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VIA ELECTRONIC FILING

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

Re: STB Docket NOR 42141

Dear Ms. Brown:

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

Thank you for your assistance.

Sincerely,

/s/ David L. Meyer

Attachment

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

Contains color images

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42141

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

NORFOLK SOUTHERN'S RESPONSE TO AMTRAK'S COMPLAINT

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Dated: January 7, 2015

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NORFOLK SOUTHERN’S RESPONSE TO AMTRAK’S COMPLAINT

Norfolk Southern Railway Company (“Norfolk Southern”) hereby responds to the Complaint and Memorandum of Law filed by the National Railroad Passenger Corporation (“Amtrak”) on November 17, 2014, as corrected on November 19, 2014.¹

As a threshold matter, Norfolk Southern acknowledges the Board’s decision served December 19, 2014, in Docket No. 42134,² 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 calendar quarters.” *Amtrak/CN* December 19

¹ Norfolk Southern’s Response 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.

² *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”).

Decision at 10. Norfolk Southern respectfully disagrees with the Board's conclusion, and in the interest of preserving its legal position is requesting dismissal of Amtrak's Complaint for the reasons set forth in the Appendix hereto.

If the Board nonetheless proceeds to construe "on-time performance" for purposes of this proceeding without regard to the invalidity of the metrics developed under Section 207, and does so in a manner that triggers an investigation pursuant to Amtrak's Complaint, Section 24308(f)(1) would then command that the Board move past the metrics to a broad-gauged assessment, relating specifically to the Capitol Limited, of "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 . . . or reasonably addressed by Amtrak." Congress instructed the Board to review such issues as "the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays." The investigation would conclude with recommendations by the Board "to improve the service, quality, and on-time performance" of the Capitol Limited. *Id.*

The Board's recommendations, if any, would be the sole outcome of an investigation unless the Board were to take the further step of finding that "delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." *See* 49 U.S.C. § 24308(f)(2). An inquiry into whether there was any "failure to provide" the "preference" due under Section 24308(c) would be a distinct and subsidiary component of the Board's broader task to investigate all potential causes of the "substandard" performance that might trigger an investigation under 49 U.S.C. § 24308(f)(1).

Norfolk Southern devotes the balance of its Response to the issues raised by the Board's apparent intention to construe "on-time performance" for purposes of this proceeding, and potentially thereafter to conduct an investigation pursuant to Section 24308(f)(1) in response to Amtrak's Complaint.

INTRODUCTION

Amtrak's Complaint requests that the Board initiate a Section 24308(f) investigation into the alleged "substandard performance" of the Capitol Limited, which operates daily in both directions across 480 miles of Norfolk Southern's tracks between Chicago, Illinois, and Pittsburgh, Pennsylvania.³ The Complaint alleges particularly poor on-time performance over the period from April 1 through September 30, 2014.

Amtrak's Complaint corresponds to the period when much of Norfolk Southern's network – like the networks of other major railroads – suffered the effects of significant congestion. The Board is already aware of the service challenges Norfolk Southern and other freight carriers experienced in 2014. Those network challenges had significant adverse effects on train performance in Norfolk Southern's Northern Region, where it hosts the Capitol Limited. Congestion has been particularly acute between Chicago and Cleveland, where the Capitol Limited shares Norfolk Southern's "Chicago Line" with 100-plus freight trains that use the line daily. But, the segment between Cleveland and Pittsburgh on Norfolk Southern's "Cleveland Line" and "Fort Wayne Line" has not

³ The Capitol Limited operates over CSXT tracks between Pittsburgh and Washington, D.C., and over Amtrak-owned trackage between 21st Street and Chicago Union Station in Chicago. Norfolk Southern is not responsible for, and will not address herein, the Capitol Limited's handling on trackage owned by others.

escaped the ill effects.⁴ Congestion on these lines adversely affected both Amtrak's passengers and the many shippers whose goods move on Norfolk Southern's freight trains.

Long before Amtrak filed its Complaint, train performance on this part of Norfolk Southern's system – and the Capitol Limited in particular – had Norfolk Southern's focused attention. The Capitol Limited uses the same tracks Norfolk Southern uses to carry freight between the vital Chicago Gateway and the Northeastern United States. The Chicago, Cleveland, and Fort Wayne Lines comprise the funnel between Chicago and the rest of Norfolk Southern's freight network, with by far the highest train densities on Norfolk Southern's system, as shown in Figure 1 at page 14 below.

Norfolk Southern is in the midst of a multi-pronged effort to achieve sustained improvement in train performance across its network, with a particular focus on the lines used by the Capitol Limited. Norfolk Southern's efforts target the service challenges and resulting congestion that lie at the core of performance issues experienced by Amtrak and Norfolk Southern trains alike. Unfortunately, due to the nature of railroading and the traffic levels on the lines used by the Capitol Limited, the available steps are not simple to implement and are unlikely to offer immediate relief. They include, among other measures, hiring and training additional train crews, acquiring additional locomotives,

⁴ The Chicago Line, Cleveland Line, and Fort Wayne Line are part of Norfolk Southern's Northern Region. The Capitol Limited also operates over a short, approximately three-mile portion of Norfolk Southern's Pittsburgh Line adjacent to the handoff with CSXT in Pittsburgh.

redesigning complex transportation plans to re-route trains to other lines, investing in track and other capacity, and adjusting freight train schedules.

Norfolk Southern's recent efforts chart a path forward to improve the performance of Amtrak and Norfolk Southern trains, and there are initial signs of progress. The Capitol Limited's performance has shown steady improvement since the low-point in late September and early October 2014 (as shown in Figure 2 at page 23 below). That progress continues and Norfolk Southern expects further improvement throughout 2015.

Perhaps contrary to Amtrak's desire, changes to dispatching practices is not a viable path toward improved "on-time" performance because Norfolk Southern's dispatchers *already* give the Capitol Limited preference over freight trains. They work hard to weave Amtrak's trains through a web of freight trains serving shippers who likewise depend on the high-density freight lines over which Amtrak operates. There simply is no magic wand that could allow Amtrak's trains to run delay-free irrespective of network conditions without crippling Norfolk Southern's ability to move freight as well.

As we explain in this Response, Norfolk Southern remains open to working cooperatively and proactively with Amtrak to address the Capitol Limited's performance. To that end, Norfolk Southern requests that the Board order the parties to mediate the issues raised by Amtrak's Complaint. Such an approach need not be delayed by the legal uncertainty surrounding the Board's ability to construe the meaning of "on-time performance" in Section 213 or the complexities associated with the Board's plan to fashion a new metric.

To be productive, the scope of a mediation would include the full array of issues that Congress contemplated would be investigated under Section 213, including not only “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,” but also:

- (a) whether performance issues could be “reasonably addressed by Amtrak;”
- (b) the “the accuracy of the train performance data;” and
- (c) the extent to which “scheduling and congestion contribute to delays.”

49 U.S.C. § 24308(f). Without addressing these and other issues affecting the Capitol Limited’s performance, Norfolk Southern’s experience suggests that Amtrak may be reluctant to acknowledge the challenges of moving passengers on high-density freight arteries or participate meaningfully in the consideration of all the steps that are *reasonably* needed to achieve meaningful and lasting improvements in passenger train performance.

In Section I, we review some of the challenges Norfolk Southern confronted during 2014 and the steps underway to improve the performance of freight and passenger trains that share Norfolk Southern’s busy Northern Region mainlines. In Section II, we explain the array of issues that would have to be “investigated” as part of any Section 213 investigation. In Section III, we urge the Board to order the parties to mediate these issues in the hope that more progress could be made with the help of a neutral mediator than through a purely adversarial process. Finally, in Section IV we offer our thoughts on the procedures applicable to (1) the Board’s adoption of an “on-time performance” metric and (2) any subsequent investigation of Capitol Limited performance.

I. NORFOLK SOUTHERN IS WORKING HARD TO IMPROVE TRAIN PERFORMANCE ON THE LINES USED BY THE CAPITOL LIMITED

Norfolk Southern was working hard to address congestion on the portions of its system used by the Capitol Limited long before Amtrak filed its Complaint, and Norfolk Southern continues to do so.

A. Norfolk Southern Has Repeatedly Acknowledged that Amtrak's Capitol Limited Was Negatively Impacted by Norfolk Southern's Service Challenges During Much of 2014

As the Board is aware, 2014 has been a particularly challenging operating year for freight railroads. Norfolk Southern has publicly acknowledged that train performance – especially on the high-density lines used by the Capitol Limited – has been hit hard by the challenges of the past year. In public correspondence with the Board pre-dating Amtrak's Complaint, Norfolk Southern laid out the difficulties it was confronting and the steps it was taking to address them.⁵

Those difficulties are not a function of Norfolk Southern's failure to treat Amtrak trains properly, but instead affect all trains, freight and passenger alike. Unanticipated growth in demand for freight transportation during 2014 strained Norfolk Southern's available crew and locomotive resources and the track and terminal capacity needed to maintain fluid operations. Norfolk Southern's Chicago Line was called upon to handle upwards of 115 trains on an average day, with increased train lengths magnifying the capacity consumed by each train. Operations on the Chicago Line were exacerbated by

⁵ See Letter from C.W. Moorman to Hon. Daniel R. Elliott, III (Oct. 13, 2014) (hereinafter "October 2014 Moorman Letter") (Exh. 1 hereto); Letter from C.W. Moorman to Hon. Daniel R. Elliott, III (Sept. 15, 2014) (hereinafter "September 2014 Moorman Letter") (Exh. 2 hereto).

congestion in the Chicago terminal itself, which is a uniquely complicated point of convergence for much of North America's freight traffic along with dozens of Amtrak trains and hundreds of commuter trains.⁶ An aggressive maintenance schedule and the mandated installation of PTC components also impacted operations along the Capitol Limited's route during 2014. The result was a vicious cycle of slower network velocity and occupied track space, which drove congestion and resource shortages, which in turn further slowed network velocity. Amtrak has acknowledged many of these root causes of poor train performance on Norfolk Southern's Chicago Line, attributing it to "a combination of rising demand on the East Coast for more intermodal freight and crude oil shipments which originate west of Chicago, underinvestment in critical rail infrastructure that produces public benefits and short term capital projects that create additional temporary bottlenecks."⁷

Norfolk Southern's freight arteries are not Amtrak's private playground. As shown in Figure 1 below, the lines used by the Capitol Limited are strategically vital links in Norfolk Southern's freight network, and include the system's highest-density segments. Together the Chicago Line, Cleveland Line, and Fort Wayne Line connect the

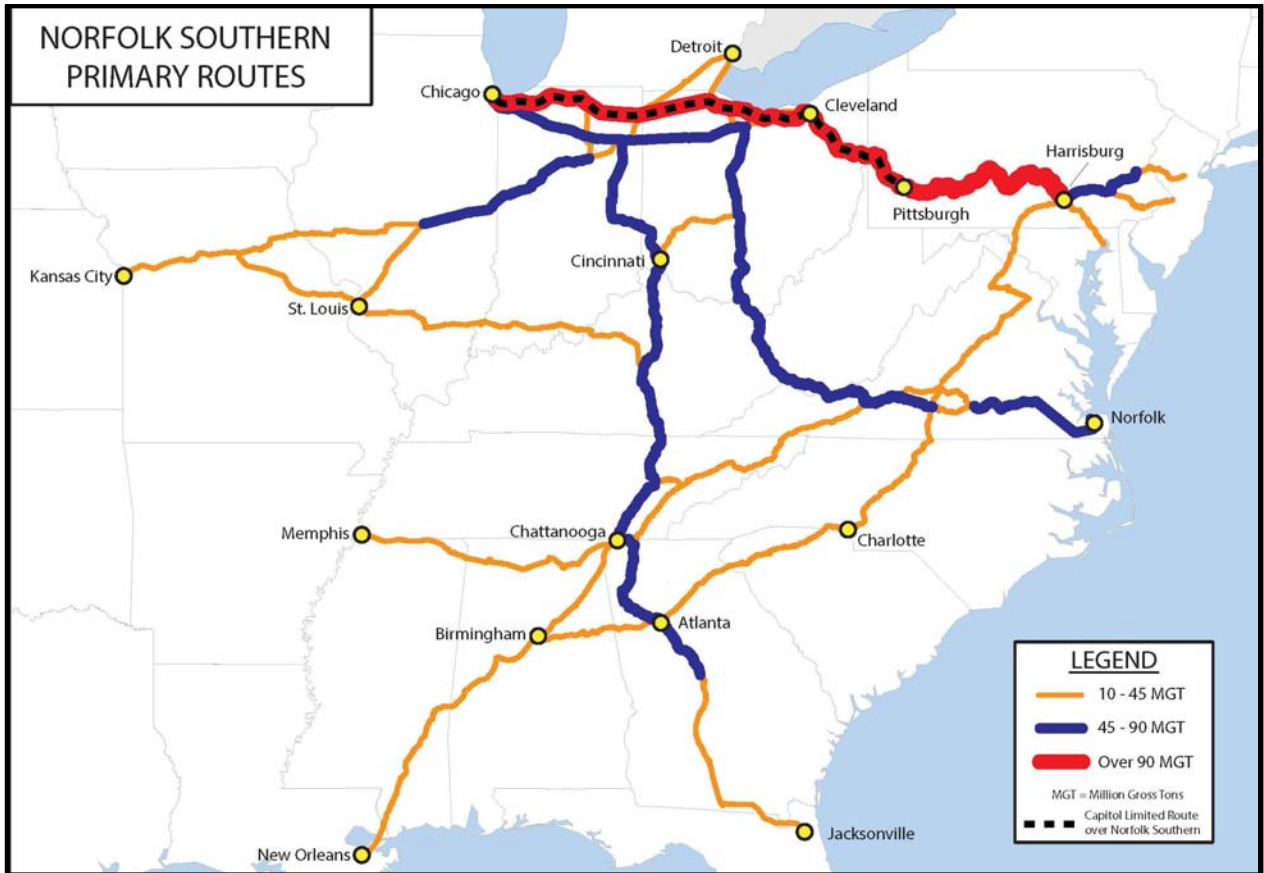
⁶ See, e.g., K. Miller, K. Costa, and D. Cooper, "Getting America's Freight Back on the Move: A Plan for Investing in Our Freight Infrastructure" (Aug. 2012) at 5, *available at* http://cdn.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/freight_infrastructure.pdf (noting that, "[a]t the nation's worst freight rail bottleneck in Chicago, 500 freight trains struggle to maneuver alongside nearly 800 passenger trains and street traffic on a daily basis. The result: it takes roughly 30 hours for the average freight train to make its way through Chicago alone.").

