

January 7, 2015

Writer's Direct Contact
(202) 887-1519
DMeyer@mofocom

VIA ELECTRONIC FILING

237397

Cynthia T. Brown
Chief, Section of Administration
Office of Procedures
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
January 7, 2015
Part of
Public Record

Re: STB Docket NOR 42141

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket is Norfolk Southern Railway Company's Motion to Dismiss the Complaint filed by the National Railroad Passenger Corporation.

Thank you for your assistance.

Sincerely,

/s/ David L. Meyer

Attachment

cc (with attachment): Greg E. Summy, Esq.
 Garrett D. Urban, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42141

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

NORFOLK SOUTHERN’S MOTION TO DISMISS AMTRAK’S COMPLAINT

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: January 7, 2015

TABLE OF CONTENTS

INTRODUCTION5

I. THE BOARD LACKS AUTHORITY TO PROCEED WITH A FORMAL INVESTIGATION UNDER SECTION 24308(F) SO LONG AS THE PRIIA METRICS AND STANDARDS ARE NULL AND VOID.....5

 A. The Plain Words and Architecture of the Statute Make Clear that Congress Intended Section 213 to Use a Single Definition of On-Time Developed Via the Section 207 Process8

 B. The Legislative History of Section 213 Confirms that the Only Trigger Is One Based on Section 207 Metrics13

 C. Until the Board’s December 19 Decision, Section 213 Was Consistently Viewed as Containing a Single On-Time Performance Trigger Predicated on the Section 207 Metrics and Standards17

 D. The FRA/Amtrak Section 207 Metrics and Standards Development Process Itself Confirms that Congress Could Not Have Intended for Section 213 to Make Use of a Separate Set of Metrics Developed by the Board.....20

 E. It Would Be Especially Inappropriate to Interpret Section 213 as Containing a Stand-Alone On-Time Performance Trigger Applicable to Individual Routes Where Host Railroad Performance Is Already Governed by Binding Contractual Metrics22

II. DISMISSAL IS THE APPROPRIATE COURSE24

CONCLUSION.....26

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42141

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

NORFOLK SOUTHERN’S MOTION TO DISMISS AMTRAK’S COMPLAINT

Norfolk Southern Railway Company (“Norfolk Southern”) hereby moves to dismiss¹ the Complaint filed by the National Railroad Passenger Corporation (“Amtrak”) on November 17, 2014, as corrected on November 19, 2014.²

Norfolk Southern acknowledges the Board’s decision served December 19 in Docket No. 42134,³ which held that “the invalidity of Section 207 does not preclude the Board from construing the term ‘on-time performance’ and initiating an investigation under Section 213 if we determine that the on-time performance with respect to [a particular Amtrak train] service has fallen below 80 percent for two or more consecutive

¹ Norfolk Southern has filed this motion as Appendix II to its Response to Amtrak’s Complaint, and, out of an abundance of caution, is filing this motion in a separate docket entry.

² Norfolk Southern’s Motion to Dismiss is being filed pursuant to the Board’s order granting CSXT’s Request for Extension of Time to Respond to the National Railroad Passenger Corporation’s Complaint to Initiate Investigation. *See* Decision served Dec. 4, 2014.

³ *Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry. Co. (“Amtrak/CN”),* Docket No. 42134 (decision served Dec. 19, 2014) (“December 19 Decision”).

calendar quarters.” *Amtrak/CN* December 19 Decision at 10. Norfolk Southern respectfully disagrees with the Board’s conclusion and requests that the Board dismiss Amtrak’s Complaint for the reasons set forth below.

INTRODUCTION

Amtrak’s Complaint requests that the Board initiate an investigation under PRIIA Section 213, codified at 49 U.S.C. § 24308(f), into the alleged “substandard performance” of the Capitol Limited. However, the formal mechanism of a Section 24308(f) investigation is not among the options currently available to Amtrak or the Board. Such an investigation cannot begin so long as the Metrics and Standards adopted pursuant to PRIIA section 207 remain “null and void” as a result of court orders currently under review by the Supreme Court. Norfolk Southern therefore requests that the Board dismiss this proceeding. If and when valid Metrics and Standards are in place and Norfolk Southern’s performance is determined to not satisfy those standards, Amtrak may file a new Complaint. Until then, the initiation of a Section 24308(f) investigation is premature and not authorized by PRIIA.

