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Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Thomas H. Dupree Jr.
Direct: +1 202.955.8547
Fax: +1 202.530.9670
TDupree@gibsondunn.com

January 7, 2015

VIA ELECTRONIC FILING

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

Re: In Re: National Railroad Passenger Corporation's Complaint to Initiate Investigation of the Performance of the Capitol Limited (STB Docket No. NOR 42141)

Dear Ms. Brown,

Enclosed for filing in the above-referenced docket is CSX Transportation's Response to the National Railroad Passenger Corporation's Complaint to Initiate Investigation of the Performance of the Capitol Limited.

Please note that CSXT uses a different caption for this matter because Amtrak's proposed caption is incorrect for two reasons. First, it presupposes that the Board has already launched an investigation. Second, it concludes that the performance of the Capitol Limited is "substandard" before an investigation has occurred.

Thank you for your assistance with this matter.

Sincerely,

/s/ Thomas H. Dupree, Jr.

Thomas H. Dupree, Jr.

Counsel for CSX Transportation, Inc.

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. NOR 42141

**IN RE NATIONAL RAILROAD PASSENGER CORPORATION'S
COMPLAINT TO INITIATE INVESTIGATION OF THE
PERFORMANCE OF THE CAPITOL LIMITED**

**CSX TRANSPORTATION'S RESPONSE TO
THE NATIONAL RAILROAD PASSENGER CORPORATION'S
COMPLAINT TO INITIATE INVESTIGATION**

Peter J. Shudtz
CSX TRANSPORTATION, INC.
1331 Pennsylvania Avenue, N.W.
Suite 560
Washington, D.C. 20004
Tel. (202) 783-8124
peter_shudtz@csx.com

Paul R. Hitchcock
Cindy Craig Johnson
Sean M. Craig
CSX TRANSPORTATION, INC.
500 Water Street, J150
Jacksonville, FL 32202-4423
Tel. (904) 359-1192
paul_hitchcock@csx.com

Thomas H. Dupree, Jr.
John Christopher Wood
Michael K. Murphy
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. (202) 955-8500
tdupree@gibsondunn.com

Charles D. Nottingham
CHARLES D. NOTTINGHAM PLLC
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006
Tel. (202) 215-5456
chipnottingham@verizon.net

Counsel for CSX Transportation, Inc.

Dated: January 7, 2015

CSX TRANSPORTATION'S RESPONSE TO THE NATIONAL RAILROAD PASSENGER CORPORATION'S COMPLAINT TO INITIATE INVESTIGATION

On November 17, 2014, the National Railroad Passenger Corporation (“Amtrak”) filed a Complaint seeking to invoke the Board’s authority, pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), 49 U.S.C. § 24308(f), to initiate an investigation of Amtrak’s Capitol Limited service. CSX Transportation, Inc. (“CSXT”) respectfully responds as follows:

PRELIMINARY STATEMENT

CSXT and Amtrak have long defined their relationship by contract. The Operating Agreement between the companies—first signed in 1971 and renegotiated over the years, most recently in 2005—sets forth the terms and conditions under which Amtrak trains may operate on CSXT tracks. One element of the Operating Agreement is a provision that establishes performance standards and a system of financial incentives aimed at helping Amtrak achieve on-time performance.

Hosting Amtrak trains on busy rail lines is complex and difficult. Businesses and consumers across CSXT’s 23-state network and throughout the United States rely on freight rail for on-time deliveries. Just as air traffic controllers must manage takeoffs and landings at a busy airport, CSXT must sequence Amtrak trains in a way that gives Amtrak its statutory preference rights while at the same time ensuring that freight traffic can continue to move efficiently and safely. Working under the terms of their Operating Agreement, CSXT and Amtrak have for decades been able to navigate these challenges, working cooperatively to the benefit of freight and passenger service alike.

Amtrak now seeks to jettison this cooperative framework. Rather than work with CSXT to address the on-time performance of the Capitol Limited, Amtrak has filed a complaint asking

the Board to launch an investigation against CSXT based on not-yet-defined standards that may very well differ from the standards the parties negotiated and agreed to apply in their Operating Agreement.

