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**BY E-FILING**

Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

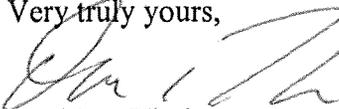
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Office of Proceedings  
February 8, 2016  
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Public Record

**Re: *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (Docket No. EP 726)***

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find the Comments of Canadian National Railway Company, which are being submitted on behalf of Illinois Central Railroad Company and Grand Trunk Western Railroad Company.

Very truly yours,



David A. Hirsh

Counsel for Illinois Central Railroad Company  
and Grand Trunk Western Railroad Company

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. EP 726

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ON-TIME PERFORMANCE UNDER SECTION 213 OF THE  
PASSENGER RAIL INVESTMENT AND IMPROVEMENT ACT OF 2008

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**COMMENTS OF CANADIAN NATIONAL RAILWAY COMPANY**

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February 8, 2016

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. EP 726

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ON-TIME PERFORMANCE UNDER SECTION 213 OF THE  
PASSENGER RAIL INVESTMENT AND IMPROVEMENT ACT OF 2008

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**COMMENTS OF CANADIAN NATIONAL RAILWAY COMPANY**

Canadian National Railway Company and its U.S. rail carrier subsidiaries (collectively “CN”) respectfully submit these comments in response to the Surface Transportation Board’s Notice of Proposed Rulemaking in Docket No. EP 726, *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, (Dec. 28, 2015). As a host railroad for Amtrak, and as a participant in a pending proceeding begun by an Amtrak complaint that relies on the On-Time Performance (“OTP”) trigger for investigation in Docket No. NOR 42134, *National Railroad Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Ry. Co.* (“Amtrak-CN Section 213 Investigation”), CN has a strong interest in the proposed rule.

**SUMMARY**

CN endorses in general and elaborates further on the comments of the Association of American Railroads (“AAR”) in this proceeding. First, as discussed by AAR and argued by CN previously, the Board lacks authority to establish a definition of “on time” for the purpose of implementing an OTP trigger for investigations under Section 213. If, however, the Board rejects that position, then, consistent with Congress’s intent that there be a single OTP trigger,

the Board should clarify that the definition it adopts will be the only such definition used for purposes of the OTP trigger, regardless of the fate of the PRIIA Metrics & Standards on appeal. Second, AAR advocates the use of existing Amtrak-host operating agreements as the basis for determining if trains are on time. CN's operating agreement, and other such agreements, include specific contractual criteria for determining whether a train is on time on each host railroad segment. Use of the data generated under such agreements to identify candidates for investigation will provide a superior criterion for determining whether a Section 213 investigation is warranted. Finally, CN agrees with AAR's position opposing the use of stale data as a basis for investigation under Section 213, and asks that the Board state in this proceeding and/or in its policy statement under consideration in Docket No. EP 728, *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, that only data from the latest four full quarters will be considered as a basis for launching a Section 213 investigation.<sup>1</sup>

## COMMENTS

### **I. CONGRESS SET ONLY ONE OTP TRIGGER IN SECTION 213, AND DID NOT DELEGATE AUTHORITY TO THE BOARD TO DEFINE WHAT IT MEANS FOR A TRAIN TO BE ON TIME.**

Section 213 of PRIIA provides that the Board "may," and, in some circumstances, "shall" investigate a train's performance if its OTP is below 80% for two consecutive quarters. 49 U.S.C. § 24308(f)(1). However, OTP is not a self-defining term, as (1) there are many ways to define what it means for a particular train to be "on time," and (2) there are many ways to define

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<sup>1</sup> CN also agrees with the discussion in AAR's comments concerning the inadequacy of many of Amtrak's schedules. Most Amtrak schedules have not been revised in many years; in general, railroad congestion has increased substantially since they were set; and many cannot be met reliably when congestion levels are high.

the number of total trains that operate in a given quarter.<sup>2</sup> As CN argued in support of its motion to dismiss in Docket No. NOR 42134, Congress intended the FRA and Amtrak to supply the definitions of “on time” and OTP that would apply to the trigger for such investigations. *See* CN Motion to Dismiss (Sept. 17, 2014); CN Petition for Reconsideration (Jan. 7, 2015). In Section 207 of PRIIA, enacted at the same time as Section 213, Congress instructed FRA and Amtrak to “develop new or improve existing . . . measures of on-time performance.” PRIIA § 207(a). As the Board knows, whether that was a constitutionally valid delegation remains in dispute. But regardless of the outcome of that constitutional dispute, Congress chose FRA and Amtrak – not the Board – to define OTP. When Congress assigns an administrative task to one entity, neither the Board nor the courts can re-assign it. *See, e.g., Bayou Lawn & Landscape Servs. v. Sec’y of Labor*, 713 F.3d 1080, 1084-85 (11<sup>th</sup> Cir. 2013); *Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.”) (citation omitted). Accordingly, CN maintains that the Board lacks authority under PRIIA to define OTP for Section 213 trigger purposes and that it should therefore dismiss this proceeding.

