



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. 42141**

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**NATIONAL RAILROAD PASSENGER CORP. –  
INVESTIGATION OF SUBSTANDARD PERFORMANCE  
OF THE CAPITOL LIMITED**

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**NORFOLK SOUTHERN’S REPLY TO NATIONAL RAILROAD PASSENGER  
CORPORATION’S ON-TIME PERFORMANCE EVIDENCE**

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Norfolk Southern Railway Company (“Norfolk Southern”) hereby responds to the On-Time Performance Evidence filed by the National Railroad Passenger Corporation (“Amtrak”) on October 17, 2016 (“Amtrak’s On-Time Performance Evidence”), as corrected by an additional filing on October 17, 2016.

The Board issued its final rule defining on-time performance in *On-Time Performance Under Section 213 of the Passenger Rail Investment & Improvement Act of 2008*, EP 726 (STB served July 28, 2016) (“OTP Decision”). Norfolk Southern has appealed that decision to the United States Court of Appeals for the Eighth Circuit, along with the Association of American Railroads, Canadian National Railway Company, CSX Transportation, Inc., and Union Pacific Railroad Company. The petitioners filed their Joint Opening Brief on October 14, 2016. Amicus briefs supporting petitioners were filed on October 21, 2016, including a brief on behalf of the United States Chamber of Commerce urging the court of appeals to overturn the OTP Decision. Respondents’ brief is due on November 22.

In the interim, in a decision served on September 15, 2016, the Board removed this proceeding from abeyance and directed Amtrak to submit evidence demonstrating that the on-time performance (OTP) of its Capitol Limited service has averaged less than 80% for any two

consecutive calendar quarters under the definition of, and the formula for calculating, on-time performance adopted by the Board in *On-Time Performance Under Section 213 of the Passenger Rail Investment & Improvement Act of 2008*, EP 726 (STB served July 28, 2016) (to be codified at 49 C.F.R. Part 1040). See *National Railroad Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Finance Docket No. 42141, slip op. at 1 (STB served Sept. 15, 2016) (“September 15 Decision”). The Board specified that “Amtrak shall indicate which two (or more) consecutive calendar quarters now serve as the basis for its complaint . . . .” *Id.* at 3. The Board also directed Amtrak to provide and explain its calculation of “the denominator, numerator, and the resulting OTP percentage” for each applicable quarter. *Id.* The Board provided that Norfolk Southern could reply by October 25, 2016. *Id.*

The Board’s September 15 Decision also recognized that Norfolk Southern’s motion to dismiss Amtrak’s Amended Complaint in this docket, filed on January 7, 2015, remained pending. The Board indicated that it would “address th[at motion] and any other outstanding requests in a subsequent decision.” *Id.* at 1 n.1. The Board also observed that Amtrak’s 2015 Complaint “preceded the Final Rule,” and that “nearly seven calendar quarters ha[d] elapsed since Amtrak’s November 2014 evidentiary submission.” *Id.* at 3.

As discussed below, Norfolk Southern has three responses to Amtrak’s OTP Evidence at this time. *First*, in light of progress in the pending Eighth Circuit review of the Board’s OTP Decision, the Board should hold this proceeding in abeyance. The parties should not be required to undertake significant discovery and other burdens associated with an investigation before the Eighth Circuit has an opportunity to rule on the legality of the Board’s OTP rule, without which there could be no investigation. *Second*, Amtrak should be required to supplement its evidence with the underlying data from which its calculations were derived so that Norfolk Southern can

have a full and fair opportunity to test that evidence prior to the initiation of an inevitably burdensome investigation. *Third*, Amtrak's new OTP Evidence goes well beyond the scope of the original Complaint as to which Norfolk Southern's motion to dismiss remains pending, posing significant procedural challenges. Before any investigation is commenced, Amtrak should be required to amend its complaint so as to (a) enable Norfolk Southern to interpose any valid legal objections to the proposed scope of any investigation and (b) provide a foundation for the Board's framing of any investigation.