⁷ Amtrak Press Release, "Amtrak Establishes Blue Ribbon Panel to Address Chicago Rail Gridlock: Congestion Causing Major Delays for Passengers and Freight Shipments" (Oct. 28, 2014) at 1, *available at* <http://www.amtrak.com/ccurl/209/554/Amtrak-Blue-Ribbon-Panel-Chicago-Rail-Congestion-ATK-14-097.pdf>.

crucial Chicago Gateway with the population and industrial centers of the Midwest and Northeast, as well as eastern Canada. The 100-plus daily freight trains that traverse portions of the Chicago Line and the roughly 70 daily freight trains operating between Cleveland and Pittsburgh carry virtually every commodity moved by rail – including bulk shipments of crude oil, coal, grain, frac sand, and rock; chemicals; industrial products; finished automobiles; and service-sensitive intermodal shipments.⁸

⁸ The FRA regards the Chicago Line as “one of the busiest freight lines in the country.” FRA et al., Chicago – Detroit/Pontiac Passenger Rail Corridor Program, Tier 1 Draft Environmental Impact Statement, at 84 (Sept. 2014), *available at* <http://greatlakesrail.org/~grtlakes/documents/PublicHearings/Complete%20Tier%201%20DRAFT%20Environmental%20Impact%20Statement.pdf>.

Figure 1
Map of Norfolk Southern's Primary Routes
and Route of Capitol Limited Across the Highest-Density Segments



When the northern part of Norfolk Southern's system experienced unanticipated congestion during 2014, the Capitol Limited's performance suffered, but it was far from alone. The same conditions that hampered Capitol Limited's movement also slowed Norfolk Southern's and other carriers' freight trains,⁹ including the many service-sensitive premium intermodal trains Norfolk Southern moves between Chicago and

⁹ Canadian Pacific, CSXT, the Indiana Harbor Belt Railroad, and the Chicago, South Shore & South Bend Railroad also operate freight trains over portions of the Chicago Line via trackage rights.

Eastern terminals. In fact, delays to Norfolk Southern's freight trains far exceeded delays to Amtrak's Capitol Limited; overall, Norfolk Southern's service metrics have fallen significantly from the record-breaking levels of 2013.¹⁰ These challenges led Norfolk Southern to embark on a major effort to improve train performance long before Amtrak filed its Complaint.

B. Norfolk Southern is Taking Concrete Steps to Improve the Performance of the Capitol Limited

In September and October 2014, Norfolk Southern's CEO, Wick Moorman, laid out for the Board and the public the extraordinary resources and attention Norfolk Southern was devoting to remedying poor train performance across its network, and particularly its Northern Region. Mr. Moorman's October 2014 letter to the Board spelled out in detail the steps that Norfolk Southern anticipated would benefit performance of Amtrak trains using the Chicago Line.¹¹ As Mr. Moorman explained,

¹⁰ See, e.g., Norfolk Southern Third Quarter 2014 Earnings Results Presentation (Oct. 22, 2014) at 10, *available at* http://www.nscorp.com/content/dam/QuarterlyEventFiles/3q-2014/3q2014_transcript.pdf. Norfolk Southern's composite service measure is the weighted average of adherence to operating plan, connection performance, and train performance, with weights of 30%, 30%, and 40%, respectively. See Norfolk Southern 2014 Proxy Statement (May 8, 2014), at 41, *available at* http://www.nscorp.com/content/dam/nscorp/get-to-know-ns/investor-relations/proxy-statements/nsc_proxy_2014.pdf.

¹¹ In addition, Norfolk Southern has kept the Board and its staff apprised of progress through its monthly calls with the Board concerning operating conditions and a separate, weekly dialogue with Board Staff following Chairman Elliot's October 6, 2014, letter to Mr. Moorman. The latter dialogue, which focused on Amtrak operations, was discontinued by the Board when Amtrak commenced this formal, adversarial proceeding. Norfolk Southern trusts that, consistent with the Board's longstanding policies, the Board Staff who participated in those confidential communications will be recused from involvement in this proceeding. See, e.g., STB Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases* (Decision served Sept. 5, 2007), at 24 ("To protect the confidentiality of mediation discussions, the appointed Board staff will be

(footnote continued on next page ...)

Norfolk Southern recognized that measures aimed at adding resources (transportation crews and equipment), restoring operational fluidity, increasing terminal and line capacity, and finding ways to moderate the surging demand placed on existing capacity and resources offered the only viable path to near-term improvements in train performance on this route.

We summarize below some of the many elements of Norfolk Southern's multi-pronged plan to improve Northern Region train performance.

Norfolk Southern Is Hiring and Training Additional Train Crew Employees.

Rising traffic and unanticipated congestion strained Norfolk Southern's crew base, as evidenced by a 32 percent increase in train and engine ("T&E") service overtime hours in the third quarter of 2014 compared to the prior year.¹² As detailed in its prior letters to the Board, Norfolk Southern quickly and significantly increased its hiring efforts. Because it takes seven to nine months to bring on board and qualify newly-hired T&E employees, the benefits of these efforts on network congestion will not be fully realized until later in 2015. Still, since Mr. Moorman's letter of October 13, a total of 245 T&E Trainees have been qualified on the Northern Region.

As previously detailed, Norfolk Southern also temporarily transferred 114 conductors and engineers from other parts of its network to locations on the Northern

(... footnote continued from previous page)

recused from all subsequent involvement in the case should the case not be fully resolved through mediation.").

¹² Norfolk Southern Third Quarter 2014 Results Presentation (Oct. 22, 2014), at 7, *available at* http://www.nscorp.com/content/dam/QuarterlyEventFiles/3q-2014/3q2014_transcript.pdf.

Region – including the Chicago Line – where volume has outpaced crew availability. Forty-seven of those temporary transfers have extended their stay beyond the initial 60-day term and continue to provide additional support. Norfolk Southern also offered incentives to retirement-eligible T&E employees to defer their departures.

With these measures, the number of T&E employees in active or training status increased from 11,290 at the beginning of 2014 to over 11,900 by year end, better aligning the railroad's crew base with anticipated freight volumes. Over and above the 2014 increases, Norfolk Southern expects to add 700 to 800 more active T&E employees in 2015, with as many as possible of the new hires coming on board in the first half of the year.

Norfolk Southern Is Adding Additional Locomotives. Reduced network velocity also has impacted locomotive resources and created a need for more. Norfolk Southern took delivery of approximately 90 locomotives in the last two months of 2014, and expects to add 50 more to its fleet by the end of January 2015.¹³ Overall, the number of locomotives available for service has reached historic highs. As these locomotives have become available, along with the new train crew employees needed to operate them, Norfolk Southern's ability to maintain network fluidity has improved, and the resulting reduction in congestion has magnified the productivity of both existing and new resources.

¹³ October 2014 Moorman Letter at 4 (Exh. 1).

Norfolk Southern Operations Will Benefit from New Infrastructure

Investments. Even prior to the service challenges that developed during 2014, Norfolk Southern has been planning and spending heavily to increase capacity on the Chicago Line and other parts of its system to handle increasing freight volumes.

One of these projects – Norfolk Southern’s \$160 million expansion of its Bellevue, Ohio, classification yard, the first stage of which was put into service in late November – will have significant near-term benefits for operations on the Capitol Limited’s route.¹⁴ Norfolk Southern accelerated the project in response to recent traffic growth. When fully operational, it will nearly double the Bellevue Yard’s capacity and will improve network fluidity by reducing the number of times cars must be switched and enabling more direct routes and reduced car miles.¹⁵ The expanded Bellevue Yard will enable the classification of more freight cars and the building of more and longer blocks. This in turn will allow Norfolk Southern to build more trains that bypass Norfolk Southern’s classification yards in Elkhart, Indiana, and Conway, Pennsylvania, running directly to destination or connecting carriers at Chicago. Norfolk Southern projects that it will originate eight fewer trains at Elkhart and seven fewer trains at Conway when Bellevue is fully operational, and will likewise terminate many fewer trains at these yards

¹⁴ *Id.* at 5.

¹⁵ Norfolk Southern Q3 2014 Earnings Results Presentation at 6. The Bellevue Yard project is described in greater detail in Norfolk Southern’s 2014 Investor and Financial Analyst Conference presentation at Bellevue, Ohio (Sept. 22-23, 2014), *available at* <http://www.nscorp.com/content/dam/investor-day/2014/bellevue-combined-investor-day-slides.pdf>.

(five fewer at Elkhart and nine fewer at Conway).¹⁶ This will relieve congestion at Elkhart and Conway, while also minimizing the potential for trains entering those terminals to be held on the mainline, which adversely impacts the operation of other trains (including the Capitol Limited) using the limited mainline capacity.

Another project will further ease congestion in the vicinity of Elkhart Yard. Norfolk Southern is constructing a new 3.2 mile siding extension between Elkhart Yard and Norfolk Southern's Marion Branch, which diverges to the south from the Chicago Line east of Elkhart Yard in Goshen, Indiana. The new siding will allow freight trains using the Marion Branch to reach Elkhart Yard without having to use Chicago Line mainline trackage. Once completed, the new siding will remove about ten daily train movements from the mainline tracks used by the Capitol Limited.

A third important project is the Englewood Flyover, which was put into service in October 2014. This project, which is part of the broader CREATE initiative, installed a new bridge to replace the at-grade crossing of Norfolk Southern's Chicago Line and Metra's Rock Island District commuter route on the South Side of Chicago. Over 75 weekday commuter trains use this Metra line, which often interfered with the movement of Amtrak trains and Norfolk Southern freights on the Chicago Line. DOT regarded the crossing as "one of the worst railway obstructions in North America," and it was often

¹⁶ *Id.*

blamed for “causing havoc in Metra and Amtrak schedules.”¹⁷ Metra’s use of the Flyover has already improved the movement of trains into and out of the busy Chicago terminal.

Another source of congestion during 2014 will ease in 2015 with the completion of Norfolk Southern’s 2014 cycle of programmed maintenance across the Northern Region. Norfolk Southern carried out an intensive program of scheduled maintenance work during the summer and fall of 2014, which involved 60 miles of rail replacement and over 100 miles of tie and surfacing work on the Chicago Line alone. Norfolk Southern also installed several new cross-overs between Chicago and Elkhart. All of this work will help avoid greater service disruptions in the future – and the new cross-overs improved dispatching options – but it also added to congestion while underway. Norfolk Southern’s program maintenance for 2015 on the Chicago Line will be much less intensive than the 2014 program.

Norfolk Southern’s Has Made Many Other Operational Adjustments to Improve Fluidity. In addition to the investments described above, Norfolk Southern implemented numerous changes in its operations in order to ease congestion and improve train performance. Since Mr. Moorman’s October 13 letter, Norfolk Southern continued to work with connecting carriers to establish alternative interchange points with the goal of reducing congestion through the Chicago Gateway. Norfolk Southern established

¹⁷ Richard Wronski, “‘Flyover’ Aimed at Cutting Rail Congestion,” CHICAGO TRIBUNE (Oct. 23, 2014), *available at*: <http://www.chicagotribune.com/news/ct-metra-englewood-flyover-20141023-story.html>.

several new trains and modified routings of existing trains in order to move traffic out of Elkhart Yard and off the Chicago Line. And, Norfolk Southern reworked its blocking to reduce congestion at Conway Yard, which contributed to train delays – including the Capitol Limited – moving between Cleveland and Pittsburgh.

C. Norfolk Southern's Efforts Have Begun to Show Real Progress

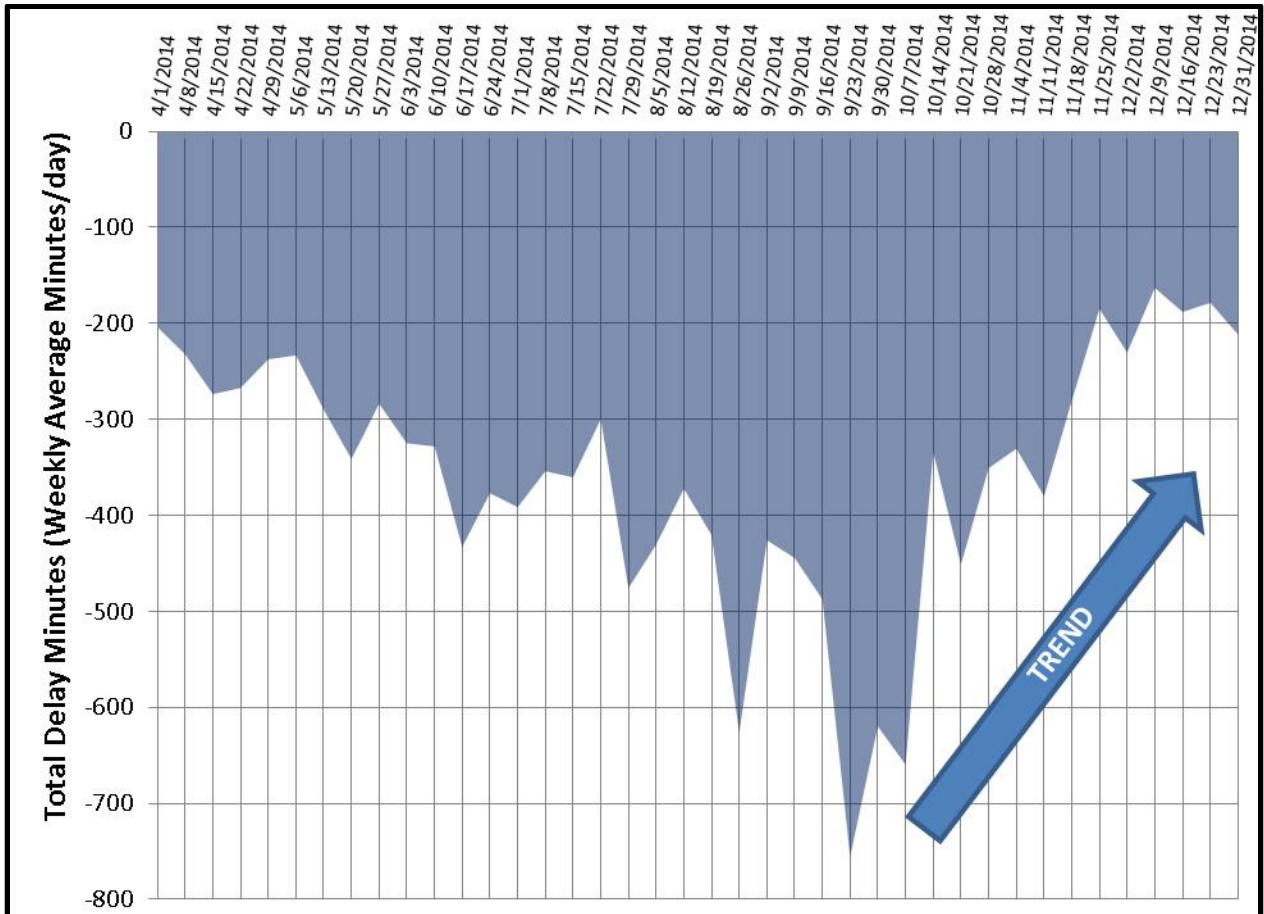
Norfolk Southern's multi-pronged action plan is showing real progress. During the period of most acute congestion in September and early-October 2014, as many as 50 freight trains were forced to tie down on the mainline east of Chicago after congestion and crew shortages caused a snowball effect, whereby trains waiting for crews occupied needed track capacity, causing more crews to expire on the line. Today, similar to the situation prior to 2014, any such occurrences are rarities. Norfolk Southern's operational redesign has shifted numerous freight trains off the Chicago Line in whole or in part, reducing pressure on available track capacity. And steps taken to improve yard operations and reduce congestion at Elkhart and Conway Yards have reduced delays suffered by trains waiting on the mainline for clearance to enter these yards.

