

HARKINS CUNNINGHAM LLP

Attorneys at Law

David A. Hirsh
dhirsh@harkinscunningham.com
Direct Dial: 202.973.7606

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
Telephone 202.973.7600
Facsimile 202.973.7610

236694

ENTERED
Office of Proceedings
September 17, 2014
Part of
Public Record

September 17, 2014

BY E-FILING

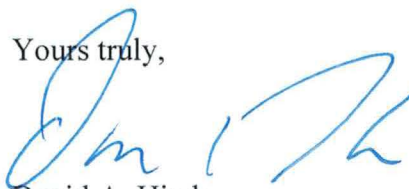
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

**Re: Docket No. NOR 42134, *National Railroad Passenger Corporation –
Section 213 Investigation of Substandard Performance on Rail Lines of
Canadian National Railway Company***

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding please find CN's Motion to Dismiss or, in the Alternative, to Stay.

Yours truly,



David A. Hirsh

Enclosure

cc: The Honorable Richard J. Durbin
William Herrmann, Esquire
Linda J. Morgan, Esquire
Louis P. Warchot, Esquire

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42134

**NATIONAL RAILROAD PASSENGER CORPORATION –
SECTION 213 INVESTIGATION OF SUBSTANDARD PERFORMANCE
ON RAIL LINES OF CANADIAN NATIONAL RAILWAY COMPANY**

CN'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 347-7840

Paul A. Cunningham
David A. Hirsh
Simon A. Steel
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

*Counsel for Canadian National Railway Company, Grand Trunk
Western Railroad Company, and Illinois Central Railroad Company*

September 17, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42134

**NATIONAL RAILROAD PASSENGER CORPORATION –
SECTION 213 INVESTIGATION OF SUBSTANDARD PERFORMANCE
ON RAIL LINES OF CANADIAN NATIONAL RAILWAY COMPANY**

CN'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY

CN¹ hereby moves to dismiss this proceeding. In the alternative, if the Board chooses not to dismiss at this time, CN moves that the proceeding (including Amtrak's pending motion to amend its complaint)² be stayed pending the Supreme Court's final decision on the

¹ "CN," "Amtrak" and other terms and abbreviations are used herein as defined in CN's Response to Amtrak Petition Under Section 213 of PRIIA (filed Mar. 9, 2012) ("Response").

² CN is moving to dismiss this entire proceeding. Pending disposition of CN's motion, CN requests that other aspects of this proceeding be held in abeyance. If the Board denies CN's motion to dismiss and does not stay this proceeding, CN requests twenty (20) days to respond to Amtrak's motion and amended complaint.

As the Board knows, this is the first proceeding brought in reliance on Section 213 of PRIIA. After extensive briefing by the parties on appropriate procedures to govern such proceedings, the Board determined in a detailed decision served January 3, 2013 (which Amtrak did not appeal) that its well-established complaint procedures apply. These allow for discovery and evidentiary filings by the parties. The Board also determined that sampling should be employed to allow close and systematic review of individual Amtrak movements. The wisdom of that approach is underscored by the fact that Amtrak's Illini/Saluki service, which is the subject to Amtrak's proposed amended complaint, runs approximately 730 trains for each two-quarter period. CN rejects (among other arguments in Amtrak's motion to amend the complaint) the claim that the filing of its proposed amended complaint would somehow render those determinations "moot." Mot. to Amend at 9-11. Moreover, if a response to either Amtrak's motion or proposed amended complaint proves necessary, CN wishes to respond, among other things, to Amtrak's proffered examples of supposed preference violations.

constitutionality of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”) in *Department of Transportation v. Association of American Railroads*, No. 13-1080.

INTRODUCTION

As explained in Section I below, under the decision of the D.C. Circuit in *Association of American Railroads v. U.S. Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013) (“*AAR v. DOT*”), there is no statutory basis for this proceeding under Section 213 of PRIIA, 49 U.S.C. § 24308(f). Amtrak’s original Petition for Relief (“Complaint”) relies explicitly, and its proposed amended complaint (“Amended Complaint”) depends no less, on the PRIIA metrics and standards³ the D.C. Circuit set aside. And, as explained in Section II below, Amtrak’s proffered alternative basis for this proceeding, 49 U.S.C. § 11701, is inapplicable. Therefore, we respectfully submit, there is no statutory basis for the Board to proceed with the investigation sought by Amtrak.