Amtrak's complaint came without warning. Even though Amtrak and CSXT are in regular contact monitoring and discussing the performance of Amtrak trains on CSXT track, and even though Amtrak and CSXT routinely work together to resolve problems arising on the Lakeshore Limited and other routes, Amtrak never raised its concerns about the Capitol Limited with CSXT. Instead, by filing its complaint without any attempt at discussion or negotiation, Amtrak seeks to make litigation before the Board the first step in the process, rather than the last resort after all other efforts have failed.

The Board should dismiss Amtrak's complaint because it is based on a statutory scheme that has been invalidated. The D.C. Circuit's decision striking down PRIIA Section 207's Metrics and Standards—including the On-Time Performance standard—means that there is no longer any triggering mechanism for an investigation. As CSXT explains in its Motion to Dismiss, the Board therefore lacks the authority to begin an investigation—or to circumvent the D.C. Circuit's ruling by creating its own definition of On-Time Performance. For that reason, the Board should decline to open an investigation and should dismiss this proceeding with prejudice.

If it proceeds, the investigation will show that the performance of the Capitol Limited is not due to a failure to give preference to Amtrak. To the contrary, CSXT works hard to keep Amtrak trains running on time—even when they arrive on CSXT tracks behind schedule, even when Amtrak is responsible for the delay, and even when giving preference to Amtrak trains means that other passenger and freight traffic will be delayed. CSXT goes the extra mile every

day to accommodate Amtrak trains—often at the expense of its own business—and the Board should reject Amtrak’s effort to blame CSXT for problems of its own creation.

The preference requirement does not require freight railroads to give Amtrak trains absolute priority in every circumstance. That would be an absurd standard—and one that would destroy shippers by creating gridlock and effectively bringing freight rail operations to a halt throughout the United States. The preference requirement contemplates a co-existence between freight and passenger rail that provides Amtrak with its statutory rights while at the same time ensuring that the entire rail network moves safely and fluidly. It is a mandate that must be applied in the context of particular trains and particular routes, taking into account not just the needs of Amtrak and its passengers, but also the millions of commuter rail passengers and the millions of consumers and businesses who depend on an effective freight rail network.

The suggestion that Amtrak’s dismal financial performance is due to a failure to give its trains preference is baseless. In the event this proceeding were to reach the merits stage, CSXT intends to introduce evidence demonstrating how Amtrak’s problems are directly attributable to its own failings, including unrealistic scheduling and a host of managerial and operational deficiencies that have long plagued Amtrak and that have nothing to do with the freight railroads that host Amtrak trains.

For now, however, the Board should do two things in the event it does not dismiss this proceeding outright.

First, it should refer the parties to mediation, just as it did in the *Canadian National* case. “The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible,” 49 C.F.R. § 1109.1, and this dispute is a classic candidate for a mediated resolution. The parties have historically worked

together in a cooperative spirit, and even though Amtrak filed its complaint without any attempt at compromise, there is no reason to believe that a negotiated settlement would be unachievable in this case.

Second—and again, only in the event it denies CSXT’s motion to dismiss—the Board should develop an On-Time Performance standard through notice-and-comment rulemaking. Now-Vice Chairman Begeman was correct in explaining that an industry-wide rule of such significance should not be created through an adjudicative proceeding involving Amtrak and a single freight railroad. A formal notice-and-comment rulemaking proceeding will assist the Board in evaluating the strengths and weaknesses of various proposed definitions. Particularly given the pendency of a U.S. Supreme Court decision on the Metrics and Standards, there is no reason for the Board to rush to judgment by adopting a new definition through an adjudication in which many critical stakeholders may not have the chance to be heard.

RESPONSE

I. The Board Should Direct The Parties To Mediation.

“The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible.” 49 C.F.R. § 1109.1; *see also id.*, § 1109.2 (permitting any party to request an order from the Board commencing mediation). Mediation is warranted here, for several reasons.

First, CSXT and Amtrak have a long history of working together to resolve disputes. In the past, when presented with difficult questions of how best to accommodate the competing needs of freight and passenger traffic, they have worked under the terms of their Operating Agreement to successfully negotiate mutually acceptable resolutions. There is no reason to believe that CSXT and Amtrak would be unable to work out a similar resolution as to the challenges presented by the Capitol Limited.