I. THE BOARD LACKS AUTHORITY TO PROCEED WITH A FORMAL INVESTIGATION UNDER SECTION 24308(F) SO LONG AS THE PRIIA METRICS AND STANDARDS ARE NULL AND VOID

Norfolk Southern is aware of the Board’s recent conclusion in the *Amtrak/CN* proceeding that the unconstitutionality of the PRIIA Section 207 Metrics and Standards⁴

⁴ FRA & Amtrak, *Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of the Passenger Rail Investment and Improvement Act of 2008*, 75 Fed. Reg. 26,839 (footnote continued on next page ...)

does not preclude an investigation under PRIIA Section 213. *Amtrak/CN* December 19 Decision at 6. Norfolk Southern respectfully disagrees with that conclusion, and urges the Board to correct its error by ruling that – at least where a host railroad operates under a valid and binding operating agreement providing for performance incentives and penalties – Congress did not intend for Section 213 to authorize the Board to develop and apply “on-time performance” metrics separate and apart from the uniform set of Metrics and Standards⁵ it required be promulgated under PRIIA Section 207.

As Norfolk Southern explains, the plain and common sense reading of the statute is that Congress (1) intended there to be a single set of metrics that might serve as triggers for a potential investigation under Section 213, and (2) felt strongly enough about on-time performance that it specified that such an investigation could be triggered whenever on-time performance – however defined through the Section 207 metric- and standard-setting process – fell below 80 percent.

Any interpretation of the triggers established by Section 213 must begin with an analysis of the statutory text. As the Board’s December 19 Decision concludes, the plain

(... footnote continued from previous page)

(May 11, 2009); FRA, *Metrics and Standards for Intercity Rail Passenger Service* (May 12, 2010), Dkt. No. FRA-2009-0016, at 11, 26-27, available at <http://www.fra.dot.gov/Elib/Details/L02875> (hereinafter “Metrics and Standards”).

⁵ As the Board is aware, the U.S. Court of Appeals for the D.C. Circuit has ruled that Section 207 of PRIIA is unconstitutional. *AAR v. DOT*, 721 F.3d 666, 677 (D.C. Cir. 2013). Amtrak has acknowledged that the Metrics and Standards developed pursuant to Section 207 are thus “null and void.” See Amtrak’s Reply to Canadian National Ry.’s Motion to Dismiss, *Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of CN*, Docket No. 42134 (filed Oct. 7, 2014), at 10-11 n. 8; see also *Amtrak/CN* December 19 Decision at 9-10 (triggers based on Section 207 are invalid and inoperative).

terms of Section 24308(f), which codified Section 213 of PRIIA, provide that there can be no investigation under that provision unless:

the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under Section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters.

49 U.S.C. § 24308(f).

This much is uncontroversial. But the Board interpreted the triggers in Section 213 incorrectly when it concluded that Section 213 establishes two *separate* on-time performance triggers – one involving “on time performance” as used in Section 213 and not linked to the Section 207 Metrics and Standards and the other treating on-time performance as part of “service quality ... for which standards are established under Section 207.” *See, e.g.*, December 19 Decision at 9 (concluding that, in addition to the Section 207-based trigger, the Board “may independently define ‘on-time performance’”). Having read Section 213 as containing two separate on-time performance prongs, the Board proceeded to devote most of its analysis to the question whether the supposed “on-time performance” trigger of the first clause can be “severed” from the rest of Section 213, which all agree depends entirely on the now-void Section 207 Metrics and Standards.

Respectfully, the premise of the Board’s analysis, and thus its conclusion, is incorrect. Section 213 contains only one “on-time performance” trigger, linked to the Section 207 Metrics and Standards, and there is nothing that can be “severed” from the null and void Section 207 metrics. This is clear from the statutory text and architecture,

legislative history, the consistent views of Amtrak, the Board, and the U.S. Government prior to December 19, and the nonsensical implications of the Board’s contrary interpretation.

A. The Plain Words and Architecture of the Statute Make Clear that Congress Intended Section 213 to Use a Single Definition of On-Time Developed Via the Section 207 Process

First and foremost, a fair reading of the text of PRIIA precludes the interpretation of Section 213 as creating a stand-alone “on-time performance” trigger. Reading Sections 213 and 207 of PRIIA together, as the Board must,⁶ it is clear that Congress meant for the “on-time performance” Metrics and Standards developed under Section 207 to govern the application of Section 213 in cases where Amtrak’s “on-time performance” was alleged to fall below 80 percent. Section 207, like Section 213, treats separately the “performance” and “service quality” of Amtrak’s trains.⁷ In Section 207, Congress was clear that Amtrak and the FRA were to develop metrics addressing, on the one hand, “performance” (meaning “measures of on-time performance and delays incurred”) and,

⁶ See, e.g., *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (“[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”).

