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VIA E-FILING

236557

August 29, 2014

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
August 29, 2014
Part of
Public Record

Re: STB Finance 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-referenced docket is the National Railroad Passenger Corporation's Amended Complaint and Motion to Amend the Complaint.

If you have any questions, please contact me.

Respectfully submitted,

/s/Linda J. Morgan

Linda J. Morgan
Attorney for National Railroad Passenger Corporation

Enclosures

**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**

MOTION TO AMEND THE COMPLAINT

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August 29, 2014

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MOTION TO AMEND THE COMPLAINT

INTRODUCTION

The National Railroad Passenger Corporation (“Amtrak”) hereby respectfully files this Motion to Amend the Complaint in the above referenced proceeding. The Amended Complaint narrows the focus of the complaint to the performance of Amtrak’s Illini/Saluki service rather than all the Amtrak services on Canadian National addressed in the Original Complaint, and provides the Board with updated performance information on the Illini/Saluki service.¹

As explained in the Amended Complaint, the performance of Amtrak’s Illini/Saluki service on Canadian National’s tracks has been consistently substandard. In the quarter ending June 30, 2014, the All-stations on-time performance (“OTP”) of the Illini/Saluki service was 49.2 percent; it was 42.1 percent in the previous quarter; and it has been well below the 80 percent investigation threshold for three years.²

¹ Amtrak counsel asked Canadian National’s counsel if Canadian National would concur with the process of amending the existing complaint. In response, counsel stated that the railroad could not concur.

² See Amended Complaint, Appendix A. All-stations OTP is defined as the percentage of times Amtrak trains departed their origin station and arrived at each other station (including the end station) within 15 minutes of the times on the public schedule.

PROCEDURAL HISTORY

On January 19, 2012, Amtrak filed a Petition for Relief Requiring the Initiation of An Investigation of Substandard Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”).³ In its Petition, Amtrak asked the Board to investigate substandard performance of a number of Amtrak passenger trains on rail lines owned by Canadian National Railway Company and its subsidiaries, Grand Trunk Western Railroad Company and Illinois Central Railroad Company (collectively “CN”).⁴

On March 9, 2012, CN filed a reply.⁵ Simultaneous with its reply, CN filed a Motion for Abeyance.⁶ In the Motion for Abeyance, CN asked the Board to hold the proceedings in abeyance pending the resolution of cross-motions for summary judgment in *Association of American Railroads v. Department of Transportation (AAR v. DOT)*.⁷ CN argued that the metrics developed pursuant to PRIIA Section 207, at the heart of *AAR v. DOT*, were directly relevant to the instant proceeding and could “render the proceeding a nullity.”⁸

On March 27, 2012, before the Board issued a decision on CN’s Motion for Abeyance, Amtrak and CN filed a Joint Motion requesting Board-supervised mediation.⁹ The Board granted the joint request and held the proceeding in abeyance for up to 90 days while the parties

³ *Petition for Relief by Amtrak Requiring the Initiation of an Investigation of Substandard Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, January 19, 2012 (hereinafter “*Original Complaint*”).

⁴ *Original Complaint*, 2.

⁵ *CN Response to Amtrak Petition Under Section 213 of PRIIA*, March 9, 2012.

⁶ *CN Motion for Abeyance*, March 9, 2012.

⁷ *Ass’n of Am. R.R.s v. Dep’t of Trans.*, 865 F.Supp.2d 22 (D.D.C. 2012), *rev’d*. 721 F.3d 666 (D.C. Cir. 2013), *cert. granted*, 82 U.S.L.W. 3731 (U.S. June 3, 2014).

⁸ *CN Motion for Abeyance*, 5.

⁹ *Joint Motion of National Railroad Passenger Corporation and CN Requesting STB-Supervised Mediation*, March 27, 2012.

participated in mediation.¹⁰ The parties then sought and received three 30-day abeyances to continue mediation through October 4, 2012.¹¹

On May 21, 2012, the District Court granted summary judgment in favor of the Department of Transportation in *AAR v. DOT*.¹² The AAR appealed.

