**Nos. 16-3307, 16-3504, 16-3512, 16-3513, 16-3514 (consolidated)**

# IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, *et al.*,

*Petitioners*

*v.*

SURFACE TRANSPORTATION BOARD;
UNITED STATES OF AMERICA,

*Respondents*

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,

*Intervenors*

On Petitions For Review Of An Order
Of The Surface Transportation Board

## JOINT BRIEF FOR INTERVENORS THE SOUTHERN RAIL COMMISSION, NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, ENVIRONMENTAL POLICY CENTER, *ET AL.*, AND SMART-TRANSPORTATION DIVISION-NEW YORK IN SUPPORT OF THE BOARD

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December 6, 2016

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Interveners make the following disclosure:

**The Southern Rail Commission** was created in 1982, by act of the 97th Congress, as an interstate rail compact joining the states of Louisiana, Mississippi and Alabama. The Southern Rail Commission's mission is to promote the safe, reliable and efficient movement of people and goods to enhance economic development along rail corridors; provide transportation choices; and facilitate emergency evacuation routes.

**The National Association of Railroad Passengers** ("NARP") is the largest not-for-profit national membership advocacy organization for train and rail transit passengers, with 28,000 members nationwide. Since its founding in 1967, NARP has worked to expand the quality and quantity of passenger rail in the United States. NARP's mission is to work for a modern, customer-focused national passenger train network that provides a travel choice Americans want.

**The Environmental Law and Policy Center of the Midwest** ("ELPC") is a not-for-profit public interest environmental legal advocacy organization. Founded in 1993, ELPC develops and leads successful strategic advocacy campaigns to improve environmental quality and protect our natural resources through the advancement of clean air, clean transportation and clean energy

policies at the regional and national levels. ELPC has worked to advance intercity passenger rail in the Midwest and nationwide for more than twenty years.

**The Indiana Passenger Rail Alliance** (d/b/a All Aboard Indiana) was incorporated in 1994 as an Indiana not-for-profit corporation and is a grassroots, volunteer citizen organization dedicated to making available to both the general public and state and local governments, information about the issues and benefits of the development of modern, 21st Century, passenger rail systems in the state of Indiana. This includes, but is not limited to, the connection of Indiana communities with the national transportation system by passenger rail.

**The Ohio Association of Railroad Passengers** (d/b/a All Aboard Ohio) is not-for-profit organization comprised of citizens, businesses and organizations that advocate for more and better transportation choices in Ohio, including more passenger trains, better public transit and improved rail infrastructure. All Aboard Ohio exists to achieve a modern, consumer-focused, statewide passenger rail system.

**All Aboard Wisconsin** is a not-for-profit alliance of organizations and individuals promoting passenger trains, connecting buses and other public transportation choices statewide as an integral part of Wisconsin's and the nation's travel network. All Aboard Wisconsin seeks to engage Wisconsin residents in thoughtful and informed conversations about, and to help find solutions to meet

their transportation needs in the coming years; emphasizing the role and efficient coordination of intercity passenger trains and other connecting transportation services.

**The Friends of the Cardinal** is a not-for-profit organization of citizens who live in the greater Kanawha Valley area of West Virginia including the counties of Fayette, Kanawha, Putnam, Clay, Boone, Lincoln, Cabell and Wayne Counties. Friends of the Cardinal's mission is to improve public intercity transportation throughout the area of Southern West Virginia primarily through supporting the existing passenger rail service and advocating for additional new passenger rail service.

**Michigan Association of Railroad Passengers Inc.** is a Michigan non-profit corporation that represents the interests of the traveling public wishing to use rail and other transportation providers and to educate the public and officials about the benefits of improved and expanded passenger rail services.

**The Midwest High Speed Rail Association** is a member-supported non-profit organization advocating for fast, frequent and dependable trains that link Midwestern economies and communities.