⁷ Section 207 provides, in pertinent part: “Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly ... develop new or improve existing metrics and minimum standards for measuring *the performance and service quality* of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, *measures of on-time performance and delays* incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation.” (emphasis added).

on the other hand, separate metrics relating to a laundry list of “service quality” attributes. “Performance” was distinct from “service quality,” not a subset of it.

Section 213 picked up on this distinction between “performance” and “service quality” by spelling out that an investigation could be commenced only if Amtrak’s “on-time performance” fell below 80 percent or, with respect to the array of other “*service quality*” attributes, Amtrak’s performance fell short of the specific standards developed under Section 207.

Reading Section 213’s reference to “on-time performance” as outside the Metrics and Standards process contradicts the unambiguous plain language of the statute, makes no sense, and cannot be squared with Congress’s statutory architecture. The Board’s interpretation reads entirely out of the statute Congress’s express command that “on-time performance” metrics be among those developed under Section 207. Since “on-time performance” is not a subset of “service quality,” as Congress used the terms in Section 207, the reference to “service quality” in Section 213 cannot be read inconsistently to *include* on-time performance within its scope. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”).

But, if “on-time performance” is not a subset of “service quality,” then the Board’s interpretation of Section 213 as giving it “independent” authority to define “on-time performance” would eliminate the “on-time performance” metrics developed under Section 207 as a basis for triggering a Section 213 investigation. Instead, under the Board’s reading, the only “on-time performance” trigger would be the one defined and applied independently by the Board. This directly contradicts Congress’s express

command in Section 207 that the Metrics and Standards would address “on-time performance.” *See* PRIIA § 207 (“[s]uch metrics, at a minimum, shall include ... measures of on-time performance”). The Board’s reading would mean FRA’s and Amtrak’s efforts to develop measures of on-time performance had no purpose.

For the Board’s reading to be plausible, Congress would have had to refer to “on-time performance” at least twice in Section 213: once to enable the Board to construe the term without regard to the Metrics and Standards, and again (along with “service quality”) in the second clause of Section 213 where Congress refers explicitly to the metrics developed under Section 207. But Congress consciously and expressly used the term *only once* – showing that it intended for investigations to be commenced under Section 213 only based on the metrics to be developed under Section 207.

More fundamentally, even if one could find room in Section 213 for an interpretation embracing two separate on-time performance triggers, the result would be nonsensical and inconsistent with the broader architecture of the statute.⁸ If the Board were correct, Section 213 would allow an investigation to be triggered by the Section 207 on-time performance metrics, and *also allow* one to be triggered by whatever

⁸ *See, e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)) (rejecting FDA’s assertion of the authority to regulate tobacco products); *see also id.* at 132-33 (“court must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme’”) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

interpretation of “on-time performance” the Board might apply in a particular adjudication. This cannot be squared with Congress’ statutory scheme for two reasons:

First, the notion that Congress could have intended two separate and potentially inconsistent measures of on-time performance, each of which could trigger a Section 213 investigation, is belied by the core purpose underlying Congress’s enactment of the PRIIA Metrics and Standards, which was to stimulate development of a *single set* of “new or improve[d] existing metrics and minimum standards.” PRIIA, § 207. Congress expressly provided in Section 207 that the process for developing metrics and standards might well improve upon “existing metrics” in addition to developing entirely “new” ones, thus indicating that the outcome of the Section 207 process was to be a *single set of uniform* Metrics and Standards, not both a new one and another new one cobbled together by the Board partially in reliance on “pre-existing” (as implied by the Board’s December 19 Decision at 7).

Second, and separately, the notion that Congress left the definition of “on-time performance” to case-by-case adjudication by the Board is inconsistent with Congress’ quite conscious decision to have investigation under Section 213 *triggered* by a set of new standards that would have only *prospective* application. Congress gave FRA and Amtrak the responsibility for developing, with broad public participation, a set of metrics and standards that would be used to judge the future performance of Amtrak trains. FRA in turn submitted its proposed metrics and standards for public comment and then revised

them in response to that comment.⁹ FRA recognized that its “final” Metrics and Standards could not be applied retroactively, for purposes of investigations under Section 213 or otherwise, precisely because those Metrics and Standards – including metrics defining “on-time performance” – were “*new performance measures.*” *See Metrics and Standards* at 4-5 (emphasis added).