**I. THE BOARD SHOULD HOLD THIS PROCEEDING IN ABEYANCE PENDING THE EIGHTH CIRCUIT'S RULING ON THE LEGALITY OF THE FINAL ORDER**

As Commissioner Begeman observed last week in the pending Section 213 proceeding involving Canadian National, the Eighth Circuit's review of the legality of the Board's OTP Decision, which is a precondition for any investigation at all in this case, warrants holding this proceeding in abeyance. Finance Docket No. 42134, *National Railroad Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Ry.* (“*CN Section 213 Proceeding*”), slip op. at 1 (STB served Oct. 21, 2016) (Commissioner Begeman dissenting) (“[The Eighth Circuit proceeding] will determine whether the Board has authority to define OTP given that the standard developed by Amtrak and the Federal Railroad Administration is invalid. I believe the best course of action here is to let the court answer that question rather than risk wasting the resources of Amtrak, CN, and the Board by processing this case while our authority to do so is being resolved.”). It would be senseless to require the parties here to undertake significant discovery and other burdens to advance an investigation only to have the proceeding aborted by a ruling that the OTP Decision, and thus the Board's authority to conduct this investigation, was contrary to law.

Norfolk Southern is mindful that the Board was aware of the Eighth Circuit proceeding when it decided to remove this proceeding from abeyance in September. But Amtrak’s newly-filed OTP Evidence vastly expands the scope of the investigation it seeks and magnifies immeasurably the burdens that such an investigation will entail. Amtrak’s new evidence purports to add 27 additional months to the investigation, which would cover 2-3/4 years and 2,000 separate trains.

Moreover, the Eighth Circuit proceeding has moved quickly and is now well advanced. Briefing will be completed by December 20, 2016, and the matter argued in early 2017. Amicus briefs filed last week show that there is widespread and compelling support for the Petitioners’ position that the Board’s OTP Decision exceeded the Board’s authority granted by Congress.<sup>1</sup>

Accordingly, Norfolk Southern joins CSX Transportation, Inc. in urging that the Board exercise its inherent authority to manage its docket by holding this proceeding in abeyance for an additional few months to permit the Eighth Circuit process to be completed. *See Idaho Northern & Pacific Railroad Company—Abandonment Discontinuance Exemption—in Washington and Adams Counties, ID*, AB-433-2X (STB served Nov. 14, 1996) (Continuing the abeyance of a Board proceeding: “The Board has authority to control its own docket. [I]n exercising that authority, we may hold a proceeding in abeyance if we conclude doing so would be the best course of action.”). The Board has recently exercised this authority in a pending Amtrak

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<sup>1</sup> *See* Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioners, at 6 (“During the rulemaking, [the Board] offered no interpretation of section 207(a) and made no attempt to explain how the PRIIA, as enacted, gives it the authority to define on-time performance. Instead, the Board argued that it somehow acquired this authority in April 2016, when the D.C. Circuit issued its decision in AAR. . . . But this argument not only disregards Congress’s delegation of authority in section 207, it misunderstands the effect of the D.C. Circuit’s decision.”); Brief Amicus Curiae of Professor Neomi Rao in Support of Petitioners, at 2 (“The Board has no statutory authority to issue the On-Time Performance Rule. Interpreting the Passenger Rail Investment and Improvement Act of 2008 (‘PRIIA’) to uphold the Board’s rule would undermine Congress’ lawmaking authority and improperly expand the Executive’s power.”).

proceeding where the constitutionality of the predicate for Board action is similarly being tested in the courts. *See Petition by Nat'l R.R. Passenger Corp. (Amtrak) for Relief pursuant to 49 U.S.C. § 24905*, No. FD 36048, slip op. at \_ (STB served Oct. 3, 2016) (holding the proceeding in abeyance “because the Board’s and parties’ resources would be wasted if § 24905 were found to be unconstitutional [in court proceeding, because] § 24905 provides the Board’s only authority to make an award in this proceeding”). The Board should follow the same path here.

