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January 8, 2015

BY E-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: Docket No. NOR 42134, *National Railroad Passenger Corporation – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding please find CN's Answer to Amtrak's Amended Complaint.

Yours truly,

David A. Hirsh

Enclosure

cc: All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42134

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

CN'S ANSWER TO AMTRAK'S AMENDED COMPLAINT

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January 8, 2015

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Pursuant to 49 C.F.R. § 1111.4 and the Decision served December 19, 2014 in this proceeding ("December 19 Decision"), CN[1] answers Amtrak's Amended Complaint filed on August 29, 2014. CN sets forth herein the responsive information typically found in an answer.[2] In addition, because this is the first case brought under 49 U.S.C. § 24308(f) (as enacted by Section 213 of PRIIA),[3] and raises significant issues of first impression, this answer includes some discussion of the legal and factual context of this case, and of the procedural framework applicable to the proceeding.

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[1] "CN," "Amtrak" and other terms and abbreviations are used herein as defined in CN's Response to Amtrak Petition Under Section 213 of PRIIA (filed Mar. 9, 2012) ("CN Response").

[2] The Amended Complaint does not use the normal paragraph numbering of a complaint, and mixes factual allegations with conclusory assertions and legal argument. Accordingly, this answer cannot follow the usual form of responding to discrete allegations by individual paragraph numbers.

[3] For sake of convenience, this Answer sometimes refers to 49 U.S.C. § 24308(f) as "Section 213 of PRIIA."

I. PROCEDURAL BACKGROUND

On January 19, 2012, Amtrak filed its initial Complaint with the Board under Section 213 of PRIIA, requesting an investigation of the performance of eight Amtrak services hosted (in whole or in part) by CN and seeking damages under 49 U.S.C. § 24308(f)(2) for alleged preference violations. That Complaint was based on allegations that certain Amtrak services operating on CN failed to meet the standards established by Section 207 of PRIIA. CN filed a detailed Response on March 9, 2012. With agreement of the parties, the proceeding was held in abeyance between April and November, 2012, to provide an opportunity for Board-supervised mediation, and again between February 2013 and July 2014, for the purpose (among others) of "provid[ing] additional time that may be necessary for final resolution of the constitutionality of Section 207(a)" of PRIIA.[4] *See* Third Joint Status Report at 1 (May 19, 2014).

On August 29, 2014, Amtrak moved to amend its complaint. The Amended Complaint, which was submitted by Amtrak as an attachment to its motion, alleges deficient service and suggests potential preference violations[5] on only one of Amtrak's services hosted by CN, the Illini/Saluki service. It claims the Board has a duty to conduct an investigation under Section 213 of PRIIA, notwithstanding the invalidity of the Section 207 standards, because the "All-

[4] The parties jointly agreed to the second abeyance in light of the decision of the U.S. Court of Appeals for the D.C. Circuit, which held that Section 207 of PRIIA impermissibly delegated regulatory authority to a "private entity" (Amtrak) and therefore was an unconstitutional delegation of power. *AAR v. DOT*, 721 F.3d 666 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2865 (2014). As a result of the court's decision, the standards issued under Section 207, and on which Amtrak grounded its initial Complaint, are invalid. An appeal of the D.C. Circuit's decision has been fully briefed and argued, and is now pending before the Supreme Court, which is expected to issue a decision no later than June 2015.

[5] Under 49 U.S.C. § 24308(c), Amtrak's trains generally are entitled to "preference over freight transportation in using a rail line, junction, or crossing."

stations OTP" and "Endpoint OTP" of that service, as defined by Amtrak, were below 80 percent each quarter for the past three years.[6] Amended Complaint at 1, 3-4, and Ex. A.

On September 17, 2014, CN moved to dismiss the Amended Complaint, or to stay the proceeding pending the Supreme Court's decision in its review of *AAR v. DOT*. On December 19, the Board (1) granted Amtrak's motion to amend the complaint, (2) denied CN's motion to dismiss the Amended Complaint or to stay the proceeding, (3) set a schedule for argument on how to define OTP (on time performance) for the purpose of this proceeding, and (4) held that the procedural schedule established in the decision served January 3, 2013, was moot. Yesterday, on January 7, 2015, CN filed a Petition for Reconsideration of the December 19 Decision, asking the Board to reconsider its decision not to dismiss this proceeding, or in the alternative, reconsider its decision not to stay this proceeding pending the Supreme Court's decision on the constitutionality of Section 207(a) of PRIIA.

