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

Re: In Re: On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (Docket No. EP 726)

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are the comments of the Association of American Railroads.

Thank you for your assistance in this matter.

Sincerely,

/s/ Thomas H. Dupree Jr.  
Thomas H. Dupree Jr.

Enclosure

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 726

On-Time Performance under Section 213 of the Passenger Rail  
Investment and Improvement Act of 2008

**COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS**

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## INTRODUCTION

The Association of American Railroads (AAR) respectfully submits this comment in response to the Surface Transportation Board's Notice of Proposed Rulemaking in Docket No. EP 726, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008* (Dec. 28, 2015). AAR's freight railroad members, who host Amtrak trains, have a strong interest in the proposed rule.<sup>1</sup> AAR maintains its position that the Board lacks the statutory authority to define On-Time Performance for purposes of a Section 213 investigation, and submits these comments subject to that objection.

Any On-Time Performance rule should respect existing operating agreements between Amtrak and the freight railroads, including provisions specifying how to determine if a train is late. If Amtrak and a freight railroad have already agreed on a way to measure on-time performance for the train or segment at issue, the Board should respect that agreement and avoid displacing and overriding the parties' agreement with a *different* way of measuring on-time performance. Thus, in cases where the parties have reached agreement as to how to measure on-time performance of Amtrak trains on a host, the Board should not apply its own definition but instead use the parties' definition.

In cases where Amtrak and the host railroad have *not* agreed on a way to measure on-time performance, the Board's inquiry should begin by asking whether Amtrak's published schedule is reasonable. If the schedule is grounded in reality—if it provides

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<sup>1</sup> Amtrak is also a member of AAR, but these comments are filed on behalf of AAR's freight members only and are not joined by Amtrak.

for a transit time that can be regularly achieved as a practical matter in the real world—then it is proper to use on-time performance metrics as a basis for initiating an investigation into the root causes of a failure to consistently meet the schedule, subject to a reasonable tolerance for delays. On the other hand, if the schedule is unrealistic and cannot be reliably met in the real world—because, for example, it rests on outdated traffic or operational assumptions—then it would be *improper* to use on-time performance metrics as the basis for beginning an investigation into the root causes of a situation that is easily addressed through a schedule adjustment. A broad-ranging investigation in such a case would only waste the resources of the Board, Amtrak, and the host freight railroad. Because basic fairness and administrative efficiency alike demand that on-time performance be evaluated against a standard that is reasonable, the Board should require a party seeking to initiate an investigation to make a prima facie showing that its schedule is reasonable before commencing a root-cause investigation. Alternatively, the Board should give the host railroad the opportunity to demonstrate that Amtrak’s schedule is *not* reasonable prior to a full, root-cause investigation.

AAR recommends several additional modifications to the proposed rule, including:

- The Board should provide that it will only undertake investigations based on data from the preceding four calendar quarters—a reasonable limitation that will ensure the Board does not waste its resources investigating a route that has been performing satisfactorily for more than a year.

- The Board should provide at least a 15-minute allowance for all routes, not just those exceeding 300 miles.
- The Board should eliminate the 30-minute “cap” on permissible delays, and extend its tiered allowance schedule to provide for greater allowances for routes exceeding 500 miles.
- The Board should calculate On-Time Performance on a host-by-host basis, to ensure that on multiple-host routes, each host railroad’s performance will be properly and fairly assessed.

## **BACKGROUND**

Section 207(a) of PRIIA provides that FRA 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 . . . on-time performance and minutes of delay . . . .” Section 213 of PRIIA provides that, “[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters,” the Board shall initiate an investigation at Amtrak’s request “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 over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.”

Consistent with Section 207(a), the FRA and Amtrak conducted a rulemaking proceeding and jointly issued a set of metrics and standards in 2010. *See* 75 Fed. Reg. 26,839 (May 12, 2010). Many interested parties submitted comments, including AAR,

freight railroads, commuter railroads, and state regulators. *See* FRA Docket No. 2009-0016.

In 2013, the United States Court of Appeals for the District of Columbia Circuit struck down Section 207 of PRIIA and the metrics and standards as an unconstitutional delegation to Amtrak, which the court deemed a private party. *See Ass'n of Am. R.R.s v. Dep't. of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013). In reaching this conclusion, the court explained that PRIIA § 207 “provides the means for devising the metrics and standards, [while] § 213 is the enforcement mechanism. If the ‘on-time performance’ or ‘service quality’ of any intercity passenger train proves inadequate under the metrics and standards for two consecutive quarters, the STB may launch an investigation . . . .” *Id.* at 669.