On November 2, 2012, the Board reactivated the proceeding and ordered the parties to meet and confer on an appropriate procedural framework to govern the case, to be filed with the Board on November 26, 2012.¹³ The Board also directed CN to indicate whether it intended to pursue its continued abeyance until the D.C. Circuit provided a ruling on the *AAR v. DOT* case, which was then before that court.¹⁴

On January 2, 2013, the Board issued a decision denying CN's request for a further abeyance, granting CN's motion for leave to file a response to Amtrak's proposed procedural schedule, and ordering the parties to consult to develop "a methodology for sampling the movements on each of the relevant Amtrak routes to provide a representative subset of evidence

¹⁰ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1 (STB Served April 3, 2012).

¹¹ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1 (STB Served July 2, 2012); *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1 (STB Served July 31, 2012); and *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1 (STB Served August 31, 2012).

¹² *Ass'n of Am. R.R.s v. Dep't of Trans.*, 865 F.Supp.2d 22 (D.D.C. 2012).

¹³ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1-2 (STB Served Nov. 2, 2012).

¹⁴ *Id.*

to represent all subject movements.”¹⁵ The Board also adopted a procedural schedule in its decision.¹⁶

On February 6, 2013, Amtrak and CN filed a Joint Motion to Stay the Proceeding and hold them in abeyance because Amtrak and CN were in productive discussions regarding the issues raised in Amtrak’s Original Complaint.¹⁷ The Board granted the abeyance through April 2, 2013.¹⁸ The parties sought another abeyance on March 22, which was granted by the Board on March 27, 2013.¹⁹ The Board also directed the parties to file a status report by August 1, 2013.²⁰ On August 2, 2013, Amtrak and CN filed a Joint Motion to Extend Abeyance and also to extend the due date for the status report to August 8, 2013.²¹ The Board granted the motion.²² The parties filed a Joint Status Report and Motion to Extend Abeyance on August 9, 2013.²³ The Board granted the parties’ motion and ordered the parties to provide joint quarterly status reports beginning on November 19, 2013.²⁴

¹⁵ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 4 (STB Served Jan 2, 2013).

¹⁶ *Id.* at Appendix.

¹⁷ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1 (STB Served Feb. 8, 2013).

¹⁸ *Id.* at 2.

¹⁹ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1 (STB Served March 27, 2013).

²⁰ *Id.* at 2.

²¹ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1 (STB Served August 6, 2013).

²² *Id.*

²³ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 1 (STB Served Aug. 19, 2013).

²⁴ *Id.*

Meanwhile, on February 19, 2013, the Court of Appeals for the D.C. Circuit reversed the District Court's decision in *AAR v. DOT* and held that the metrics developed pursuant to PRIIA Section 207 impermissibly delegated regulatory authority to Amtrak.²⁵ The Department of Transportation (DOT) appealed the D.C. Circuit's decision to the United States Supreme Court.

Amtrak and CN filed a joint status report on November 19, 2013, and asked the Board to continue to hold the proceedings in abeyance through July 31, 2014.²⁶ Amtrak and CN stated that they were continuing discussions but had not reached an agreement and also cited the possibility of Supreme Court review of the *AAR v. DOT* decision at the Court of Appeals.²⁷ The parties then filed Joint Status Reports on February 19, 2014, and May 19, 2014.²⁸

The Supreme Court granted certiorari in *AAR v. DOT* on June 3, 2014.²⁹ A date for oral argument in the case has not been scheduled.

On July 21, 2014, Amtrak filed a Notice of Intent to Amend the Complaint in advance of this submission.³⁰ Amtrak's Notice of Intent to Amend the Complaint stated that the subsequent Amended Complaint would "be based on the 80 percent standard [in PRIIA Section 213] and focus on a particularly egregious performance problem that can and should be investigated without further delay pursuant to Section 213."³¹

²⁵ *Ass'n of Am. R.R. v. U.S. Dep't of Trans.*, 721 F.3d 666, 677 (D.C. Cir. 2013).