II. LEGAL AND FACTUAL BACKGROUND

A. The CN/Amtrak Operating Agreement

The relationship between Amtrak and the "host" freight railroads over which it operates is primarily defined in the Rail Passenger Service Act of 1970 ("RPSA")[7] and, more particularly, in operating agreements entered into under RPSA between Amtrak and each of the host railroads. The Amtrak/CN Operating Agreement defines the terms and conditions under which CN makes its lines, with related facilities and services, available to Amtrak.

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[6] The one exception is the first quarter of calendar 2013, for which the Endpoint OTP as measured by Amtrak was above 80%.

[7] Pub. L. No. 91-518, 84 Stat. 1327 (generally codified as amended at 49 U.S.C. §§ 24101-24711).

The Operating Agreement includes detailed contractual provisions for incentive payments to reward CN for timely handling of Amtrak trains, and for penalties resulting from delays to those trains resulting from causes within CN's control. These provisions, negotiated and agreed to by Amtrak and CN, take into account specific operating characteristics of the Illini/Saluki service, and reflect the parties' judgment regarding the extent to which CN should be held responsible for delays to Amtrak's trains on its lines. The incentive provision is functionally equivalent to an 80% OTP standard: each month, CN earns incentive payments for the Illini/Saluki service if 80% of the trips of a train arrive within an agreed-upon tolerance at designated checkpoints along the route, with adjustments for delays not within CN's control. (Conversely, CN incurs penalties if 70% or fewer of the trains arrive at those checkpoints within that tolerance, with any applicable adjustments.) The Amended Complaint relies on Amtrak's proposed OTP definition, and ignores the performance measures the parties agreed to in the Operating Agreement.

CN and Amtrak have been unable to agree to the terms and conditions for renewal of the Operating Agreement, which would have expired under its own terms had it not been extended in force by action of the Board, and Amtrak has instituted a proceeding to have the Board prescribe those terms and conditions.[8] At issue in that proceeding are many issues germane to this proceeding, including whether and to what extent Amtrak should pay for infrastructure to reduce delays to its own trains and to CN's trains, whether and to what extent CN should be compensated for delays to its own trains due to the operation of Amtrak's trains, and the basis for

[8] In prescribing the terms and conditions of a host railroad operating agreement, the Board must provide for compensation of the host railroad for at least all the incremental costs incurred as a result of Amtrak operations. 49 U.S.C. § 24308(a)(2)(B); *Application of Nat'l R.R. Passenger Corp. under 49 U.S.C. 24308(a) – Springfield Term. Ry.*, 3 S.T.B. 157, 158 (1998).

and amount of incentives earned or penalties owed by CN for the operation of Amtrak's trains on its rail lines.

B. The Illini/Saluki Service

Amtrak's Illini/Saluki service consists of two daily roundtrips (four trains total, identified by Amtrak as trains 390, 391, 392, and 393 and by CN as P390, P391, P392, and P393) serving 11 stations (including the endpoints) between Chicago's Union Station and Carbondale, IL.[9] The route is 308.9 miles long; 306.7 miles of the route are on CN's line and the other 2.2 miles, between Chicago's Union Station and the point of entry to/exit off of CN's line, are controlled by Amtrak. One train pair operates in the morning and the other in the afternoon; both are scheduled to meet at or near Champaign, IL, the approximate mid-point of the route.

The Illini/Saluki service operates over a segment of CN's main line between Chicago and New Orleans – the core of CN's United States operations. The corridor is predominately CTC-controlled single track, with sidings and short sections of double track between major terminal areas to allow trains to meet and pass each other. The traffic mix includes six passenger trains (the four Illini/Saluki trains and two trains per day on Amtrak's City of New Orleans service), CN's core train groups (intermodal trains and inter- and intra-divisional manifest trains), bulk trains (including coal, grain, and oil), trackage rights trains, and local trains and road switchers. In 2012, CN moved over 37 million gross ton-miles per route mile over this corridor.[10]

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[9] Service on this route has evolved since Amtrak's inception in 1971. Since 1986, there has been regular service between the existing endpoints of Chicago and Carbondale – initially two trains a day, and four trains per day beginning in 2006. Insofar as CN is aware, no money from Amtrak or any other public funding source was allocated for infrastructure or capacity improvements to CN's lines in order to support the additional service.

[10] CN 2013 Investor Fact Book at 38.

The OTP for this route, as reflected by the incentive provision of the Operating Agreement (which takes into account the route-specific details described above), has historically been above 80%, as shown by the following table.