**Virginians for High Speed Rail** was founded in 1994 as a not-for-profit coalition of citizens, localities, economic development agencies, community organizations, and businesses that educate and advocate for the improvement and

expansion of rail service in Virginia to achieve fast, frequent, and reliable rail service. The mission of VHSR is to promote rail transportation as an energy-efficient, environmentally friendly mode of transportation.

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## STATEMENT OF THE CASE

Intervenors represent a diverse group of stakeholders—an interstate rail commission, national and regional passenger rail advocacy organizations and a labor union—that are bound together by a common goal of advancing the development and operation of intercity passenger rail service in the United States. All of the Intervenors have thousands of citizens, members and workers who regularly ride or service Amtrak trains and have directly experienced the chronic and lengthy delays in on-time performance of those trains.

The current challenge of the Surface Transportation Board's (Board) On-Time Performance Rule, pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24308(f), by the Petitioners, who represent the interests of several freight railroads and their trade association, is the latest roadblock by the railroads designed to derail intercity passenger rail service operating on their tracks.

Americans have been riding Amtrak passenger trains in record numbers. Intercity passenger ridership increased from 16 million in 1972 to 31 million passengers in 2012. For most of the past decade, ridership records have been shattered year-over-year despite obstacles such as the fact that Amtrak service largely operates on tracks owned by the freight railroads and service is extremely limited. Amtrak operates long distance trains that typically run only once daily in

each direction on a route. The vast majority of U.S. freight railroads lines do not have any passenger rail operating on them.

Prior to the litigation and regulatory delays brought by the Petitioners seeking to roll back the statutory protections of passenger rail service under PRIIA, Amtrak was posting impressive and consistent on-time performance rates for the first time in the 45-year saga of the national rail transportation network of 71percent for long distance trains in 2012.

### A. Litigation and Regulatory Challenges to On-Time Performance of Intercity Passenger Train Service

Then in August 2011, the Association of American Railroads (AAR), a Petitioner in this action, challenged the Federal Rail Administration and Amtrak metrics and standards on the ground that Section 207 of PRIIA was unconstitutional because the statute placed legislative and rulemaking authority in the hands of Amtrak, who AAR contend was a private entity. The Court of Appeals decision in 2013 invalidating Amtrak's on time performance metrics and standards under Section 207 of PRIIA,[1] which was later unanimously overturned by the U.S. Supreme Court, [2] had an almost immediate negative impact on

[1] *Ass'n of Am. R.Rs. v. Dep't Transp*., 721 F.3d 666 (D.C. Cir. 2013).
[2] *Dep't of Transp. v. Ass'n of Am. R.Rs*., 135 S. Ct. 1225 (2015).

Amtrak's on-time performance and resulted in chronic and persistent delays, sometimes hours in length.[3]

The delays of 2014 were protracted and chronic. In its 2014 performance report, Amtrak found host (freight) railroad delays accounted for roughly two-thirds of all of its delays. "Freight train interference rates have nearly tripled, and this indicates not only that there are more delays, but also that those delays are of longer duration. In response, ridership and ticket revenues have fallen by 15percent year over year to date." [4]

By June 2014, the system-wide on-time performance rate had fallen to 69.7 percent, and the rate for long distance routes was only 41.2 percent, half of what it had been 29 months earlier.[5] The steep decline in on-time performance had numerous adverse impacts on the public and taxpayers. American business,

[3] On remand, the D.C. Circuit again found Section 207 unconstitutional this time on the ground that the statute violates the Due Process Clause. *Ass'n of Am. R.R.s v. Dep't of Transp. (AAR II)*, 821 F.3d 19 (D.C. Cir. 2016). The Department of Transportation filed a petition for panel rehearing which was denied on September 9, 2016. The time for seeking Supreme Court review has not yet expired.

[4] D.J. Stadtler, Vice President of Operations, Amtrak, Testimony Before the Surface Transportation Board (April 10, 2014), www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadler-STBApr-09-2014.pdf .

