

September 1, 2017

Writer's Direct Contact
+1 (202) 887.1519
DMeyer@mofo.com

VIA ELECTRONIC FILING

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

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Office of Proceedings
September 1, 2017
Part of
Public Record

Re: *Norfolk Southern's Pending Motion to Dismiss Amtrak's Complaint in STB Docket NOR No. 42141* – National Railroad Passenger Corporation - Investigation of Substandard Performance of the Capitol Limited

Dear Ms. Brown:

Norfolk Southern Railway Company ("Norfolk Southern") respectfully requests that the Surface Transportation Board ("STB") act on its pending Motion to Dismiss in the above-referenced docket. The United States Court of Appeals for the Eighth Circuit recently held that the STB lacked authority to promulgate the definition of "on-time performance" for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA") on which Amtrak's amended complaint was founded. *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 2017 U.S. App. LEXIS 12408, at *31 (8th Cir. July 12, 2017). Because the Metrics and Standards developed by the Federal Railroad Administration ("FRA") and Amtrak also are invalid (*see Assoc. of Am. R.Rs. v. Dep't of Transp.*, Case No. 1:11-CV-1499 (D.D.C. Mar. 23, 2017)), no lawful definition of on-time performance exists for the STB to apply under Section 213, and Amtrak's complaint must be dismissed.

Norfolk Southern originally filed a motion to dismiss the proceeding on January 7, 2015. *See* Norfolk Southern's Motion to Dismiss Amtrak's Complaint, *National Railroad Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (filed Jan. 7, 2015) ("Motion to Dismiss"). Norfolk Southern asserted that the STB lacked the authority to proceed with a formal investigation under 49 U.S.C. § 24308(f) so long as the "Metrics and Standards" developed under Section 207 of PRIIA are null and void. *See* Motion to Dismiss at 5-8. Under Section 207, Congress directed Amtrak and the FRA jointly to "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.” PRIIA § 207 (codified at 49 U.S.C. § 24101 (note)). At the time, the United States Court of Appeals for the District of Columbia Circuit had held that Section 207 was unconstitutional. *See Assoc. of Am. R.R.s. v. Dep’t of Transp.*, 721 F.3d 666 (D.C. Cir. 2013). As a result, Norfolk Southern contended, dismissal was proper because “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.” Motion to Dismiss at 25.

The STB subsequently held this proceeding in abeyance pending the outcome of a rulemaking it initiated in Docket No. EP 726 to define “on-time performance” for purposes of Section 213 of PRIIA. *See National Railroad Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (STB served Dec. 28, 2015). On July 28, 2016, the STB issued a final rule in Docket No. EP 726, which took effect on August 27, 2016. In it, the STB asserted that, notwithstanding the invalidation of the Section 207 Metrics and Standards, it had “implicit authority to fill a gap exposed by the . . . invalidation of a portion of a statute” and define on-time performance. *On-Time Performance under Section 213 of PRIIA*, Docket No. EP 726, slip op. at 5 (STB served July 28, 2016).

Having promulgated its own definition of on-time performance for purposes of PRIIA, the STB removed this proceeding from abeyance and instructed Amtrak to submit evidence showing that the Capitol Limited service had averaged less than 80% on-time performance under the STB’s new definition. *National Railroad Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (STB served Sept. 14, 2016). The STB stated that it would address Norfolk Southern’s pending Motion to Dismiss in a subsequent decision. *See id.* slip op. at 1, n.1.

Norfolk Southern, along with several other host railroads, sought judicial review of the STB’s new definition on the ground that the STB lacked authority to define on-time performance for purposes of initiating an investigation under 49 U.S.C. § 24308(f). In a unanimous opinion, a three-judge panel of the U.S. Courts of Appeals for the Eighth Circuit agreed. The court vacated the STB’s on-time performance rule and held that the plain language of PRIIA evidenced that Congress clearly intended that “on-time performance in § 213(a) means on-time performance as developed by the FRA and Amtrak under § 207(a).” *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 2017 U.S. App. LEXIS 12408, at *31 (8th Cir. July 12, 2017). The court’s mandate issued on August 29, 2017.

Accordingly, the only possible basis for a PRIIA investigation in response to Amtrak’s complaint would be Metrics and Standards “developed by the FRA and Amtrak under § 207(a).” However, there are no such Metrics and Standards in existence. While the STB was developing its own on-time performance definition, the U.S. Court of Appeals for the District of Columbia Circuit again invalidated the PRIIA Metrics and Standards as

unconstitutional. *See Assoc. of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19 (D.C. Cir. 2016). On remand, the U.S. District Court for the District of Columbia declared PRIIA Section 207 unconstitutional in its entirety, vacated the Metrics and Standards, and entered final judgment in favor of the industry. *Assoc. of Am. R.Rs. v. Dep't of Transp.*, Case No. 1:11-CV-1499 (D.D.C. Mar. 23, 2017). Although the government has noticed an appeal of that final order, the Metrics and Standards remain invalid today.

Given the Eighth Circuit's decision and the lack of any valid Metrics and Standards developed by FRA and Amtrak, the STB is without any authority to proceed with this investigation. As a result, the STB should promptly grant Norfolk Southern's Motion to Dismiss.

Respectfully,

David Meyer

PP Marcie Fine

David L. Meyer

cc: All parties of record

CERTIFICATE OF SERVICE

I, Marcie Brimer, certify that on September 1, 2017, a copy of the letter regarding *Norfolk Southern's Pending Motion to Dismiss Amtrak's Complaint in STB Docket NOR No. 42141* – National Railroad Passenger Corporation - Investigation of Substandard Performance of the Capitol Limited, was served by email or by first-class mail on all parties of record, as follows:

Thomas H. Dupree, Jr.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
TDupree@gibsondunn.com

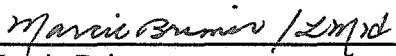
Kevin M. Sheys
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006

Justin J. Marks
1666 K Street, NW Suite 500
Washington, DC 20006

Laura E. Weis
Champaign County Chamber Of Commerce
303 West Kirby Avenue
Champaign, IL 61820

Michael K. Murphy
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, NW, Suite 700
Washington, DC 20036
Jeff.Moreno@thompsonhine.com



Marcie Brimer