On-Time Performance of the Illini/Saluki Service as Measured by the CN/Amtrak Operating Agreement										
2012				2013				2014		
Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3
89.1%	89.3%	84.1%	81.1%	91.0%	91.6%	87.3%	82.9%	66.6%	81.4%	85.7%

III. JURISDICTION

CN denies that the OTP data cited by Amtrak establish a basis for Board investigation under Section 213 of PRIIA. First, for the reasons discussed in CN's motion to dismiss and in its Petition for Reconsideration of the Board's December 19 Decision, CN maintains that, under the decision of the D.C. Circuit in *AAR v. DOT*, there is no statutory basis for the Board to proceed with the investigation sought by Amtrak under Section 213 of PRIIA.

Second, and without waiving the legal issues raised in CN's motion to dismiss, CN notes that the December 19 Decision determined that the Board should define OTP for purposes of triggering an investigation under Section 213 of PRIIA. Until there is an established definition of OTP for purposes of this proceeding, Amtrak's Amended Complaint has not and cannot demonstrate that the Board's jurisdiction has been triggered in this case under the 80% OTP standard. Moreover, insofar as the Board may seek to define OTP for purposes of triggering an investigation under Section 213 of PRIIA, under the definition of OTP implicit in the penalties and incentives provisions of the parties' Operating Agreement applicable during the quarters at issue the Board would not have jurisdiction to initiate this proceeding, because the Illini/Saluki's

OTP has only been below the 80% threshold for one quarter in the past three years. *See supra*, Section II.B.

CN admits that the All-stations OTP figures and Endpoint OTP figures referenced in Section I on pages 3-4 of the Amended Complaint are those published in the quarterly reports prepared by Amtrak for publication by the Federal Railroad Administration ("FRA"). However, CN denies that those figures are "below" the "investigation threshold" or otherwise demonstrate that the Board must initiate an investigation or has authority to do so.

IV. ISSUES AFFECTING THE ON-TIME PERFORMANCE OF AMTRAK'S ILLINI/SALUKI SERVICE

CN understands that Amtrak wishes to improve OTP for the Illini/Saluki service,[11] and CN remains, as it has always been, willing to work with Amtrak to address its concerns and help develop and achieve realistic schedules. The level of OTP (as measured by Amtrak) of Illini/Saluki is not unusual, however, and CN rejects Amtrak's claim that its longstanding and systemic operating problems and failure to achieve consistently high OTP on this service are in any way attributable to a failure by CN to properly dispatch the line or to afford Amtrak's trains preference. CN's dispatchers accord Amtrak's trains preference, regularly holding other traffic

[11] Amtrak does not achieve its goal of 80% OTP (measured by Amtrak's preferred definition of OTP) on most of its routes. In neither of the first two quarters of 2014 did Amtrak's premium Acela service achieve an Endpoint OTP of 80%. In one of those quarters, only 4 out of Amtrak's 24 corridor (*i.e.*, short- and middle-distance) services (17%) achieved an endpoint OTP of 80% or greater; in the other quarter, it was 5 out of 24 (21%). In those same two quarters, none of Amtrak's 15 long-distance services achieved an 80% Endpoint OTP. Amtrak's OTP varies among routes and route segments in response to a complex array of factors including the levels of capital investment by Amtrak, the nature of Amtrak's schedules, the level of congestion on the routes, the mix of traffic moving at different speeds along the route, the number of host carriers on the route, the number of interlockings along the route, maintenance and weather issues, and other route- and track-specific characteristics.

in favor of Amtrak and expediting Amtrak's trains ahead of other traffic on what is a frequently congested single-track line, with only a limited number of locations for meets and passes.

There are ways in which delays to the Illini/Saluki service might be reduced, for example, through improved communication and collaboration between Amtrak and CN, but the greatest issues by far affecting the performance of that service are a lack of sufficient infrastructure to avoid traffic congestion and the perpetuation of unrealistic schedules that cannot be regularly met given Amtrak's failure to contribute to any infrastructure improvements for the line. CN has proposed that Amtrak consider a number of infrastructure improvements to address Amtrak's concerns in areas where Amtrak's service is experiencing significant delays, including delay Amtrak categorizes as FTI ("freight train interference").[12] Amtrak has declined to consider such investments, even though they would address persistent problems and significantly improve Amtrak performance.