The bottom-line result has been a pronounced improvement in Amtrak train performance since early October, according to Amtrak's own data. Amtrak's conductors keep delay reports for each train, recording any delay versus schedule as well as choosing a reason for each delay from a limited universe of categories based on observations from their perspective on the train. Although total delay minutes may provide a general indication of Amtrak's performance versus schedule, the coding Amtrak assigns to any

particular delay provides little, if any, insight into the root-cause of that delay, because a conductor is unable to see the wider network in which the train operates.

Still, focusing solely on the Capitol Limited, delay minutes as recorded by Amtrak show pronounced and steady improvement after bottoming out in early October 2014, as shown in Figure 2 below. Despite sustained heavy traffic volumes, average delays to the Capitol Limited in recent weeks are down from their peak to roughly the level experienced in early 2014. As additional crews come on line and other aspects of Norfolk Southern's improvement plan take hold, Norfolk Southern anticipates continued improvement in train performance during the first half of 2015, although severe weather conditions this winter may again adversely impact operations.

Figure 2
Capitol Limited Total Delay Minutes
on Norfolk Southern per Amtrak Data
(Eastbound and Westbound)
April 1, 2014 – December 31, 2014



D. Norfolk Southern Is Eager to Explore Other Ways to Improve Amtrak Performance

Norfolk Southern has prided itself on a cooperative working relationship with Amtrak. Consistent with that relationship, Norfolk Southern was in regular communication with Amtrak about conditions affecting the Capitol Limited (and the 30 other Amtrak trains that operate on Norfolk Southern's system every day). Norfolk

Southern regrets that Amtrak felt compelled to invoke the formal and adversarial mechanism of Section 24308(f).

The pendency of this proceeding necessarily imposes restrictions on the free flow of information between the companies,¹⁸ and will also make Amtrak reluctant to acknowledge the inevitable impact of freight train volumes or to work cooperatively on the full array of measures needed for lasting improvement in passenger train performance. Norfolk Southern looks forward to returning to a more cooperative posture of mutual cooperation and engagement in furtherance of Norfolk Southern's goals of improving train performance.¹⁹

No matter how much improvement Norfolk Southern is able to achieve in the performance of trains using its lines between Chicago and Pittsburgh, however, Norfolk Southern has every expectation that Amtrak will not be fully satisfied with the performance of the Capitol Limited. These lines will remain very high-density freight arteries that have limited capacity and are subject to all of the vagaries of weather, maintenance outages, and other operational disruptions inherent in railroading. As Amtrak's Complaint lays out, on-time performance as viewed from Amtrak's perspective

¹⁸ Norfolk Southern emphasizes that Amtrak's decision to commence this proceeding has had, and will continue to have, no effect on its handling of Amtrak's trains.

¹⁹ In addition to Norfolk Southern's efforts described above, there is no shortage of attention being paid by others to ways to improve operating conditions in the Chicago region *outside the context of adversarial litigation*. Amtrak itself has appointed a so-called "Blue Ribbon Panel," whose membership includes Amtrak's counsel in this matter, to study the issue, with a final report expected by the end of May 2015. *See* Amtrak Blue Ribbon Panel Release. Norfolk Southern looks forward to reviewing any constructive recommendations this group might offer.

has been below 80 percent for many years. *See* Complaint, Ex. B. Taking an even longer perspective, the Capitol Limited’s annual on-time performance as reported to FRA by Amtrak has averaged only 53 percent over the past eight years.²⁰ The Capitol Limited’s performance has not been materially better or worse than that of Amtrak’s other long-distance services. Across Amtrak’s entire long-distance train network – which touches parts of every Class 1 railroad except Kansas City Southern – Amtrak services of over 400 miles in length averaged only 60 percent “on time” (again, as Amtrak defines that term) between 1972 and 1992, and just 51 percent between 1995 and 2005.²¹

Historic performance levels may well offer an upper bound for future expectations absent significant changes in how Amtrak schedules its trains. From Norfolk Southern’s perspective, long-term upward trends in demand for rail freight transportation pose many additional challenges for the operation of long-distance passenger trains on important, high-density freight arteries. Norfolk Southern highlighted many of the issues – including some of the specific challenges that would be encountered in the Chicago terminal and on Norfolk Southern’s Chicago Line – when it commented on FRA’s and Amtrak’s proposed Metrics and Standards in 2009.²²

²⁰ FRA Quarterly Reports to Congress on Intercity Passenger Rail On-Time Performance, Fiscal Years 2007 through 2014, *available at* <http://www.fra.dot.gov/Page/P0532>.

²¹ *See* Carl D. Martland, Developing Achievable Schedules for Passenger Trains Operating on Freight Routes, *Journal of Transportation Research Forum*, Vol. 47, No. 4 (Fall 2008), at 66-67, *available at* http://www.trforum.org/journal/downloads/2008v47n4_04_PassengerTrainsFreightRoutes.pdf.

²² *See* Norfolk Southern Comments on Metrics and Standards (Apr. 1, 2009) (Exh. 3 hereto) (“Despite the current economic downturn, capacity and congestion problems still arise and the
(footnote continued on next page ...)

Achieving the levels of “on-time” performance that Norfolk Southern believes Amtrak desires would require a serious commitment by Amtrak to adopt realistic schedules that take into account congestion and other real-world conditions, rather than ones based first and foremost on idealized “pure running time” calculations. If Amtrak insists on maintaining its current schedules – which have stayed constant despite major variations in freight train density and changes in traffic mix on the lines Amtrak shares²³ – achieving such performance would require large investments in capacity that Amtrak has historically been unwilling or unable to fund.²⁴ Approaches such as these would necessarily have significant implications for Norfolk Southern’s contractual relationship with Amtrak.

Norfolk Southern is committed to honoring all of its obligations respecting the Capitol Limited’s operation. The Operating Agreement that Norfolk Southern entered into with Amtrak in 2006 (without the need for Board action under Section 24308(a))

(... footnote continued from previous page)

issues will return with greater urgency when the economy and traffic levels recover.”), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2009-0016-0012>.

²³ Amtrak’s scheduled running time for the Capitol Limited on Norfolk Southern trackage has not been revised in at least seven years, despite repeated effort by Norfolk Southern to open a dialogue with Amtrak over more realistic schedules.

²⁴ Meaningful improvement may also require more detailed scrutiny of the actual root causes of delay, as distinct from the simplistic and often inaccurate delay reporting Amtrak performs today. *Cf.* 49 U.S.C. § 24308(f) (as part of an investigation the Board may “review the accuracy of the train performance data”). For example, Amtrak’s practice is to attribute to “freight train interference” any delay suffered by the Capitol Limited when it is waiting behind a freight train, even if it is waiting because of a line obstruction blocking the movement of both trains that had nothing to do with anything within the control of the host railroad (*e.g.*, one caused by a washout or a trespasser fatality).

spells out performance standards for the Capitol Limited and provides for both incentive payments and monetary penalties based on how well Norfolk Southern performs.

Norfolk Southern also acknowledges its statutory obligation to provide “preference” to Amtrak trains, and believes that it has fully complied with that obligation. Indeed, Norfolk Southern is especially proud of the incredible work of its dispatchers, who have managed to keep Amtrak and other trains moving in recent months despite the challenges discussed above. Dispatching these lines in a manner that maintains operational fluidity while also seeking to expedite Amtrak’s passenger trains is incredibly complex and difficult. Dispatchers must orchestrate a daunting array of train movements every 24 hours.

Figure 3 below, which is a stringline diagram depicting the trains scheduled for a single day in December 2014 on the Capitol Limited’s route, provides a glimpse into this complexity. The diagram does not depict the many unscheduled trains, including unit trains of grain, crude oil, and other commodities, which are assigned lower dispatching priority than intermodal and general merchandise trains and are fit in around the scheduled train operations.²⁵ Even when no tracks are out of service for maintenance, no switches are disabled for necessary signal maintenance, and no trains are stopped on the line for local work or other reasons, extraordinary dispatching skill and judgment is necessary to move all of these trains.

²⁵ More generally, the diagram depicts a desired operating plan, which assumes the confluence of adherence to schedule by shippers, receivers, interline carriers, commuter rail operators, Amtrak and its customers, as well as the cooperation of weather, track, and equipment, along with the absence of other events such as accidents or the presence of trespassers.

Figure 3
Stringline Showing Scheduled Train Movements
on Pittsburgh-Chicago Route of Capitol Limited
Over One 24-Hour Period in Mid-December 2014²⁶

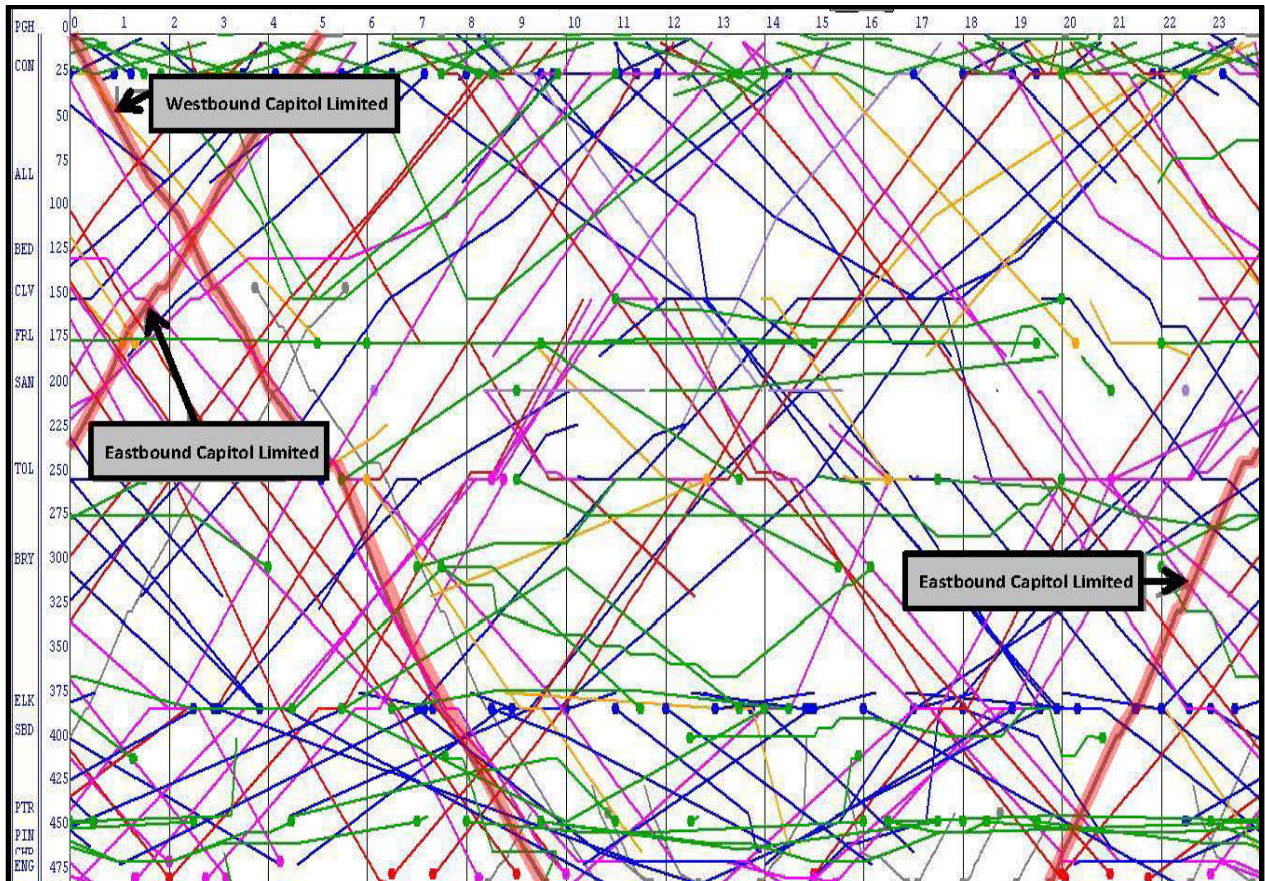


Figure 3 vividly underscores the point that there is no silver-bullet approach to improving the performance of Amtrak's Capitol Limited that is compatible with the need

²⁶ Each individual line in the diagram is a scheduled train movement eastbound or westbound across the lines used by the Capitol Limited. The X-axis shows the time-of-day, beginning with midnight and ending 24-hours later, and the Y-axis depicts the Capitol Limited's route, with Pittsburgh at the top and Chicago at the bottom. Thus, a downward sloping line is a westbound train, and an upward sloping line is an eastbound train. The eastbound and westbound Capitol Limited schedules are highlighted in red and labelled.

for Norfolk Southern to continue serving the many rail freight shippers who depend on the timely movement of freight trains across the trackage used by the Capitol Limited.

