

HARKINS CUNNINGHAM LLP

Attorneys at Law

dhirsh@harkinscunningham.com
Direct Dial: (202) 973-7601

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804

Telephone 202.973.7600
Facsimile 202.973.7610

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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: Section 213
Investigation of Substandard Performance on Canadian National
Railway Company Rail Lines (Docket No. NOR 42134)***

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find (1) CN's Response to Amtrak's Proposed Procedural Framework and (2) CN's Motion for Leave to file that response.

Very truly yours,



David A. Hirsh

Counsel for Canadian National Railway Company,
Grand Trunk Western Railroad Company, and
Illinois Central Railroad Company

Enclosures

cc: David W. Ogden, Esquire
William Herrmann, Esquire

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42134

NATIONAL RAILROAD PASSENGER CORPORATION –
SECTION 213 INVESTIGATION OF SUBSTANDARD
PERFORMANCE ON RAIL LINES OF CN

**CN'S RESPONSE TO AMTRAK'S PROPOSED
PROCEDURAL FRAMEWORK**

Sean Finn
Olivier Chouc
CN
P.O. Box 8100
Montréal, QC H3B 2M9
(514) 399-5081

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608
(202) 347-7840

Paul A. Cunningham
David A. Hirsh
Simon A. Steel
Richard B. Herzog
James M. Guinivan
Matthew W. Ludwig
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

*Counsel for Canadian National Railway Company,
Grand Trunk Western Railroad Company, and
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On November 5, 2012, the Board instructed the parties to “submit to the Board in writing, jointly, if possible, a proposed procedural framework.” On November 26, having failed to reach agreement, the parties submitted competing procedural proposals (“CN Framework,” “Amtrak Framework”). CN restated, with appropriate updating, the procedural framework it had proposed in its March 9, 2012 Response to Amtrak’s January 19, 2012 Petition that commenced this proceeding. Amtrak criticized CN’s proposed framework and, for the first time, stated its own proposal. Thus, Amtrak had the opportunity to respond to CN. In contrast, CN has not until now had the opportunity to respond to Amtrak. Therefore, and pursuant to the accompanying Motion for Leave to Respond, CN responds to Amtrak’s filing, as follows.

INTRODUCTION AND SUMMARY

Amtrak would provide no opportunity for the parties to update the pleadings, to file briefs, or to make evidentiary proffers. Nor would it allow the parties to bring to bear their extensive knowledge and expertise and assist the Board in developing and clarifying the issues as the proceeding progresses. It would preclude public comment or third-party participation in a major, first-of-its-kind, precedent-setting proceeding. It would offer none of the logical

sequencing and narrowing of the issues that will be required to make the proceeding manageable and efficient.¹ And most significantly, Amtrak's proposal would deprive CN of constitutional due process in a proceeding in which CN is at risk of damages.

Beyond reminding the Board that it has a duty to conduct an "investigation" (*id.* at 5) – which was the *premise* of the Board's call for procedural proposals – Amtrak's main proposal is that the Board impose a 270-day deadline on the entire proceeding (including both recommendations under 49 U.S.C. § 24308(f)(1) and any damage award under 49 U.S.C. § 24308(f)(2)) (*id.* at 3-4). There is no legal basis for Amtrak's proposed deadline, and establishing a deadline would be premature at this early stage of the proceeding, particularly when Amtrak resists any narrowing of the issues raised by its overbroad, inaccurate, and outdated Petition. Rational procedures such as those that CN has proposed will help the Board to perform efficiently and fairly the tasks Congress has set it; arbitrary deadlines will not.

Amtrak complains that "[t]here has been enough delay" since Amtrak filed its Petition in January (Amtrak Framework at 7). Amtrak ignores the facts that (i) the "delay" was a product of Amtrak's own motion, along with CN, to hold the proceedings in abeyance for mediation, and (ii) the parties used the delay to improve the performance of Amtrak's trains.² Amtrak also

¹ The unreasonableness of Amtrak's resistance to any narrowing of the investigation in light of post-Petition developments (Amtrak Framework at 5) and its failure to provide for any means for the parties to inform the Board of post-Petition developments is underscored by Amtrak's challenge relating to the Cardinal and Hoosier State services. These two services (out of the eight services that were the subject of Amtrak's Petition) not only operate almost entirely over other carriers, but the short 5.8-mile segment of CN in greater Chicago that they traverse is scheduled, subject to final Board approval, to be acquired by CSX before the close of first calendar quarter 2013 as part of CSX's acquisition of an exclusive perpetual operating easement. *See CSX Transp., Inc. – Acquisition of Operating Easement – Grand Trunk W. R.R.*, Docket No. FD 35522 (STB served Sept. 12, 2012). CSX would then replace CN as Amtrak's host.