That decision to proceed via notice-and-comment rulemaking reflects a proper recognition that the railroads should know what is expected of them before they act (and have input into the establishment of those expectations), and only be subjected to an onerous regulatory investigation if they fail to comply with those previously-known standards.

The Board’s December 19 Decision would supplant the regime Congress desired with a *retroactive* system, in which Board would decide what “on-time performance” means in the course of judging performance that *has already occurred*.¹⁰

Notwithstanding the Board’s broad general authority to construe ambiguous phrases in the statutes it administers, here we know that Congress wanted something very different – standards developed with broad public participation that would govern prospectively

⁹ See Proposed Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110-432, 74 Fed. Reg. 10983 (proposed Mar. 13, 2009) at 1, *available at* <https://www.fra.dot.gov/eLib/Details/L02876> (“In accordance with Section 207 of the Passenger Rail Investment and Improvement Act of 2008, the Federal Railroad Administration (FRA) and Amtrak are jointly submitting for stakeholder comment the following proposed metrics and standards for intercity passenger rail service.”).

¹⁰ The Board’s December 19 Decision makes this clear. The Board will be deciding the meaning of “on-time performance” at the same time as it has in hand data reflecting the performance of Amtrak’s trains on CN’s lines. *Id.* at 11.

only. The Board's plan to construe the term in the course of deciding whether to commence investigations has no valid basis in this statute.

B. The Legislative History of Section 213 Confirms that the Only Trigger Is One Based on Section 207 Metrics

The Board's December 19 Decision rests heavily and repeatedly on legislative history, asserting that the "guiding principle of Congress's intent in enacting the statute" was to authorize the Board to define "on-time performance" for purposes of Section 213. December 19 Decision at 10. The Board's reliance on legislative history is misplaced.

Resort to legislative history is neither necessary nor appropriate given the plain language of Section 213. But a proper reading of the legislative history shows that Congress in fact did intend for "on-time performance" metrics and standards to be developed solely via the Section 207 process.

The Board correctly observed that Congress's enactment of Section 213 was motivated at least in part by its "intent to facilitate the 'efficient' resolution of passenger rail delays." December 19 Decision at 10; *see also id.* at 8-9. But this intent does not support the Board's reading of Section 213. Instead, it merely explains why Congress included Section 213 in the statute in the first place. That Congress wanted to enable the Board to conduct investigations in some circumstances does not speak to the question whether it intended also to enable the Board, on the basis of its own definitions of on-time performance, to supplant or supplement the triggering effect of the metrics to be developed under Section 207.

If anything, the legislative history strongly supports the conclusion that Congress did not intend such a result. First of all, the Board repeatedly emphasizes Congress's

desire that the Board conduct investigations “efficiently.” *Id.* at 8-9. But efficiency would not be served by reading Section 213 as implementing two potentially inconsistent triggers. The only plausible path towards “efficiency” within the statutory framework Congress put in place was that charted in Section 207: a notice-and-comment rulemaking pursuant to which a single set of Metrics and Standards would be developed and then used as the sole basis for triggering investigations under Section 213. Under the Board’s view, every potential investigation would instead involve a battle over the proper definition of “on-time performance.”¹¹

Second, the available legislative history strongly confirms that “on-time performance” as used in Section 213 was specifically intended by Congress to refer to the Section 207 Metrics and Standards. The Board relies on Senate Report 110-67 for the proposition that Section 213 was designed “to address ‘on-time performance *and* service issues impacting intercity passenger trains,’ and Congress specifically intended for *either* to be the trigger for a Board investigation.” December 19 Decision at 8 (citing S. Rep. 110-67 at 11 (May 22, 2007)) (emphasis in original). Again, this much is obvious from the text of Section 213 itself, which (as discussed above) refers to both “on-time performance and “service quality.” The question is whether Congress intended the

¹¹ If the Board instead contemplates devising in the *Amtrak/CN* case a one-size-fits-all definition that would be applicable in all Section 213 cases, such a process should be conducted with the participation of all potentially interested parties. *Cf.* December 19 Decision at 11-12 (Begeman, C., dissenting) (“[T]he Board would best fulfill its obligations under the law by initiating a rulemaking to establish clear standards by which on-time performance cases could be fairly processed.”). From the standpoint of “efficiency,” however, such a process would still inefficiently duplicate the notice-and-comment rulemaking already undertaken under Section 207.

reference to “on-time performance” to create a separate, Board-construed trigger untethered to the Section 207 metrics.