CN acknowledges, however, that in instituting this rulemaking the Board is acting on the premise that it does have authority to define OTP for Section 213 trigger purposes. If the Board adheres to that position, it should follow it to its logical conclusion and, accordingly, clarify that whatever OTP trigger it adopts will be the exclusive OTP trigger for Section 213 investigations. If the Board is correct that Congress intended it to establish the OTP trigger for Section 213

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<sup>2</sup> For example, trains are not measured for timely performance under the Amtrak-CN Operating Agreement if they are detoured, or annulled or terminated by Amtrak, or suffer major delays due to accidents or force majeure conditions beyond the control of the parties. *See* Amtrak-CN Operating Agreement at Appendix V-5.

investigations, it cannot have intended FRA and Amtrak to do so too. Congress surely did not intend to have different regulators create conflicting definitions of the same term for the same purpose, or to have the Board waste time and effort formulating an OTP definition that would have no effect if the FRA/Amtrak definition of the same term applies. Accordingly, if the Board proceeds to define the Section 213 OTP trigger in this proceeding, it should clarify that, regardless of the outcome of the pending constitutional litigation, the OTP trigger it adopts will be the exclusive OTP trigger for Section 213 purposes.

**II. IF THE BOARD ESTABLISHES AN OTP TRIGGER FOR SECTION 213 INVESTIGATIONS, THAT TRIGGER SHOULD UTILIZE THE ON-TIME PERFORMANCE DATA GENERATED UNDER APPLICABLE AMTRAK-HOST OPERATING AGREEMENTS.**

As discussed in AAR's comments, rather than adopting a one-size-fits-all definition of timeliness, where available the Board should use on-time data generated under Amtrak-host operating agreements to establish whether to trigger an investigation under Section 213 based on OTP. Calculating quarterly OTP using the data produced under such agreements would provide a clear and tailored means of determining whether an investigation is warranted.

Under the current Amtrak-IC/GTW Operating Agreement ("Amtrak-CN Operating Agreement"), for example, each train trip is measured to determine if it meets established criteria of timely performance. After considering what makes sense for a particular train with a particular schedule, Amtrak and CN have agreed on criteria to determine which trips are timely and which are not. In other words, they have reached an informed, train-specific agreement on criteria for assessing timely performance.<sup>3</sup> Using the data generated under the Amtrak-CN

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<sup>3</sup> It should be even clearer that Amtrak must not be allowed to agree contractually that a given level of performance is acceptable, and not subject to penalties, and then assert in a Section 213 proceeding that performance at such levels violates preference and should result in an award

Operating Agreement (and like agreements), it is a simple matter to calculate the quarterly OTP for a given train: one need only divide the number of trains operated over the quarter by the number of trains counted as timely under the terms of the agreement.

Making use of operating agreement criteria for timely train performance would also satisfy the Board's preference for a definition that "would be clear and relatively easy to apply." Notice of Proposed Rulemaking at 6. For contractual purposes, Amtrak and hosts like CN already maintain, and audit through agreed contractual procedures, data for each train. This information is therefore readily available and would require no collection or development of new data.<sup>4</sup>

More importantly, adopting contractual criteria and data concerning train performance as the basis for the Section 213 OTP trigger would ensure that to the maximum extent possible the measurement of OTP is tailored to the particular train and will incorporate adjustments and other nuances that cannot be captured by a global "one size fits all" mileage-based standard. The determination of OTP would not depend upon the Board's choice of a pre-set number of minutes of tolerance per mile, or a minimum for minutes of tolerance, or whether a cap is imposed on tolerance and, if so, how much. Use of contractual criteria and data concerning train performance would guarantee a much more realistic and meaningful view of which Amtrak trains are having significant operational problems such that an investigation would be warranted. It would also prevent Amtrak from unfairly invoking the levels of performance for which it

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of damages against the host. Contract performance that is not earning penalties should be an absolute defense to any preference violation claim.

<sup>4</sup> Using contractual criteria and data would likewise "simplify the record-keeping and production of evidence that may otherwise be necessary for Amtrak and the host carriers if on-time performance were defined using a number of additional factors, such as the amount of delay at intermediate stops." Notice of Proposed Rulemaking at 6.

contracts as inadequate and a basis for a Section 213 investigation, including possible relief and damages.

**III. THE BOARD SHOULD NOT ALLOW STALE DATA TO BE USED FOR PURPOSES OF AN INVESTIGATION TRIGGER.**

CN agrees with AAR that the Board should not allow Section 213 investigations to be triggered on the basis of stale data, and that a reasonable cutoff is the last four complete calendar quarters. This would assure that requests for investigation are at least not based on data that is more than a year old. The main statutory purpose of a Section 213 investigation is for the Board to formulate forward-looking “recommendations.” (49 U.S.C. § 24308(f)(1)). If a train has performed well over the preceding year, the Board’s and parties’ energies should not be wasted on dissecting historical problems that have already been solved.

Adopting such a limitation is within the Board’s inherent investigative authority. Accordingly, CN asks that the Board make clear in this proceeding as well as in Ex Parte No. 728 that it will not permit the use of stale data as a basis for a Section 213 trigger.

**CONCLUSION**

CN appreciates the opportunity to comment on the Board's proposed rule.

Respectfully submitted,



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