²⁶ *Joint Status Report, National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, Nov. 19, 2013.

²⁷ *Id.*

²⁸ *Joint Status Report, National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134 (STB Served Feb 19, 2014) and *Joint Status Report, National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, May 19, 2014.

²⁹ *Ass'n of Am. R.R. v. U.S. Dep't of Trans.*, 721 F.3d at 677, *cert granted*, 82 U.S.L.W. 3731 (U.S. June 3, 2014).

³⁰ *Amtrak Notice of Intent to Amend the Complaint*, July 21, 2014.

³¹ *Id.* at 5.

DISCUSSION OF THE AMENDED COMPLAINT

I. Notwithstanding *AAR v. DOT*, the STB has a statutory obligation to investigate the substandard performance of the Illini/Saluki service because of the failure to meet the 80 percent standard.

In PRIIA Section 213, codified at 49 U.S.C. § 24308(f)(1), Congress mandated the following:

If 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, the Surface Transportation Board (referred to in this section as the “Board”) may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.

(Emphasis added).

While resolution of the *AAR v. DOT* case remains uncertain, Section 24308(f)(1) clearly directs the Board, upon complaint of Amtrak, to initiate an investigation when on-time performance of an Amtrak train has fallen below 80 percent for two consecutive quarters. This portion of the statute is not at issue in the *AAR v. DOT* case. Amtrak’s Amended Complaint is based on the 80 percent standard under PRIIA Section 213 rather than the metrics developed under PRIIA Section 207, and focuses on a particularly egregious performance problem on the Illini/Saluki service that can and should be investigated without further delay pursuant to Section 24308(f).

As noted above and in the Amended Complaint, in the quarter ending June 30, 2014, the All-stations OTP of the Illini/Saluki service was 49.2 percent; it was 42.1 percent in the previous

quarter; and it has been well below the 80 percent investigation threshold for three years. Endpoint OTP was 57.7 percent in the quarter ending June 30, 2014 and was 41.6 percent in the previous quarter; for the three years ending June 30, 2014, Endpoint OTP has been below the 80 percent investigation threshold for all but one quarter, during which it was 80.5 percent.³²

Furthermore, under 49 U.S.C. § 24308(c), host railroads such as CN must give preference to Amtrak trains over freight trains subject only to very limited exceptions. The Amended Complaint provides evidence of possible preference violations. In connection with its investigation into substandard performance, the Board should award damages and other relief as appropriate if preference violations are found.

II. The Amended Complaint provides an opportunity for the Board in a focused way to implement Congressional intent concerning substandard performance of Amtrak's Illini/Saluki service.

In addition to focusing on the 80 percent on-time performance threshold, the Amended Complaint significantly reduces the scope of this proceeding by focusing on the Illini/Saluki service. By focusing specifically on the Illini/Saluki service, the Amended Complaint narrows the scope of the proceeding to a single Amtrak service that is consistently substandard. Particularly in light of the importance of the Illini/Saluki service to the Chicago-Champaign-Carbondale areas, the Illini/Saluki service is a prime example of the negative effect substandard performance of Amtrak trains can have.

Although all seven of the Amtrak services on CN lines provide important passenger service, and have significant performance issues that warrant relief under PRIIA Section 213, Amtrak recognizes the resource-intensive nature of the Board's task in promptly investigating and addressing the substandard service issues on all the routes in response to one complaint and

³² See Amended Complaint, Appendix A. Endpoint OTP is defined as the percentage of times Amtrak trains arrived at their terminal station within 15 minutes of the arrival time on the public schedule.

therefore seeks to amend the complaint as a means of expediting the review of substandard performance on the Illini/Saluki service.

III. Granting the Motion to Amend the Original Complaint would be consistent with Board precedent and in the public interest.