Amtrak has also refused to adopt realistic schedules that could both make the service more reliable and reduce delay. Amtrak's Illini/Saluki schedules are based on theoretical "pure run time" ("PRT") between points, which does not account for differences in weight and horsepower among various consists, wheel slip, less-than-ideal engine performance, train handling techniques among train crews, weather, and other real-world occurrences that can cause an otherwise un-delayed train to fail to make its PRT.[13] And the total trip times for these

[12] See CN Response at 25-26; *id.* Exhibit I.

[13] In Amtrak's delay reports, this is reflected in delays categorized as "OTH" and described as "insufficient run time" or something similar. For some trains on the Illini/Saluki service, such delays can account for over a quarter of the delay minutes on a segment. For example, from January through November 2014, 619 of the 2,425 delay minutes (25.5%) incurred by train 391 between Champaign and Mattoon were coded as OTH. For this train during this period, delays coded as OTH represented 9.0% of all delays. These delays strongly

schedules (PRT plus relief minutes) have remained static for years, despite changes in locomotives and passenger equipment, track infrastructure, and operating conditions, including significant increases in traffic and congestion.

In addition, specific scheduling issues contribute to frequent delays on this service. For example, both sets of the Illini/Saluki train pairs are presently scheduled to meet at or near Champaign, IL, a location with known congestion and limited capacity (that Amtrak has refused to address); adjusting the schedules so that meets no longer occur at this location could significantly reduce both the PTI ("passenger train interference") and FTI delays experienced by these trains. Similarly, Amtrak's morning southbound train is frequently delayed by Metra cross traffic at the 16th Street interlocking in Chicago; rerouting, or adjusting the schedule, or grade separating so that Amtrak's train is not attempting to cross a Metra-controlled interlocking in the middle of Metra's rush hour would be a potential solution to a frequent and often significant delay.

Amtrak's own operational issues also contribute to the delay it encounters. For example, Amtrak often has difficulty ensuring that its trains arrive onto CN's lines on time,[14] and those delays can be substantial.[15] While CN prioritizes Amtrak's trains, conflicts and delays can be inevitable when CN must slot an early or late Amtrak train into a stream of other trains that are

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suggest that schedules should be lengthened for some trains on some segments in order to reduce these delays and make the schedules more realistic and reliably achievable.

[14] Through the end of November 2014, train 391 experienced delays of 10 minutes or more 63 times (approximately 19% of all movements) on the 2.2 mile stretch before it reached CN's line. For train 393, that number was 99 (approximately 30% of all movements). In total, 162 of the 668 southbound movements (24%) experienced delays of 10 minutes or more before they even reached CN's lines.

[15] For example, on January 26, 2013, P391 departed Union Station in Chicago 107 minutes late due to a bad order car. Despite arriving to CN significantly out of slot, through the skillful work of CN's dispatchers, the trains was able to make up 5 minutes of time en route.

running according to schedules designed to avoid conflicts with Amtrak. In addition, the fluidity of CN's lines is often impaired when Amtrak suffers mechanical breakdowns (due to the age and condition of its equipment) on CN's lines, when its locomotives run out of fuel, or when its crews expire under the Hours of Service Act.[16]

Finally, a relatively recent issue has arisen that has significantly harmed the performance of the Illini/Saluki trains during the second half of 2014. For safety reasons, CN has had to impose a slow order on trains operated as part of the Illini/Saluki service due to Amtrak's use of equipment for those trains (single-level Horizon/Amfleet series cars) that can fail to properly "shunt," or activate, the highway-rail at-grade crossing gates and warning devices when moving at track speed. This problem seems to occur only (a) with Horizon/Amfleet series cars (so that the slow order does not apply to other services that operate on the same route using different equipment, such as the City of New Orleans service, which uses a heavier, lower profile, bi-level Superliner cars), (b) when that equipment is moving at a high speed (thus, the slow order imposed by CN will allow Amtrak's trains to properly shunt 100% of the time), and (c) primarily on tangent track (*i.e.*, straight line) and not on curved track. CN has imposed the slow order to eliminate the significant safety hazard that would be presented by an Amtrak train moving at track speed through a grade crossing without activating the crossing warning device.

[16] For example, on June 16, 2014, P391 stopped for 245 minutes on CN's line between Effingham and Centralia after its engine died. On April 9, 2014, P390 stopped for 127 minutes just outside the Carbondale station for an unscheduled crew change after the original crew ran through a switch and had to be removed from service. On May 5, 2013, P392 stopped at the Centralia station for 279 minutes after its engine died; the passengers were bussed to Chicago, and a freight locomotive was dispatched to move the empty train to Chicago. The problems with Amtrak equipment are particularly acute in cold weather. *See, e.g.*, J. Hilkevitch, Amtrak Fails to Weather Winter Well, CHICAGO TRIBUNE (March 6, 2014), *available at* http://articles.chicagotribune.com/2014-03-05/news/ct-amtrak-winter-delays-met-0306-20140306_1_amtrak-service-amtrak-data-amtrak-officials. *See also* CN Response at 22-23, nn. 28-30.

