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March 29, 2018

BY E-FILING

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

ENTERED
Office of Proceedings
March 29, 2018
Part of
Public Record

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 the Unopposed Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Dismiss the Amended Complaint and terminate this proceeding.

Very truly yours,

/s/ David A. Hirsh
David A. Hirsh

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

Enclosures

cc: Kevin M. Sheys, Esquire
William H. Herrmann, Esquire
Christine E. Lanzon, Esquire
Edward J. Fishman, Esquire
Justin J. Marks, 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

**UNOPPOSED MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY AND
GRAND TRUNK WESTERN RAILROAD COMPANY TO DISMISS**

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Respondents Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, “CN”) move to dismiss the Amended Complaint of National Railroad Passenger Corporation (“Amtrak”) and terminate this proceeding. With the issuance of the mandate of the United States Court of Appeals for the Eighth Circuit in the case of *Union Pacific Railroad v. STB*, 863 F.3d 816 (8th Cir. 2017) (“*UP v. STB*”), and the United States Supreme Court’s denial of petitions for certiorari, 86 U.S.L.W. 3408 (U.S. Feb. 20, 2018), there is no legal basis for an investigation of Amtrak’s Amended Complaint by the Board under 49 U.S.C. § 24308(f).¹ Amtrak has authorized counsel to report that Amtrak does not oppose CN’s request for dismissal of this proceeding.

BACKGROUND

Under 49 U.S.C. § 24308(f), the Board may investigate allegedly substandard performance of Amtrak passenger trains if “on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of

¹ Enacted by Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Pub. L. No. 110-432, Div. B, § 213(a), 122 Stat. 4907, 4925.

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.” Amtrak’s Amended Complaint (filed August 29, 2014) seeks an investigation of the performance of the trains comprising its Illini/Saluki service, alleging that on-time performance (“OTP”) on the Illini/Saluki averaged less than 80%. Amtrak’s Amended Complaint does not rely on the metrics jointly promulgated by the Federal Railroad Administration (“FRA”) and Amtrak under Section 207.²

In 2015, this proceeding was held in abeyance pending completion of the Board’s rulemaking proceeding (“EP 726”) to define OTP for purposes of 49 U.S.C. § 24308(f).³ On July 28, 2016, the Board issued a final rule in EP 726.⁴ CN and other host railroads filed petitions for review of that rule, which were consolidated in the Eighth Circuit.

While judicial review of the EP 726 final rule was pending, the Board removed this proceeding from abeyance and directed Amtrak to provide evidence that OTP, as defined in EP 726, fell below 80% on the Illini/Saluki trains for two consecutive calendar quarters.⁵ Amtrak responded by filing data purporting to show that each Illini/Saluki train had failed to achieve 80% OTP as defined by the Board in the final rule under EP 726.⁶

² Motion to Amend Complaint at 6 (filed Aug. 29, 2014).

³ *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Docket No. EP 726 (STB decisions served May 13, 2015 and Dec. 28, 2015).

⁴ Codified at 49 C.F.R. Part 1040.

⁵ Decision served Sept. 15, 2016.

⁶ See Amtrak’s On-Time Performance Evidence at 2 (filed October 17, 2016) (stating that Amtrak’s OTP evidence, providing “the basis for Amtrak’s complaint,” was “calculated in accordance with 49 C.F.R. Part 1040” – i.e., the EP 726 definition).

The Board denied CN's petition for reconsideration of an earlier decision declining to dismiss this proceeding. The Board cited the EP 726 final rule as the grounds for disagreeing with CN's argument that the Board lacked a valid statutory basis for initiating an investigation in this proceeding.⁷

On October 25, 2016, CN responded to Amtrak's OTP evidence and asked that the Board hold the proceeding in abeyance pending the Eighth Circuit's review of the EP 726 final rule.⁸ The Board has not taken further action in this proceeding.

On July 12, 2017, the Eighth Circuit issued a decision vacating the Board's EP 726 final rule, holding that the Board has no authority to define OTP for purposes of 49 U.S.C. § 24308(f). *UP v. STB*, 863 F.3d at 825-26. The court's mandate issued on August 29, 2017. The Supreme Court denied petitions for certiorari on February 20, 2018.

ARGUMENT

In Amtrak's evidence in support of its Amended Complaint, Amtrak seeks an investigation under 49 U.S.C. § 24308(f) solely on the basis that the Illini/Saluki's OTP has averaged less than 80% as defined by the Board in EP 726. However, the Eighth Circuit invalidated the Board's definition of OTP under EP 726, explaining that, given Congress's intent that OTP be defined by joint promulgation by FRA and Amtrak under Section 207,⁹ the Board

⁷ Decision served Oct. 21, 2016.

⁸ CN's Response to Amtrak's On-Time Performance Evidence and Request to Hold Proceeding in Abeyance (filed Oct. 25, 2016).

⁹ The metrics and standards adopted under Section 207 of PRIIA were separately invalidated by the D.C. Circuit decision in *Ass'n of Am. R.R.s v. DOT*, 821 F.3d 19 (D.C. Cir. 2016), which held Section 207 unconstitutional. The U.S. District Court for the District of Columbia subsequently vacated the metrics and standards issued by FRA and Amtrak under that section and entered judgment for the plaintiff Association of American Railroads. *Ass'n of Am. R.R.s v. DOT*, Civil Action No. 11-1499 (D.D.C. Mar. 23, 2017). That ruling is presently on

lacks authority to define OTP for purposes of 49 U.S.C. § 24308(f). *UP v. STB*, 863 F.3d at 825-26. Consequently, there is no basis for an investigation of Amtrak's Amended Complaint by the Board under 49 U.S.C. § 24308(f).

CONCLUSION

The Board should dismiss Amtrak's Amended Complaint and terminate this proceeding.

Respectfully submitted,

/s/ David A. Hirsh

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review in the D.C. Circuit. *Ass'n of Am. R.R.s v. DOT*, No. 17-5123 (D.C. Circuit argued Mar. 5, 2018).

CERTIFICATE OF SERVICE

This is to certify that, on this 29th day of March, 2018, I caused a true and correct copy of the foregoing Unopposed Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Dismiss to be served upon the parties listed below by electronic mail.

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Counsel for National Railroad Passenger Corporation

/s/ Nicholas E. Richards
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