II. A BOARD INVESTIGATION PURSUANT TO SECTION 24308(F) WOULD NECESSARILY ENTAIL CONSIDERATION OF THE FULL ARRAY OF ISSUES BEARING ON THE CAPITOL LIMITED’S PERFORMANCE

If the Board decides to commence an investigation under Section 24308(f)(1), it would have to address the full array of issues relating to the performance of the Capitol Limited on Norfolk Southern’s high-density mainlines. Unfortunately for Amtrak, neither Norfolk Southern (nor the Board) has the power to magically sweep away the conditions that slow down all trains on heavily-used freight lines. On key arteries like the ones used by the Capitol Limited, Amtrak must co-exist with the freight traffic on which the Nation’s commerce depends. As Congress recognized when it enacted PRIIA, achieving satisfactory passenger train performance (under whatever metrics and standards one might apply) poses difficult and complex challenges for long-distance passenger trains.²⁷

Congress was aware that congestion caused by freight operations might affect passenger train performance through no fault of the host railroad, and Congress likewise saw that the on-time performance of passenger trains depends in part on how realistic a schedule Amtrak imposes on the train. *See* 49 U.S.C. § 24308(f); *see also* S. REP. NO. 110-067 at 11 (2007) (“[Amtrak] must consider restructuring these [long-distance] routes”). These important considerations implement the wisdom the Board’s predecessor

²⁷ *See* S. REP. NO. 110-067 at 10-11 (2007), *available at* <http://www.gpo.gov/fdsys/pkg/crpt-110srpt67/pdf/crpt-110srpt67.pdf>.

agency applied when the issue of Amtrak's performance was first addressed. *See Amtrak & the Texas & Pacific Ry., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 645, 671-72 (1976) (noting relevance of freight operations and line capacity in setting Amtrak schedules that could realistically be achieved).

In recognition of the complexity of the issues raised by Amtrak's use of infrastructure that is also vital to the movement of freight, the scope that Congress charted for potential Section 213 investigations is broad. The Board must inquire not just whether there are steps that Amtrak's host railroads might reasonably take, but also whether "delays or failure to achieve minimum standards are due to causes that could *reasonably* be addressed by" that railroad. Equally important, the investigation must go beyond this to consider whether performance issues could be "reasonably addressed by Amtrak" and "the extent to which scheduling and congestion contribute to delays." 49 U.S.C. § 24308(f).²⁸ The Board's mandate in carrying out such an investigation is "to identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *Id.*

Congress thus made very clear that PRIIA Section 213 did not provide Amtrak or the Board with license to conduct a fishing expedition for potential "preference" violations. To the contrary, Congress demanded a serious inquiry into the underlying causes for the performance of the Amtrak trains at issue, with the issue of "preference" arising only "if" that broader investigation (*i.e.*, the matters "investigated under paragraph

²⁸ The investigation also may consider "the accuracy of [Amtrak's] train performance data." *Id.*

(1) [of § 24308(f)]”) leads the Board to make the further determination that “delays or failures to achieve minimum standards ... are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation.” *See* 49 U.S.C. § 24308(f)(2). The obligation to provide “preference” was enacted in 1973 and codified as 49 U.S.C. § 24308(c).²⁹ Whether or not a failure to provide preference was a cause of any delays to Amtrak’s Capitol Limited is thus an inquiry separate and distinct from the threshold determination whether there is sufficient basis of “substandard performance” to trigger an investigation under 49 U.S.C. § 24308(f)(1).

III. NORFOLK SOUTHERN IS OPEN TO BOARD-SUPERVISED MEDIATION REGARDLESS OF WHETHER THE BOARD ULTIMATELY CONCLUDES THAT THE CAPITOL LIMITED’S ON-TIME PERFORMANCE TRIGGERS AN INVESTIGATION

As noted above, Norfolk Southern was disappointed that Amtrak chose to commence litigation rather than continuing to engage with Norfolk Southern in a cooperative quest to improve the Capitol Limited’s performance. Along with the numerous steps that Norfolk Southern already has underway, Norfolk Southern believes that a frank and open discussion about the impact of congestion and the value of more realistic passenger train schedules and possible infrastructure needs is a vital precondition for sustainable performance improvements that might approach the levels Amtrak seems to desire. Norfolk Southern is open to having such discussions with Amtrak at any time and in any forum, including via Board-supervised mediation, which the Board has the authority to order under 49 C.F.R. § 1109.2.

²⁹ *See* Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10, 87 Stat. 548, 552 (1973).

The Board has been clear that it “favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible.” 49 C.F.R. § 1109.1. Norfolk Southern thus proposes that the Board appoint a mediator and hold the present action in abeyance for an initial period of 120 days to enable the parties to pursue mediation. While mediation has independent benefits, it also offers the Board the quickest avenue towards constructive dialogue and action in this proceeding, bypassing the uncertainty surrounding the Board’s ability to construe the meaning of “on-time performance” under 49 U.S.C. § 24308(f)(1) and the complexities associated with the Board’s plan to develop its own “on-time performance” metrics.

Following receipt of Amtrak’s Complaint herein, Norfolk Southern suggested to Amtrak that non-binding mediation of the issues raised by the Complaint might provide a useful vehicle for facilitating further progress towards improved train performance. Amtrak’s counsel, however, indicated that Amtrak likely would not be amenable to such a path, in part because of the need to build a record through discovery. Amtrak’s desire for discovery is not a legitimate obstacle to productive mediation. Although Norfolk Southern envisions a mediation process that would not entail formal discovery, Amtrak already possesses ample access to the facts surrounding the performance of the Capitol Limited and Norfolk Southern’s operations and investments on the relevant lines. In particular, Amtrak has detailed knowledge of Norfolk Southern’s dispatching practices through its real-time access to Norfolk Southern’s dispatching screens, including for most of the Capitol Limited’s route.

Norfolk Southern is concerned that if Amtrak is in fact averse to mediation, its position may reflect a desire for an inappropriate “fishing expedition” through the

discovery process³⁰ rather than a good faith desire to consider the underlying causes and full array of potential steps that all parties may need to take to achieve performance improvements. Among those potential steps would be the adoption of more realistic schedules for the Capitol Limited that would better inform the public, help set realistic expectations of the time needed to traverse hundreds of miles of high-density freight thoroughfares, better address travel connection planning, and otherwise better serve the passenger service mission that underlies Amtrak's services. Norfolk Southern therefore urges the Board to order Amtrak to mediate with Norfolk Southern regarding the issues raised in its Complaint.³¹

IV. PROCEDURAL ISSUES BEARING ON ANY INVESTIGATION IN RESPONSE TO AMTRAK'S COMPLAINT

Finally, we address two issues bearing on the procedures that would govern further proceedings in this docket.

³⁰ The Board has been clear that its processes may not be used to conduct fishing expeditions. See *Duke Energy Corp. v. Norfolk Southern Ry.*, Docket No. 42069 (decision served July 26, 2002) at 4 ("discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition"); *Shell Chemical Co. & Shell Oil Co v. Boston & Maine Corp., et al.*, Docket No. 41670 (Decision No. 25, served Apr. 23, 1998), at 3 (Board will take steps to ensure that its discovery processes not support efforts "to troll in the recollections of knowledgeable persons to see what they might come up with that may be of aid to [defendants'] case").

³¹ Norfolk Southern submits that any mediation would be most productive if conducted on a bilateral basis between Norfolk Southern and Amtrak, without the participation of CSXT. The issues pertinent to Norfolk Southern's ability to affect the performance of the Capitol Limited on Norfolk Southern's lines generally do not implicate CSXT (and vice versa), and any consideration of those issues would be more efficiently undertaken without constraints imposed by the need to shield Norfolk Southern confidential information from CSXT.

A. Norfolk Southern Must Be Given a Full and Fair Opportunity to Participate in the Board’s Determination Regarding the Meaning of “On-Time Performance”

First, in its December 19 decision in the *Amtrak/CN* proceeding, the Board concluded that a necessary first step in determining whether to commence an investigation is to construe the meaning of “on-time performance” for purposes of PRIIA Section 213, and then to apply that definition to the facts pertaining to the actual performance of the particular Amtrak train at issue. *See* December 19 Decision at 11-12.

The Board appears to contemplate “on-time performance” metrics developed for the specific Amtrak trains at issue in that case. *Id.* (“the Board seeks the parties’ views regarding how to construe the term ‘on-time performance’ *in this case*” (emphasis added)). That approach seems a necessary corollary of the Board’s conclusion that it may construe and apply in an individual adjudication on-time performance metrics that are distinct from the *uniform* set of metrics developed by the FRA and Amtrak under Section 207.

Nonetheless, the Board’s construction of “on-time performance” in the *Amtrak/CN* proceeding has the potential to set precedent that the Board will apply in determining whether to commence an investigation of performance issues relating to the Capitol Limited, as put in issue by Amtrak’s Complaint, or other Amtrak services that use Norfolk Southern’s lines about which Amtrak may complain in the future. As the Board knows, the definition of “on-time performance” was a major point of controversy in the development of Metrics and Standards under PRIIA Section 213, with Norfolk Southern

and other host railroads taking very different views from Amtrak.³² Moreover, the chosen definition will impact a much broader set of stakeholders that depend on the national rail system, including state and regional rail authorities, commuter railroads, and thousands of shippers across the country. Accordingly, the Board should change course and address the definition of “on-time performance” in a rulemaking process open to public comment, as suggested by Vice Chairman (then-Commissioner) Begeman in dissent.³³ For now, Norfolk Southern intends to seek intervention in the *Amtrak/CN* case for the limited purposes of addressing the definition of “on-time performance.”

Given the way Congress contemplated metrics would be developed under Section 207 and the undoubted importance of this issue to an array of stakeholders, most prominently the railroads that host Amtrak operations and thus are subject to potential investigations under PRIIA Section 213, Norfolk Southern sees considerable merit in Vice Chairman Begeman’s suggestion that the Board’s deliberation on this subject be open to public participation and comment. *See* December 19 Decision at 11-12. Such a process was envisioned by Congress and for the development by FRA and Amtrak of the

³² 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.”); 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>.

³³ *See* December 19 Decision at 11-12 (Begeman, C., dissenting).

Metrics and Standards under PRIIA Section 207.³⁴ Norfolk Southern accordingly urges the Board to stay both this case and the *Amtrak/CN* case while it undertakes a notice-and-comment rulemaking to address this important and contentious topic.

B. If The Board Ultimately Determines To Commence an Investigation, It Should First Provide the Parties an Opportunity to Confer on a Procedural Order

If the Board determines to move forward with an investigation based on a possible conclusion that the “on-time performance” of Amtrak’s Capitol Limited was below 80 percent, Norfolk Southern requests that the Board first provide the parties with an opportunity to confer on a procedural schedule to govern such an investigation. The parties can consult the Board’s previous statements on a procedural framework for investigations under Section 24308(f). *See Amtrak/CN*, Decision served Jan. 3, 2013, at 3.³⁵ Consequently, should the Board conclude that it will proceed with an investigation in this case, Norfolk Southern requests that the parties be given 30 days to arrive at an agreed procedural order, or submit their own separate proposals on issues upon which they cannot agree.

³⁴ 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), *available at* <https://www.fra.dot.gov/eLib/Details/L02876> (at 1) (“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.”); *see also* Norfolk Southern’s Motion to Dismiss, Appendix II, at page 75.

³⁵ Although the Board has vacated the procedural schedule ordered therein, *see Amtrak/CN* December 19 Decision at 5 n.3, Norfolk Southern presumes that the Board’s views on the appropriate structure of an investigation are unaffected by that action.

CONCLUSION

Norfolk Southern remains eager to work with Amtrak to consider the full array of steps needed to improve the performance of Amtrak's Capitol Limited and the many dozens of daily freight trains with which it shares Norfolk Southern's busy Northern Region mainlines. Norfolk Southern asks that the Board order non-binding mediation of the issues raised by Amtrak's Complaint. In the meantime, Norfolk Southern will seek to participate in the Board's determination of the meaning of "on-time performance" for purposes of Section 213 of PRIIA.

Respectfully submitted,

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Dated: January 7, 2015

EXHIBIT 1

OCTOBER 13, 2014 LETTER FROM C.W. MOORMAN
TO HON. DANIEL R. ELLIOTT, III



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C. W. Moorman
Chairman and
Chief Executive Officer

October 13, 2014

The Honorable Daniel R. Elliott, III
Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Dear Chairman Elliott:

I write in response to your October 6, 2014, letter regarding Amtrak train performance. I appreciate the opportunity to explain further Norfolk Southern's plans to improve Amtrak's performance over our lines. As you detailed, although many Amtrak trains on NS are running at or near historic service levels, Amtrak trains have experienced atypical and lengthy delays over our Chicago Line between Toledo and Chicago in recent months. Such delays are not unique or specific to Amtrak, but instead are symptomatic of the broader network service challenges facing Norfolk Southern. As I described in my letter of September 15th, Norfolk Southern has seen unanticipated and sustained volume growth across many segments of our network since early this year, leading to a loss in network velocity for freight and passenger traffic alike. These developments in particular have affected traffic utilizing our Chicago Line.

Recognizing the impact of these challenges on the performance of passenger trains, Norfolk Southern has maintained close communication with Amtrak and has been working to implement several measures that should benefit Amtrak service. Because current Amtrak performance issues are derivative of Norfolk Southern's network challenges, these steps include a mix of both passenger-specific projects and other initiatives that will benefit Amtrak trains by improving overall network velocity and performance. As each individual measure is implemented over the coming months, Norfolk Southern expects to see incremental improvement to Amtrak service. We will also continue to investigate and discuss measures with Amtrak that provide the potential for additional gains.

I. Amtrak Train Performance on Norfolk Southern

Norfolk Southern hosts fourteen Amtrak services over its lines, with an average of thirty-two trains per day. These include the Capitol Limited, Cardinal, Crescent, Lake Shore Limited, and Silver Star long distance services, as well as the state-supported Carolinian, Blue Water, Pere Marquette, Wolverine, Hoosier State, Pennsylvanian, Piedmont, Norfolk, and Lynchburg services. Most of these services do not run exclusively on Norfolk Southern, but instead are routed over multiple host railroads.

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As I explained in my letter of September 15th, severe winter weather in the first quarter and subsequent strong and unanticipated volume growth have presented operating challenges and reduced our network velocity. Such impacts of course affect Norfolk Southern's freight service, but they are also felt by passenger services sharing our rail lines. Despite these challenges, Amtrak trains operating across most of our territory have not seen significant variations from their historic service levels. Instead, the primary location of increased delays to Amtrak trains has been Norfolk Southern's Chicago Line between Cleveland and Chicago, on our Northern Region.

II. Chicago Line

As your letter recognized, Amtrak trains operating over Norfolk Southern's Chicago Line have incurred significant and atypical delays in recent months. These include: (1) the Capitol Limited, which runs daily between Washington, D.C., and Chicago, including 481 miles over NS between Pittsburgh and Chicago; (2) the Lake Shore Limited, which runs daily between New York and Chicago, including 339 miles over NS between Cleveland and Chicago; and (3) the three Michigan services (the Blue Water, the Pere Marquette, and the Wolverine), which operate over the 39 miles between Porter, Indiana, and Chicago. In total, Amtrak operates fourteen trains a day over Norfolk Southern between Porter and Chicago.