[5] See Amtrak, Monthly Performance Report for June 2014, at E-7 (July 31, 2014), www.amtrak.com/ccurl/621/650/Amtrak-Monthly-Performance-Report-June2014.pdf.

passengers and workers have borne the negative consequences of these delays in terms of costs, time and threats to passenger safety.

The passenger stories reflecting the effects of the chronic delays in 2014 include the following:

- On the Empire Builder, oil workers who travel on the Empire Builder on a biweekly basis from their homes in Ohio to their jobs in the oil fields in North Dakota were routinely delayed.

- On the Capitol Limited, which had 236,000 passengers in 2014, Amish passengers, who have limited transportation options, were left waiting for several hours in Toledo eventually boarding the east bound train to return them to Harpers Ferry, West Virginia.

- On the Lake Shore Limited, that had a ridership of 373,000 passengers in 2014, a couple traveling across cross-county was forced to sit in a cornfield outside Ravenna, Ohio for 12 hours waiting for freight to clear. Because the delay was so extensive, the amount of food on board the train, as well as the restroom operations became major concerns for the passengers and crew.[6]

In January 2012, Amtrak sought a Board investigation under Section 213 of PRIIA, 49 U.S.C. § 24308(f) regarding alleged "substandard performance of Amtrak passenger trains" on a number of rail lines. See Respondent's Brief at 13 - 14. On December 19, 2014, the Board in a 2-1 decision granted Amtrak's motion to amend its complaint.[7] Amtrak moved to limit its complaint to an investigation

[6] Comment: Environmental Law and Policy Center, All Aboard Indiana, All Aboard Ohio, All Aboard Wisconsin, Midwest High Speed Rail Association and Virginians for High Speed Rail, doc. ID 240049 (Feb. 8, 2016)(JA71, 75)

[7] Nat'l R.R. Passenger Corp.-Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry., (Illini/Saluki), NOR 42134(STB

of delays on the route between Chicago and Carbondale, Illinois (Illini/Saluki service) and revised basis for the investigation as being failure to achieve an 80 percent "on-time performance" for two consecutive calendar quarters as set forth in Section 213. The promulgation of the Board's On-Time Performance Rule, which was requested by Petitioners, stems from that case.

Understanding the historical context in which the Board's On-Time Performance Rule arises demonstrates why Petitioner's challenges must fail.

### B. Statutory and Regulatory History of On-Time Performance of Intercity Passenger Train Service

From their inception, most freight railroads were chartered as "common carriers" and were essentially regulated monopolies providing both passenger and freight services and as such were regulated by the Interstate Commerce Commission (ICC) which came into existence in 1887. In the 1950s as the subsidization of highways and airlines, in addition to tax policy started eating into the profitability of passenger rail, the freight railroads sought to be relieved of their obligation to provide passenger rail serves. However, as common carriers, the railroads were prohibited from ceasing service until the ICC and state regulatory commissions issued an order allowing the cessation of passenger service. *National*

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served Dec. 19, 2014), 2014 WL 7236883 ("December 2014 Decision")(available on the Board's website at: Decision ID 44076).

*R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry.*, 470 U.S. 451, 454 (1985).

Like the other transportation modes of highways and airlines in the United States, Congress considered passenger rail to be an integral part of the national transportation network. So in 1970 a grand bargain between Congress and the freight railroads was struck to save passenger rail service in the U.S. Congress created Amtrak "to avert the threatened extinction of passenger train in the United States." See Rail Passenger Service Act of 1970 (RPSA) Pub. L. No. 91-518, § 101, 84 Stat. 1328 (creating the National Railroad Passenger Corporation, now known as Amtrak). RPSA expressly states that Congress considers passenger rail service to be a "public convenience and necessity" and "that federal financial assistance as well as investment from the private sector of the economy" was needed to achieve the national goal of continuing and improving passenger-rail service rail in the United States. RPSA, Pub. L. No. 91-518, § 101, 84 Stat. 1328.

