006) (“a vague statutory term in a regulatory statute can operate as a delegation to the regulatory agency to supply meaning.”). Indeed the STB has exercised its broad authority to construe provisions of its governing statutes by interpreting undefined but

essential terms like “incremental cost” and “express.” See e.g. *Nat’l R.R. Passenger Corp. and Union P. R.R. Co, Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 926, 937-949 (ICC served April 14, 1977 ) (established incremental costs in terms and compensation case); and *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)—Union P. R.R. Co. and S. P. Transp. Co.*, 1998 STB LEXIS 144, \*18 (STB served May 28, 1998) (evaluated the scope of the term “express”). Moreover, in *Amtrak/CN*, the STB does not purport to exercise rulemaking authority. For this reason, the entirety of CSX’s “straw-man” rulemaking argument is inapposite.

### CONCLUSION

CSX’s assertion that Section 213 unambiguously bars a Board investigation except under the Metrics and Standards is unpersuasive. To the contrary, Section 213 unambiguously authorizes an investigation without reliance on the Metrics and Standards. Even assuming Section 213 is ambiguous, CSX has failed to demonstrate that the Board’s construction of the statute in *Amtrak/CN* is an impermissible one. For these reasons, the Board should deny CSX’s Motion to Dismiss.

Respectfully submitted,



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Dated: January 27, 2015

## CERTIFICATE OF SERVICE

I certify that on January 27, 2015, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to CSX's Motion to Dismiss Amtrak's Complaint, was served via email upon the following counsel of record:

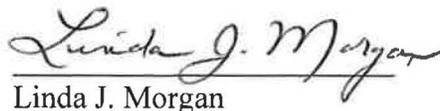
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