² Since the parties' November 26 filings, settlement negotiations have ceased to be active. But CN continues to strive to work together with Amtrak to improve Amtrak's performance.

expresses concern that “tens of thousands of Amtrak passengers continue to suffer inordinate delays and substandard performance on CN rail lines,” adding inflammatory and unsupported characterizations of CN’s current conduct (*id.*), while ignoring the reality that CN’s performance against Amtrak’s schedules as measured under the Amtrak-CN Operating Agreement (as opposed to error-prone PRIIA measures) has averaged well over 90% for the year.³

Moreover, Amtrak offers no constructive solutions to its asserted concerns. What would help any passengers who are currently suffering delays is for the Board to focus on the real remaining issues and prioritize a thorough and efficient investigation of delays, including all their causes, culminating in balanced, forward-looking practical recommendations for improvement, as prescribed by Congress in 49 U.S.C. § 24308(f)(1). CN’s bifurcated proposal provides for just such a process: the Board would first conduct an informal inquiry under 49 U.S.C. § 24308(f)(1), and thereafter, as appropriate, proceed under 49 U.S.C. § 24308(f)(2), with necessary due process, to address legal and factual issues concerning preference, damages, and other remedies. In contrast, Amtrak’s proposal would require the Board to postpone publishing recommendations until it had resolved a wide array of complex legal and factual issues relating to preference and, potentially, damages arising under 49 U.S.C. § 24308(f)(2)-(3).

In sum, Amtrak’s proposal would deprive CN of due process, deprive the Board of necessary information and valuable perspectives on important issues of first impression, and likely delay the forward-looking recommendations that could benefit passengers.

³ The tension between Amtrak’s legal posturing and the real progress that has been achieved on the operating level underscores one of the benefits of separating the Board’s practical recommendations function under subsection (f)(1) from its adjudicatory function under subsection (f)(2), as CN has advocated.

I. AREAS OF AGREEMENT

There appear to be the following areas of partial agreement between CN and Amtrak:

- As noted in the CN Framework, the parties agree that formal adversarial process, including party-initiated discovery, is not necessary for the Board to accomplish its investigation and recommendation task under 49 U.S.C. § 24308(f)(1) (in CN’s terms, Phase I). However:
 - CN believes that adversarial process is necessary, as a matter of fairness and due process, for the Board’s “preference” determination and remedial task under 49 U.S.C. § 24308(f)(2)-(3) (in CN’s terms, Phase II), whereas
 - Amtrak opposes bifurcation and opposes any adversarial process beyond comments after a preliminary Board decision.
- The parties agree that before gathering information, the Board should obtain further guidance from the parties. *See* CN Framework, Appendix at ¶ 3(b); Amtrak Framework at 3. However:
 - CN’s proposal calls for substantive briefing, with evidentiary support, on the issues that the Board is required to address under 49 U.S.C. § 24308(f)(1), with updating to ensure that the Board does not waste time investigating stale data and issues that have already been resolved, whereas
 - Amtrak does not provide for any briefing or presentation of evidence by the parties, or for updating, and opposes narrowing the issues. *See* Amtrak Framework at 3-5. Instead, Amtrak proposes that the parties submit “proposed investigation plans.” *Id.* at 3.⁴

⁴ It is not clear what Amtrak means by “proposed investigation plans.” If that were a short-hand for the substantive briefing CN proposed in its Response to Amtrak’s Petition nine months ago, presumably Amtrak would say so. Amtrak may intend to confine the parties to submitting discovery-like wish-lists of information to demand from the opposing party, without mapping out and updating the issues and without opportunity for response other than by objection to subpoenas. But such a process would not help the Board discharge either of its statutory responsibilities. Without briefs and evidence clarifying and narrowing the issues, discovery wish-lists will not enable the Board to engage in efficient, targeted fact-finding and to develop constructive recommendations under 49 U.S.C. § 24308(f)(1). And, as elaborated in the next section, confining the parties to a “proposed investigation plan” before arriving at a decision on damages under 49 U.S.C. § 24308(f)(2) would both deprive CN of due process and deprive the Board of the briefing and evidentiary presentations necessary to inform a reliable adjudication.