Second, the present dispute is unusual in that Amtrak made no effort to resolve these problems through the usual informal channels before filing its complaint. This stands in stark contrast to how the parties have long resolved problems arising on other routes. For example, CSXT and Amtrak meet quarterly to discuss challenges facing Amtrak's Lakeshore Limited line, and have weekly phone calls to ensure that developing problems are quickly identified and resolved. Amtrak did not make similar efforts to resolve its concerns regarding the Capitol Limited line before filing its complaint.

Third, mediation would benefit the parties and the Board by clarifying the issues in dispute. Amtrak's bare-bones complaint offers little guidance as to its precise grounds for concern. In this regard, its complaint is very different from the complaint Amtrak filed in the *Canadian National* proceeding that provided far more factual detail and crystalized the disputed issues far better than does its complaint in this case. Mediation would give Amtrak the chance to elaborate on its concerns and afford the parties the chance to see if the dispute can be narrowed or resolved short of litigation.

Fourth, mediation will not unduly delay resolution of this dispute. The Board could ask the parties to provide a status report within 30 days—or whatever time period the Board deems appropriate—at which point the litigation would resume if the parties have concluded that mediation is unlikely to bear fruit.

For all these reasons, the Board should refer to parties to mediation, in accordance with the Board's policy of resolving disputes through mediation "whenever possible." 49 C.F.R. § 1109.1. Such an approach would be consistent with the way the Board handled the *Canadian National* proceeding. See *Nat'l. R.R. Passenger Corp.—Section 213 Investigation of*

Substandard Performance on Rail Lines of Can. Nat'l. Ry. Co., Dkt. No. NOR 42134, Decision at 1 (STB Apr. 3, 2012) (granting request for Board-supervised mediation).

II. If The Board Elects To Proceed, It Should Commence A Notice-And-Comment Rulemaking.

The Board lacks the authority to define On-Time Performance—Congress delegated that authority to the FRA and Amtrak. The D.C. Circuit’s invalidation of that authority does not somehow transfer it to the Board. *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.”).

If, however, the Board concludes that it has this authority, it should proceed through notice-and-comment rulemaking rather than through adjudication in the *Canadian National* matter. A definition of On-Time Performance “will most assuredly be used in all other current and future cases, and have a far-reaching impact on the entire industry.” *Nat'l. R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Can. Nat'l. Ry. Co.*, Dkt. No. NOR 42134, Decision at 11-12 (STB Dec. 19, 2014) (Commissioner Begeman, dissenting). Vice Chairman Begeman was correct in explaining that a definition with industry-wide significance should not be created through an adjudicative proceeding involving a small fraction of the affected stakeholders.

Notice-and-comment rulemaking will allow all stakeholders—Amtrak, freight railroads, commuter railroads, shippers, and passengers—to have a say in the process. Indeed, Congress believed that the definition of On-Time Performance was sufficiently important—and would have such broad impact—that it required the FRA and Amtrak to consult with a variety of

stakeholders in developing a definition. Specifically, Congress directed the rulemakers to develop the On-Time Performance standard (and other standards) “in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers.” PRIIA § 207(a). Were the Board to proceed through adjudication, nearly all of these voices and perspectives would be cut out of the process—directly contrary to the express intent of Congress.

The Board’s discretion to proceed through adjudication rather than notice-and-comment rulemaking is not absolute. “[T]here may be situations where [an agency’s] reliance on adjudication would amount to an abuse of discretion.” *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974). “Such a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency’s previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application.” *Pfaff v. U.S. Dept. of Housing and Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996); *see also id.* at 749 n.4 (“Adjudication is best suited to incremental developments to the law, rather than great leaps forward.”). Indeed, federal courts have long held that agencies cannot issue broad, generally-applicable rules through adjudication. *See, e.g., First Bancorp. v. Bd. of Governors of the Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984) (agency may not “propose legislative policy by an adjudicative order” or use adjudication to make “a broad policy announcement” with “no adjudicative facts having any particularized relevance” to the proceeding); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1982) (agency improperly proceeded by adjudication where its order had “general application” and did

“far more than remedy a discrete violation”); *Patel v. Immigration & Naturalization Serv.*, 638 F.2d 1199, 1205 (9th Cir. 1980) (agency “improper[ly] circumvent[s]” the rulemaking procedure when it uses an adjudication to develop criteria that “do[] not call for a case-by-case determination” and “may be stated and applied as a general rule even though the result may vary from case to case”).