While the Supreme Court was reviewing the D.C. Circuit’s decision, the Board issued a ruling in the Illini/Saluki case (Docket No. NOR 42134), holding 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.” Slip op. at 10 (Dec. 19, 2014). The Board asked the parties to brief the question of how the Board should define “on-time performance” for purposes of PRIIA § 213. *Id.* Commissioner Begeman dissented. She suggested that the Board conduct a notice-and-comment rulemaking proceeding to consider, among other things, whether it has authority to define OTP and, if so, how to define it. *Id.* at 12 (Begeman dissenting).

In March 2015, the Supreme Court reversed and remanded the D.C. Circuit’s decision. It held that for purposes of AAR’s constitutional challenges, Amtrak should be

deemed a government actor rather than a private company. 135 S. Ct. 1225 (2015). The Court remanded to the D.C. Circuit for consideration of what it described as the “substantial” constitutional claims remaining in the case. *Id.* at 1234.

On May 15, 2015, the Board instituted this proceeding in response to AAR’s conditional petition for rulemaking.<sup>2</sup>

### LEGAL AUTHORITY

AAR respectfully maintains its position that the Board lacks the statutory authority to define On-Time Performance for purposes of a Section 213 investigation, and should terminate this rulemaking on that basis. PRIIA expressly grants Amtrak and the FRA—not the Board—the power to define On-Time Performance for purposes of Section 213. Grants of rulemaking power are necessarily exclusive. By vesting one entity with specific rulemaking power, Congress implicitly precludes other entities from wielding that same power. *See Bayou Lawn & Landscape Servs. v. Sec’y of Labor*, 713 F.3d 1080, 1084-85 (11th Cir. 2013) (“Even if it were not axiomatic that an agency’s power to promulgate legislative regulations is limited to the authority delegate[d] to it by Congress, . . . [courts] would be hard pressed to locate that power in one agency where it had been specifically and expressly delegated by Congress to a different agency.”).

When Congress has delegated authority to the Board to define statutory terms, it has done so explicitly. In the Rail Passenger Service Act of 1970, for example, Congress

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<sup>2</sup> AAR had asked that its petition be granted only in the event that the Board did not grant Canadian National’s motion for reconsideration in the Illini/Saluki case or the motions to dismiss filed by CSX Transportation and Norfolk Southern in the Capitol Limited case.

explicitly delegated authority to the Interstate Commerce Commission (“ICC”) to “prescribe such regulations as it considers necessary to provide safe and adequate service, equipment, and facilities for intercity rail passenger service.” Pub. L. No. 91-518, § 801, 84 Stat. 1327, 1339 (1970) (codified at 45 U.S.C. § 641); *see also Adequacy of Intercity Passenger Rail Serv.*, 344 ICC 758, 759 (1973) (“The Railroad Passenger Service Act of 1970 authorized the Commission to prescribe regulations for the adequacy of intercity passenger train service.”). Congress removed power from the ICC to prescribe regulations to ensure adequate service when it repealed this provision in 1979, and it has never returned this authority to the Board. *See* Pub. L. No. 96-73, § 111(b), 93 Stat. 537, 541 (1979).<sup>3</sup>

Because it lacks statutory authority, and because issuing its own On-Time Performance definition will create conflicting definitions in the event the FRA and Amtrak’s standards are ultimately upheld, the Board should terminate this rulemaking.

## DISCUSSION

If the Board chooses to define On-Time Performance, it should make several important changes to its proposed rule to ensure fairness, as well as to safeguard Board resources from unnecessary and wasteful Section 213 investigations. The Board has

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<sup>3</sup> The Board’s lack of statutory authority to engage in this rulemaking is discussed in detail in Canadian National’s petition for reconsideration of the Board’s December 19, 2014 order in the Illini-Saluki matter, Docket No. NOR 42134 (Jan. 7, 2015), and in the motions to dismiss Amtrak’s complaint filed by CSX Transportation and Norfolk Southern in the Capitol Limited matter, Docket No. NOR 42141 (Jan. 7, 2015).

limited resources and should tailor its rule so that those resources are expended on investigations that are most likely to yield useful and meaningful findings.