Norfolk Southern's Chicago Line is the busiest corridor on our system, and other carriers, including Canadian Pacific and CSX, also have operating rights over our network in this area. On average, more than 110 trains operate every day between Chicago and Elkhart, Indiana, the location of a major Norfolk Southern yard. Heavy traffic extends all the way east to Toledo, with around 100 trains per day operating between Toledo and Elkhart.

Current operations over the Chicago Line face three major and distinct challenges. First, as the Board is well aware, congestion in and around the Chicago gateway limits operational flexibility. Every railroad is dependent on its interchange partners to receive and release trains, and all of the Class I railroads have experienced lower train speeds this year, impacting cycle times. As a result, trains often must be staged along the route into Chicago until they can be interchanged, decreasing available yard and track capacity.

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Second, volumes have surged on our network this year, including on the Northern Region. For example, our combined loaded and empty volumes at the Chicago terminal are up over 7 percent from the third quarter of 2013. We particularly have seen increased volumes in unit trains carrying crude oil coming from our western interchange partners. At the same time, our reduced network velocity requires more locomotives, more railcars, and more crews to move the same amount of freight. The combination has resulted in a shortage of sufficient, qualified Train & Engine ("T&E") employees on the Northern Region, as well as a strain on available locomotive power. More freight trains on the line, and insufficient crews or power to keep them moving consistently, pose additional obstacles to maintaining fluidity.

Third, Norfolk Southern in recent months has implemented several improvement projects on the Chicago Line. Many of these are signal upgrades necessary for installation of Positive Train Control ("PTC"). PTC signal construction began on the Chicago Line in March and is ongoing, with expected completion in 2015. Although construction is scheduled to coincide with other planned maintenance when possible, at times work has impacted train traffic, including in particular two major signal cut-ins in the Toledo area in May and August. We have also been carrying out our regular maintenance program and working on additional improvements, many of which are detailed below, that are intended to enhance fluidity on the line. Included in these are components of the Indiana Gateway project, which is specifically designed to benefit the cited Amtrak services and is scheduled for completion in 2016.

III. Causes of Delay

My previous letter detailed the impacts of Norfolk Southern's network challenges on freight service. Of course, Amtrak trains already receive first priority in dispatching on our Chicago Line, as they do on all parts of our network. But freight congestion and decreased capacity slow all traffic by increasing the number of trains that must be passed while reducing the possibilities to avoid such meets. Moreover, when freight trains experience mechanical issues or their crews run out of time, they more frequently have had to tie down on the main line. These delays can have a cascading effect.

Such occurrences have affected the Capitol Limited, Lake Shore Limited, and Michigan trains primarily between Elkhart and Chicago, although in the last few weeks delays have at times extended east of Elkhart. Weaving Amtrak trains in and around stopped trains has caused many of the most severe delays, and congestion getting in and out of Elkhart Yard has ramifications for all operations through that area. Planned maintenance programs and outages required for PTC installation have also impacted available track capacity.

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IV. Steps NS Is Taking to Improve Amtrak Performance

We are in the process of implementing a wide range of measures to improve Amtrak's performance on our lines. Because Amtrak's issues are symptomatic of Norfolk Southern's broader service challenges on the Northern Region, many of these steps will improve the performance of passenger service through improvements to our overall operations in that area:

- **Crews:** In response to crew shortages, Norfolk Southern ramped up hiring at a very quick pace, with approximately 1,400 current trainees and approved hires now in process. New conductors will be targeted to the Northern Region between Chicago and New Jersey. We expect to hire another 300 crew this year and anticipate hiring 1,200 to 1,500 next year to meet both projected growth and fill normal attrition. Moreover, because the hiring and training process takes time, Norfolk Southern is paying incentives, along with room and board, for over a hundred employees to temporarily shift to the Northern Region and mark-up for sixty days, and we reassigned twenty-three additional Transportation supervisors to the area. We are also offering incentives for T&E employees to defer retirement, for furloughed employees to relocate, and for T&E employees to forego vacation at peak times.
- **Locomotives:** Norfolk Southern will receive delivery of fifty new locomotives beginning in November. We are also acquiring and rehabilitating approximately 100 used locomotives that are in various states of delivery, and the majority will be available for service by the end of the 2014.
- **Service Design Changes:** We have implemented design changes to over twenty trains, moving traffic off of the Dearborn Division or out of Elkhart Yard to relieve congestion. We are also rerouting traffic previously interchanging in Chicago to Kansas City, St. Louis, and Streator, Illinois, where possible, and have entered a tactical agreement with Union Pacific to relocate transfers between our railroads to Kansas City.

We are also implementing or nearing completion on several projects that will impact passenger service directly:

- **Englewood Flyover:** The Englewood Flyover, which became operational only within the past week, now separates approximately seventy Metra commuter trains from interfering with Amtrak trains operating over Norfolk Southern on Chicago's South Side.

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- **Track Work:** Norfolk Southern has substantially completed its heaviest program track work on the Chicago Line for the year, including over sixty miles of rail replacement and over one hundred miles of tie and surfacing work. As we reduce maintenance activity heading into the winter months, we should see a corresponding reduction in related delays and outages.
- **Bellevue Yard:** In December, Norfolk Southern expects to complete the \$160 million capacity expansion at our Bellevue, Ohio, classification yard. This strategic investment, which NS accelerated in response to consumer demand, will provide additional capacity to our Northern Region and improve the fluidity of our network by reducing car handling and car miles. The Bellevue expansion should also reduce mainline congestion on the Chicago Line by allowing more trains to bypass our busy Elkhart Yard.
- **Capacity Additions:** Many additional cross-overs are being installed between Chicago and Elkhart and more are under consideration. Such projects improve operating flexibility and increase the opportunities to route trains around congestion when it arises.
- **Other Capital Projects:** Norfolk Southern should complete the extension of a siding in Goshen, Indiana, early next year, allowing trains traveling between our Marion District and Elkhart Yard to bypass the Chicago Line altogether. Although on a longer timeframe, portions of the Indiana Gateway project are already under construction as part of a plan to improve seven locations on Norfolk Southern's Chicago Line and one on the Amtrak Michigan Line specifically to benefit Amtrak service.

V. Communication with Amtrak

Additionally, Norfolk Southern continues to investigate and discuss potential temporary routing changes with Amtrak, as well as examine possibilities for permanent alternative routing that could minimize delays. Norfolk Southern understands the consequences of lengthy delays to Amtrak and its passengers and strives to be transparent about these issues. Our Joint Facilities group works closely with Amtrak's Host Railroad Group to share information about conditions impacting passenger services and explore opportunities for improvements. This includes providing our upcoming annual maintenance production schedule in the fourth quarter of the preceding year and updating such information continually as those schedules change. Amtrak also has access to our dispatching system so that they can monitor their trains in real-time. We have increased our other communications, including inviting Amtrak to visit and observe our dispatching center in Dearborn, Michigan, and holding recent discussions between senior-level executives. More broadly, last month we began publishing system-wide monthly service updates on our website.

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VI. Conclusion

Norfolk Southern recognizes that Amtrak's performance on several of its trains operating between Toledo and Chicago has been significantly reduced over the preceding months. We are working hard to implement the plans outlined above to improve this situation, and we remain dedicated to improving network velocity for the benefit of all trains operating over our lines. Each of the steps discussed should provide incremental improvement to Amtrak service once implemented. Because NS is pursuing several measures with different timeframes, and because these issues largely stem from network challenges resulting from increased volumes, we cannot point to any single date when service will return to normal levels. Instead, improvement is expected to be gradual over the coming months and will still be subject to outside factors including interdependent operations over the Chicago gateway and weather. We will continue to work closely with Amtrak to identify other specific measures that might benefit and improve passenger train performance.

In closing, I thank you for your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "C.W. Hoffman", with a stylized flourish at the end.

cc: The Honorable Deb Miller, Vice Chairman
The Honorable Ann D. Begeman, Commissioner

EXHIBIT 2

**SEPTEMBER 15, 2014 LETTER FROM C.W. MOORMAN
TO HON. DANIEL R. ELLIOTT, III**



Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
Telephone (757) 629-2601
Fax (757) 533-4954

C. W. Moorman
Chairman and
Chief Executive Officer

September 15, 2014

The Honorable Daniel R. Elliott, III
Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Dear Chairman Elliott:

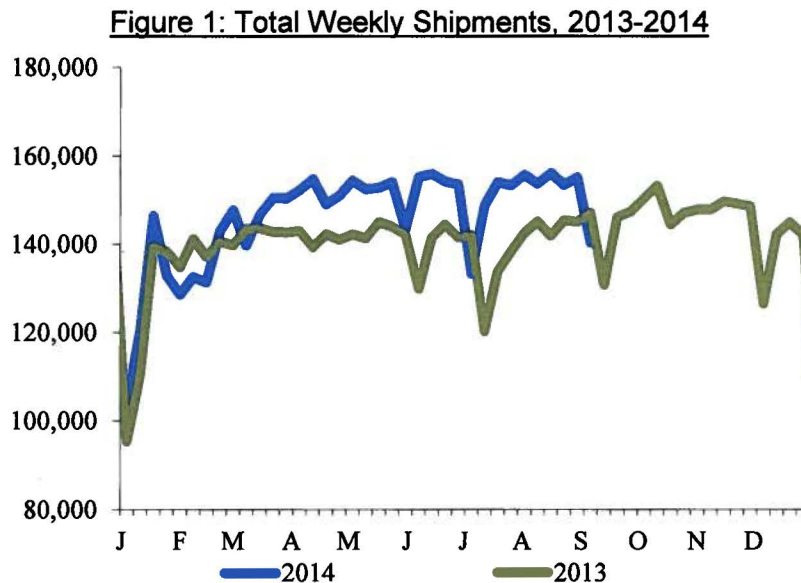
I write in response to your August 19, 2014, letter regarding end-of-year business demands. Since late March, Norfolk Southern has seen unexpected and continued strength in volumes across nearly every segment of our network, straining our resources and, in particular, our crew base coming out of a difficult winter weather season. As a result, although our operations remain fluid, our service going into fall is not at a level with which we are satisfied. We are responding to this challenge by ramping up hiring, continuing capital and locomotive investments, and adding new channels for communications with our customers. Although improvements will be gradual, customers are not likely to see significant improvements in shipment cycle times and consistency of transit times until the first quarter of 2015.

I. 2014 Has Seen Significant and Unanticipated Levels of Volume Growth

Our own internal projections for 2014 generally predicted flat growth, with increases in intermodal and crude oil shipments partially offsetting expected declines in coal. Volumes began to increase in late March, which we initially thought reflected pent-up demand from the severe winter. However, volume increases have been sustained and reflected across nearly every business segment and have run well ahead of the pace of the overall economy.

For the second quarter of 2014, traffic was up 8% over the second quarter of last year, which includes double-digit increases in intermodal along with gains in both merchandise and coal traffic. To put the volume growth in perspective, our weekly volumes averaged about 153,000 loads in the second quarter of this year, compared to 141,000 the year before. In fact, we only saw volumes exceed 150,000 loads in two weeks of all of 2013.

The figure below illustrates the sustained increase in weekly shipments across our network.



With respect to the remainder of 2014, Norfolk Southern's views on business levels are based upon our current understanding of various markets. Please keep in mind that market conditions may change in a manner that might render these views incorrect.

First, overall coal volume increased 3% in the second quarter of 2014 over the second quarter of last year. Utility coal shipments are expected to be flat throughout the remainder of the year due to mild summer weather and falling natural gas prices. Coal volumes will be tempered by weaker export metallurgical and thermal coal market conditions along with lower domestic metallurgical coal shipments.

In intermodal, shipments grew 11% in the second quarter over last year. As truck capacity tightens, we anticipate continued volume growth in our domestic network. We also expect continued volume increases in our international intermodal business, but we expect the pace of growth in this sector to moderate somewhat in the second half of the year.

Driven by metals and construction, chemicals, and agriculture, our merchandise business volumes were up 7% in the second quarter over last year. We expect continued growth across most merchandise market segments. In chemicals, crude by rail continues to be strong, and we expect our full-year 2014 volumes to be in excess of 100,000 carloads with substantial opportunity for continued growth next year. In automotive, our volumes should continue to improve as car supply becomes more fluid

and production increases. Lastly, favorable growing conditions for another robust soybean and corn crop should lead to strong year-over-year gains ahead in agricultural markets.

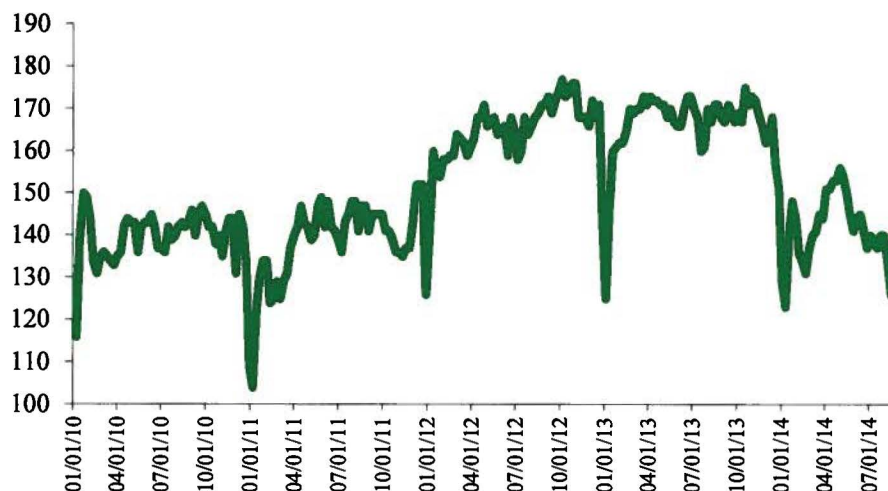
In sum, we expect continued volume growth across most of our intermodal and merchandise market segments but reduced coal volumes in the second half of 2014.

II. Increased Volume Has Strained Resources

On the heels of a difficult operating environment in the first quarter, higher volumes have presented a new set of challenges for our operations and slowed our progress in returning the network to targeted service levels and network velocity. As the Board knows, severe winter weather negatively impacted our service in the first quarter of 2014. When we appeared in front of the Board in April, we had started to see improvement in network velocity, reduced shipment delays, and in trends in some of our key network service metrics.

However, those improvements have not been sustained due to new challenges from the unanticipated volume. Specifically, the lack of sufficient, qualified Train & Engine (T&E) employees to handle that volume has impeded continued recovery and led to a loss in network velocity, shown below.