Testing is ongoing, but CN suspects that the wheel profile on this type of equipment is the primary cause of the shunt failure.[17] In the interim, CN, with the assistance of Amtrak, has been testing shunt "enhancers" that are wired into the crossing controller – these shunt enhancers have been installed by Amtrak in other locations (such as portions of Amtrak's Michigan Corridor) where its equipment is at risk of failing to shunt a crossing. CN, the ICC, and the FRA have also suggested testing shunt enhancers that can be installed on Amtrak's locomotives, but Amtrak has thus far been unwilling to test these types of shunt enhancers. In any event, Amtrak could quickly resolve the issue by using Superliner equipment (which it already uses on this corridor on the City of New Orleans service) for the Illini/Saluki service.

V. RESPONSE TO OTHER ALLEGATIONS

A. Response to Allegations That Delays to Amtrak Trains Suggest Preference Violations

1. Preference Generally

"Preference," as that term is used in 49 U.S.C. § 24308(c), has never been authoritatively defined, and Amtrak's Amended Complaint provides no practical definition or concept of preference. Through the examples it cites as demonstrating potential preference violations, however, Amtrak suggests that any time an Amtrak train is delayed, impeded, or routed through a siding on a host carrier's line, that delay means that preference has been denied by the host carrier. This extraordinarily broad, rigid, and self-serving notion of preference is contrary to the plain meaning of "preference," to Congressional intent, and to the understanding of CN and other

[17] CN has been recognized by the Illinois Commerce Commission ("ICC") and FRA as the industry leader among Class I railroads in upgrading and maintaining its grade crossing and signal equipment. Testing has indicated that at speeds above 75 mph on tangent track, the Horizon/Amfleet cars do not make sufficient contact with the rails in order to activate the circuits that are connected to the grade crossing devices.

freight railroads. Moreover, its adoption would make it impossible for freight railroads to meet the shipping needs of the many customers who rely on them.

Preference does not and cannot mean that Amtrak's trains will never suffer a delay due to interference with other rail traffic or that its trains will never be routed through sidings to pass other trains. Train meets and delays are inevitable given the volume and mix of traffic and the mostly single-track railroad over which the Illini/Saluki service runs. In order to expedite Amtrak's trains and reasonably serve its shippers, CN necessarily utilizes all of its available track infrastructure, including sidings, as efficient and appropriate. At times, the use of sidings may be the only option available for a dispatcher to clear the line, and frequently is the best way to expedite Amtrak trains.

As numerous witnesses testified before the Board in 2009,[18] Amtrak's then-proffered interpretation of preference (which is implicit in the Amended Complaint) lacks authoritative support and would create tremendous network inefficiencies that could ultimately result in gridlock. Preference must allow reasonable, successful co-existence between passenger and freight traffic sharing a complex network.

Moreover, Amtrak's claim that it is entitled to some extreme notion of preference is particularly suspect and inappropriate because Amtrak has been unwilling to bear the costs of even some of the steps that would be required to achieve anything approaching such a notion of preference (*e.g.*, infrastructure investment or schedule adjustments or reductions). Neither has Amtrak been willing to structure its Operating Agreement with CN in such a way that it would bear a portion of the added costs that would be associated with its extreme view of preference.

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[18] *See* Hrg. Tr., *Passenger Rail Investment and Improvement Act of 2008*, STB Ex Parte No. 683 (Feb. 11, 2009).

Yet CN is entitled under the statute to compensation for all incremental costs of service to Amtrak, including the costs of meeting its preference obligations.

2. Amtrak's Specific Examples of Delay

Amtrak discusses what it characterizes as "delays" to three trains, and suggests that their dispatching may demonstrate a failure to accord Amtrak's trains preference. Far from doing so, those examples underscore the challenges faced by CN's dispatchers and their skillful management of a complex network in which traffic volumes, operational requirements, and capacity constraints require interweaving Amtrak trains through multiple freight and other passenger trains.