## **II. THE BOARD SHOULD DIRECT AMTRAK TO PRODUCE THE DETAILED TRAIN PERFORMANCE DATA UNDERLYING ITS AGGREGATED EVIDENCE**

Norfolk Southern respectfully requests that the Board direct Amtrak to provide the parties with the individual train data underlying the calculations submitted as Amtrak’s On-Time Performance Evidence. It is impossible for Norfolk Southern to assess the accuracy of the calculations submitted by Amtrak based solely on the aggregated calculations Amtrak has provided.

Norfolk Southern’s ability to probe the accuracy of Amtrak’s calculations and the underlying data from which they were derived is critical. On-time performance is the statutory threshold governing the Board’s jurisdiction to proceed under Section 24308(f). If the Capitol Limited’s performance fell below 80 percent for two consecutive quarters, the Board is required to launch an investigation upon request. *See* 49 U.S.C. § 24308(f)(1). Conversely, if performance has not fallen below 80 percent for two consecutive quarters, there would be no investigation. *Id.* An investigation will be costly, both in time and expense, for all parties involved. If any calendar quarters are not properly included in the scope of the investigation, that matter should be determined now.

Norfolk Southern fully expects that Amtrak has attempted to portray accurately the on-time performance data relating to these trains. But mistakes can and do occur, as evidenced by

Amtrak's need to file a corrected copy of its evidence within hours of its initial submission. Without access to the underlying data reporting each individual train's arrival and departure time at each station, Norfolk Southern cannot meaningfully respond to Amtrak's calculations, precluding it from testing Amtrak's invocation of the Board's jurisdiction.

Norfolk Southern's need for supporting detail is magnified in this case, which involves multiple host railroads. As the Board knows, the Capitol Limited operates over lines owned by Norfolk Southern, CSX, and Amtrak itself. Norfolk Southern does not have any independent ability to track or measure on-time performance at stations located on lines owned, operated, and dispatched by other carriers. At most, Norfolk Southern would be able to verify (or contest) data relating to those stations located on its own system. As a result, Norfolk Southern cannot calculate the all-stations on-time performance of even a *single* Capitol Limited train from its own data at every station between Washington, D.C. and Chicago, let alone all of the trains operated during a given calendar quarter.

Therefore, Norfolk Southern requests that the Board direct Amtrak to provide the parties with the individual train operational data underlying the calculations submitted as Amtrak's On-Time Performance Evidence, including the arrival time for each train run during each calendar quarter at each individual stop on the route, along with the published schedule time. Norfolk Southern does not expect this request to be onerous for Amtrak. Amtrak maintains such data in the normal course of business, and Amtrak must have gathered this data already to produce the Exhibit attached to its filing. If Amtrak is relying solely on data accessible through its ARROW system, Norfolk Southern would simply need instructions on how to replicate the dataset underlying Amtrak's calculations.

### III. AMTRAK'S RADICAL EXPANSION IN THE PERIOD COVERED BY ITS OTP EVIDENCE POSES CHALLENGES FOR THE MANAGEABILITY OF THIS PROCEEDING

As the Board has observed, Amtrak's Amended Complaint was filed nearly two years ago, and remains subject to a pending motion to dismiss that the Board will address in a future order. September 15 Decision at 1 n.1, 3. Amtrak's new OTP Evidence purports to quintuple the period that would be covered by an investigation, including one additional quarter (2014 1Q) *prior* to the period covered by Amtrak's original Complaint and eight additional quarters subsequent to that period (2014 Q4 through 2016 Q3). *See* Amtrak's On-Time Performance Evidence at 1 ("Exhibit A shows the consecutive calendar quarters which now serve as the basis for Amtrak's complaint, and the train numbers to which Amtrak's complaint applies"). Amtrak's attempt to expand the scope of this proceeding raises several important procedural challenges.