- The parties agree that they should have the opportunity to comment on any recommendations the Board proposes. *See* CN Framework, Appendix at ¶ 3(f)-(g); Amtrak Framework at 4. However:
 - CN proposes simultaneous party and public comment on proposed recommendations (CN Framework, Appendix at ¶ 3(g)) and, separately, briefing by the complainant, Amtrak, followed by a response by the accused, CN, with respect to allegations of preference violation and claims for damages and other relief (*id.* ¶ 4(h)), whereas
 - Amtrak would allow the parties (and only the parties) just a single simultaneous opportunity, after the Board has completed its fact-finding process and issued a preliminary decision, to comment on recommendations, alleged violations, and relief, thus giving CN no opportunity to defend itself before the Board issues a preliminary decision, no opportunity to participate in the fact-finding process, and no opportunity to respond to Amtrak’s comments. *See* Amtrak Framework at 3-4.

- The parties agree that the Board should proceed efficiently and expeditiously. However:
 - CN proposes a logical process to narrow the issues and a logical sequencing of procedures to render the investigation manageable, efficient, and fair, and particularly to expedite forward-looking recommendations, whereas
 - Amtrak proposes artificial deadlines, while opposing narrowing the issues and opposing giving priority to the Board’s forward-looking recommendations function.

II. SHORTCOMINGS OF THE AMTRAK FRAMEWORK

A. Amtrak’s Framework Would Deprive CN Of Due Process With Respect To Any Preference And Damages Determinations.

PRIIA assigns to the Board two very different tasks:

- (1) broad-based fact-finding regarding delays generally and their various causes, culminating in practical, forward-looking public interest recommendations – a task akin to rulemaking (49 U.S.C. § 24308(f)(1)); and
- (2) legal determination of specific allegations of statutory preference violation, potentially culminating in damages calculated in light of judgments concerning deterrence and financial losses – an adjudicatory function (49 U.S.C. § 24308(f)(2)-(3)).

The Board's first task, culminating in non-binding recommendations, raises no due process concerns, although a sensibly structured fact-finding process with appropriate party and public participation should be adopted to enable the Board to perform it efficiently and effectively. But the Board's second task puts CN at risk of potentially substantial damages. Accordingly, when the Board addresses its second task, the Fifth Amendment, as well as basic considerations of fairness and sound and reliable administrative procedure, requires that CN be afforded, at a minimum, the opportunity to defend itself, by gathering and presenting evidence, with notice of the specific allegations and legal standards at issue, before the Board considers issuing any adverse award against it. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citation omitted); *In re Ruffalo*, 390 U.S. 544 (1968) (due process violated when lawyer was not given fair notice of specific charges against him before disbarment proceedings).⁵

Amtrak's proposal would deprive CN of due process. Amtrak proposes a single, undifferentiated, non-adversarial process to accomplish the Board's two distinct tasks. Under Amtrak's proposal, the Board would make a determination regarding damages under 49 U.S.C. § 24308(f)(2), with:

⁵ *See also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 542 (1978) ("[E]ven in a rule-making proceeding when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds,'" in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process") (citations omitted); *Railroad Comm'n of Texas v. United States*, 765 F.2d 221, 228 (D.C. Cir. 1985) ("While the Staggers Act itself does not trigger the formal hearing requirements of the APA, the ICC nonetheless 'must conduct whatever proceedings are necessary to ensure that it has sufficient information so that its final decision reflects a consideration of the relevant factors. . . . An evidentiary hearing must be conducted when there are disputed issues of material fact.'") (citation omitted); 49 U.S.C. § 706(a) (any Board award of damages must be supported by findings of fact).