Amtrak's first example involves three short delays to a southbound Illini/Saluki train (apparently, P391) on May 16, 2013. The first delay, of seven minutes, involved a meet with a northbound freight train (Q195) in which the freight train remained on the main line and Amtrak was routed through the siding at Peotone. Amtrak asserts that CN "could have routed the freight train onto one of the two earlier sidings and allowed the Amtrak train to hold the main and maintain its speed." Its assertion is wrong. The two earlier sidings it is apparently referencing – Kankakee, immediately to the south of the meet, and the siding between Gar Creek and Otto, which is farther south, were both in active use for other traffic. Use of these sidings to maintain the fluidity of the line through this area was critical not only for CN's freight traffic, but also for two other northbound Amtrak trains running through this same territory, one which ran earlier (P058, City of New Orleans service), and one which ran later (P390, Illini/Saluki service). Notably, Amtrak does not allege, and CN does not believe, that P391 would have been expedited by Q195 taking the Peotone siding instead of holding the main at the point of their meet.

The second delay cited by Amtrak, of four minutes, involved the routing of the Amtrak train (P391) onto the siding at Champaign to avoid a freight train on the main line (A497) that

was actively switching cars in the Champaign yard. Amtrak asserts that "CN could have either kept the freight train in the yard, or placed it on a nearby siding to allow Amtrak to continue on the main track without delay." The Champaign yard, however, does not have sufficient capacity to allow southbound trains to pull fully into the yard while they switch cars there. In addition, due to the configuration of the yard, it is operationally infeasible to conduct switching operations from the Champaign siding as opposed to the main line. Moreover, A497's switching had begun well before the arrival of P391, and it was critical that it proceed expeditiously in order to avoid delaying other southbound trains that have to stop and switch in the yard. Finally, even if A497 had not been on the main, P391 could not have held the main moving south through Champaign as it would have run into Amtrak's own northbound train P390, which was simultaneously running northbound into Champaign. (This conflict between two of Amtrak's own trains is one of the issues that would be addressed by the capacity additions CN has proposed, but Amtrak has refused to fund.)

The final delay to P391, of six minutes, occurred when Amtrak followed a freight train (A432) out of the Centralia Yard for a short distance until the freight train could clear into the next available siding. Amtrak asserts that "the freight train could have been held on a second main track a few miles earlier in order to allow the Amtrak train to proceed without delay." CN did not do so, however, because A432 was ready to move south before the arrival of P391, and while CN's dispatcher might ordinarily have held A432 until P391 passed, it could not do so in this instance because it had to clear the area of traffic as quickly as possible to create a sufficient window for CN's maintenance-of-way employees ("MOW") to attend to repairs on the main line. Although P391 caught up to A432, it followed it only a short distance to the next siding where A432 moved off the main to allow P391 to continue at speed on the main line.

Notably, despite the congestion and dispatching challenges CN faced, P391 that day: (1) arrived on-time for purposes of CN's Operating Agreement with Amtrak; (2) arrived at its endpoint, Carbondale, at 2:00 PM, fifteen minutes later than its scheduled arrival time, which, under Amtrak's definition of endpoint OTP (which includes a 15 minute tolerance for this service), was "on-time"; (3) had FTI delays of only 17 minutes out of total Amtrak recorded delay of 55 minutes (31%), with those 17 minutes representing only 43% of the total recovery time allowed pursuant to the public schedule negotiated by Amtrak; and (4) experienced delays coded as "insufficient run time" on 3 of its 10 segments, suggesting a need to lengthen the schedule in those segments. Moreover, in according Amtrak preference, CN incurred at least 64 minutes of delay to its own freight trains, incurring significant related costs for which Amtrak has refused to compensate CN.

Amtrak's second example involves two delays to a northbound Illini/Saluki train (apparently, P392) on July 28, 2013. The first delay, which was only three minutes long, involved the routing of P392 through the siding at Champaign to avoid a freight train (M399), which was switching cars in the Champaign yard. Amtrak asserts that "CN could have held the freight train in a nearby yard or siding in order to let the Illini/Saluki train pass." Again, CN dispatched these trains properly. M399 was a southbound train. It could not use the prior siding at Rantoul because that siding was being held open in order to accommodate the upcoming meet between P392 and Amtrak's northbound train P393. And in Champaign, as discussed above, M399 had to occupy the main line as the congested yard lacked capacity to fully store the train and clear the main, and M399 could not perform its switching from the siding at that location. The obvious and correct solution was for Amtrak to bypass M399 through the available siding.