Before any investigation is commenced, Amtrak should be required to amend its Complaint to conform to the period purportedly covered by its new OTP Evidence.<sup>2</sup> This is essential to serve two purposes. *First*, it would enable Norfolk Southern to interpose any valid legal objections to the alleged scope of the proposed investigation, including the important question whether principles of laches and repose preclude Amtrak from expanding the period to be investigated *backwards* into early 2014 despite the fact that it *did not* seek to have that period investigated when it filed its Complaint almost two years ago.

*Second*, an amended Complaint is also essential to narrow the focus of any investigation. Amtrak's OTP Evidence is completely silent as to what in particular about the Capitol Limited's performance during the lengthy 2-<sup>3</sup>/<sub>4</sub> year period covered by its OTP Evidence should be

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<sup>2</sup> If Amtrak were not required to amend its complaint, these same issues would still need to be addressed at the threshold of any investigation.

investigated. A fishing expedition covering all issues relating to the operation of the 2,000 trains that operated over the entire 780-mile route between Washington and Chicago would be an absurd waste of resources and impossible to administer.<sup>3</sup>

The 80-percent OTP threshold is merely the statutory trigger for the Board's *authority* to investigate. Failure to achieve that level of OTP has no independent force implying anything about a train's performance that warrants relief, especially in light of the Board's own observation that schedules would need to be adjusted to address the Board's all-stations OTP metric. *See* OTP Decision at 6 ("To support all stations OTP on such a route could require a reevaluation and potential reallocation of recovery time across the entire route."); *see also* Norfolk Southern's Response To Amtrak's Complaint at 33, *National Railroad Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Finance Docket No. 42141 (filed Jan. 7, 2015) ("Among those potential steps would be the adoption of more realistic schedules for the Capitol Limited that would better inform the public, help set realistic expectations of the time needed to traverse hundreds of miles of high-density freight thoroughfares, better address travel connection planning, and otherwise better serve the passenger service mission that underlies Amtrak's services.").

Amtrak has asked for this investigation, and it should state with particularity what it proposes to have the Board investigate.<sup>4</sup> It is especially important that Amtrak be required to put a host railroad such as Norfolk Southern on notice of what it is being called upon to defend in a

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<sup>3</sup> *See CN Section 213 Proceeding*, slip op. at 4 (STB served Jan. 3, 2012) ("However, the Board acknowledges the issues underlying CN's suggested approach—that reviewing all of the evidence associated with every untimely train movement on all of the routes could result in a large, unwieldy record.").

<sup>4</sup> As the Board has already indicated, as the claimant Amtrak will have "the primary burden of proving its case." OTP Decision at 6.

case such as this where the train at issue traversed the lines of multiple host railroads. *See* OTP Decision at 8 (“Although the Board understands that concern [about multicarrier routes], the attribution of delays to hosts and specific causes more properly pertains to – indeed, would likely be *among the initial topics addressed in* – the investigatory phase of a case.”) (emphasis added).

#### IV. CONCLUSION

For the reasons stated above, Norfolk Southern requests that the Board (a) hold this proceeding in abeyance pending the outcome of the Eighth Circuit review of the OTP Decision; (b) direct Amtrak to provide the parties, preferably in electronic format, with the individual train data underlying the calculations submitted as Amtrak’s On-Time Performance Evidence, including the arrival time for each train run during each calendar quarter at each individual stop on the route, along with the published schedule time, and provide the parties with sufficient time to review and verify the data and calculations after they are received; and (c), before commencing any investigation, instruct that Amtrak amend its complaint to conform to the new OTP evidence and include therein a more definite statement of what in particular about Norfolk Southern’s performance warrants investigation.

Respectfully submitted,

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Dated: October 25, 2016

## CERTIFICATE OF SERVICE

I, Aaron D. Rauh, certify that on this date a copy of the Norfolk Southern Railway Company's Reply to National Railroad Passenger Corporation's On-Time Performance Evidence, filed on October 25, 2016, was served by email and by first-class mail, postage prepaid, on all parties of record, as follows:

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