- no sufficient notice to CN of which specific allegations in Amtrak’s 119-paragraph Petition are alleged to constitute preference violations, and why;⁶
- no notice to CN of how the Board will define or otherwise address the disputed statutory concept of “preference,” which has never been authoritatively interpreted;
- no assurance of an opportunity for CN to see any evidence against it;
- no opportunity for cross-examination;
- no opportunity for CN to brief or argue to the Board regarding legal issues such as the meaning of preference, or regarding relevant factual issues;
- no opportunity for CN to present its own fact and/or expert evidence;
- no opportunity for CN to gather evidence by party-initiated discovery;
- no opportunity for CN to see, comment on, or provide any evidence regarding the factors relevant to determining any damages under 49 U.S.C. § 24308(f)(3); and
- no opportunity for CN and the Board to develop a record for potential judicial review under 28 U.S.C. § 1336(a) or §§ 2321 & 2342).

Amtrak’s proposal would allow CN only two inadequate opportunities to participate in a proceeding to determine whether it should be required to pay damages. First, CN could submit a “proposed investigation plan” to the Board at the outset of the investigation. Whatever a “proposed investigation plan” is, it does not appear intended to provide for argument regarding

⁶ Amtrak’s Petition offers no definition of “preference,” but appears to concede that a preference violation must involve a decision by a dispatcher. *See, e.g.*, Petition ¶¶ 15, 17. However, the specific allegations of Amtrak’s Petition addressing decisions by CN dispatchers are minimal, and are confined to 4 of the 8 train services encompassed by Amtrak’s Petition (*id.* ¶¶ 91-93, 97). Amtrak calls those allegations “examples” of a “pattern and practice” of preference violations (*id.* ¶ 97), which Amtrak says is “suggest[ed]” by Amtrak’s FTI (“freight train interference”) data (*id.* ¶ 98). But an allegation of FTI is not in and of itself an allegation of a preference violation. For example, Amtrak routinely records as “FTI” instances in which an Amtrak train is unavoidably blocked by a disabled freight train, instances in which an Amtrak train is delayed at an interlocking not controlled by the host carrier, and delays caused when Amtrak trains arrive late and unpredictably, and thus unavoidably find themselves behind freight trains. – none of which can be attributed to a dispatcher decision to deny Amtrak preference. Thus, Amtrak’s allegation of a “pattern and practice” of preference violations is too vague to give CN or the Board notice of what, if any, specific alleged conduct Amtrak seeks to make the subject of adjudication under 49 U.S.C. § 24308(f)(2).

the merits or for presentation of evidence. The opportunity to propose that the Board, in its discretion, investigate particular issues or sources of evidence is no substitute for the opportunity for a party to actually develop and present evidence and argument. And CN cannot effectively defend itself under 49 U.S.C. § 24308(f)(2) by submitting a “proposed investigation plan” at the outset of the Board’s investigation, because (i) Amtrak’s Petition does not give CN notice of what specific conduct is alleged to constitute a preference violation (*see* n.6, *supra*), (ii) CN does not yet have notice of what kinds of conduct the Board may consider, under what standards, to constitute potential preference violations,⁷ and (iii) CN does not yet know what evidence may be used against it.

Second, Amtrak’s proposal would allow the parties a brief opportunity, *after* the Board concludes its fact-finding process and issues preliminary findings, recommendations, and any awards, including damages, against CN, to “provid[e] comments on the preliminary findings and, if desired, propos[e] additional recommendations and other remedial measures.”⁸ Amtrak

⁷ There has never been an authoritative interpretation of the statutory preference obligation, and its meaning has been controversial for decades. Without guidance from the Board, CN does not know whether it needs to defend the decisionmaking of CN dispatchers in certain specific circumstances (*e.g.*, when freight and Amtrak trains are known to be approaching a switch almost simultaneously), the decisionmaking of dispatchers more generally, or some broader category of conduct.