Figure 2: Line Haul Miles Per Day (Network Velocity), January 2010 – August 2014



As the Board heard in testimony concerning Ex Parte 711, slower network velocity requires more locomotives, more railcars, and more crews to move the same amount of freight. Major track work in the Chicago area and signaling projects associated with PTC regulations are also impacting our operations in certain corridors.

III. Restoring Network Velocity and Improving Service Remains Our Top Priority

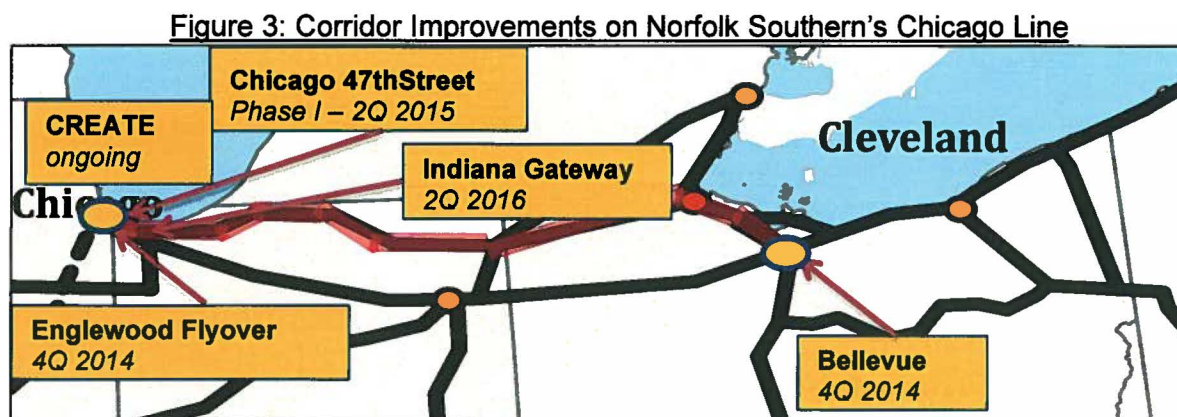
Improving network velocity is essential both to bring service levels back to customer expectations and to restore efficiency to our operations. Our plan to respond to these challenges includes capital, crew, and locomotive investments.

A. Capital Expenditures

Notably, throughout the recent period our network has remained fluid with no significant bottlenecks due to physical constraints. Norfolk Southern continues to make sizeable investments to maintain and expand infrastructure to meet business demands. Our capital budget for 2014 is approximately \$2.2 billion, which includes, among other things:

- Capital roadway improvements of \$910 million, including rail, crosstie, ballast, and bridge programs;
- \$300 million to acquire new locomotives and rebuild and upgrade existing units;
- Positive train control implementation costs of \$220 million; and
- Investments in facilities and terminals of \$210 million.

Facility and terminal investments are particularly important in keeping operations fluid. One of the most important ongoing investments is the \$160 million expansion of our classification yard at Bellevue, Ohio, which NS accelerated in response to consumer demand. Now scheduled to be completed in December and operational in the first quarter of 2015, it will more than double the throughput capacity of the yard. Importantly, the expansion gives us additional relief capacity during periods of congestion in the Chicago area in time for this winter should we experience additional severe weather. This project will help NS improve its capacity to block and build trains that can bypass bridge carriers at Chicago and connect directly with our western and Canadian business partners.



Bellevue's expansion is part of over \$500 million committed to investment in routes and terminals in our Chicago to Cleveland corridor. Chicago area projects, particularly the Englewood Flyover scheduled to go into service in the fourth quarter of this year, are also critical to improving Amtrak performance over Norfolk Southern lines in and out of Chicago.

In addition to infrastructure improvements, Norfolk Southern continues to invest in innovation initiatives to improve service for our customers, such as Unified Train Control System (UTCS), our next-generation dispatching system. Together with its Movement Planner component, UTCS acts as the equivalent of an air traffic control system for our railroad, using advanced algorithms to formulate a comprehensive movement plan that minimizes network congestion and delay and maximizes schedule adherence from a system perspective. In 2013, Norfolk Southern completed rollout of the base UTCS dispatching system on all eleven operating divisions. As of mid-year 2014, Movement Planner was operational on all or parts of eight of the operating divisions, and its rollout will continue through early 2015.

B. Crews

As mentioned earlier, our most immediate constraint to improved service is our T&E crew base. Fortunately our crew base is correctable over a shorter time frame than adding infrastructure or locomotive acquisitions. Still, the process of recruiting, completing background and medical checks, training, and qualifying new conductors takes about eight to nine months. Norfolk Southern ramped up hiring at a very quick pace, with approximately 1,400 current trainees and approved hires in process. We expect to hire another 300 crew this year and anticipate hiring further next year to meet both projected growth and fill normal attrition. Norfolk Southern is also offering incentives for T&E employees to defer retirement, for furloughed employees to relocate, and for T&E employees to forego vacation at peak times. Our qualified crew ranks should begin to improve materially starting in October.

C. Locomotives

Our primary challenge right now is the velocity of our locomotives and rolling stock--it is not the amount of equipment. Norfolk Southern entered the third quarter of 2014 with 220 more locomotives available for transportation than this time last year. We took delivery of 25 new locomotives in the first quarter and will take on an additional 50 locomotives beginning in October. We also are opportunistically acquiring used locomotives for rebuild in our Juniata locomotive shop in Altoona, Pennsylvania. We have kept our surge fleet (normally deployed during the winter or for incidents impacting operations) fully deployed to help meet current demand, and our new locomotives will help us rebuild that fleet for this winter.

IV. Service Outlook and Customer Outreach for Remainder of 2014

Despite these efforts, we currently project service challenges to continue at least through the first quarter of 2015. Major track work in the Chicago area and PTC projects will continue to impact operations over two of our major corridors in early fall. Our shortfall of qualified T&E employees will start to decline late this year with gradual improvement in our network velocity and service levels. We expect that, by the end of the first quarter, our network velocity and service levels will begin to approach normal levels consistent with historical performance. Therefore, as a result, passenger trains operating on NS tracks should also see improvements.

Improvements in NS's network velocity will also depend in part on the performance of our interchange partners. As the Board saw with Chicago this past winter, congestion and service impacts on other railroads also affect us because Norfolk Southern operates in a broader network. Carriers have strong incentives to minimize equipment cycle times, both to benefit their own operations and to reduce per diem charges for cars operating on their lines. Similarly, the demurrage system encourages customers to promptly return rail cars into the transportation network. Still, the nature of network operations means that there may be outside factors that could hinder our improvements.

Norfolk Southern is working hard to keep its customers informed about these concerns. Since its appearance at the Board in April, we have continued frequent direct communication between sales contacts and customers, with periodic updates provided by marketing groups on operations, hiring progress, locomotive deliveries, and expected track work and other projects.

This month Norfolk Southern will also start to implement a broader communication program on service conditions, which will be available to the public through our website. It will include monthly updates on planned track work, bridge work, and other facility work that will impact train service and shipment transit times, along with more visible links to AAR service metric data. Every quarter we will provide updates from senior executives outlining the current state of our operations as well as updating information on our crew base and critical assets (such as locomotive and rail car acquisitions, and new infrastructure projects). This system will allow customers to better plan their operations as we work to restore reliable and consistent service.

V. Conclusion

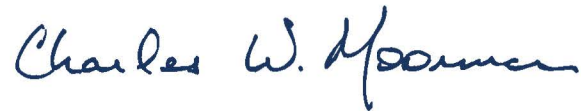
Norfolk Southern is actively and rapidly working to add tactical resources to increase the velocity of the railroad in response to the challenges discussed above. We believe that our overall network capacity is well sized to accommodate growth, and we continue to make strategic investments across our network to handle additional growth, many of

which are coming on line soon. We are also continuing direct customer interaction and adding new channels to communicate service information to our customers. Still, we expect that our network velocity and service levels will remain below historical performance levels until at least the first quarter of 2015.

We remain concerned that many of the proposals currently before the Board would compound many of these challenges that the railroad industry has experienced in 2014. Forced access would introduce inefficiencies into the rail system and further decrease network velocity while also reducing revenues. Further, any move to apply a system-wide revenue adequacy constraint would penalize railroads for gains in competitive traffic while removing their ability and incentive to respond to current and projected transportation demands that require further productivity and infrastructure investments.

In closing, I thank you for your inquiry.

Sincerely,

A handwritten signature in blue ink that reads "Charles W. Moorman". The signature is written in a cursive style with a large, stylized "M" at the end.

cc: The Honorable Deb Miller, Vice Chairman
The Honorable Ann D. Begeman, Commissioner

EXHIBIT 3

NORFOLK SOUTHERN'S COMMENTS IN FRA/AMTRAK METRICS AND STANDARDS PROCESS

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
DOCKET NO. FRA-2009-0016**

**METRICS AND STANDARDS FOR INTERCITY PASSNGER RAIL SERVICE
UNDER SECTION 207 OF PUBLIC LAW 110-432.**

**COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY
TO THE FEDERAL RAILROAD ADMINISTRATION**

Norfolk Southern Railway Company joins in the comments submitted by the Association of American Railroads on behalf of its freight railroad members and submits the following comments on the proposed Amtrak on-time performance metrics and standards.

Norfolk Southern Railway Company ("NSR") is a Virginia corporation, which is a Class I railroad under the classification scheme of the Surface Transportation Board ("STB"). NSR is subject to the jurisdiction of the STB as well as to the jurisdiction of the Federal Railroad Administration ("FRA"). NSR operates approximately 21,000 route miles of railroad line in 22 States and the District of Columbia.

Amtrak Trains Operating On NSR Rail Lines

The following Amtrak trains operate on NSR rail lines for at least part of their route under an Off-Corridor Agreement between Amtrak and NSR. Only two of these trains (a round trip) operate for all, or all except terminal track mileage, of their route over NSR rail lines. The entire routes of these Amtrak trains, the NSR rail line segment(s) that the trains operate over and the length of those segments are shown below.

- Amtrak Train Numbers 1 and 2 may use 4 miles of NSR line between Elysian Fields, New Orleans, LA and East City Junction, LA. Amtrak's Sunset Limited currently operates over Canadian National ("CN") rail lines in New Orleans, but it could operate over NSR's line if service between Jacksonville, FL and New Orleans, LA is restored.

- The Crescent - Train Numbers 19, 20 Daily.
 - o The Crescent operates between New York, NY and New Orleans, LA. The Crescent operates over 1138 miles of NSR rail line between Alexandria, VA and East City Junction, New Orleans, LA. However, the NSR track mileage is not continuous because the Crescent operates over 3 miles of CSXT rail line in Birmingham, AL.
 - o As part of an agreement with the Commonwealth of Virginia, new round trip Amtrak service between Alexandria, VA and Lynchburg, VA, on the Crescent route, is scheduled to begin in or about October 2009.

- Amtrak Atlantic Coast Services - The Carolinian; The Piedmont - Train Numbers 73, 74, 79, 80 Daily.
 - o The Carolinian: The Carolinian travels daily between Charlotte and New York City, with stops in Raleigh, Richmond, Washington, DC, Baltimore and Philadelphia.
 - o The Piedmont: The Piedmont makes daily trips between Raleigh and Charlotte.
 - o The Carolinian and Piedmont are financed and operated by Amtrak in partnership with the State of North Carolina. The State of North Carolina has formally notified NSR of its intention to initiate additional Amtrak passenger train service between Raleigh, NC and Charlotte, NC in Fall 2009.
 - o Train numbers 73 and 74 operate over 176 miles of NSR rail line between Raleigh, NC and Charlotte, NC.
 - o Train numbers 79 and 80 operate over 204 miles of NSR rail line between Selma, NC and Charlotte, NC.

- Silver Star - Train Numbers 91, 92 Daily.
 - o The Silver Star operates between New York, NY and Miami, FL. The Silver Star operates over 28 miles of NSR rail line between Selma, NC and Raleigh, NC.

- The Cardinal - Train Numbers 50, 51 - 3 days a week between New York, NY and Chicago, IL via circuitous route through Washington, DC.
 - o The Cardinal operates over 76 miles of NSR rail line between Alexandria, VA and Orange, VA or 104.8 miles of NSR rail line between Alexandria, VA and Charlottesville, VA when the Cardinal is rerouted from the line of the Buckingham Branch Railroad. The Cardinal also uses 3 miles of NSR rail line in Chicago, IL between CP-518 and 21st St. and less than 1 mile of NSR rail line between

approximately 76th Street and 80th Street in Chicago, IL. Amtrak Trains 317 and 318 also use these short segments of NSR track in Chicago, IL.

- Lake Shore Limited -Train Numbers 48, 49 Daily.
 - o The Lake Shore Limited operates between New York, NY and Chicago, IL. The Lake Shore Limited operates over 339 miles of NSR rail line between Chicago (21st St.), IL and Cleveland, OH.
- Capitol Limited - Train Numbers 29, 30 Daily.
 - o The Capitol Limited operates between Chicago, IL and Washington, D.C. The Capitol Limited operates over 480 miles of NSR rail line between Chicago, IL (21st St.) and Pittsburgh, PA (Bloom), where it connects with the Pennsylvanian. The Pennsylvanian operates between New York, NY and Pittsburgh, PA, including the segment between Pittsburgh, PA and Harrisburg, PA over an NSR rail line, as shown next.
- The Pennsylvanian -Train Numbers 42, 43, 44 Daily.
 - o The Pennsylvanian operates between New York, NY and Pittsburgh, PA. The Pennsylvanian connects in Pittsburgh with Capitol Limited trains 29 and 30, to and from Chicago. The Pennsylvanian operates over 248 miles of NSR rail lines between Pittsburgh, PA and Harrisburg, PA.
- Amtrak Michigan-Chicago Services - Train Numbers 350, 351, 352, 353, 354, 355, 364, 364, 365, 365, 370, 371 - Chicago - Grand Rapids/Port Huron/Detroit - Pontiac - Multiple Departures Daily

Amtrak's Michigan Services trains include the following trains, which operate over segments of NSR rail lines and part or all of Amtrak's own rail line between Porter, IN and Kalamazoo, MI.

 - The Pere Marquette: Daily service between Grand Rapids, MI and Chicago, IL.
 - The Wolverine: Daily service between Pontiac, MI and Chicago, IL.
 - The Blue Water: Daily service between Port Huron, MI and Chicago, IL.
 - o Service on the Blue Water and Pere Marquette routes is financed in part through funds made available to Amtrak by the Michigan Department of Transportation.