On this question, the legislative history on which the Board relies explains quite clearly that Congress *did not* so intend. The Senate Report completed the sentence quoted in the December 19 Decision as follows: “To address on-time performance and service issues service issues impacting intercity passenger trains, *the bill would direct FRA to issue a quarterly on-time service report.*” S. Rep 110-67 at 11 (May 22, 2007) (emphasis added). The draft bill accomplished this in what was then Section 208, entitled “Metrics and Standards” and the direct predecessor of Section 207. As the Senate Report summarizes, that provision mirrored the enacted version of Section 207 by calling for the development of “metrics and standards for measuring the performance and service quality of intercity train operations.” Two sentences later, the Report explains that the same provision would “require FRA to publish a quarterly report on train performance and service quality.” *Id.* at 25. Given this symmetry, there can be no serious question that at all times in connection with the enactment of PRIIA, Congress had in mind that both “on-time performance” and “service quality” would be governed by the Section 207 Metrics and Standards, and not by some set of definitions that the Board might arrive at in case-by-case adjudication.

At times the Board’s December 19 Decision appears to rely on Congress’s obvious intention that Section 213 provide a basis for conducting investigations to support a very different conclusion about what Congress *would have enacted* had it known that the Section 207 metrics would be ruled unconstitutional. *See* December 19 Decision at 8 (“highly likely that Congress *would have intended* ... in the event Section

207 procedures were declared unconstitutional”; “Congress *would have intended* for the below-80-percent on-time performance trigger of Section 213 to be severable”) (emphases added). This flight of “what if” speculation about what Congress *would have* legislated is impermissible agency action. By its plain terms, Section 213 does not contain the alternative that the Board believes that Congress *might have enacted* had it known that a “cloud” of constitutional uncertainty would hang over the Section 207 path, and the Board is not free to fill in the statutory void.

As the Supreme Court recently reminded, “an agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2445 (U.S. 2014). In *Utility Air Regulatory Group*, the EPA purported to define its own set of thresholds under the Clean Air Act after concluding that those spelled out in the statute were unworkable in practice. The Supreme Court specifically rejected the agency’s attempt to take refuge in *Chevron* deference because Congress makes laws, not the agency. As in the *Utility Air Regulatory Group*, the Board may not craft a new trigger for investigations under Section 213 just because the courts have ruled that the ones that Congress spelled out in the statute is not currently viable. As the Supreme Court explained, “recogniz[ing such] authority ... would deal a severe blow to the Constitution’s separation of powers.” *Id.* at 2446.

That is so “[r]egardless of how serious the problem an administrative agency seeks to address,” *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125-26 (agency “may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” (internal citation omitted)). Likewise, statutes may not be “rewritten” by courts or by agencies – including via the severance of one

portion of the text from the whole -- when Congress' goals are necessarily thwarted by a judicial determination that some part of the structure put in place by Congress is unconstitutional. *See United States v. Stevens*, 559 U.S. 460, 481 (2010) (“We ‘will not rewrite a ... law to conform it to constitutional requirements,’ for doing so would constitute a ‘serious invasion of the legislative domain.’”) (citations omitted); *Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992) (explaining, in rejecting a proposed severance of the invalid portion of the statute, that “it is clearly not this Court’s province to rewrite a state statute.”); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (explaining that, in analyzing proposed severance of the invalid portion of the statute, that “we restrain ourselves from ‘rewrit[ing] state law to conform it to constitutional requirements’”) (citations omitted).

C. Until the Board’s December 19 Decision, Section 213 Was Consistently Viewed as Containing a Single On-Time Performance Trigger Predicated on the Section 207 Metrics and Standards

In light of the analysis above, it is not surprising that until the Board’s December 19 Decision (and apart from Amtrak’s self-serving advocacy in this proceeding and its briefing in support of its amended complaint in *Amtrak/CN*), Section 213 was consistently read as establishing a single trigger based on the on-time performance and service quality Metrics and Standards developed under Section 207.

Until the court of appeals invalidated the Section 207 Metrics and Standards, Amtrak had no difficulty understanding that any potential Section 213 investigation based on on-time performance issues would require application of the Section 207 metrics. Testifying before the Board in Ex Parte No. 683, Amtrak explained that the metrics and standards developed by it and the FRA *pursuant to Section 207* were

intended to provide a single set of *uniform* metrics and standards: “Section 207 requires that Amtrak and the Federal Railroad Administration, in consultation with the STB and others, work together to establish *uniform* metrics and standards.”¹² And its initial complaint in *Amtrak/CN* was predicated entirely on those Metrics and Standards. Complaint, *Amtrak/CN* (filed Jan. 19, 2012).