One of the leading administrative law treatises states that there is “near unanimity” between judges and academics in “extolling the virtues of the rulemaking process over the process of making ‘rules’ through case-by-case adjudication.” 1 Pierce, *Administrative Law* (4th ed. 2002) § 6.8, p. 368. These reasons include: (1) rulemaking often leads to higher-quality rules, since the agency receives more input than in an adjudication against one party; (2) enhanced political oversight, since the notice period allows potentially affected parties to notify politicians, while adjudications often provide no warning about the “rules” being set forth until after the fact; (3) rulemaking is less costly than case-by-case adjudication; (4) rules are more clear than agency opinions; (5) adjudication focuses all the costs of an adverse decision on one actor in the field, while others learn of the outcome at no cost to themselves; and (6) adjudication leads to more disparate action by the regulators, who can pick and choose targets. *Id.* at 368-73.

All of these concerns counsel strongly in favor of defining On-Time Performance through notice-and-comment rulemaking. As Vice Chairman Begeman recognized, *see Canadian National*, slip op. at 12, rulemaking will “establish clear standards” through an “inclusive” process that will give all interested parties a voice and will “present the Board with a wide-ranging analysis of the potential standards”—precisely as Congress directed. Indeed, it would be anomalous for the Board to conclude that it may define On-Time Performance without consulting with all interested stakeholders, when Congress specifically prohibited the FRA and

Amtrak from defining On-Time Performance until after it had consulted with a variety of groups. Moreover, now that there are two pending complaints requesting Section 213 investigations, it would be unusual and unfair to develop key legal standards in the context of one proceeding—and then automatically apply them to the parties in the other proceeding.

It would be particularly unwise for the Board to proceed through adjudication at a time when shippers are expressing heightened concern over freight service. *See generally United States Rail Service Issues—Performance Data Reporting*, Dkt. No. EP 724 (Sub-no. 4). Shippers and their customers depend on reliable freight rail service, and they should be given a fair opportunity to voice their concerns in a rulemaking proceeding open to comment from every interested party.

For all these reasons, the Board should proceed through notice-and-comment rulemaking before issuing an On-Time Performance standard that will have “a far-reaching impact on the entire industry.” *Canadian National*, slip op. at 12 (Commissioner Begeman, dissenting).

III. CSXT’s Response to Amtrak’s Allegations

Paragraph 1: CSXT admits that Amtrak trains number 29 and 30, marketed as the Capitol Limited line, operate on CSXT tracks from Washington, D.C. northwest through Rockville, Maryland, into Martinsburg, West Virginia, through Cumberland and Connellsville, Maryland, and finally into western Pennsylvania. Upon information and belief, the operations extend on Norfolk Southern Railway (“NSR”)-owned track through Pittsburgh, Pennsylvania westward through Ohio and Indiana, and terminate in Chicago, Illinois. CSXT-owned track accounts for less than 40 percent of the route miles on the Capitol Limited. The Capitol Limited also operates on segments of Amtrak-owned track and connects two of Amtrak’s most congested terminals.

Paragraph 2: CSXT admits that it is a rail carrier and one of two freight rail carriers over which Amtrak operates the Capitol Limited service.

Paragraph 3: CSXT neither admits nor denies this allegation, as it relates to NSR.

Paragraph 4: This paragraph asserts legal conclusions, as to which no response is required. To the extent the paragraph calls for a response, the allegations are denied.

CSXT further states that the Board should not adopt Amtrak's proposed methods of defining On-Time Performance. As explained in CSXT's motion to dismiss, the Board lacks the statutory authority to issue its own definition. And even if it had such authority, the Board should develop its definition through notice-and-comment rulemaking rather than through adjudication.