Under the Board's rules "[l]eave to amend any document is a matter of the Board's discretion." 49 C.F.R. § 1104.11. *See also Scio Pottery Company v. Consolidated Rail Corporation*, 1990 ICC LEXIS 29, 3 (ICC Served Jan. 18, 1990). The Board should exercise its discretion and grant Amtrak's Motion to Amend the Complaint. There is good cause for doing so, and amending the complaint would not unduly delay the proceeding or prejudice either party.

In considering whether to grant a motion to amend, the Board determines whether good cause exists to do so. *A & R Line, Inc.—Abandonment Exemption—In Cass and Pulaski Counties, In.; Toledo, Peoria & Western Railway Corporation—Discontinuance of Service Exemption—In Cass and Pulaski Counties, In.*, 2004 STB LEXIS 148, 2 (STB Served Mar. 3, 2004) ("Good cause exists to grant the motion to amend."). Here, there is good cause to grant Amtrak's Motion to Amend the Complaint because the Amended Complaint will allow the Board to fully investigate CN host railroad service while tying the complaint specifically to what is not now under review by the Supreme Court and narrowing the scope of the proceeding so that it can be handled in a more focused and timely manner.

The Board has also evaluated whether an amended pleading will unduly delay the proceeding or prejudice any party. *See United States Department of Energy—Rail Construction and Operation—Caliente Rail Line in Lincoln, Nye, and Esmeralda Counties, NV*, 2008 STB LEXIS 359, 5 (STB Served June 26, 2008) (Board granted the State's Motion to Amend, based, in part, on the fact that "acceptance of the State's pleading will not unduly delay the proceeding or prejudice any party."). Here, a Board decision granting Amtrak's Motion to Amend the

Original Complaint will not unduly delay the proceeding. In fact, the Motion to Amend seeks to narrow the scope of the complaint, thereby reducing the time and resource allocation for the Board and all parties involved. In addition, narrowing the scope of the complaint will not prejudice either of the parties as both parties will benefit from a more resource-focused process.

IV. The Board’s investigative authority is intended to expedite a full review of the issue before it and should be implemented in this proceeding with that in mind.

In 49 U.S.C. § 24308(f)(1), Congress explicitly provided the Board with the authority to investigate on its own or upon complaint of Amtrak. Accordingly, the Board has the authority to investigate and “obtain information from all parties involved. . .”³³ The statute specifically provides the Board with the authority, on its own initiative, to compile the data necessary to conduct an investigation. Congress mandated that the Board have broad investigatory authority in this area, and the Board should exercise that authority in this case.

The investigative authority granted to the Board in 49 U.S.C. § 24308 (f) is in addition to the Board’s already “broad powers to investigate complaints of non-compliance with the Interstate Commerce Act or its own orders.”³⁴ Pursuant to 49 U.S.C. § 11701(a), the Board has broad power to initiate an investigation upon receipt of a complaint. The Board also has the authority to take appropriate action to compel compliance with the statute. Relying on these investigatory powers, the Board has ordered parties to provide specific information in a number of different contexts.³⁵ The Board’s investigatory powers are clearly broad, and the agency has

³³ 49 USC § 24308(f)(1).

³⁴ *Moore v. Bhd. of Locomotive Eng’rs*, 2000 U.S. Dist. LEXIS 9231, 13 (D. Kan. June 15, 2000) (citing 49 U.S.C. § 721).

³⁵ In particular, the Board recently, on its own initiative, ordered Canadian Pacific Railway and BNSF Railway to provide further information regarding network performance. *United States Rail Service Issues—Grain*, STB Finance Docket No. 724, slip op. at 7 (STB Served Aug. 18 2014); *See also Wisconsin Power and Light Co. v. Union Pacific R.R. Co.*, 2000 STB LEXIS 667, 1 (STB Served Nov.

on its own initiative applied them accordingly. The Board should exercise its broad authority to investigate the substandard performance of the Illini/Saluki with this in mind.