Similarly, when the validity of the Section 207 standards was presented to the court of appeals, the court had no difficulty concluding that the now-unconstitutional Metrics and Standards “*define the circumstances in which the STB will investigate whether infractions are attributable to a freight railroad’s failure to meet its preexisting statutory obligation to accord preference to Amtrak’s trains.*” *AAR v. DOT*, 721 F.3d 666, 672 (D.C. Cir. 2013) (emphasis added), *cert. granted* 134 S. Ct. 2865 (June 23, 2014).

And when the Department of Justice defended the constitutionality of the Section 207 Metrics and Standards in its reply brief before the Supreme Court, it likewise explained that *those metrics* were the door through which a Section 213 investigation would have to proceed:

Congress could have given Amtrak the ability to initiate such a proceeding whenever it believed the statutory requirement had been violated. Instead, it provided that *the metrics and standards* would, in addition to providing useful information to Congress and the public, help determine when Amtrak could—and when it could not—trigger a governmental investigation.

¹² STB Ex Parte No. 683, Hearing Tr. at 17 (Feb. 11, 2009) (quoting Amtrak witness Crosbie) (emphasis added).

Reply Brief for Petitioner, *DOT v. AAR*, 2014 WL 5395799 at *6 (U.S. Oct. 22, 2014) (emphasis in original and added). At oral argument before the Supreme Court, the Assistant to the Solicitor General again made clear that the Metrics and Standards play a vital “triggering and gatekeeping role,” with any Section 213 “investigation by the Surface Transportation Board ... triggered by their [sic] having been a failure by Amtrak to satisfy the metrics and standards.” Oral Argument, *DOT v. AAR*, 2014 WL 6882757 at *8 (U.S. Dec. 8, 2014). Violation of the Metrics and Standards is “a threshold determination, ... limiting the circumstances in which an investigation can begin.” *Id.* at *13. The Metrics and Standards could not have this dispositive role if Section 213’s definition of “on-time performance” offered an entirely separate path to open an investigation.

The same view was shared by the Board until the December 19 Decision. In former-Chairman Nottingham’s remarks introducing the Board’s 2009 hearing to address the Board’s role in implementing PRIIA Section 213, he perceptively explained that the standards governing the Board’s “power to investigate, in certain circumstances, failures by Amtrak to meet on time performance standards” would be those “established by Amtrak and the Federal Railroad Administration, in consultation with the Board and others” under Section 207 of PRIIA. Ex Parte No. 683, Hearing Tr. at 5 (Feb. 11, 2009) (remarks of Chairman Nottingham).

Later that same year, when the Board filed comments before the FRA on the proposed Metrics and Standards, it again expressed its understanding that PRIIA would

not give the Board any responsibilities in connection with Section 213 unless and until the “the metrics and standards are finalized.”¹³ The Board urged the FRA and Amtrak to move quickly to develop those Metrics and Standards, because, in the Board’s view, doing so was “an *essential step* in order for the processes put in place by PRIIA to be effective.”¹⁴

D. The FRA/Amtrak Section 207 Metrics and Standards Development Process Itself Confirms that Congress Could Not Have Intended for Section 213 to Make Use of a Separate Set of Metrics Developed by the Board

The Board’s interpretation of Section 213 also cannot be reconciled with the extraordinary lengths to which Amtrak and the Federal Railroad Administration went to develop – drawing from a wide array of possible alternatives and over the objection of numerous host railroads – the definitions of on-time performance that would be included in the Metrics and Standards promulgated pursuant to Section 207.

From the beginning, FRA and Amtrak understood that the Section 207 process would need to devote significant attention to the development of “on-time performance” measures, separate from the “service quality” issues that would also need to be addressed

¹³ See Comments of the Surface Transportation Board (April 1, 2009), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2009-0016-0014>. The Board’s complete statement was as follows: “*Once the metrics and standards are finalized*, PRIIA gives STB new responsibilities with respect to the performance and service quality of Amtrak trains. Section 213 of PRIIA establishes a process for investigation by STB in certain circumstances *when the new metrics and standards are not met. ...*”) (emphases added).