As a condition of relieving railroads of their intercity passenger rail service obligations and receiving federal financial assistance in the form of operating grants and capital investment. Congress required that the private railroads allow Amtrak to operate passenger trains on their tracks and facilities, at rates either agreed to by Amtrak and the host railroads or prescribed by the ICC, and later the Surface Transportation Board. See 49 U.S.C. § 24308(a); *National R.R. Passenger*

*Corp. v. Boston & Maine Corp*., 503 U.S. 407, 410 (1992); *Atchinson, Topeka & Santa Fe Ry*., 470 U.S. at 455.

Despite the grand bargain, intercity passenger rail service continued to be plagued by poor on-time performance. In 1973, Congress investigated concerns that some of the railroads were continually impeding the movement of Amtrak trains and instituting slow orders. Senator Vance Hartke from Indiana, Chairman of the Surface Transportation Subcommittee stated that: "[I]n Indiana, the James Whitcomb Riley is forced to run at speeds of 10 miles per hour because of slow orders on bad track between Indianapolis and Chicago. Running a passenger train over track like that is a public disservice." [8] To address the interference from freight rail, Congress granted Amtrak a "general preference" in dispatching over freight transportation, specifying that Amtrak has "preference over freight transportation in using a rail line, junction or crossing, subject to the objection of a rail carrier, and the [Board] orders otherwise under this subsection after section 553 of Title 5 hearing." 49 U.S.C. § 2308(c). *See also* Amtrak Improvement Act of 1973, Pub. L. No. 93,146, §10(2), 87 Stat. 552 (initial version). Congress granted passenger rail the right of preference in a large part on the importance of on-time performance. People will not ride trains that are habitually late, thus undermining

[8] Amtrak Oversight and Authorization: Hearing on S. 1763: Before the Surface Transportation Subcomm. of the S. Comm. on Commerce, 93rd Cong. 88 (1973)(statement of Senator Vance Hartke).

Congressional intent both to provide meaningful transportation services and to minimize the necessary federal investment to accomplish this goal.

The 1973 Act also contains a waiver provisions that permits the freights to be relieved from providing the dispatching preference to passenger rail if it could demonstrate that giving Amtrak trains preference would "materially lesson the quality of the freight service to shippers."[9] To date no freight railroad has sought a waiver of Amtrak's preference under this provision.

Fast forward to 2008, and intercity passenger rail trains are still suffering from poor service reliability and on-time performance due to freight rail interference.[10] Amtrak's on-time performance for long-distance trains was below 40 percent. Even though Congress created a statutory right of passenger rail preference in the 1970s, the problem of certain freight railroads impeding Amtrak service persisted because Amtrak had no mechanism to enforce the passenger rail preference. Amtrak could not sue the host railroads in court or appeal to the Secretary of Transportation when it believed that its preference was violated.

Congress enacted PRIIA in 2008, in part, because it recognized that on-time performance was critical to the success of achieving viable national intercity passenger rail service in the United States and that there had to be a process for

[9] The Amtrak preference and waiver procedure was originally codified at 45 U.S.C. § 562(e) and later recodified as 49 U.S.C. § 24308(c).
[10] H.R. Rep. No. 110-690, at 36 (2008)(*2008 House Report*)(available at 2008 WL 2316545)

enforcing the preference protections of passenger rail. Following the passage of PRIIA, Amtrak's on-time performance increased dramatically. Just two years later, in 2012, Amtrak achieved its highest ever on-time performance level of 88.7 percent system-wide and 81.2 percent for long distance.

## SUMMARY OF ARGUMENT

This court should reject Petitioners' challenges to the Board's On-Time Performance rule because the Board has the statutory authority to promulgate the rule; the Board reasonably considered all of the public input during the course of the rulemaking; and the Board's adoption of the "All-Stations" approach was reasonable and not arbitrary or capricious.