Amtrak's Motion to Amend seeks to reduce the time and resource allocation of the investigation into CN service failures for all of the parties – Amtrak, CN and the Board – while still addressing in a timely way the systemic CN service issues as they are experienced on one route. Amtrak hereby asks the Board to grant this Motion to Amend the Original Complaint and expeditiously proceed with an investigation of Illini/Saluki service.

V. The Board's directive regarding sampling is no longer necessary.

In the Board's decision dated January 2, 2013, the Board noted that "[i]t is in the parties interest, as well as the Board's, to develop a thorough but manageable record to resolve this dispute while keeping litigation costs as low as possible."³⁶ Continuing, the Board said, "[t]o that end, the parties are directed to collaborate to develop a sampling method across all of the relevant route data that would provide a representative subset of evidence to present all movements subject to the petition."³⁷ As the proceeding remained in abeyance following the issuance of this decision, Amtrak and CN did not develop the sampling method suggested by the Board. At this stage, however, it is no longer necessary for the Board to reactivate its order for the establishment of a sampling method across all the relevant route data, as the Amended

14, 2000) (Board ordered a railroad to "to point out where in the record (by document and page number and by Bates number) it shows how [the railroad] developed the cycle times used to find the number of locomotives required by the stand-alone railroad.").

³⁶ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, STB Docket No. NOR 42134, slip op. at 4 (STB Served Jan. 2, 2013).

³⁷ *Id.*

Complaint focuses on only one route and thus implicates a much more limited and more manageable amount of data.³⁸

CONCLUSION

For the foregoing reasons, Amtrak asks the Board to grant this Motion to Amend the Complaint.

Dated: August 29, 2014

Respectfully submitted,

/s/Linda J. Morgan

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³⁸ The procedural schedule issued by the Board in the January 2, 2013 decision is now moot. *See Id.*

CERTIFICATE OF SERVICE

I certify that on August 29, 2014, a true copy of the foregoing *National Railroad Passenger Corporation's Motion to Amend the Complaint* was served via email upon the following counsel of record:

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Docket No. NOR 42134

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AMENDED COMPLAINT

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August 29, 2014

INTRODUCTION

Pursuant to 49 C.F.R. §1117.1, the National Railroad Passenger Corporation (“Amtrak”) hereby submits this Amended Complaint to initiate an investigation by the Surface Transportation Board (“STB” or “Board”) of the substandard performance of Amtrak’s Illini/Saluki service between Chicago and Carbondale, IL, which runs almost entirely on rail lines owned by Canadian National Railway Company subsidiary Illinois Central Railroad Company (“CN”).

In the quarter ending June 30, 2014, the All-stations on time performance (“OTP”) of the Illini/Saluki service was 49.2 percent; it was 42.1 percent in the previous quarter; and it has been well below the 80 percent investigation threshold for three years.¹ Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), codified at 49 U.S.C. § 24308(f), “[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters . . . upon the filing of a complaint by Amtrak . . . the Board shall initiate [] an investigation” into the causes of delays incurred by Amtrak passenger trains operating over a rail carrier's lines.

Accordingly, Amtrak requests that, pursuant to 49 U.S.C. § 24308(f)(1), the STB initiate expeditiously an investigation of the substandard performance on the Illini/Saluki service. Amtrak further requests that if the Board, pursuant to 49 U.S.C. 24308(f)(2), determines in connection with the investigation that preference violations exist, it award damages and other relief as reasonable and appropriate against CN in accordance with 49 U.S.C. § 24308(f)(3).

¹ See Appendix A. All-stations OTP is defined as the percentage of times Amtrak trains departed their origin station and arrived at each other station (including the end station) within 15 minutes of the times on the public schedule.