A further issue is how the Board will consider exceptions to the general statutory preference requirement, including what constitutes an emergency or a material lessening of the quality of freight transportation. *See* 49 U.S.C. § 24308(c). These issues may arise: (i) in making practical recommendations under subsection (f)(1); (ii) in considering violations and damages under subsection (f)(2); and (iii) if CN seeks formal relief from preference under subsection (c). CN’s proposal would allow the Board and the parties to address these issues in an orderly manner as they arise, including, if necessary, permitting an application by CN under subsection (c) as an integral part of Phase II. Under Amtrak’s proposal, it is not apparent how these issues would or could be given due consideration, and CN might need to file a sweeping hypothetical application for relief under subsection (c) at an early stage of these proceedings, in order to protect itself.

⁸ Amtrak’s proposal would allocate a maximum of 90 days to (i) the Board’s determination and publication of its preliminary findings, recommendations, and any damage award; (ii) CN and

Framework at 4. That would be too little, too late. Due process and common sense require that the accused have an opportunity to defend itself “at a meaningful time and in a meaningful manner.” *Mathews*, 424 U.S. at 333. Yet Amtrak’s proposal would preclude CN from addressing legal and factual merits issues until after (i) the “fact development phase” has been terminated, and (ii) the Board has issued “preliminary” findings and rulings including, potentially, a damage award. Amtrak Framework at 3-4. That procedure would violate CN’s due process rights. It would also place the Board in the untenable position of having to act simultaneously as detective, expert, prosecutor, defense counsel, judge, and jury, with no assistance from the parties until after it issues its preliminary decision.

B. Amtrak’s Framework Would Delay And Diminish The Value Of Board Recommendations, And Result In Wasted Effort.

CN has proposed a solution – bifurcation – that would permit the expeditious and informal development of recommendations and also, as appropriate, the fair and reliable adjudication of preference and damage claims. Amtrak’s approach, on the other hand, would not be practical, constructive, or efficient. First, given due process requirements, if , as Amtrak suggests, a single undifferentiated process is used for the Board’s two distinct tasks – recommendations under subsection (f)(1) and preference/damages under subsection (f)(2) – it would require the use of full adversarial procedures even to develop the Board’s recommendations. Neither party, however, recommends such procedures as the most efficient

Amtrak comments thereon; and (iii) the Board’s final decision. Amtrak Framework at 3-4. Thus, depending on how long it took the Board to prepare its preliminary and final decisions, CN would have only a short window to address preliminary decisions that might be based in part on evidence that CN had not seen and legal determinations that it could not anticipate. Moreover, Amtrak includes no provision for reply comments. Under Amtrak’s proposal, it could propose new findings and remedies as part of its comments on the Board’s preliminary findings and recommendations and CN would have no opportunity to respond.

means of deriving non-binding recommendations for how the parties (and, potentially, third parties) should work individually and together in the future to improve Amtrak's performance.

Second, because it would involve issuing findings, recommendations, and binding relief simultaneously, Amtrak's approach would prevent the Board from publishing its 49 U.S.C. § 24308(f)(1) recommendations until it had addressed and resolved (in a manner consistent with due process) the full array of complex and controversial legal and factual issues arising under 49 U.S.C. § 24308(f)(2)-(3), including:

- the meaning of the statutory duty of preference;
- what specific conduct Amtrak alleges to be preference violations;
- whether and how CN violated its preference obligation;
- what, if any, delays were caused by preference violations;
- what, if any, evidence supports damages or other remedies; and
- what, if any, remedies are appropriate.

The need to resolve these issues, coupled with the due process requirements applicable to a damages determination, would inevitably delay the Board's issuance of recommendations.

Those delays could be avoided by bifurcating the proceeding, as CN proposes.

Third, Amtrak's approach could diminish the value of the Board's recommendations. If the Board issues recommendations first, as CN proposes (and consistent with Congress's placement of the Board's recommendations function in a separate subsection, before the preference/damages function), the parties will have strong incentives to focus on working cooperatively to implement those recommendations. If, instead, the Board's recommendations emerge only as part of a package that includes rulings on preference and damages, attention will

tend to focus more on what the Board ordered – and on potential enforcement and/or review proceedings – and less on whatever cooperation it recommended.