Since the D.C. Circuit’s mandate has issued and has not been stayed, it would be appropriate to dismiss this proceeding without delay. CN appreciates, however, that a different analysis may apply if the Supreme Court were to reverse the D.C. Circuit. (The Supreme Court has granted certiorari to review the D.C. Circuit’s decision, 134 S. Ct. 2865 (June 23, 2014), and scheduled oral argument for December 8, 2014, so that a merits decision by the Supreme Court is expected in the first half of 2015.) The Board may, therefore, prefer to stay this proceeding – including resolution of this motion and of Amtrak’s pending motion to amend its complaint – pending the Supreme Court’s final decision. As explained in Section III, such a stay would

³ 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 (May 11, 2010); 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> (“*Metrics & Standards*”).

avoid expending the efforts and resources of the parties and the Board on proceedings that could be a nullity, and would enable the Board and the parties to focus their efforts on the other case pending before the Board between the same parties,⁴ which will address their commercial relationship in a more comprehensive and forward-looking manner.

LEGAL BACKGROUND

Under the Rail Passenger Service Act of 1970 (as amended), *codified at* 49 U.S.C. § 24101 *et seq.* (“RPSA”), CN and other freight railroads must host Amtrak trains on their rail lines on Amtrak’s request. *See* 49 U.S.C. § 24308(a). Subject to exceptions for emergencies and in cases where it “materially will lessen the quality of freight transportation provided to shippers,” the host must afford Amtrak traffic “preference over freight transportation.” *Id.* § 24308(c). Until the enactment of PRIIA in 2008, the preference obligation was understood to be enforceable solely by suit brought by the Department of Justice (“DOJ”) under 49 U.S.C. § 24103(a)(1), and DOJ brought only one such suit, which was settled.⁵

The “terms and compensation” for hosting Amtrak are to be set contractually in an operating agreement between Amtrak and the host (here, CN), *id.* § 24308(a)(1), or, if they fail to agree, the Board may compel service and prescribe “reasonable terms and compensation,” *id.* § 24308(a)(2)(A). Such proceedings, including the proceeding between Amtrak and CN now pending before the Board (FD 35743), may be called Section 402 proceedings (because 49 U.S.C. § 24308(a) codifies former section 402 of RPSA).

⁴ *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a) – Canadian Nat’l Ry.*, Docket No. FD 35743.

⁵ *See, e.g.*, DOT Office of Inspector General, *Root Causes of Amtrak Train Delays*, Rep. No. CR-2008-076, at 3-4 (Sept. 8, 2008); *see also Passenger Rail Investment & Improvement Act of 2008*, STB Ex Parte No. 683, Hrg. Tr. 84-91 (Feb. 11, 2009) (“*Ex Parte 683 Hearing*”) (colloquy between Chairman Nottingham and then Amtrak COO William Crosbie, describing the law and experience of preference enforcement prior to PRIIA).

The operating agreement terms are to include “a penalty for untimely performance,” *id.* § 24308(a)(2)(B), but the host is entitled to recover “the incremental costs” of hosting Amtrak, and may also be paid “additional compensation” reflecting, among other factors, “quality of service,” *id.*, also known as incentive payments. For the Illini/Saluki service, for example, the Amtrak-CN Operating Agreement provides for additional “performance payments” to CN when the portion of the route that runs on CN’s lines “attains a performance within tolerance greater than 80% during a calendar month,” and for offsetting penalties when that figure is below 70%. It specifies the applicable “tolerance,” and provides a long list of delays not attributable to CN (*e.g.*, delays due to the operations of other hosts, delays due to faulty Amtrak equipment, delays due to interlockings not controlled by CN, delays loading and unloading passengers) that are to be disregarded when assessing performance on CN’s line. *See* Operating Agreement §§ 5.1.C, 5.2.A, App. V.⁶

Congress enacted PRIIA in 2008. Section 213 added 49 U.S.C. § 24308(f) to RPSA – the provision invoked by Amtrak when it petitioned the Board to initiate this proceeding in January 2012. Section 213 provides that the Board may initiate an investigation (or must do so upon complaint by Amtrak or host railroads)

[i]f 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.