**I. In Defining On-Time Performance, The Board Should Be Guided By The Strong Public Interest In Ensuring A Fluid Rail Network And Avoiding Unnecessary Regulatory Proceedings.**

Congress has provided that the Board’s enforcement of the preference requirement not “materially lessen the quality of freight transportation provided to shippers.” 49 U.S.C. § 24308(c). That mandate is further enshrined in 49 U.S.C. § 10101, which directs the Board to minimize regulation, promote efficient freight service, and ensure the development and continuation of a sound rail transportation system.

These congressional directives must inform and guide the Board’s formulation of an On-Time Performance rule. Regulating in a rigid and absolute way that imposes unnecessary regulatory burdens—for example, by requiring root-cause analyses of failures to achieve schedules that are unreasonable—would be inconsistent with the congressional mandate.

The Board should also be mindful of the existing burdens already imposed on the freight railroads by their obligation to host Amtrak trains. For the most part, Amtrak trains operate over rights-of-way that are owned by the freight railroads and constitute the core infrastructure over which those railroads conduct their business—the transportation of freight. Because of their unique characteristics, Amtrak’s passenger trains consume a disproportionate share of the limited capacity or “train slots” available on a line. That is because (among other things) passenger trains travel at higher speeds than freight trains,

and have statutory preference over freight trains. *See, e.g.*, Mark H. Dingler, et al., *Impact of Train Type Heterogeneity on Single-Track Railway Capacity*, 2009 Trans. Res. Record 41, 47 (explaining that “[a]dding passenger trains to a freight-only line . . . creat[es] even greater delays” than adding additional freight trains because “the pertinent characteristics of passenger trains are even more different than the variations among freight trains. Passenger trains have higher maximum speeds, power-to-ton ratios, and dispatching priorities.”); *see also National Rail Infrastructure Capacity and Investment Study 4-7* (2007) (“Typically, a corridor serving multiple train types will have a lower capacity than a corridor serving a single train type”).

Rail freight tonnage and congestion have increased markedly over past decades and are expected to continue to increase for decades to come. The Department of Transportation recently warned that “[t]he volume of goods moved by rail has increased steadily since 1980, and is projected to increase by over 37 percent through 2045. With increases in passenger traffic and freight demand, track congestion may increase, especially in higher-traffic passenger corridors. Growing congestion may reduce the reliability of the railway network for both freight and passenger movements.” Dep’t of Transp., *Beyond Traffic: Trends and Choices* 249-50 (2015 draft), <http://1.usa.gov/1NOIWSS>; *see also National Rail Infrastructure Capacity and Investment Study 2-3* (2007) (noting rail traffic density tripled between 1980 and 2006). An On-Time Performance standard should acknowledge that capacity and freight volumes today are significantly different from those that existed in 1973, the date the proposed standards were adopted.

As the Board recently explained, the preference requirement is not “absolute.” Notice of Proposed Statement of Board Policy, *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, Docket No. EP 728, at 3. Moreover, because “[a]n individual dispatching decision involving two trains may have efficiency consequences for the network,” 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).” *Id.* at 4. Just as the Board recognized that the preference requirement must be construed in light of the need to maintain a fluid rail network, the Board should construe On-Time Performance in a way that recognizes that there are many other users of the network—freight carriers, the businesses and consumers that rely on freight service, as well as the millions of passengers who rely on commuter railroads.

## **II. The Board Should Modify Its Proposed Rule In Several Key Respects.**

The Board’s proposed definition of On-Time Performance would immediately expose the majority of Amtrak routes in the United States to burdensome root-cause investigations. *See generally* Fed. R.R. Admin., *Rail Service Metrics and Performance Reports*, <https://www.fra.dot.gov/Page/P0532>. To avoid overwhelming the Board with unnecessary and wasteful investigations that will consume the Board’s resources—and to make the Section 213 process efficient and, more importantly, fair—the Board should modify its approach.

**A. The Board Should Use The Contractual On-Time Performance Measures That Are Found In Host Railroad Operating Agreements.**

If the operating agreement between Amtrak and a host railroad incorporates measures of on-time performance applicable to the Amtrak route at issue, or to the host's portion of that route, the Board should use that measure rather than the Board's own. This would be a sound approach consistent with congressional intent. As the Senate Commerce Committee stated in connection with the legislation that became PRIIA § 207, "[i]t is the Committee's expectation that the freight railroads be consulted in the development of the metrics and that to the extent practicable, the metrics and standards developed not be inconsistent with measures of ontime performance included in the contracts between the freight railroads and Amtrak." S. Rep. 110-67, at 25 (2007).