- o Train numbers 350, 351, 352, 353, 354, 355 use NSR lines between Chicago, IL (21st St.) and Dearborn, MI (actually Vinewood, Detroit, MI). These trains operate over 39 miles of NSR line between Chicago, IL (21st St.) and Porter, IN; 22 miles of NSR rail line between Kalamazoo, MI and Gord Interchange, Battle Creek, MI and 118 miles of NSR line between Baron, Interchange and MI and Vinewood, Detroit, MI.
- o Train numbers 364 and 365 operate over 61 miles of NSR line between Chicago, IL (21st St.) and Gord Interchange, Battle Creek, MI.
- o Train numbers 370 and 371 operate over 39 miles of NSR line between Chicago, IL (21st St.) and Porter, IN (CP-482).
- In the Raleigh, NC area, NSR and CSXT operate an 8-mile paired track segment between Boylan in Fetner which is controlled by CSXT. Amtrak trains 73, 74, 79, 80, 91 and 92 utilize this segment. A similar situation exists near Kansas City where NSR and BNSF have a paired-track arrangement between WB Junction (near Carrollton, MO) and CA Junction (east of the Missouri River). Amtrak trains 3 and 4 (Southwest Chief) utilize this segment which is dispatched by BNSF. Although CSXT and BNSF control the dispatching for these segments of rail line and the segments apparently are included in their operating agreements with Amtrak, NSR maintains the segment of the track that it owns between the end points that are shown.

NSR Operations on Amtrak Rail Lines

NSR has an interest in operations over Amtrak's own lines as well. NSR operates over Amtrak's Northeast Corridor under a Northeast Corridor Freight Operating Agreement between Amtrak and NSR, pursuant to a Freight Operating Easement. NSR has local operating rights between Washington, DC and Philadelphia, PA over the NEC and between Philadelphia, PA and Harrisburg, PA (Keystone Corridor) and overhead operating rights between Washington, DC and Lane, NJ under NSR's NEC Freight Operating Agreement with Amtrak.

NSR operates over Amtrak's Michigan rail line between Kalamazoo, MI and Porter, IN as successor to a Trackage Rights Agreement between Amtrak and Conrail, as amended.

Certain Characteristics of Amtrak Trains Operating on NSR Rail Lines; Operations in the Chicago Terminal Area; Capital Improvements, Flexible Operations Needed in Chicago

Almost all Amtrak trains operated over NSR rail lines also operate over the lines of at least one other railroad or of Amtrak itself. All of these Amtrak trains, except the Crescent, operate over fewer than 551 miles on NSR lines. Most of these trains originate or terminate and operate in the highly congested Chicago area.

Because Amtrak trains operating in Chicago must traverse numerous crossings, including crossings of other railroad lines, the Amtrak trains are often subject to delays of varying lengths of time. NSR does not control some of these crossings and the dispatching through them. Most of the Amtrak trains operating over NSR track in Chicago have very little delay tolerance for their runs on NSR rail lines because they operate over such short distances on NSR track. Yet these trains often experience delay at these non-NSR crossings due to the dispatching on or the circumstances existing on other railroads. An important crossing in the Chicago area affecting NSR rail line traffic is at Englewood Interlocking. Englewood Interlocking is controlled by Metra, a commuter railroad. Any train, including Amtrak trains, can be delayed at this interlocking, especially during peak rush hour times. NSR has no control over these delays. Yet, this type of delay is categorized as freight train interference or commuter train interference and the delay is charged to NSR, the host railroad, even though a third party may have actually caused the delay to the Amtrak train. Infrastructure improvements could alleviate many such problems, but at substantial cost. Schedule changes can help on-time performance at least to some extent, as well.

On the NSR rail line between Porter, IN and Chicago, IL, NSR must effectively commingle Amtrak passenger trains and a large number of freight trains, from several different carriers, manage these trains across a conflicting passenger corridor with more than 50 passenger trains a day (including commuter trains) that is not controlled by NSR, and keep everything moving on those segments for which NSR is responsible for dispatching. The aging, complicated and congested railroad infrastructure and the lack of complete control by any railroad of the entire movement of trains through the Chicago area make adherence to on-time performance standards for Amtrak trains that in part traverse tracks through Chicago difficult and problematical on any given day, especially under current Amtrak schedules. The tight run times of some Amtrak trains that traverse NSR in the Chicago area over only a short distance (not necessarily even the overall scheduled time) also have little tolerance for delay in NSR's contracts. Even a few minutes of delay that in fact is caused by another railroad can result in one of these trains being considered late on NSR.

NSR would need large additions to infrastructure to significantly and continuously improve Amtrak passenger train on-time performance in the Chicago area and maintain those high levels of performance. NSR can not afford to fund such costly capital investments and infrastructure improvements aimed at keeping Amtrak passenger trains on or near current schedules on a daily basis. Amtrak or the federal government must fund these investments or improvements if they believe the goal of improving train movement and Amtrak train on-time performance in the Chicago area is desirable.

The traffic density and lack of complete control of dispatching and train movements by any railroad in the Chicago terminal area, and the intersection of freight railroad lines with commuter lines, requires reasonable dispatching decisions to keep all trains, including the Amtrak and commuter passenger trains, moving as fast as possible under varying circumstances. The rote application of absolute dispatching rules or priorities would be counter-productive in many cases.

Before such investments and improvements could possibly be made, application of the proposed metrics and standards could result in the imposition of penalties and other consequences for NSR for delays to Amtrak trains that are largely out of NSR's control. Even with large additions to infrastructure, and while NSR adheres to the policy of giving Amtrak reasonable dispatching preference under the statute, it would not be possible or rational to grant absolute priority (as contrasted with preference) to Amtrak trains for every dispatching decision in every circumstance no matter the consequence to the movement of traffic in general or even the ultimate effect on the Amtrak train or other Amtrak trains in particular.

The circumstances of train operations and the flexibility and realism of train schedules in the Chicago area are important factors for considering, measuring and improving on-time performance of almost all Amtrak trains operated over NSR rail lines and for the measurement of overall performance of Amtrak trains operating on NSR as a group.

Important Role of and Effect on Contracts

NSR has worked with Amtrak over the years to reach new operating agreements in 2006, to settle disputes, to improve processes and to make agreements or to take actions to improve the physical plants and operations of both companies. NSR believes that the subjects and purposes of the proposed standards and rules should be a matter of open discussion, contract and administration by the parties themselves to the greatest possible extent.

Nonetheless, we recognize that Congress has placed a duty on the FRA to develop the metrics and standards for Amtrak on-time performance. FRA was given a short period of time to perform this task, especially considering the change of administrations that occurred during the time period. The railroads also have had to respond to the proposals that differ from the standards used in NSR's contract and apparently also from those in Amtrak's contracts with other railroads in a very short time.

We measure Amtrak on-time performance on NSR lines, at least as between Amtrak and NSR, according to the contractual standards. We think that our contractual standards currently in place are a better tool than the proposed standards for measuring on-time performance and for reaching the ultimate goal of improved on-time performance for Amtrak trains.

NSR is concerned that FRA not adopt with any degree of permanency the proposed hastily developed metrics and standards that are rooted in incomplete or immaterial old metrics and standards. This could leave out a genuine opportunity to revisit the metrics and standards in the near future to consider better options and measurement improvements that might be available on further study, with the inclusion of more information or with the adoption of technological or process improvements.

Effective Speed

NSR believes that "effective speed" is not a good measure of Amtrak on-time performance. The true goal of the proposed metrics and standards is to measure whether trains arrived at their destination on time and if they were late, how late they might have been. This metric does not even measure on time performance in general. It bears no necessary relationship to the delays that affect or are included in the average amount of delay time for Amtrak trains over any period of time. Most importantly, it does not indicate the extent to which delays to Amtrak trains were caused by the host railroad, Amtrak or third parties. Moreover, third party train interference can be caused on the line of a host railroad but it also may occur off line when a train arrives so late for transfer to NSR's line from another railroad that it misses its normally scheduled operating slot.

On a high volume line that carries numerous freight trains and passenger trains, many other trains may be scheduled to operate after that slot has been missed. Adjustment of the operations of all of these trains to allow a higher speed, out-of-slot passenger train to proceed at higher speed, while avoiding congestion that would cause even more to delay to all trains on the line, including the passenger train, becomes difficult and may even be counterproductive. NSR or any host railroad can

do the best they can under those circumstances but the root cause of any delays will have been caused by third parties even if the host railroad is charged with them. Moreover, the running time on the host railroad actually may be reasonably satisfactory and close to schedule under the circumstances, even though the effective speed has been reduced.

NSR suggests that this measurement be dropped.

Delay Minutes Per 10,000 Train-Miles

NSR also believes that use of delay minutes per 10,000 train-miles is not a good measure of Amtrak on-time performance. No train operates over a 10,000 mile route or any distance close to that length. This metric does not show (i) the number of trains that might have been late during a month or measurement period, (ii) whether any trains were late at all because it does not exclude tolerances, (iii) whether only a few trains might have been seriously late, possibly for understandable reasons, or (iv) whether no trains on the host railroad were seriously late during the month or measurement period and only a relatively small number were late at all, but possibly still within a reasonable tolerance.

NSR suggests that this measurement be dropped.

On-Time Performance at Intermediate Stations

On-time performance at intermediate stations should not be used as a separate measure of Amtrak on-time performance. Running speed of any individual train on a host railroad's line could be adequate and the train could be on-time or within tolerance at its final destination. Nonetheless, the train could be late at intermediate stations for various reasons, many of which might not be under the control of the host railroad and many of which might be temporary. The train may have first moved over another railroad but missed its slot on NSR or any following host railroad. The Amtrak train might be delayed by repair work, including track repair work required due to weather or derailment damage. One crossover movement in dual track territory to avoid freight train interference may delay a passenger train for two minutes, but it is still counted as a delay. On a high volume freight route this occurs regularly but the passenger train will be on time at its end point in many if not most cases if it only encounters this type of delay.

The Amtrak train might be only a few minutes late at each station due to one of the foregoing factors or any number of other legitimate reasons, but the fact that any delay is recorded will make the

overall performance of the host railroad appear worse than it actually was. The Amtrak train may make up time to stations further down the route. The Amtrak train may end up within the overall delay tolerance for on-time performance at its final destination and in fact may not even be late at all at that destination. Yet this metric could be used as a factor in a penalty proceeding against a host railroad.

As pointed out by the AAR, many intermediate stations are lightly used by passengers and the measurement of the root cause of delays at such intervening stations may be time-consuming because it will require separate investigation of events that may have occurred on any single day. Moreover, Amtrak schedule changes, although generally necessary for on-time performance, can sometimes hinder on time performance if not done thoughtfully, in consultation with the host railroad and flexibly. If Amtrak trains are scheduled to meet on single track rail line, delays are inevitable, and are charged to the host railroad. This now happens to Amtrak trains operating out of Charlotte, NC on NSR's single-track rail line at that location.

Meets of Amtrak trains and other Amtrak or commuter trains, and possibly even Amtrak trains and freight trains, on single-track lines at lightly used intermediate stations can cause delays, usually brief ones, attributed to NSR even though NSR is not responsible for or has not been able to influence the schedules that cause these delays. The delay to the Amtrak train may occur for a few minutes while the train is held short of the station or it may occur at the station. While most of these train meet delays may be for only a few minutes, and may be made up as the train travels to other stations and its final destination, these train meet delays on single track lines are one more factor that shows that on-time performance at intermediate stations may produce a skewed and unreliable measurement of host railroad effort to aid Amtrak on-time performance as well as show that a host railroad can not always control delays that are attributable to it.

NSR suggests that this measurement be dropped.

Continuous Improvement

NSR believes in continuous improvement. Such improvement can be slow and difficult at times, especially after great strides have been made to correct a problem or improve a product or process. It can proceed in a jump and then remain at the improved level for a considerable period of time. Nonetheless, NSR always strives for it. However, we believe this is not a good measure of Amtrak on-time performance because even the use of processes that improve or are improved over time do not necessarily make uniformly continuous improvement. Continuous improvement is more a goal

than a metric or measuring tool. Moreover, the statute does not require this standard be used as a measurement.

NSR suggests that this measurement is not required by the statute, and is too vague, too uneven and too hard to measure accurately. It should be dropped.

Schedules; Scheduling

In the final analysis, the best way to improve on-time performance is for the railroads and Amtrak to develop reasonable and flexible schedules for passenger trains. Modern scheduling and modeling tools can improve the current Amtrak schedules and future Amtrak schedules. They can provide flexibility without having to go through time-consuming and labor intensive exercises with each change. More realistic schedules mean improved and consistent on-time performance. Many Amtrak schedules are old, static, and relatively inflexible. They were established during a time when the railroads had greater capacity (albeit some of it was deteriorated) and less traffic. Despite the current economic downturn, capacity and congestion problems still arise and the issues will return with greater urgency when the economy and traffic levels recover.

Although some metrics and standards must be adopted in this proceeding, NSR believes it would be unfair to measure Amtrak on-time performance for possibly inflexible legacy schedules with some of the crude metrics and standards that are proposed. Adjustment of the schedules and even of the metrics and standards over time is necessary to take into account factors that affect on-time performance and can not be ignore. These factors include seasonal variations in operations due to differences in weather and peak demands for rail freight service, changes in traffic levels from season to season and over longer periods of time and the need for maintenance or capital improvement work on rail lines traversed by Amtrak trains. These metrics and standards are ultimately aimed at producing greater customer satisfaction. The customer is the Amtrak passenger, who will be concerned with whether the train operates on-time under the schedule, not whether the schedule is shown to be a little faster but turns out to be merely aspirational or can only be met under the best of circumstances.

If schedules can not be met on a regular basis, but these standards or metrics are adopted with respect to frozen current schedules, the railroads may be penalized for delays over which they have little, if any, control, even if those schedules are unrealistic, or at least periodically unrealistic. The penalties under the new law arguably could be imposed despite the questionable accuracy of the measurement of on-time performance of any Amtrak train due to the infirmities of the metrics or

standards, a variety of human variables and frequent lack of full information of the root cause of delay by the person or persons reporting the delay. It is not enough to say that these measurement problems or unrealistic schedules or changes will average out. A host railroad could still be out of compliance during a long enough period of time that would give rise to the possibility of penalty proceedings, where arguably the averaging out would not be taken into account.