⁶ Under the Amtrak-CN Operating Agreement, the number of minutes of tolerance varies by route. The prior (1995) CN-Amtrak operating agreement that was in effect when PRIIA was passed instead referred to “on-time performance,” but it defined and used that term in essentially the same way that “performance within tolerance” is defined and used in the current operating agreement.

If the Board wishes to review the present Operating Agreement and/or its predecessor, subject to any objection of Amtrak that the Board might wish to hear, CN will provide copies to the Board under seal.

Congress further provided that

[i]f the Board determines that delays or failures to achieve minimum standards investigated [in a Section 213 investigation] are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under [49 U.S.C. § 24308(c)], the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate

In Section 207(a) of PRIIA, Congress provided that:

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 carrier⁷

In 2010, under that delegation, the FRA and Amtrak jointly promulgated metrics and standards including two “measures of on-time performance” – “All-stations OTP” and “Endpoint OTP.” *See Metrics & Standards* at 26-27.

The Association of American Railroads (“AAR”), of which CN is a member, challenged Section 207(a) of PRIIA as an unconstitutional delegation of rulemaking authority to Amtrak. On July 2, 2013, the D.C. Circuit agreed with AAR, invalidating Section 207(a) and the metrics and standards issued under it. *AAR v. DOT*, 721 F.3d 666. As noted, the Supreme Court granted the Government’s petition to review that decision, and a final Supreme Court decision could be expected in the first half of 2015. The D.C. Circuit’s mandate having issued without stay,⁸ however, the law at present is that Section 207(a), and the metrics and standards issued under it,

⁷ Emphasis added.

⁸ *AAR v. DOT*, No. 12-5204, Mandate Order (D.C. Cir. Oct. 22, 2013); Dkt. No. 1:11-cv-01499-JEB, Doc. No. 20 (D.D.C. filed Oct. 23, 2013).

including the “All-stations OTP” and “Endpoint OTP” “measures of on-time performance,” are null and void.

FACTUAL BACKGROUND

On January 19, 2012, Amtrak filed its Complaint with the Board under Section 213 of PRIIA, requesting an investigation of the performance of eight Amtrak services hosted (in whole or in part) by CN and seeking damages under 49 U.S.C. § 24308(f)(2) for alleged preference violations. Amtrak’s Complaint expressly relied on the “Section 207 standards” – specifically, those for “Host-Responsible Delay,” “Endpoint OTP,” and “All Stations OTP” -- as triggering the Board’s jurisdiction under Section 213. Complaint ¶¶ 16, 20, 23-24.

CN filed a detailed Response on March 9, 2012. On April 4, 2013 the Board served a decision granting joint motions by the parties for Board-supervised mediation and for abeyance, which lasted until the Board reactivated agency proceedings on November 11, 2012. After extensive briefing, in a decision served on January 3, 2013, the Board held that its complaint procedures apply, set a procedural schedule, and ordered the parties to develop a sampling method to identify a limited subset of train movements to be reviewed. From February 2013 through July 2014, the proceeding was again held in abeyance upon joint motions of the parties, for the express purpose (among others) of “provid[ing] additional time that may be necessary for final resolution of the constitutionality of Section 207(a)” of PRIIA. See Third Joint Status Report at 1 (May 19, 2014).

On August 29, 2014, Amtrak moved to amend its complaint. It attached to its motion a proposed amended complaint that alleges deficient service and preference violations regarding only one of Amtrak’s services, the Illini/Saluki service. It claims the Board has a duty under

Section 213 to investigate because the “All-stations OTP” and “Endpoint OTP” of that service were below 80 percent in the first two quarters of 2014. Amended Complaint at 1, 3-4.