## ARGUMENT

### I. THE BOARD'S AUTHORITY TO INTERPRET ON-TIME PERFORMANCE UNDER SECTION 213 IS WELL ESTABLISHED.

Petitioners rely principally on the contention that the Board is prohibited from defining "on-time performance" under Section 213 because Congress gave the Federal Railroad Administration (FRA) and Amtrak authority to develop metrics and standards that includes "on-time performance" under Section 207. Petitioners can point to no words in the statutory text expressing such preclusion.

Nor could they, Section 213 plainly provides two separate and distinct triggers authorizing the Board to commence an investigation into two separate and

distinct infractions the causes of delay of the passenger trains or the quality of passenger rail service. "Statutory interpretation … always … begins" with "the text" of the statute. *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). "[W]here … the statute's language is plain," that is "is also where the inquiry should end" because "'the sole function of the courts is to enforce [a statute] according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *see also Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 984 (8th Cir. 2009).

Under Section 213 an investigation is warranted if *either* (1) "the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters"; "or" (2) "the service quality of intercity passenger train operations for which minimum standards are established under Section 207 of [PRIIA] fails to meet those standards for 2 consecutive calendar quarters." 49 U.S.C. § 24308(f). The plain language of the statute demonstrates that Congress intended the Board to define "on-time performance" for purposes of carrying out its enforcement responsibilities under Section 213. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983)("[W]here Congress includes the particular language in one section of a statute but omits in in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). [11]

[11] *See also Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014)("[W]hen

The legislative history of PRIIA also indicates that Congress intentionally and purposely included two separate triggers in Section 213 to address two separate problems that impede the viability of national intercity passenger rail. Under PRIIA, Congress gave the Board enforcement authority to adjudicate[e] disputes between Amtrak and the freight railroads, including disputes about when Amtrak's "on-time performance problems" stem from the freight railroads' failure to "provide preference to Amtrak over freight trains." S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007). That is the first Section 213 investigation trigger. 49 U.S.C. § 24308(f)(1). The purpose of such an investigation under this trigger is to determine whether and to what extent delays are due to causes that could reasonably be addressed by the passenger rail operator or the host railroad.

Congress authorized the Board to initiate an investigation if on-time performance averages less than 80 percent for two consecutive calendar quarters, 49 U.S.C. § 24308(f)(1) or "upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service." Id. That authority is embodied in the first Section 213 trigger.

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'Congress includes particular language in one section of a statute but omits in another'-let alone in the very next provision-this court 'presume[s]' that Congress intended a difference in meaning."); *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1015 (8th Cir. 2010)(same).

In addition, Congress gave the Board the authority to enforce Section 213 thorough adjudication or rulemaking. It should be noted that in the present case, the Board initially decided to determine what constituted "on-time performance" though adjudication of the Illinois/Saluki case before it, but because the freight railroads insisted upon a rulemaking, the Board ceded to the freight railroads request. Accordingly the Railroads are foreclosed from arguing that the Board erred in using rulemaking procedures in carrying out its responsibilities under 49 U.S.C. § 24308. *See generally New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)(judicial estoppel) and *Jones v. Bob Evans Farms, Inc*., 811 F.3d 1030, 1032-33 (8th Cir. 2016).

The second Section 213 investigation trigger - failing to meet Section 207 standards – addresses poor performance and service quality of intercity passenger train operations. Section 207 provided that the FRA and Amtrak jointly in consultation with the Board and even passenger rail groups develop metrics and minimum standards to measure 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. 49 U.S.C. § 24101 note. These standards were to be used by Amtrak for various purposes including annual evaluations of its performance, the development of performance improvement plans for long-distance routes, and the

development and implement of a plan to improve on-board service. 49 U.S.C. § 24710(a)-(b). The Section 207 on-time performance metric that was promulgated by FRA and Amtrak, after notice and public comment, required that Amtrak obtain on-time performance of at least 80 percent to 95 percent of the time depending on the route and the time of year. The Section 207 on-time performance metrics are higher than the 213 and also contain a seasonal condition not present in the first 213 trigger. Even though the 207 metrics include on-time performance as a metric that metric is significantly different not only in text but also in the purpose from the first section 213 trigger. Moreover, accepting Petitioners argument that the invalidation of Section 207 metrics and standards somehow negates the first Section 213 trigger of 80 percent on-time performance would totally nullify any enforcement authority under PRIIA.