While we certainly hope to continue to work with Amtrak on reasonable schedule adjustments as needed and on meeting standards and goals in our contract, we do not wish to see this work complicated or thwarted by the establishment of unnecessary and unrealistic metrics and standards in this proceeding and the subsequent unrealistic public reporting of Amtrak on-time performance based upon them. Nonetheless, we think that could result in part from the adoption of a number of metrics and standards of questionable or apparently non-existent usefulness or accuracy. If these metrics and standards are not as accurate or useful as those already used in our current agreement with Amtrak and may even contradict them to some extent, we think it would be a step backward to consider the incorporation of these standards in our contract as “practicable.”

Capital Investment In General

We have shown above that a significant factor in the scheduling and on-time performance of Amtrak trains that originate or terminate in Chicago, which includes most Amtrak trains that operate over NSR, is the need for capital investments or improvements. While the need for capital investment in the Chicago area itself is very significant, the need for capital investment to maintain or achieve higher Amtrak speeds and improved on-time performance on Chicago area trains also includes investment required for all NSR line segments over which Amtrak’s Michigan services trains operate above the levels needed for freight operations. In turn, there are other locations in which capital investment or improvement would be needed to support improvements in on-time performance of Amtrak trains and especially to support on-time performance of any additional passenger trains, especially when traffic levels of recent years before the economic downturn return.

FRA can do nothing about infrastructure and capacity needs that might be necessary to meet the proposed standards on a consistent basis either immediately or when traffic volumes return to recent high levels in this proceeding, but if the railroads are going to be held to unrealistic and inflexible on-time performance standards based on unrealistic and inflexible legacy schedules, public investment by Amtrak or by Congress will be needed to provide the railroad capacity additions or improvements needed to make such schedules realistic and achievable.

Conclusion

NSR has worked with Amtrak on improvements to on-time performance of Amtrak trains operating over NSR lines and other economies in recent years. NSR looks forward to continuing to work with Amtrak on developing solutions to problems, resolving issues through open discussion, negotiation and mutually satisfactory agreements and the establishment of realistic and flexible schedules. These will be the steps that will produce improvements and economies and will help meet the on-time performance goals of both companies.

We urge FRA not to complicate or thwart this working relationship through the adoption of those standards and metrics in particular that are poor measures of Amtrak on-time performance at best and could subject the railroads to penalties for failure to meet on-time performance as measured by standards that are in addition to, different from and not as effective as their current contractual standards.

Only the best of the proposed metrics and standards, even if there are only a few of them, should be adopted now. Some recognition of the importance of infrastructure improvements not funded by the railroads and of the need for flexible and realistic scheduling of Amtrak trains in the improvement of Amtrak on-time performance should be given in the standards should be given, even if these factors cannot be directly included in metrics at this time. The FRA also should remain open to reconsider the final metrics and standards adopted in this proceeding in order to establish revised or additional standards or metrics as the railroads, Amtrak and the FRA itself may develop or improve them.

Respectfully submitted,
Norfolk Southern Railway Company

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APPENDIX I:

COLOR IMAGES

Figure 1

**Map of Norfolk Southern's Primary Routes
and Route of Capitol Limited Across the Highest-Density Segments**

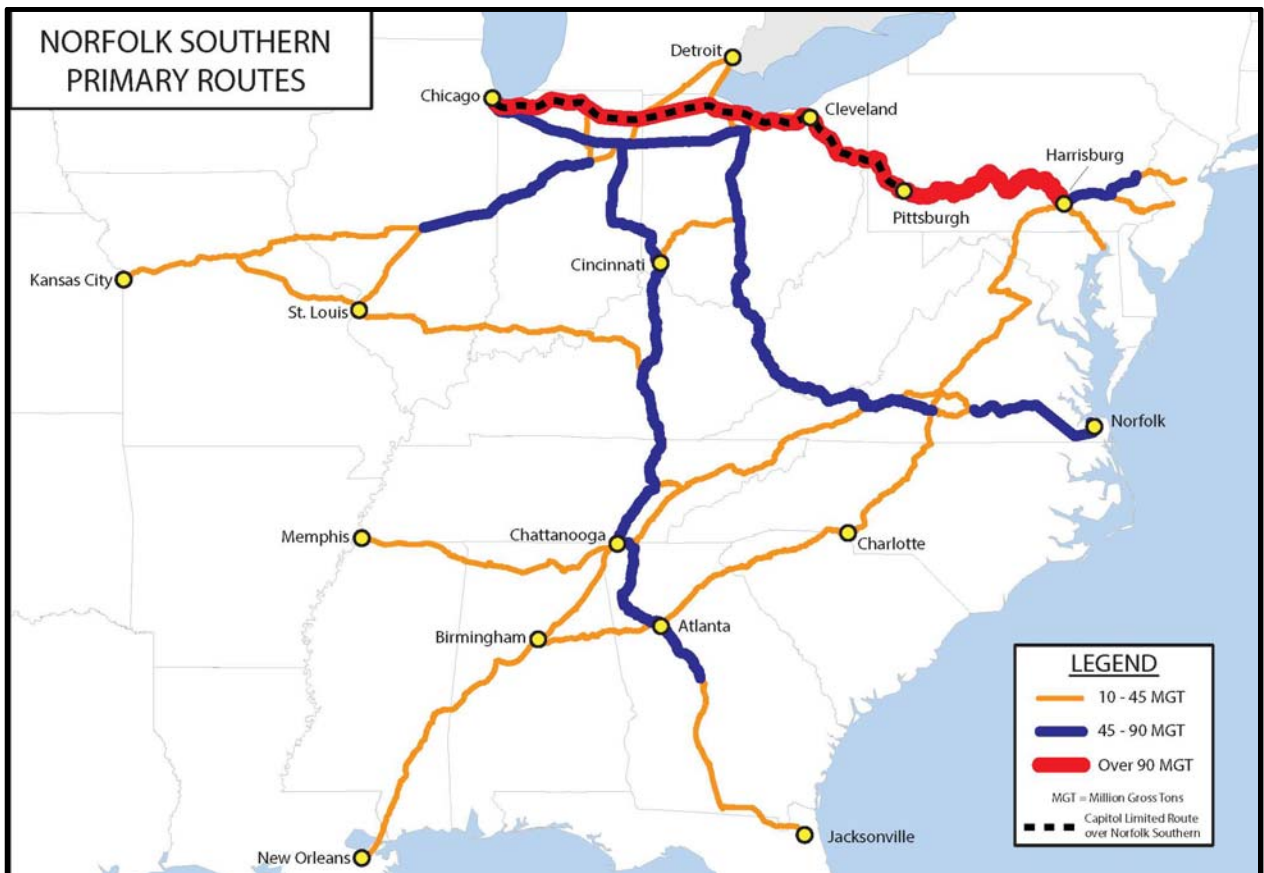


Figure 2

**Capitol Limited Total Delay Minutes
on Norfolk Southern per Amtrak Data
(Eastbound and Westbound)
April 1, 2014 – December 31, 2014**

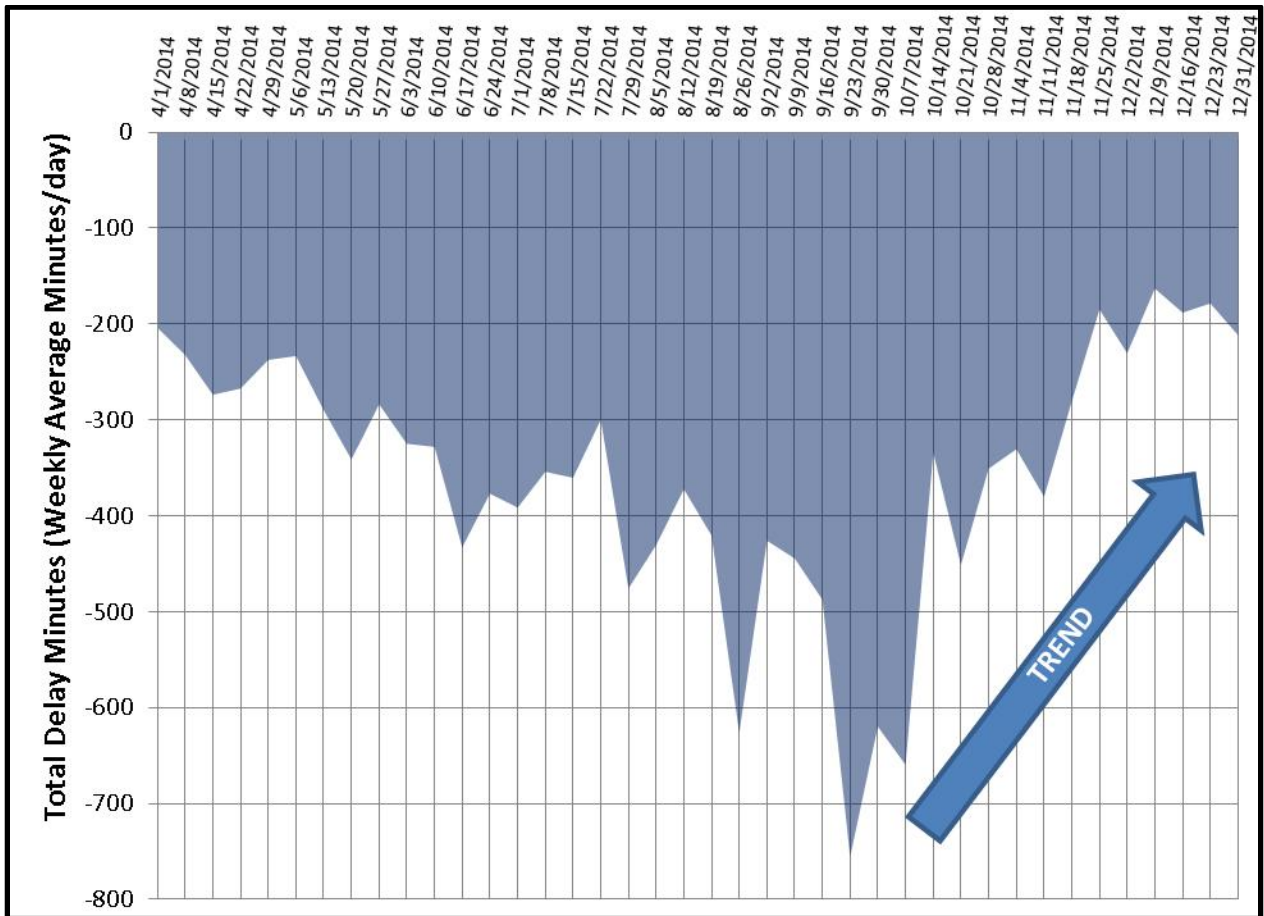
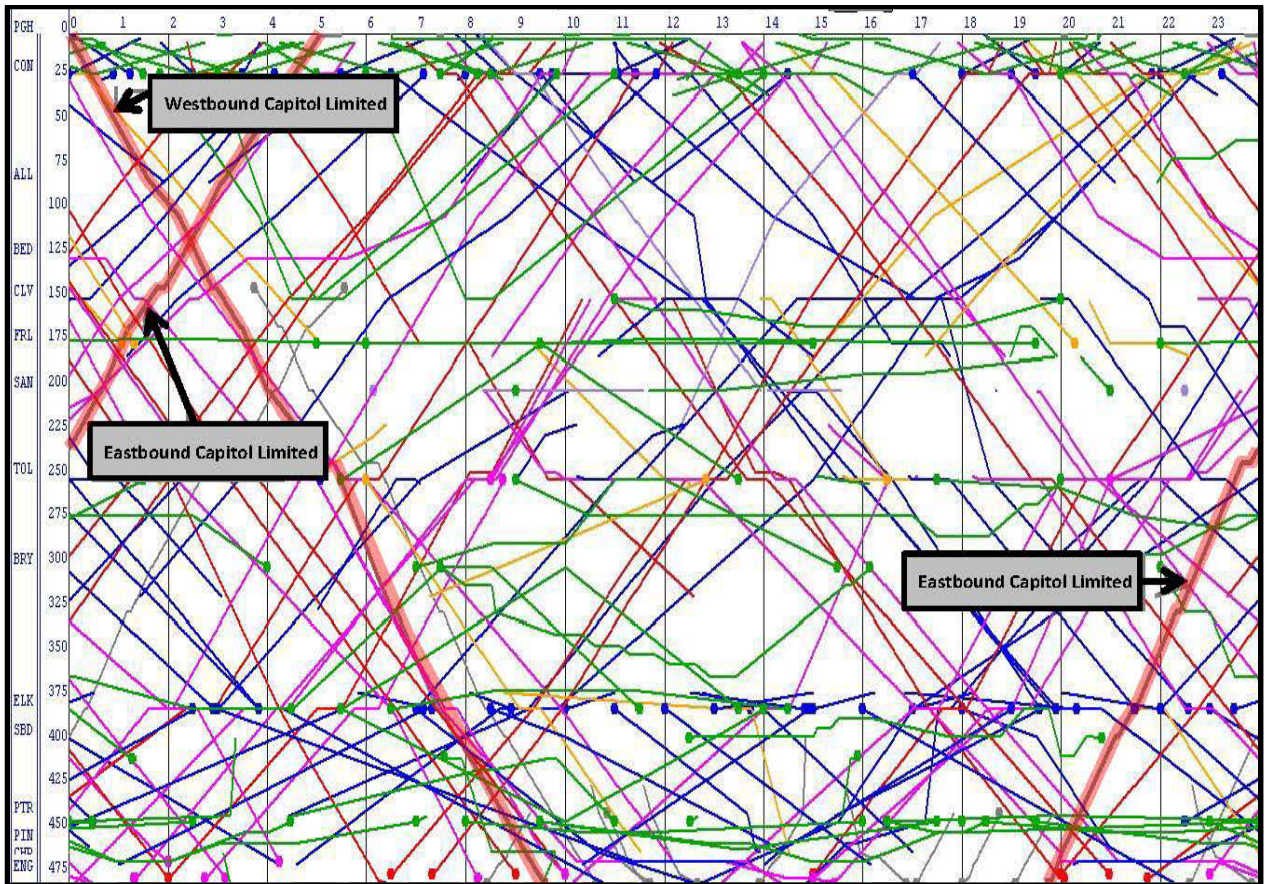


Figure 3

**Stringline Showing Scheduled Train Movements
on Pittsburgh-Chicago Route of Capitol Limited
Over One 24-Hour Period in Mid-December 2014**



APPENDIX II:

NORFOLK SOUTHERN'S MOTION TO DISMISS AMTRAK'S COMPLAINT

**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 Out of an abundance of caution, Norfolk Southern is also filing its Motion to Dismiss Amtrak’s Complaint as 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,

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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 Response to Amtrak's Complaint and the accompanying Motion to Dismiss, filed on January 7, 2015, was served by email and by first-class mail, postage prepaid, on all parties of record, as follows:

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