The second delay, of 21 minutes, involved a southbound freight train (Q194) that remained on the main line while Amtrak was routed through the siding at Ashkum. Amtrak asserts that "sidings were available for the freight train to stop and allow the Illini/Saluki train to pass first." Its assertion is wrong. All three earlier sidings (at Peotone, Kankakee, and Gar Creek) had northbound freight trains in them (M345, C789, and M335, respectively) at the time the southbound Q194 passed them. Moreover, two of those freight trains had been held in those sidings in order to expedite P392.

Notably, despite the congestion and dispatching challenges CN faced, P392 that day (1) arrived on-time for purposes of CN's Operating Agreement with Amtrak; (2) arrived at its endpoint, Chicago Union Station at 9:45 PM, ten minutes later than its scheduled arrival time and thus "on-time" under Amtrak's definition of endpoint OTP; and (3) arrived at 8 of its 10 station stops (80%) within 15 minutes of its scheduled arrival time, making its All-Stations OTP (as calculated by Amtrak) 80%. Moreover, in according P392 preference, CN incurred at least 29 minutes of delay to its own freight trains, incurring significant related costs for which Amtrak has refused to compensate CN.

Amtrak's third example involves two delays (both arising from the same event) to a southbound Illini/Saluki train (apparently P391) on September 5, 2013. These delays involved a challenging three-way meet between Amtrak, a freight train (A431) switching cars in Effingham Yard (which required it to pull from a siding onto the main line for headroom), and another northbound freight train (M335). Amtrak asserts that "CN could have directed the first freight train to clear the main track and allowed the Illini/Saluki train to pass before the arrival of the second freight train, which could have been held at a different nearby siding." Once again, its assertion is wrong. A431 could not have cleared completely into the yard due to its length and

the limited capacity of the yard; M335 likewise could not fit into the yard because it was following another train (G891) that had just cleared into the yard and there was no more room. M335 was not held at an earlier siding because there were none between the junction point where it came onto the Champaign Subdivision from the Bluford Subdivision and Effingham Yard; and M335 was not held back on the Bluford Subdivision because MOW employees were attending to repairs on that line and needed a train-free period to complete those repairs.

Notably, despite the congestion and dispatching challenges CN faced, P391 that day (1) arrived on-time for purposes of CN's Operating Agreement with Amtrak; (2) experienced delays coded as "insufficient run time" on 5 of the 10 segments, suggesting a need to lengthen the schedule for those segments; (3) experienced an 8-minute delay due to Metra cross traffic at 16th Street and therefore arrived to CN's line 8 minutes late; and (4) experienced 16 minutes of Amtrak and Third Party delays (and no Host-Responsible Delay) before its arrival at the third station stop (meaning it would be late (according to Amtrak's definition of All-Stations OTP) at each subsequent station. Moreover, in according P391 preference, CN incurred at least 65 minutes of delay to its own freight trains, incurring significant related costs for which Amtrak has refused to compensate CN.

In sum, out of approximately 4,300 Amtrak train trips in the Illini/Saluki service over the 3-year period referenced in Amtrak's Amended Complaint, Amtrak has identified three that it says CN dispatched improperly, and Amtrak's allegations as to all three are unfounded.

B. Response to Other Allegations in the Amended Complaint

Most of the statements in Amtrak's complaint are arguments or legal conclusions, which do not warrant a formal answer. Certain of Amtrak's factual allegations not addressed above, are addressed here:

In response to the "Introduction" on page 1 of the Amended Complaint, CN admits that Illinois Central Railroad Company owns rail lines on which Amtrak's Illini/Saluki service operates. CN admits that the referenced All-stations OTP figures are those published in the quarterly reports prepared by Amtrak for publication by FRA. CN denies the remaining allegations of the Introduction.

The first paragraph of Section A on page 2 of the Amended Complaint contains no factual assertions. CN admits the allegations in the second paragraph of Section A, except for the last sentence; CN has incomplete knowledge regarding the ridership of the Illini/Saluki service.

In response to Section B on pages 2-3 of Amtrak's Amended Complaint, CN denies the factual assertions in the first paragraph. To the extent there are factual assertions in the second paragraph of Section B, CN denies them.

The first paragraph of Section II on page 5 of Amtrak's Amended Complaint sets out a statute that speaks for itself and does not require any admission or denial by CN. The remainder of Section II, on pages 4-5 of Amtrak's Amended Complaint, sets out three examples of what Amtrak characterizes as "choices [by CN] that result in delay to Amtrak Illini/Saluki trains." CN has already responded to Amtrak's characterization of these incidents in Section V.A.2, above. To the extent not already addressed, CN denies the remaining allegations of Section II.