More recently, Senator Dick Durbin (D-IL), who was in the Senate during the markup and passage PRIIA in 2008, stated very clearly that "Congressional intent to reduce delays was clarified when the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) was enacted, giving the [Board] the authority to investigate when [on-time performance] is less than 80 percent in two consecutive quarters."[12]

[12] Letter to Chairman Daniel R. Elliot III, Surface Transportation Board from Senator Dick Durbin, Feb. 22, 2016. (JA 224).

The Board reasonably interpreted Section 213's plain language authorizing it to define what constitutes "on-time performance." For the reasons explained above, the text and legislative intent of PRIIA unambiguously establish that the Board has authority to apply the 80 percent trigger independent of Section 207. At the least, that construction of the statute is a reasonable one to which the Board's interpretation is entitled to deference. *See United States v. Mead*, 533 U.S. 218, 229-230 (2001) (delegation of adjudicatory authority is "a very good indicator of delegation meriting *Chevron* [deference]"); Resp. Br. 25-26. Indeed, Congress's decision to tie the second trigger to the Section 207 process but not to do so with respect to the first suggests that, at a minimum, Congress "le[ft] the question" of how to apply the first trigger "to agency discretion." *Catawba Cnty, N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (per curiam) ("congressional mandate in one section and silence in another often 'suggests … a decision … to leave the question to agency discretion'"). Therefore, Petitioners argument must fail and the Board's rule affirmed.

## II. THE BOARD REASONABLY DETERMINED THE MEANING OF ON-TIME PERFORMANCE FOR PURPOSES OF INITIATING AN INVESTIGATION UNDER SECTION 213.

The Administrative Procedure Act provides that the Board's definition of "on-time performance" under Section 213 of PRIIA must be upheld unless the decision was arbitrary, capricious, an abuse of discretion, not supported by

substantial evidence, or not in accordance with the law. 5 U.S.C. § 706(2)(A)-(E). See *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under this standard of review, a reviewing court must determine whether the definition chosen by the Board was based on a consideration of relevant factors and so long as the Board has set forth rational grounds for its action, and the Board's path is reasonably discerned, the court cannot substitute its judgment of that of the Board. *Bowman Transp. Inc. v. Arkansas Best Freight Sys., Inc*., 419 U.S. 281, 285-86 (1974); *Nebraska v. EPA*, 812 F.3d 662, 666, 669 (8th Cir. 2016); *Winter v. ICC*, 992 F.2d 824, 825-826 (8th Cir. 1993). The Board's decision here meets these standards. The Board's authority to define on-time performance under Section 213 is not only authorized by the statute, it is unequivocally supported by the legislative history of the statute, as well as long-standing agency practice by the Interstate Commerce Commission, the predecessor agency of the Board implementing that authority. *See* Respondents Brief 6-7.

The Petitioners cite the Board's failure to address their hypothetical impacts on freight railroad operations as a basis for vacatur of the rule. These alleged effects include recent and projected increase in freight traffic, greater congestion on key corridors, and the burdens already imposed on the freights by obligations to host Amtrak trains. Pet. Brief at 23.

Petitioners concerns with "operational impacts" are not germane to the determination of what constitutes on-time performance for purposes of initiating an investigation under Section 213 of PRIIA. Instead to the extent the freight railroads have actual operational concerns, those concerns are more appropriately brought, as Congress intended, before the Board pursuant to other statutory provisions.