According to Amtrak’s proposed amended complaint, the Illini/Saluki’s “All-stations OTP” was 42.1% in the first quarter, and 49.2% in the second quarter of 2014, with the equivalent figures for “Endpoint OTP” being 41.6% and 57.7%. *Id.* However, the metrics in the parties’ current operating agreement – the “performance within tolerance” metrics agreed on by Amtrak and CN to determine when CN should be rewarded or penalized for the timely or untimely performance of the Illini/Saluki on CN’s lines – offer a different perspective. Since 2011, the Illini/Saluki’s performance within tolerance has exceeded 80% in every quarter except one. The exception was the first quarter of 2014, when performance was significantly impaired by this year’s historically harsh winter and its aftermath, which also greatly affected Amtrak’s own operations on and off host carriers, as well as freight services across the country and particularly in the Midwest.⁹ The Illini/Saluki’s performance in August 2014 was 90.6%.

⁹ See, e.g., J. Hilkevitch, Amtrak Fails to Weather Winter Well, CHICAGO TRIBUNE (March 6, 2014), available at http://articles.chicagotribune.com/2014-03-05/news/ct-amtrak-winter-delays-met-0306-20140306_1_amtrak-service-amtrak-data-amtrak-officials.

ARGUMENT

I. THE D.C. CIRCUIT’S INVALIDATION OF THE SECTION 207 METRICS REMOVED ANY LEGAL BASIS FOR AN INVESTIGATION UNDER SECTION 213.

A. Reliance On The PRIIA Metrics And Standards As A Basis For A Section 213 Investigation Is Foreclosed By *AAR v. DOT*.

Amtrak’s Complaint was premised on a failure to meet “the Section 207 standards,” including “Endpoint OTP, All Stations OTP [and] Host-Responsible Delay,” as the statutory basis for the Board’s jurisdiction and obligation to investigate under Section 213. Complaint ¶ 23; *see also id.* ¶ 24. Amtrak argued that, “[p]ursuant to Section 213 of PRIIA, the STB is required to conduct an investigation upon petition by Amtrak . . . when trains operating over a host railroad fail to meet specific mandatory performance standards created pursuant to PRIIA Section 207.” *Id.* ¶ 20.

That basis for investigation is no longer available under the D.C. Circuit’s decision invalidating Section 207(a) as an unconstitutional delegation of rulemaking power to Amtrak. *See AAR v. DOT*, 721 F.3d 666. Under that ruling, the “Section 207 standards” are null and void. Accordingly, under Section 213, there are no “minimum standards . . . established under section 207” of PRIIA, and the Illini/Saluki service cannot be deemed to have “fail[ed] to meet” non-existent standards.

B. Amtrak’s Proposed Amended Complaint Is Similarly Foreclosed by *AAR v. DOT* Because The 80% OTP Standard It Invokes Also Necessarily Relies On The PRIIA Metrics And Standards.

Amtrak seeks to circumvent the D.C. Circuit’s decision by including no express reference to “the Section 207 standards” in the Amended Complaint. It instead premises its claim of investigative authority on the assertion that the Illini/Saluki service’s “on-time performance” is

“less than 80 percent.” Amended Complaint at 3. But that assertion inescapably relies on the Section 207 definitions of “on-time performance” no less than Amtrak’s original Complaint.

Congress mandated that “on-time performance” be defined by the Section 207 standards, *see* PRIIA § 207(a) (“the Federal Railroad Administration and Amtrak shall jointly . . . develop new or improve existing . . . measures of on-time performance”), and the term has no legal meaning under Section 213 apart from those standards. Accordingly, in the Section 207(a) rulemaking, the FRA and Amtrak defined the term “Endpoint OTP,” and stated that it would operate as the “on-time performance” trigger in Section 213. *See Metrics & Standards* at 17 (quoting Section 213 as follows: “If [among other possible reasons] the on-time performance [**i.e., Endpoint OTP**] averages less than 80-percent for two calendar quarters,” the STB’s investigative discretion or mandate takes effect.”) (emphasis added; all brackets in original).