THE PARTIES

A. National Railroad Passenger Corporation

In 1970, Congress created the National Railroad Passenger Corporation pursuant to the Rail Passenger Service Act ("RPSA"), 49 U.S.C. § 24101 et seq., to assume the passenger rail service that private railroad companies had long been legally required to operate.² Congress vested Amtrak with the general mission of providing "efficient and effective intercity passenger rail mobility consisting of high quality service."³

Amtrak's Illini/Saluki service provides passenger rail service between Chicago and Carbondale, Illinois, on a route owned almost entirely by CN. Illini/Saluki trains (trains numbered 390, 391, 392, and 393) serve the following station stops along the 309-mile route: Chicago, Homewood, Kankakee, Gilman, Rantoul, Champaign-Urbana, Mattoon, Effingham, Centralia, Du Quoin, and Carbondale. Ten of the eleven station stops along this route are on CN's track.⁴ The Illini/Saluki service is scheduled to take five and a half hours in both directions. The Illini/Saluki served 340,741 passengers in fiscal year 2013.

B. Canadian National Railway Company

Canadian National Railway Company operates a 32,000 kilometer rail network in the United States and Canada. In 2013, CN earned approximately \$10.57 billion (Canadian) in revenue.⁵ In the second quarter of 2014, CN's net income increased 18 percent, its operating income increased 21 percent, its revenue increased 17 percent, and its car loadings were 11

² See S. Rep. No. 110-67, at 1 (2007) ("Amtrak was established... to relieve the then financially beleaguered private railroad sector of its common carrier obligations to offer intercity passenger transportation and to preserve and reinvigorate intercity passenger rail service throughout the Nation.").

³ 49 U.S.C. § 24101(b).

⁴ See "Illini/Saluki Route Map", Attached as Appendix A.

⁵ Canadian National Railway Company, "CN reports Q4-2013 net income of C\$635 million, or C\$0.76 per diluted share." <http://www.cn.ca/en/media/2014/01/cn-reports-q4-2013-net-income> (last visited Aug. 21, 2014).

percent above the same quarter in the previous year.⁶ CN's operating ratio improved by 1.3 points, falling to a second-quarter record low of 59.6 percent, versus 60.9 percent from last year.⁷

As the host railroad for Illini/Saluki service, CN controls the movement of all trains operating on the line and thus, in order to meet its schedules, Amtrak depends on CN to dispatch the trains appropriately. Unfortunately, Amtrak's Illini/Saluki service has not seen the benefit of CN's record-breaking operating performance. Either because Amtrak is not a priority for CN or because CN sacrifices Amtrak's schedule in order to achieve its own, the Illini/Saluki performance has been, and continues to be, substandard.

DISCUSSION

I. A Board investigation is mandated here based on a level of on-time performance for the Illini/Saluki service that averaged less than 80 percent for two consecutive calendar quarters.

The Board has the authority to investigate substandard performance under 49 U.S.C.

§ 24308(f)(1), which provides (emphasis added):

If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters . . . the Surface Transportation Board . . . may initiate an investigation, or upon the filing of a complaint by Amtrak, . . . the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.

As noted in the Introduction, in the quarter ending June 30, 2014, the All-stations OTP of the Illini/Saluki service was 49.2 percent; it was 42.1 percent in the previous quarter; and it has been well below the 80 percent investigation threshold for three years. Endpoint OTP was 57.7

⁶ Canadian National Railway Company, "CN reports Q2-2014 net income of C\$847 million, up 18 percent from year-earlier net income of C\$717 million." <http://www.cn.ca/en/media/2014/07/cn-reports-q2-2014-net-income> (last visited August 15, 2014).

⁷ "CN Scores Sub-60 Operating Ratio, Sets Volume Record in Q2," ProgressiveRailroading.com, http://www.progressiverailroading.com/canadian_national/news/CN-scores-sub60-operating-ratio-sets-volume-record-in-Q2--41128 (last visited Aug. 15, 2014).

percent in the quarter ending June 30, 2014 and was 41.6 percent in the previous quarter; for the three years ending June 30, 2014, Endpoint OTP has been below the 80 percent investigation threshold for all but one quarter, during which it was 80.5 percent.⁸ The STB must investigate.