Finally, Amtrak’s approach would likely lead to wasted effort for the Board and unnecessary burdens on the parties. Under Amtrak’s approach, “proposed investigation plans” filed at the outset of the proceeding would need to anticipate and try to encompass every potential future issue, and would need to be developed without any clarification, updating, or narrowing of the issues, without any specification of what Amtrak alleges to constitute preference violations, without any definition of preference, and without any determination by the Board as to whether there is a preference case to answer. In contrast, a bifurcated approach would enable the Board to identify the relevant delays, identify their causes, identify how best problems could be solved, and consider the efficacy of its recommendations, before deciding what, if any, basis exists for Phase II proceedings. If CN has not violated its preference obligation, or if proceedings aimed at damages for deterrence purposes appear unnecessary because CN’s current conduct is justified in light of the Board’s recommendations, it would be wasteful to proceed further with the factual and legal inquiries required by 49 U.S.C. § 24308(f)(2)-(3).

C. Amtrak’s Framework Does Not Address All The Issues Before The Board.

Subsection (f)(1) provides, in part, that:

[T]he Board shall initiate such an investigation, 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. As part of its investigation, the Board has authority to *review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays*. In making its determination or carrying out such an investigation, the Board shall *obtain information from all parties involved*.

49 U.S.C. § 24308(f)(1) (emphasis added). Amtrak, however, only selectively quotes Congress’s language setting the scope of investigation: “the Board ‘shall initiate’ an investigation ‘to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by [the host railroad].’” Amtrak Framework at 5 (brackets in original).

Amtrak’s selectivity is mirrored in its proposed procedure. Amtrak provides no opportunity for CN or other parties to address “the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays.” It provides no opportunity for CN to develop and present evidence that delays could be “reasonably addressed by Amtrak.” And, in rejecting third-party participation, *id.*, it would deprive the Board of “information from all parties involved” in, for example, situations where delays occur at an interlocking controlled by a third party or on parts of an Amtrak route hosted by other railroads.

Subsection (f)(3) provides that in considering ordering any binding relief against the host carrier, the Board “shall consider . . . the extent to which Amtrak suffers financial loss” and any need for deterrence. Amtrak states that it seeks “damages against CN to remedy Amtrak’s financial loss and adequately deter future actions”⁹ Amtrak Framework at 6. But Amtrak’s proposal ends fact-finding before any finding of violations (*see id.* at 3-4), and it provides no procedure for the parties to develop evidence relevant to damages if and when actions are found to amount to preference violations.

⁹ Based on Amtrak’s Petition, however, the only potential basis for damages is deterrence. Amtrak did not allege any financial losses in its Petition and it did seek damages based on financial losses in its prayer for relief (Petition ¶ 119).

D. Amtrak's Framework Does Not Provide For Public Comment.

Amtrak's proposal makes no provision for public comment at any stage. However, the Board normally provides for public comment before deciding important matters that are likely to impact parties beyond those involved in a particular proceeding.¹⁰ Public comment is particularly appropriate in this investigation, for several reasons:

- It will be precedential. In the absence of implementing regulations, this first investigation under PRIIA will likely define the framework and standards for future PRIIA proceedings. Since the predicate for a PRIIA investigation – failure to meet the PRIIA metrics and standards – exists for most of Amtrak's train services over host railroads, the precedent set here is apt to have nationwide and industry-wide significance.
- It involves important issues of broad public concern, including the reliability and significance of the PRIIA metrics and standards and how best to ensure the co-existence of efficient long-distance passenger rail service and efficient freight rail operations on freight railroad lines. The Board's recommendations or award could impact third parties (such as shippers, Amtrak passengers, commuter rail passengers, and other rail carriers controlling signals or other portions of Amtrak's routes) and/or the environment.¹¹