When Congress provided Amtrak with a preference over freight transportation in 1973, Congress also created a process for the freight railroads to seek relief from that right of preference:

> A rail carrier affected by this subsection may apply to the Board for relief. If the Board … decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms. 49 U.S.C. § 24308(c).[13]

Curiously, no freight railroad has ever claimed that its operations have been materially lessoned and sought relief from Amtrak's right of preference under this section since the statute's passage in 1973. [14]

Accordingly, the Board had no duty to address hypothetical concerns that have relation to the on-time performance rule which defines what the

[13] The Amtrak preference and relief procedure was originally codified at 45 U.S.C. § 562(e) and later recodified as 49 U.S.C. § 24308(c).
[14] Office of Inspector Gen., Federal Railroad Administration, CR-2008-076, Root Causes of Amtrak Delays, 4 (September 8, 2008)(available at https//www.oig.dot.gov/library-item/29453).

commencement mechanism is for the Board to conduct investigations under Section 213. Moreover, Section 213 triggers an investigation including any operational concerns raised by the host railroad. Indeed, the "Board shall…identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train."

## III. THE BOARD'S ADOPTION OF AN "ALL-STATIONS" APPROACH FURTHERS THE STATUTORY OBJECTIVE OF PROVIDING A VIABLE NATIONAL INTER CITY PASSENGER RAIL SERVICE IN THE UNITED STATES AND IS NOT ARBITRARY OR CAPRICIOUS.

The Board's adoption of an "All-Station" approach is appropriate and reasonable under the applicable statutes. Section 101(c) (4) of PRIIA, Congress mandates:

> Amtrak shall . . . operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables. 49 U.S.C. § 24101(c) (4). JA385-386

The Board's interpretation is consistent with PRIIA's mandates.

In addition to the statute, providing quality intercity service at all stations is a fundamental principal that has been embodied in prior administrative regulations. The Board originally proposed limiting the measurement of on-time performance only to only endpoints based in part on a prior ICC definition, notably the 1973 ICC regulation. This approach failed to recognize, however, that, in less than a year later in 1974, the ICC revised the 1973 regulation to include all stops.

In 1974, the ICC initiated a proceeding determine the quality of intercity rail passenger service with a view toward determining whether the Commission should prescribe additional rules and regulations. The Commission held public hearings and took testimony from over 300 public witnesses and railroad representatives. As a result, the ICC determined that Rule 6(b) should be changed to clarify passenger right and the carriers' obligations. "The public should be able to rely upon train schedules at intermediate stops as well as the "final terminus" of a route. 351 ICC 883, 910, 997 (1976). Rule 6(b) was subsequently amended to incorporate the requirement that "the train shall arrive at its final terminus and at all intermediate stops no later than 5 minutes after the scheduled arrival time per 100 miles of operation, or 30 minutes after scheduled arrival time, whichever is the less." Id. Rule 6(b) remained in effect, measuring all station on-time performance until the ICC's jurisdiction over passenger rail was terminated in 1979. The reasoning of ICC, which is no less appropriate today, coupled with the goals of PRIIA, supports the adoption of the All-Station on-time performance approach by the Board under Section 213.

As the Board fully explained in the final rule, the All-Stations "approach more appropriately reflect[s] the principle that rail passengers destined for every station along a line, regardless of its size, should have the same expectation of

punctuality."[15] The Board's interpretation comports with Congress' intent as well as the administrative record for the rule.