This approach also satisfies the Board's sensible preference for a definition of On-Time Performance that "would be clear and relatively easy to apply." Notice of Proposed Rulemaking at 6. It will also better reflect the particular route and will incorporate adjustments and other nuances that cannot be captured by a global "one size fits all" mileage-based standard. And it is consistent with the parties' expectations when they signed their operating agreements and negotiated measures for determining when trains are on time, including the amount of permissible delays and what types of delays should be excluded from the analysis.<sup>4</sup>

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<sup>4</sup> The same principle should apply where a state requests an investigation, and the state and host railroad have a negotiated agreement for corridor service pursuant to 49 U.S.C. § 24405(c) or otherwise.

It is important to note that not all host railroads have agreed-upon measures of on-time performance in their operating agreements with Amtrak. But in those cases where the parties *have* done so (for example, in defining the performance worthy of earning incentives), the Board should not allow Amtrak or the host railroad to evade their contractual commitments by instigating a Section 213 investigation based on performance standards that conflict with what they had agreed by contract was acceptable after taking into account all aspects of the contract including compensation. Thus, before commencing a root-cause investigation, the parties should be given the chance to submit contractual provisions reflecting an agreement about how to measure On-Time Performance for the Amtrak route in question or the host's portion of that route. If the parties *have* so agreed, the Board should apply that performance measure, rather than its own, in determining whether to begin a root-cause investigation.<sup>5</sup>

**B. In Cases Where The Parties Have Not Agreed On A Way To Measure On-Time Performance, The Board Should Require A Prima Facie Showing That Amtrak's Schedule Is Reasonable.**

It is evident from Amtrak's long history of poor on-time performance, as documented in published reports, that many Amtrak schedules are archaic and unrealistic. Accordingly, to avoid imposing unnecessary burdens on itself and the railroads in cases where the parties have not already agreed on a way to measure on-time performance, the Board should require Amtrak to make a prima facie showing that the schedule in question is reasonable and can be consistently achieved in the real world before the Board

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<sup>5</sup> If they do not already have access to the contractual data concerning performance, parties other than Amtrak and hosts who may have a right to request a Section 213 investigation could acquire it through Amtrak.

undertakes a root-cause investigation. A threshold reasonableness assessment could take into account (among other things) the distance of the route and the speed at which Amtrak trains are capable of traveling on that route, the quantity and nature of both freight and commuter traffic on that route, and the complexities inherent in operating different kinds of rail service over the same track.

Requiring a *prima facie* showing of reasonableness would be well within the discretion the Board has claimed it has in defining On-Time Performance. Although the statutory language provides that the Board “shall” commence an investigation at Amtrak’s request if the On-Time Performance standard is not met, the Board has the discretion to define On-Time Performance to include as an element the reasonableness of the schedule at issue.

Making a threshold demonstration of the schedule’s reasonableness is consistent with the intent of Congress and maintains fidelity to the text of the statute. Section 213 does not speak to the baseline for determining On-Time Performance, and it would be well within the Board’s discretion to focus its investigative efforts on routes with reasonable schedules. A threshold showing of reasonableness is also consistent with how other providers of passenger transportation are treated under federal law. If airlines issue unrealistic schedules, they face liability for deceptive trade practices. *See* 14 C.F.R. § 399.81(a) (“The unrealistic scheduling of flights by any air carrier providing scheduled passenger air transportation is an unfair or deceptive practice and an unfair method of competition . . .”).

A prima facie assessment of reasonableness would be just that: it would not definitively resolve the question of reasonableness, which would be examined de novo in the course of the root-cause analysis, assuming the investigation proceeds. Nor would it include a detailed investigation into all aspects of the schedule, including the array of adjustments and changes that might improve on-time performance. Indeed, the reasonableness of Amtrak's schedules must play a critical role in any root-cause investigation, and adjusting the schedule must be one of the potential recommendations considered by the Board. The prima facie assessment would not pre-determine any of these issues.

In the alternative, upon the filing of a complaint, the Board could presume the Amtrak schedule is a sufficiently reasonable basis for an On-Time Performance assessment, but allow the host freight railroad to rebut this presumption through modeling, data reflecting historic performance, or other evidence. If the host railroad rebuts the presumption of reasonableness, the Board would not undertake a root-cause investigation.

In short, because many of Amtrak's published schedules are unrealistic, the Board should not accept them at face value in determining whether to undertake a root-cause investigation. Rather, as part of its definition of On-Time Performance, the Board should require a threshold showing of reasonableness by Amtrak—or permit the host railroad to make a threshold showing of unreasonableness—as a matter of administrative efficiency and basic fairness.