¹⁰ See, e.g., *U.S. Dep't of Energy v. Baltimore & O. R.R.*, Docket No. NOR 38302S (STB served Oct. 15, 2012) (seeking comments on proposed settlement of case arising out of railroad rates and practices regarding transportation of spent nuclear fuel and other high-level radioactive wastes, and empty containers and buffer and escort cars used for that transportation); *W. Coal Traffic League – Petition for Declaratory Order*, Docket No. FD 35506 (STB served Sept. 28, 2011) (inviting public comment on issues relating to write-up of railroad's net investment base for regulatory purposes as a result of acquisition premium); *Union Pac. R.R. – Petition for Declaratory Order*, STB Finance Docket No. 35219 (STB served Mar. 10, 2009) (requesting comments on petition for declaratory order regarding extent of railroad's common carrier obligation with respect to shipper request for transportation of toxic inhalation hazard commodities); *Simplified Standards for Rail Rate Cases – Taxes in Revenue Shortfall Allocation Method*, STB Ex Parte No. 646 (Sub-No. 2) (STB served June 27, 2008) (soliciting public comments on issue, which had arisen in three rate reasonableness proceedings, regarding treatment of taxes in applying revenue shortfall allocation method under Board's three-benchmark rate reasonableness methodology); *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served Feb. 27, 2006) (soliciting public comments on various issues, which had arisen in pending rate reasonableness cases, regarding application of Board's stand-alone cost methodology); *Arizona Pub. Serv. Co. v. Burlington N. & Santa Fe Ry.*, Docket No. 41185 (STB served Oct. 14, 2003) (industry associations granted right to submit comments as amici on issues of broad industry concern, in rate reasonableness case).

¹¹ When the Board conducted informational hearings on the implementation of PRIIA in the abstract in *Ex Parte No. 683*, the Board received comments from many interested persons and

- It involves important unresolved legal issues, including the meaning and scope of host railroads' obligation to give "preference" to Amtrak trains – an issue that has been unresolved, and controversial, since the obligation was created in 1973.

If the Board were to shut out the public, as Amtrak appears to advocate, it would be deviating from its own practice, depriving itself of valuable information, and depriving third parties of an opportunity to comment on matters of critical potential importance to them.

III. AMTRAK'S ARGUMENTS IN SUPPORT OF ITS FRAMEWORK

A. Amtrak's Framework is Not Dictated by PRIIA.

Amtrak makes three arguments in support of its proposal and against CN's. Its first and third arguments imply that it would be "improper" for the Board to adopt key features of CN's proposal that are missing in Amtrak's proposal. Amtrak argues that there is no "statutory basis" for incorporating in this proceeding public comment, third-party participation, narrowing, and bifurcation, Amtrak Framework at 5, and that CN's two-phase approach "improperly . . . isolat[es] delay data and recommendations from issues of preference." *Id.* at 6. Amtrak, however, does not go so far as to claim that the procedures CN proposes would be unlawful. And any such claim would be baseless.

Amtrak recites that PRIIA requires the Board to conduct an "investigation" and "obtain" the necessary information. But it offers no reason to doubt that the CN Framework is a lawful and apt way for the Board to discharge that responsibility. Amtrak notes that PRIIA does not specifically "mention" public comment, third-party participation, narrowing, and bifurcation. But PRIIA likewise does not mention Amtrak's proposed "investigation plans" or Amtrak's own two-phase concept (*see id.* at 3-4). Nothing in the statute precludes the Board from adopting the

groups. If permitted, public comment in the concrete context of the Board's first proceeding under PRIIA is likely to be at least as wide-ranging and valuable.

procedures CN has proposed. Amtrak cites no precedents supporting the notion that they are “improper,” and it is well-established that when Congress is silent on procedure, the Board has discretion to adopt procedures that will allow it to best fulfill its statutory mission consistent with due process.¹²

Amtrak’s further claim that CN’s proposal would improperly “isolat[e] delay data and recommendations from issues of preference” (*id.* at 6) is incorrect and misses the point. Unlike Amtrak’s proposal, CN’s proposal would permit the parties to raise relevant facts and arguments in each phase of the proceeding, and it would enable the Board to address its two statutory tasks in a logical, orderly manner. The benefits of CN’s proposed bifurcation are clear (*see* section II.B, above; CN Framework at 5-6, 11-12; CN’s Response to Amtrak’s Petition at 72-73), and Amtrak’s claim that bifurcation is “improper” is unsupported.

B. Amtrak’s Framework Would Not Assist the Board In Expediently Carrying Out Its Statutory Mandate.

Amtrak’s remaining argument is that its proposal will result in less delay than CN’s proposal. Amtrak Framework at 5-6, 7. Amtrak seems to believe that the keys to efficiency are (i) omitting such customary procedures as active party participation, public comment, and replies to party filings, and (ii) imposing artificial deadlines on the Board and the parties. *Id.* at 3-4.