Moreover, Amtrak's proposed definitions of On-Time Performance are unfair, unworkable, and would force the Board to expend its limited resources on mandatory investigations of freight railroads that are not responsible for Amtrak delays. Both of Amtrak's proposed definitions—"All-stations on time performance" and "Endpoint on time performance"—are overbroad because they measure delays without taking into account whether the Amtrak train was already running late when it arrived on the host freight railroad's tracks. If a host railroad regularly receives an Amtrak train an hour behind schedule, it would be subject to a mandatory investigation at Amtrak's request even though it may have been impossible for the freight railroad to ensure a satisfactory "All-stations on time performance" or "Endpoint on time performance." Another flaw in Amtrak's proposed definitions is that it fails to account for situations where an Amtrak train operates on the tracks of more than one freight railroad over the course of its journey. Even if the first freight railroad to host the Amtrak train meets all the On-Time Performance requirements (by any applicable standard), it still could be subject to a

mandatory investigation if delays occur once the Amtrak train has left its tracks and is operating on the tracks of the second freight railroad.

In the event the Board proceeds to define On-Time Performance through adjudication in *Canadian National*, CSXT will move to intervene for the limited purpose of submitting a brief concerning the Board's authority to define, and the proper definition of, On-Time Performance and any other relevant standards and definitions. Any definition of On-Time Performance must account for delays that occur before the Amtrak train arrives on the tracks of the host railroad. Any definition must also consider the performance of each host railroad separately.

Paragraph 5: This paragraph contains a request for relief, as to which no response is required. To the extent a response is called for, CSXT states that the Board lacks authority to begin an investigation under 49 U.S.C. § 24308(f)(1).

Paragraph 6: This paragraph contains a request for relief, as to which no response is required. To the extent a response is called for, CSXT denies that the alleged delays of the Capitol Limited are attributable to CSXT's failure to provide preference under 49 U.S.C. § 24308(c).

Should the Board begin an investigation of the Capitol Limited's performance, it must "determine whether and to what extent delays . . . are due to causes that could . . . reasonably [be] addressed by Amtrak" 49 U.S.C. § 24308(f)(1). That inquiry should focus on all potential root causes of the alleged delays, including deficiencies in Amtrak's operations and its unrealistic scheduling. *See id.* (Board may consider extent to which scheduling contributes to delays).

Respectfully submitted,

Peter J. Shudtz
CSX TRANSPORTATION, INC.
1331 Pennsylvania Avenue, N.W.
Suite 560
Washington, DC 20004
Tel. (202) 783-8124
peter_shudtz@csx.com

Paul R. Hitchcock
Cindy Craig Johnson
Sean M. Craig
CSX TRANSPORTATION, INC.
500 Water Street, J150
Jacksonville, FL 32202-4423
Tel. (904) 359-1192
paul_hitchcock@csx.com

/s/ Thomas H. Dupree, Jr.
Thomas H. Dupree, Jr.
John Christopher Wood
Michael K. Murphy
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. (202) 955-8500
tdupree@gibsondunn.com

Charles D. Nottingham
CHARLES D. NOTTINGHAM PLLC
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, DC. 20006
Tel. (202) 215-5456
chipnottingham@verizon.net

Counsel for CSX Transportation, Inc.

Dated: January 7, 2015

CERTIFICATE OF SERVICE

I certify that, on this 7th day of January, 2015, I have caused a true and correct copy of the foregoing Response to the National Railroad Passenger Corporation's Complaint to Initiate Investigation to be served upon the parties listed below by electronic mail.

William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Linda J. Morgan
lmorgan@nossaman.com
Kevin M. Sheys
ksheys@nossaman.com
Katherine C. Bourdon
kbourdon@nossaman.com
Nossaman LLP
1666 K Street N.W., Suite 500
Washington, D.C. 20006

Counsel for National Railroad Passenger Corporation

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
dmeyer@mofoc.com
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W., Suite 6000
Washington, D.C. 20006

Counsel for Norfolk Southern Railway Company

/s/ Thomas H. Dupree, Jr. _____
Thomas H. Dupree, Jr.