¹⁴ *Id.* (emphasis added).

under Section 207.¹⁵ The record from Amtrak and FRA’s development of the Section 207 Metrics and Standards shows that measuring “on-time performance” raises complex issues, and that there are many different and potentially inconsistent ways to measure this aspect of performance. The comments on the proposed metrics reveal extensive debate and controversy regarding the definition of on-time performance. *See, e.g. Metrics and Standards* at 11-22 (“The largest number of comments on the Proposed Metrics and Standards concerned the measures for on-time performance and train delays.”).¹⁶

If and when valid metrics are ultimately promulgated, it is impossible to know how different they will be from the definition of on-time performance that Amtrak would propose to advance for the Board’s adoption in this proceeding. But it is inconceivable that Congress would have provided in Section 207 for an arduous process of arriving at a single set of metrics, only to leave Amtrak free to argue whatever position it wished before this Board in an effort to trigger a Section 213 investigation. Were that so, the

¹⁵ *See Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110-432, 74 Fed. Reg. 10983 (proposed Mar. 13, 2009) at 6, available at <https://www.fra.dot.gov/eLib/Details/L02876>.*

Like the two statutory provisions at issue here (Sections 207 and 213), the Metrics and Standards themselves divide the universe of Amtrak service metrics into two categories: on-time performance and various “service quality” metrics. *See Metrics and Standards* at 11, 22.

¹⁶ *See also, e.g.,* Kevin M. Sheys, “*Amtrak’s Metrics-Making Power Hangs in the Balance*,” NOSSAMAN LLP ALERT (July 28, 2014) (“Host railroads took issue with many aspects of the draft metrics and especially those formulated to measure on-time performance.”), *available at* <http://www.nossaman.com/AmtraksMetricsMakingPowerHangsInTheBalance>.

consideration of “on-time performance” in the Metrics and Standards process would have been a colossal and unnecessary waste of time.¹⁷

E. It Would Be Especially Inappropriate to Interpret Section 213 as Containing a Stand-Alone On-Time Performance Trigger Applicable to Individual Routes Where Host Railroad Performance Is Already Governed by Binding Contractual Metrics

Interpreting Section 213 as providing for a set of Board-developed on-time performance metrics separate from those developed under Section 207 would be particularly inappropriate in a context where the host railroad is already subject to agreed-upon contractual incentives and penalties driven by Amtrak’s on-time performance. As discussed above, Section 207 spells out a process by which the FRA and Amtrak would develop a single and uniform set of on-time performance metrics having general application to all Amtrak trains and all host railroads. Norfolk Southern does not doubt that Congress intended for those Metrics and Standards potentially to trigger investigations under Section 213 even when the Amtrak service in question was operated pursuant to a contract entered consensually between Amtrak and its host railroad.

But it would defy logic and common sense to conclude that Congress intended, in addition, to give the Board the authority to apply its own “on-time performance” metrics to particular Amtrak services operated under contract with host railroads whenever

¹⁷ Moreover, the Metrics and Standards could not establish the “new” forward-looking, uniform metrics Congress intended if the Board were free to construe “on-time performance” in a manner different from that arrived at under Section 207, including based on potential measures that – unlike the Metrics and Standards – were “*already* ‘existing’ at the time of PRIIA’s passage,” as the Board’s December 19 Decision implies at 7.

Amtrak chose to complain. Doing so would supplant the train performance metrics embodied in binding operating agreements between Amtrak and the host railroad over whose tracks those services operate.

To be sure, Congress, the Board and Amtrak have over the years referred to a variety of “metrics and standards” relating to on-time performance. As the Board’s December 19 Decision notes, many of these have long since been repealed by Congress. *See* December 19 Decision at 7 n.22. And as Amtrak’s Memorandum of Law supporting its Complaint here recites, the Board’s own past definitions of on-time performance have arisen in “the context of terms and compensation cases under 49 U.S.C. § 24308(a).” Memorandum of Law at 1. Those cases, of course, involve the Board’s setting of *contractual terms* governing Amtrak’s operation over a host railroad when the parties fail to agree, and cannot be a basis for addressing the terms that should govern here, where Norfolk Southern and Amtrak have *agreed* to terms.

But all of these other measures are beside the point. If there is to be a single, uniform definition of on-time performance for purposes of Section 213, Congress provided a pathway to arrive at one – the now-invalid Section 207 Metrics and Standards. If there is to be a metric developed for the specific purposes of judging the performance of the Capitol Limited’s operation over Norfolk Southern’s trackage, Amtrak’s agreement with Norfolk Southern must govern, and the Board has no authority to interpret or apply that definition. That contract in fact spells out detailed performance standards and provides for both incentive payments and monetary penalties based on how

well Norfolk Southern performs in enabling the train to move across the railroad without undue delay caused by Norfolk Southern.¹⁸ If Amtrak wishes to enforce those standards, its remedy is under the Agreement, which is subject to binding arbitration, not Board review. *See* Norfolk Southern-Amtrak Operating Agreement, Art. 6 (“any claim or controversy . . . concerning interpretation, application or implementation of this Agreement shall be submitted to binding arbitration.”).¹⁹ PRIIA did not authorize Amtrak to invoke, or the Board to apply, such contractual provisions for purposes of Section 24308(f).²⁰

II. DISMISSAL IS THE APPROPRIATE COURSE

Because the Board lacks authority to proceed with the investigation pursuant to Section 24308(f) that Amtrak’s Complaint seeks, the Board should dismiss the

¹⁸ In recent months Norfolk Southern has incurred penalties pursuant to these provisions relating to its operation of the Capitol Limited.