II. If the Board's investigation reveals that delays are attributable to preference violations, the Board should award damages and prescribe other measures to deter future preference violations.

Federal law mandates that passenger service be given preference over freight service.

Specifically, 49 U.S.C. § 24308(c) provides:

Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.

CN very often makes choices that result in delays to Amtrak Illini/Saluki trains. The following examples are typical:

- On May 16, 2013, a southbound Illini/Saluki train was delayed three times by CN's decisions. First, CN routed the Illini/Saluki train onto a siding, which required it to reduce its speed, so that a freight train could operate on the main line. CN could have routed the freight train onto one of two earlier sidings and allowed the Amtrak train to hold the main and maintain its speed. CN's decision resulted in a delay to the Illini/Saluki train of seven minutes. Later, CN routed the same Illini/Saluki train onto another siding (requiring it to again reduce its speed) in order to go around a freight train on the main line switching rail cars into and out of Champaign yard. CN could have either kept the freight train in the yard, or placed it in a nearby siding to allow Amtrak to continue on the main track without delay, and then conducted its switching activities. CN's decision resulted in a further delay of four minutes. Finally, CN required the same Illini/Saluki train to operate behind a slower freight train causing an additional six minutes of delay, despite the fact 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.

⁸ See Appendix A. Endpoint OTP is defined as the percentage of times Amtrak trains arrived at their terminal station within 15 minutes of the arrival time on the public schedule.

- On July 28, 2013, CN dispatched a northbound Illini/Saluki train into a siding to avoid a freight train that was switching cars on the main line. CN could have held the freight train in a nearby yard or siding in order to let the Illini/Saluki train pass. Operating in the siding required the Illini/Saluki train to reduce speed and resulted in a delay of three minutes. Next, CN dispatched the Illini/Saluki train into another siding to wait for a southbound freight train to pass, despite the fact that sidings were available for the freight train to stop and allow the Illini/Saluki train to pass first. This resulted in a further delay of twenty-one minutes to the Illini/Saluki train.
- On September 5, 2013, CN gave a southbound Illini/Saluki train a stop signal while a freight train was using the main track for head room to switch cars into a siding. After the Illini/Saluki train had already waited, CN then dispatched the Illini/Saluki train into the siding along with the freight train in order to let another, different northbound freight train pass on the main track. 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 in a different nearby siding. Even after the first delay, CN could have held the second freight train in a different siding and let the Amtrak train have the route. However, by forcing the Illini/Saluki train to wait for both freight trains, CN delayed the Illini/Saluki train by 38 minutes.

CN's choices in the above examples suggest possible preference violations. As part of its investigation of substandard performance, the Board under 49 U.S.C. § 24308(f)(2) may take action if delays are caused by the host railroad's failure to provide preference:

If the Board determines that delays . . . investigated under paragraph (1) are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under subsection (c), the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.

Paragraph (3) addresses "Damages and Relief" as follows:

In awarding damages and prescribing other relief under this subsection the Board shall consider such factors as—(A) the extent to which Amtrak suffers financial loss as a result of host rail carrier delays . . . and (B) what reasonable measures would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.

In light of the evidence provided in this Amended Complaint, as part of its investigation the Board should look into possible preference violations and act accordingly.

III. The Board has broad authority to initiate an investigation of Amtrak Illini/Saluki service on CN.

In 49 U.S.C. § 24308(f)(1), Congress was very specific in directing the Board to initiate an investigation upon complaint of Amtrak. In granting this authority, Congress was fully aware of the broad investigative powers that it had already granted the agency and envisioned that the Board would implement its investigative authority in this instance broadly. The grant of investigative authority presumes that the agency will on its own initiative seek out the information that it needs to implement its authority. The Board should not hesitate to take such initiative with respect to its investigation of the delays to Amtrak trains on the Illini/Saluki service.