The Board should proceed efficiently and expeditiously, but to do so, it need not sacrifice fairness and reliability. Amtrak’s deadlines have no legal basis. Congress set no deadline for

¹² *See, e.g., Vermont Yankee*, 435 U.S. at 543 (“Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”’) (citations omitted); *Railroad Comm’n of Texas*, 765 F.2d at 228 (“Depending upon the nature of the case and the issues requiring resolution, the [agency] has substantial flexibility to structure the hearings it must provide.”) (citation omitted) (brackets in original).

PRIIA proceedings, which is in marked contrast to what Congress has done regarding other proceeding.¹³ And whether or not the Board may ultimately be able to accomplish its statutory tasks in nine months or less, it is premature at this point to arbitrarily limit the proceeding. That is especially true in this first-of-its-kind proceeding in which the Board has complex and important statutory tasks and will set important precedents concerning PRIIA data and future PRIIA proceedings.

Amtrak's proposed deadlines and crude procedural simplifications will not aid the Board in performing its statutory duties. Rather, the Board's progress is likely to be delayed by Amtrak's opposition to providing the Board with updated information, and to narrowing the Petition's scope, and more generally to having the parties play an active role. And Amtrak's resistance to giving priority to the development of recommendations can only delay their practical benefits for Amtrak's passengers.

The real keys to efficiency are constructive and active early participation by the parties (who had extensive experience with the practical issues in the case long before the Board's investigation began), clarification, focusing, and narrowing of the issues, and a logical sequencing of procedures that gives priority to forward-looking recommendations and avoids wasted effort on legal issues that may become moot. CN's more detailed framework offers these features. It is carefully structured to facilitate a rational, focused, systematic sequencing of

¹³ Amtrak argues that because Congress instructed the Board to investigate delays that occurred over a two-quarter period, it must have intended investigations to be brief. Amtrak Framework at 5. But Amtrak chose not to file the one-train, two-quarter petition that Congress contemplated (*see* 49 U.S.C. § 24308(f)(1)), but instead an eight-train, four-quarter petition that implicates the full routes of its services running for thousands of route miles over the lines of many other host carriers. Amtrak also chose to raise issues in January 2012 regarding train performance from as early as October 2010, and then chose to join CN in seeking abeyance. In any event, had Congress wished to set a deadline, it would have said so. *See, e.g.*, 49 U.S.C. § 11325 (merger review time limits).

issues that will lead reliably, expeditiously and without wasted effort to the accomplishment of the Board's tasks. And unlike Amtrak's framework, it addresses essential issues of due process, reliability, and public comment, and substantive issues such as assessment of Amtrak's PRIIA data, non-CN causes of delay, and the meaning of the statutory preference obligation.

CONCLUSION

For the reasons stated above, the Board should reject Amtrak's framework as inadequate and adopt CN's framework.

Respectfully submitted,



Paul A. Cunningham
David A. Hirsh
Simon A. Steel
Richard B. Herzog
James M. Guinivan
Matthew W. Ludwig
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

Sean Finn
Olivier Chouc
CN
P.O. Box 8100
Montréal, QC H3B 2M9
(514) 399-5081

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608
(202) 347-7840

*Counsel for Canadian National Railway Company,
Grand Trunk Western Railroad Company, and
Illinois Central Railroad Company*

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CERTIFICATE OF SERVICE

I certify that I have this 12th day of December, 2012, served the foregoing Response to Amtrak's Proposed Procedural Framework by sending a copy by first-class mail, or a more expeditious method of delivery, to each of the following:

Eleanor D. Acheson
William Herrmann
herrmaw@amtrak.com
Christine Lanzon
lanzonc@amtrak.com
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4285

David S. Molot
david.molot@wilmerhale.com
David W. Ogden
david.ogden@wilmerhale.com
Jonathan E. Paikin
jonathan.paikin@wilmerhale.com
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3642

A handwritten signature in cursive script, appearing to read 'C. Mellen', written over a horizontal line.

Christine A. Mellen