### C. The Board Should Make Several Additional Modifications.

In addition to requiring the threshold showings discussed above, the Board should change its proposed rule in several ways.

*First*, the Board should provide that it will only undertake investigations based on performance data from two consecutive calendar quarters within the four calendar quarters preceding the filing of a complaint. This is a reasonable limitation that will ensure the Board does not adjudicate stale claims. If a train's current performance is satisfactory, it would waste the parties' and the Board's resources to devote time to analyzing the root causes of problems that have already been solved. This limitation will also ensure fairness—for the freight railroads and Amtrak alike—by avoiding disputes that turn on evidence that no longer exists and witness memories that have long since faded. Of course, in the event that a root-cause investigation proceeds, data from earlier calendar quarters may be relevant and admissible.

*Second*, the Board should provide at least a 15-minute allowance for *all* routes, not just those exceeding 200 miles. Airlines are given a similar allowance, even for very short flights. Federal regulations define a “late flight” as “a flight that arrives at the gate 15 minutes or more after its published arrival time.” 14 C.F.R. § 234.2. In fact, federal regulations define a “chronically delayed flight” as one “that is operated at least 10 times a month, and arrives more than 30 minutes late (including cancelled flights) more than 50 percent of the time during that month.” 14 C.F.R. § 399.81(c)(2).

If anything, trains should be afforded a *more* generous delay allowance than planes. Whereas planes face minimal capacity constraints once they are in the air and en

route, passenger trains must navigate a congested network throughout their journey. Delays can arise at any point on the long trip that may span thousands of miles and multiple calendar days. In light of the many obstacles and risks of delay that passenger trains face when operating on today's rail network—obstacles that planes simply do not face—it makes no sense to hold trains to a *more* demanding standard of On-Time Performance. Particularly in light of the frequent need to coordinate with Amtrak or another host railroad, any allowance of less than 15 minutes would be insufficient to account for the unavoidable delays that inevitably result from the host's lack of control over when the Amtrak train may be received.

*Third*, the Board should eliminate the 30-minute/500 mile “cap” on permissible delays. It should extend its tiered approach beyond the 500-mile mark, and provide for greater maximum allowances for routes exceeding 500 miles (i.e., provide increased tiered allowances for distances exceeding 600, 700, 800 miles, and so forth). It does not make sense to provide the same maximum allowance for a 500-mile route and a 1,000-mile route. A tiered allowance schedule makes sense, and should be applied consistently across routes of varying lengths, rather than arbitrarily capped at 500 miles.

To put things in perspective, Amtrak operates its Texas Eagle on an approximately 1,305-mile route between Chicago and San Antonio. The scheduled duration of this trip is more than 31 hours. Given that trip length, it would be unreasonable to permit a mere 30-minute delay allowance. There are relatively few trains that would be affected by raising the cap. There would be fewer still if the Board elects to measure on-time performance by host segment, as AAR proposes.

*Fourth*, the Board should calculate On-Time Performance for each train on a host-specific basis. In cases involving multiple-host routes, each host railroad should be entitled to its own On-Time Performance analysis for its portion of the route, with its own tolerance based on the length of the segment, to ensure that each individual railroad's performance is properly and fairly assessed. For a multi-host train, if the performance over one host's portion of the route met On-Time Performance standards, that portion of the route would not be subject to investigation. The parties and the Board would nonetheless be free to submit and consider evidence concerning operations and scheduling for the full route insofar as it affects other hosts.

*Fifth*, and finally, the Board asked whether a train's punctuality at intermediate stops should be factored into the On-Time Performance calculation. *See* Notice of Proposed Rulemaking at 6. AAR supports the focus of the Board's proposed rule on ***end point*** On-Time Performance. Many Amtrak schedules, especially long-distance schedules, were designed with end point on-time performance in mind, not "all-stations" on-time performance. The only qualification to this is the point noted above, *i.e.*, in situations where a train is hosted by more than one railroad, the On-Time Performance calculation should be based on the On-Time Performance at the end points for the individual hosts' portions of the routes. In the event any commenters urge the Board to adopt an all-stations on-time performance metric, AAR will address those proposals in its reply.

## CONCLUSION

The Board should terminate this proceeding for lack of authority to define On-Time Performance under PRIIA § 213. If the Board proceeds with this rulemaking, it should modify its proposed rule as set forth above.

Respectfully submitted,

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