Case law affirms the expansiveness of the agency's investigative authority. "The STB has been granted broad powers to investigate complaints of non-compliance with the Interstate Commerce Act or its own orders." *Moore v. Bhd. of Locomotive Eng'rs*, 2000 U.S. Dist. LEXIS 9231, 13 (D. Kan. June 15, 2000) (citing 49 U.S.C. § 721). Pursuant to 49 U.S.C. § 11701(a), the Board has broad power to initiate an investigation upon receipt of a complaint. The Board also has the authority to take appropriate action to compel compliance with the statute. Relying on these investigatory powers, the Board has ordered parties to provide specific information in a number of different contexts.⁹ The Board's investigatory powers are clearly broad, and the agency has on its own initiative applied them accordingly.

⁹ In particular, the Board recently, on its own initiative, ordered Canadian Pacific Railway and BNSF Railway to provide further information regarding network performance. *United States Rail Service Issues—Grain*, STB Finance Docket No. 724, slip op. at 7 (STB Served Aug. 18, 2014). See also *Wisconsin Power and Light Co. v. Union Pacific R.R. Co.*, 2000 STB LEXIS 667, 1 (STB Served Nov. 14, 2000) (Board ordered a railroad to "to point out where in the record (by document and page number and by Bates number) it shows how [the railroad] developed the cycle times used to find the number of locomotives required by the stand-alone railroad.").

With specific reference to 49 U.S.C. § 24308(f)(1) the Board has the authority to investigate and “obtain information from all parties involved. . .” Consistent with the Board’s broad investigatory powers, the statute specifically envisions that the Board take its own initiative in gathering what it needs to conduct such an investigation. The Board should exercise the broad investigatory authority established by Congress to review the substandard performance of the Illini/Saluki service. This Amended Complaint narrows the scope of Amtrak’s Original Complaint from all Amtrak routes on CN to just one route, the Illini/Saluki. This will assist the Board in carrying out Congress’ mandate that the Board investigate substandard intercity passenger rail service without the need for a review of all Amtrak services on CN in a single case. In addition to the information provided herein, the Board has the authority to order the parties to provide the specific data the Board determines relevant to its investigation and it should exercise that authority here.

AMTRAK'S REQUEST FOR RELIEF

Based on the foregoing and pursuant to the Board's broad investigatory authority, Amtrak asks the Board to initiate expeditiously an investigation into the substandard performance of the Illini/Saluki service. In doing so, the Board should on its own initiative order the parties to provide it with the information necessary for its investigation. Amtrak also requests that, at the completion of its investigation, the Board provide for damages and other relief as appropriate for preference violations on this route.

Respectfully submitted,

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August 29, 2014

CERTIFICATE OF SERVICE

I certify that on August 29, 2014, a true copy of the foregoing National Railroad Passenger Corporation's Motion to Amend the Complaint was served via email upon the following counsel of record:

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OTP for Illini/Saluki Service

	FY 11 Q4	FY 12 Q1	FY 12 Q2	FY 12 Q3	FY 12 Q4	FY 13 Q1	FY 13 Q2	FY 13 Q3	FY 13 Q4	FY 14Q1	FY 14 Q2	FY 14 Q3
	Jul – Sep 2011	Oct – Dec 2011	Jan – Mar 2012	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012	Jan – Mar 2013	Apr – Jun 2013	Jul – Sep 2013	Oct – Dec 2013	Jan – Mar 2014	Apr – Jun 2014
All- Stations OTP	54.3%	59.4%	58.6%	56.6%	48.7%	54.8%	61.4%	60.5%	55.7%	55.7%	42.1%	49.2%
Endpoint OTP	66.0%	74.7%	76.4%	75.5%	58.7%	70.4%	80.5%	78.6%	75.0%	64.1%	41.6%	57.7%

EXHIBIT B