Although Amtrak does not cite the Section 207 definition of “on time performance” in its proposed amended complaint, its dependence on that definition is evident. The original Complaint alleged Amtrak’s services on CN’s lines “failed to achieve the standards for Endpoint OTP and All Stations OTP,” Complaint ¶ 24, which, it noted, were “Section 207 standards,” *id.* ¶ 23, promulgated jointly by Amtrak and FRA under Congress’s [unconstitutional] instruction in Section 207, *id.* ¶¶ 21-22, because they were not “on-time,” as defined by those standards, 80% of the time. *See id.* ¶¶ 32, 35. The proposed amended complaint claims that an investigation may proceed under Section 213 because “All-stations OTP” and the “Endpoint OTP” of the Illini/Saluki are below 80%. Am. Compl. at 3-4. It states that “All-stations OTP” is defined as the percentage of times Amtrak trains departed from their origin station and arrived at each other station (including the end station) within 15 minutes of the times on the public schedule,” *id.* at 1 n.1, and that “Endpoint OTP is defined as the percentage of times Amtrak trains arrived at their

terminal stations within 15 minutes of the arrival time on the public schedule,” *id.* at 4 n.8.

Those definitions accurately paraphrase the definition of the identical terms in the “Section 207 standards.” *See Metrics & Standards* at 26-27.

With Amtrak having used the same terms as those defined through Section 207(a), and having defined those terms as they were defined by FRA and Amtrak under Section 207(a), if there was any lingering doubt that its petition depends on the definitions developed under Section 207(a), it is eliminated by Amtrak’s failure to cite any alternative source under Section 213 for those terms and definitions. That failure is not surprising. Congress did not define “on-time performance” in PRIIA itself, and it did not adopt a definition from anywhere else. Instead, Congress mandated that “measures of on-time performance” be “includ[ed]” in the Section 207 “metrics and minimum standards” promulgated jointly by FRA and Amtrak. PRIIA § 207(a). FRA and Amtrak duly (albeit unconstitutionally) did so and developed definitions for both “All-stations OTP” and “Endpoint OTP,” and it is those terms, and their definition in the “Section 207 standards” (including, for example, the 15 minutes tolerance rule for the Illini/Saluki service) that Amtrak’s proposed amended complaint paraphrases and depends upon. As Amtrak once acknowledged, it is “[t]he Section 207 standards” that “define trains as ‘on-time’” for Section 213 purposes. Complaint ¶ 30.

This conclusion also follows from the integrated scheme Congress designed in PRIIA. Congress never intended or provided for Section 213 of PRIIA to function independently of Section 207.¹⁰ As the D.C. Circuit explained, “[a]s is often the case in administrative law, the

¹⁰ Congress could have made Section 213 independent of Section 207 by defining “on-time performance” in Section 213. Had it done so, depending on that definition, Amtrak could have triggered a Section 213 investigation without awaiting promulgation of the Section 207 metrics and standards. Instead, Congress chose to delegate the definition of “on-time performance” to the FRA and Amtrak in Section 207(a) and required that the governing metrics

[Section 207] metrics and standards lend definite regulatory force to an otherwise broad statutory mandate. The preference for Amtrak's traffic may predate PRIIA, but the metrics and standards are what channel its enforcement." *AAR v. DOT*, 721 F.3d at 672 (citation omitted). Similarly, the Government told the D.C. Circuit that under Section 213 it is the Section 207 metrics and standards "that define the circumstances in which the STB will investigate." *Id.* Congress delegated to FRA and Amtrak the task of deciding what timeliness problems should be required to trigger the Board's investigatory jurisdiction, and FRA and Amtrak discharged that obligation in their formal rulemaking adopting PRIIA metrics and standards. Since that delegation and FRA/Amtrak's definition of OTP under that delegation are constitutionally invalid under *AAR v. DOT*, there is no trigger, and no basis for investigation here.¹¹

and standards be developed within 180 days. Accordingly, the Board understood that the issuance of the FRA/Amtrak metrics and standards was "an essential step in order for the processes put in place by PRIIA to be effective," FRA Doc. No. 2009-0016-0014, at 2 (Feb. 13, 2009) (STB comments on proposed metrics and standards), and Amtrak waited until those standards were in place to attempt to trigger this, the first Section 213 proceeding.

¹¹ Congress delegated the setting of the Section 213 OTP trigger to FRA and Amtrak jointly under specific procedures set forth in Section 207(a) – not to Amtrak unilaterally or to the Board in this proceeding. This made sense because "on-time performance" is not a self-defining term.