¹⁹ In the interest of filing this Response in the public docket, Norfolk Southern has not filed a copy of its Operating Agreement, which is confidential vis-à-vis third parties. Amtrak, of course, has access to the agreement, and Norfolk Southern would be prepared to provide pertinent portions of the agreement under seal pursuant to an appropriate Board protective order if the Board so requires.

²⁰ To do so would likewise ignore the well-established principle that the Board lacks authority to interpret and apply private contracts. *See, e.g., PSI Energy, Inc. v. CSX Transportation, Inc. & Soo Line R.R.*, Docket No. 42034 (served Sept. 11, 1998) at 3 (“It is well established that, where there is a genuine dispute regarding the scope of a railroad transportation contract, the interpretation of which is necessary to resolve essential issues in a railroad rate complaint, we do not interpret the contract ourselves, but instead suspend proceedings in the rate complaint until the contract is interpreted in court.”); *New England Central R.R. – Trackage Rights Terms & Conditions – Pan Am Southern LLC*, Finance Docket No. 31250 (Sub-No. 1) (served Dec. 23, 2014) at 5 n.29 (“Board leaves enforcement of private contracts to the courts”); *Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc.*, Finance Docket No. 33905 (served Oct. 22, 2001) at 6 (“it is not our place to interpret the contracts that appear to be at the heart of this dispute”).

Complaint. Dismissal is appropriate where a complaint “does not state reasonable grounds for investigation and action.” See *Bell Oil Terminal, Inc. v. Norfolk Southern Ry*, Finance Docket No. 35302 (decision served Nov. 4, 2011), at 3; see also 49 U.S.C. § 11701(b). Here, the only relief sought by Amtrak is an investigation under Section 24308(f), but that relief is foreclosed by the invalidity of the Metrics and Standards. As such, “there is no basis upon which [the Board] could grant the relief sought” and the Complaint should be dismissed. *Bell Oil*, at 3. Of course, if and when valid Metrics and Standards subsequently become effective, the Board’s dismissal of Amtrak’s Complaint would pose no obstacle to Amtrak’s filing of a new complaint seeking to commence an investigation in the event the Capitol Limited’s performance or service quality fails to satisfy the metrics and standards then in effect.

CONCLUSION

Because a formal investigation under Section 24308(f) cannot be commenced at this time, Norfolk Southern requests that the Board dismiss Amtrak's Complaint.

Respectfully submitted,

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

/s/ David L. Meyer
David L. Meyer
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: January 7, 2015

CERTIFICATE OF SERVICE

I, Aaron D. Rauh, certify that on this date a copy of the Norfolk Southern Railway Company's Motion to Dismiss Amtrak's Complaint, filed on January 7, 2015, was served by email and by first-class mail, postage prepaid, on all parties of record, as follows:

Linda J. Morgan
Kevin M. Sheys
Katherine C. Bourdon
Nossaman LLP
1666 K Street NW, Suite 500
Washington, DC 20006
lmorgan@nossaman.com

Charles D. Nottingham
Charles D Nottingham PLLC
1701 Pennsylvania Ave., NW
Suite 300
Washington, DC 20006
chipnottingham@verizon.net

William H. Herrmann
Managing Deputy General Counsel
National Rail Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Peter J. Shutz
CSX Transportation, Inc.
1331 Pennsylvania Ave., NW, Suite 560
Washington, DC 20004
Peter_shutz@csx.com

Thomas H. Dupree, Jr.
John Cristopher Wood
Michael K. Murphy
Gibson, Dunn & Crutcher LLP
1059 Connecticut Ave., NW
Washington, DC 20036-5306
TDupree@gibsondunn.com

Paul R. Hitchcock
Cindy Craig Johnson
Sean Craig
CSX Transportation, Inc.
500 Water Street, J150
Jacksonville, FL 32202-4423
Paul_hitchcock@csx.com

/s/ Aaron D. Rauh

Aaron D. Rauh

Dated: January 7, 2015