Regarding Section III on pages 6-7 of Amtrak's Amended Complaint, CN denies any factual allegations and disputes any legal conclusions therein.

VI. FRAMEWORK FOR INVESTIGATION

The Board's decision served in this proceeding on January 3, 2013 ruled "that this case should be adjudicated using the established procedures governing complaints and the

encompassing discovery and motions practice guidelines set forth in Parts 1112 and 1114 of our rules." Slip op. at 3. The Board rejected a proposal by Amtrak that the Board conduct the investigation by issuing subpoenas under Part 1113.[19] The Board explained why the procedural framework under Parts 1111, 1112, and 1114 should apply to proceedings under Section 213 of PRIIA:

> These procedures have been thoroughly developed and interpreted through numerous litigations before the agency, and therefore provide a complete and ascertainable structure for the parties in moving forward in this type of litigation. This proceeding was begun by Amtrak, and the Board's standard practice in complaint-type proceedings is to have the record built through party-directed discovery. Amtrak and CN are best positioned to know what information is relevant to the possible causes of delay. For that reason, it is appropriate to provide for the development of relevant information through the parties' own discovery.

Decision served Jan. 3, 2013, slip op. at 3.

The decision regarding this procedural framework remains in effect and its rationale remains valid.[20] This is still a proceeding under Section 213 of PRIIA; it is still a proceeding initiated by Amtrak "complaint"; and it is still a proceeding about "causes of delay" to Amtrak's service on CN lines. The parties are clearly "best positioned" to delineate the relevant issues and bring to bear the relevant information related to the operation, measurement, and performance of this service. The parties communicate concerning this service, negotiate schedules for this service, and operate and provide compensation for this service under the Operating Agreement that the parties negotiated. CN dispatches and maintains the lines hosting the service, while

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[19] *See* Nat'l R.R. Passenger Corp.'s Proposed Procedural Framework for the Surface Transp. Bd.'s Investigation at 3, 6 (Nov. 26, 2012).

[20] Although the Board has found that the procedural schedule established in the January 3, 2013 Decision is moot (December 19 Decision at 3 n.5), that should not disturb the Board's prior analysis and decision concerning the appropriate general framework for conducting an investigation under Section 213 of PRIIA.

Amtrak controls the northernmost segment of the movement, mans and maintains its trains, dictates whether to add additional time for loading and unloading at stations, collects and generates data reporting on its service, and decides where and how to allocate its capital budget for this and other services.

The Amended Complaint ignores the Board's prior decision and rationale concerning the appropriate framework for its investigation, and makes the same vague and unhelpful proposal Amtrak made (and the Board rejected) two years ago – that the Board "take its own initiative in gathering what it needs to conduct" its investigation. Amended Complaint at 7. Amtrak does not explain how the Board should structure its inquiry, what information it should seek, or what evidence would be needed to arrive at particular conclusions. Nor does it suggest how the Board is to marshal the resources that would be necessary for it to conduct the independently directed inquiry suggested by Amtrak not only in this proceeding, but in other Section 213 proceedings Amtrak has or may seek to initiate.

The Board should reject Amtrak's structure-less proposal and affirm that the parties are to proceed under the well-established procedures in Parts 1111, 1112, and 1114, which give the parties reciprocal discovery opportunities and obligations and are conducive to a balanced and effective process for delineating and developing the issues and facts.

Under those procedures, the parties are responsible in the first instance for negotiating discovery matters and proposing a procedural schedule. 49 C.F.R. § 1111.10(a). CN is prepared to do so. As noted above, there is, however, an open issue respecting the Board's jurisdiction that the Board plans to address as the first order of business. *See* December 19 Decision at 11 (calling for briefing on the jurisdictional issue of the meaning of OTP on January 20 and February 2). Depending on whether and how OTP is defined, the jurisdictional threshold of OTP

less than 80% may or may not turn out to have been triggered. Moreover, CN yesterday filed a Petition for Reconsideration, which, among other things, renews its request for a stay and requests that the schedule in this proceeding be held in abeyance pending disposition of the Petition for Reconsideration. CN therefore proposes that the time limits in 49 C.F.R. § 1111.10(a) for the parties to meet and confer and file a proposed schedule run from the later of disposition of CN's pending petition and the Board's final determination of its jurisdiction to conduct an investigation in this proceeding.

Respectfully submitted,

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January 8, 2015

CERTIFICATE OF SERVICE

I certify that I have this 8th day of January, 2015, served copies of CN's Answer to Amtrak's Amended Complaint upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

Marissa A. Robertson