Before the Section 207 metrics and standards were promulgated, it was recognized that different stakeholders had different notions of what it means to be "on time." The Associate Administrator of FRA told the Board that "Amtrak and the freight railroads generate OTP data by different means," and he questioned, "What is the best way to objectively measure this data?" *Ex Parte No. 683 Hearing* at 34. As noted above (n.6), the 1995 CN-Amtrak agreement then in force defined "on-time performance" essentially the same way as the parties' current agreement defines "performance within tolerance."

Congress did not choose that or any other definition of OTP (although a Senate Report expressed the intent that "the metrics and standards developed [under Section 207] not be inconsistent with measures of on-time performance included in the contracts between the freight railroads and Amtrak," S. Rep. No. 110-67, at 25 (May 22, 2007)). Instead, it delegated (albeit unconstitutionally) the choice to FRA and Amtrak under Section 207(a). That delegation required FRA and Amtrak to make significant and controversial policy choices, including how to address delays that are not the fault of the host carrier; whether and how to vary tolerance for different types of services, how much tolerance to allow for each (*see, e.g., FRA, Intercity*

II. THE ALTERNATIVE BOARD AUTHORITY CITED BY AMTRAK PROVIDES NO AUTHORITY FOR THE INVESTIGATION IT SEEKS.

Amtrak cites 49 U.S.C. § 11701(a) as an alternative basis for the Board's authority. Mot. to Amend at 9-10. That provision is inapplicable.

Section 11701(a) authorizes the Board, at its discretion, to “begin an investigation under *this part*,” and take action if “a rail carrier is violating *this part*,” and Section 11701(b) provides for a party to “file with the Board a complaint about a violation of *this part*” (emphases added). Section 11701 is codified within Subtitle IV (“Interstate Transportation”), Part A (“Rail”) of Title 49 of the U.S. Code. It provides only for investigations of alleged violations of “*this part*,” Subtitle IV, Part A. Broadly speaking, Part A addresses regulation of freight rail transportation.

This proceeding is not about an alleged or potential violation of Subtitle IV, Part A. It is about CN hosting Amtrak's passenger rail service, and Amtrak's allegations regarding OTP and preference, all of which relate to 49 U.S.C. § 24308, which is codified within Subtitle V (“Rail Programs”), Part C (“Passenger Transportation”) of Title 49. Section 11701(a)'s authorization to investigate alleged violations of Subtitle IV, Part A is inapplicable to this proceeding.¹²

Passenger Rail On-Time Performance (OTP): First Quarterly OTP Report to Congress 5 (May 1, 2008) (“the definition of ‘on time’ can vary as the term does not always refer to the scheduled arrival time”); and whether to assess OTP on an “endpoint” or “all-stations” basis, or both (and whether, *e.g.*, stations used by more passengers should receive more weight in calculating on-time percentages, as then Vice-Chairman Mulvey once suggested, *see Ex Parte 683 Hearing* at 68-69). As the D.C. Circuit noted, the policy choices made by FRA and Amtrak in their definitions of OTP “attracted criticism, with much vitriol directed” at them. *AAR v. DOT*, 721 F.3d at 669; *see, e.g., Metrics & Standards*, at 16-19 (discussing comments).

Since Congress's delegation of those policy choices was, under the D.C. Circuit's decision, ineffective, they are now returned to Congress. Congress may choose to legislate a new trigger, or it may choose to wait to see what the Supreme Court decides, or it may choose to take an entirely different approach, but that is Congress's decision to make.

¹² Amtrak cites *Moore v. Bhd. of Locomotive Eng'rs*, 2000 U.S. Dist. LEXIS 9231, *13 (D. Kan. June 15, 2000), for the proposition that the Board has “broad powers to investigate complaints of non-compliance with the *Interstate Commerce Act or its own orders*.” Mot. to