Several members of Congress submitted responses to the Notice of Proposed Rulemaking supporting the Board's authority to promulgate the on-time performance rule under Section 213 and the adoption of the "All-Stations" approach.[16] Congressman Peter DeFazio (D-OR) Ranking Member on the House Transportation and Infrastructure Committee, who also voted for PRIIA in 2008, stated that: "[M]easuring performance only at the endpoint of Amtrak routes takes only 10 percent of Amtrak stations into account and leaves 24 states unmeasured altogether as those states have only intermediate but no endpoint stations. The practical importance of monitoring intermediate station on-time performance as opposed to only end-points performance cannot be overstated.[17] And a bipartisan comment submitted by U.S. Senators Roger Wicker (R-MS) and Cory Booker (D-N.J.) gave further justification for an All-Stations approach stating that: "[M]ore than two-thirds of Amtrak passengers do not travel to the final destination of a route."[18] No member of Congress submitted a comment supporting an "endpoint

[15] Final Rule Decision at 6 (JA 382).
[16] Notice of Proposed Rulemaking, *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, EP 726, 80 Fed. Reg. 80,737 (Dec. 28, 2015)(JA 16-25).
[17] Letter to Hon. Dan Elliot from Congressman Peter DeFazio, April 13, 2016 (JA 371-72)
[18] Initial Comments of U.S. Senators Wicker and Booker (JA 226).

only" on-time performance approach or questioning the Board's authority to issue a rule under Section 213.

Joining the comments by U.S. Senators and Congressman, were hundreds of public commentators representing states, citizens, public interest groups and stakeholders. Except for certain freight railroads, virtually all commentators including Intervenors, and the U.S. Department of Transportation (USDOT) and the State of Virginia (Virginia) urged the Board to define on-time performance based on arrival times at all stations along Amtrak routes not just the endpoints.[19]

On July 28, 2015 the Board issued a final rule (Final Rule Decision) adopting the "All-Stations" approach deeming an intercity passenger train's arrival at, or departure from, a given station to be "on time" if it occurs no later than 15 minutes after its scheduled time and calculating "on-time performance" at all stations rather than only at a train's end-point or destination.[20] Based upon the statute and a robust administrative record, the Board was reasonable in determining that an "All-Stations" on-time performance approach was reasonable under Section 213.

[19] USDOT Reply Comments (JA 232) and Virginia Initial Comments (JA 154).
[20] Final Rule, *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, EP 726, 81 Fed. Reg. 51,343 (Aug. 4, 2016)(JA 377-89)

## IV. CONCERNS OF AMTRAK TRAIN PERSONNEL

SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY) represents the interest of certain Amtrak train service employees, particularly those in the craft or class of conductors, brakemen, trainmen, and yardmasters, that operate passenger trains on the Northeast corridor between Boston, MA and Washington DC, as well as stations on and off the corridor such as Syracuse, Buffalo, and Niagara Falls, NY. Under the SMART/TD constitution and practices, the SMART/TD state legislative boards are given the primary responsibility and authority to appear at federal proceedings involving passenger train discontinuance threats. Poor on-time train performance inevitably leads to reduced patronage with the ultimate discontinuance of train services and concomitant job losses for train operating personnel. The job losses extend beyond the reduction of service or discontinuance of a given train, but also impair the viability of connecting passenger train services.

Amtrak on-train employees interface with the public, and are acutely aware of the current need for federal intervention to protect the necessary on-time performance, for the benefit of the public as well as for their own livelihood.

SMART-Transportation Division-New York State Legislative Board concurs in this Intervener brief, and urges the petitions for review be denied.

## CONCLUSION

Petitioners' latest attempt to overturn PRIIA and derail intercity passenger rail in the United States should be rejected. For the foregoing reasons, the Court should deny the Petitions for Review.

Respectfully submitted,

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December 6, 2016

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitation in the Court's October 6, 2016 Order, the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the virus-scanning requirement of Eighth Circuit Rule of Appellate Procedure 28A (h).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a) (7) (B), the brief contains 4,840 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

3. This brief has been scanned for viruses and is virus-free.

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## CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Eighth Circuit via the CM/ECF system this 6th day of December, 2016, which automatically sends notice and a copy of the filing to all counsel of record.

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