Nor would it make sense for a general authority provision, such as Section 11701, to apply here. Congress created a specific enforcement mechanism for 49 U.S.C. § 24308 – the investigation provision in 49 U.S.C. § 24308(f). It would contravene basic principles of statutory interpretation to infer it did so redundantly because a more general enforcement mechanism already provided the same authority. *See, e.g., United States v. Saade*, 652 F.2d 1126, 1132 (1st Cir. 1981). When Congress enacted Section 24308(f), it was, for the first time, authorizing the Board to enforce the preference requirement, which had instead always been understood to be the domain of DOJ under 49 U.S.C. § 24103(a)(1). *See, e.g., DOT Office of Inspector General, Root Causes of Amtrak Train Delays*, Rep. No. CR-2008-076 at 4-5 (Sept. 8, 2008) (explaining only DOJ, not DOT, could enforce preference); *Ex Parte 683 Hearing* at 91 (Chairman Nottingham) (“we’re taking on a little bit of a challenging, new role here” in enforcing the preference requirement previously enforced solely by DOJ).

The Board has various investigatory powers. But it is PRIIA’s specific investigatory mechanism in Section 213 that determines whether a PRIIA investigation should occur, and only that provision authorizes the Board to adjudicate preference claims, as Amtrak requests.

III. IF THE BOARD DOES NOT DISMISS THIS PROCEEDING, IT SHOULD STAY IT PENDING THE SUPREME COURT’S DECISION.

Under *AAR v. DOT*, there is no legal basis for the investigation Amtrak seeks, so dismissal is warranted. But if the Board chooses not to address these legal issues, it could instead stay this proceeding (including Amtrak’s motion to amend its complaint and CN’s motion to dismiss) pending the Supreme Court’s decision reviewing *AAR v. DOT*, which is expected in the first half of next year.

Amend at 9 & n.34 (emphasis added). But Amtrak has not made, and has no basis to make, any such complaint; instead, its complaints rest on RPSA and PRIIA.

Staying this proceeding would follow the approach taken, until recently, by the parties and the Board. *See, e.g.*, Third Joint Status Report at 1 (May 19, 2014) (memorializing that for a year ending in July 2014, the Board, pursuant to the parties' joint motion, held this proceeding in abeyance "in order to facilitate continued discussions aimed at settlement of the parties' dispute and provide additional time that may be necessary ***for final resolution of the constitutionality of Section 207(a)***" of PRIIA) (emphasis added). It would also avoid any harm and any expenditure of the parties' and the Board's resources on proceedings that are, under current law, a nullity. After the Supreme Court decision, the parties and the Board could take appropriate action, involving either the dismissal or the revival of this proceeding.

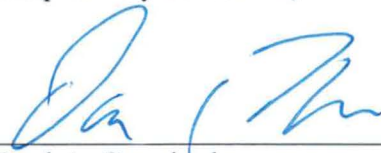
Staying the proceeding could also be practically advantageous in light of the pending Section 402 proceeding. The Section 402 proceeding will address the CN-Amtrak commercial relationship more comprehensively – including Amtrak's service demands, their cost, and CN's compensation – and in a more forward-looking manner than a Section 213 proceeding could. It presents an opportunity for the Board to set the parties on a constructive, cooperative course under a new operating agreement, and for the parties to resolve the major issues between them, so that they can concentrate more on serving passengers and shippers, and less on expensive and unproductive litigation.

CONCLUSION

Under the D.C. Circuit's decision in *AAR v. DOT*, there is no statutory basis for the Board to proceed with an investigation or adjudication of Amtrak's original or proposed amended

complaint. This proceeding should be dismissed or, alternatively, stayed pending the Supreme Court's decision on the constitutionality of Section 207(a) of PRIIA.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Paul A. Cunningham', is written over a horizontal line.

Theodore K. Kalick
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608
(202) 347-7840

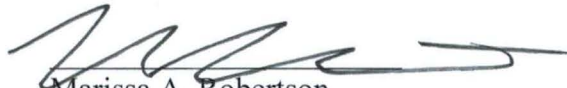
Paul A. Cunningham
David A. Hirsh
Simon A. Steel
HARKINS CUNNINGHAM LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
(202) 973-7600

*Counsel for Canadian National Railway Company, Grand Trunk
Western Railroad Company, and Illinois Central Railroad Company*

September 17, 2014

CERTIFICATE OF SERVICE

I certify that I have this 17th day of September, 2014, served copies of CN's Motion to Dismiss or, in the Alternative, to Stay upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Marissa A. Robertson