No. _____

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, ET AL.,
Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Millions of Americans rely on Amtrak's intercity passenger rail service to reach their jobs and business opportunities, commute to their colleges and universities, visit their family and friends, and travel to tourist and recreational places. They need and value efficient and reliable Amtrak passenger rail service. When Amtrak rail passengers suffer increasing delays – substandard "on-time performance" – it wastes their time, costs them money and frustrates their mobility.

Congress enacted the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA") to help improve the reliability of Amtrak's service. Congress recognized the importance of alleviating delays resulting from conflicts with slow freight rail traffic. Section 213 of PRIIA authorizes the Surface Transportation Board ("Board") to investigate and adjudicate the causes of Amtrak trains suffering substandard on-time performance under two separate "triggers": first, when the "on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters"; (49 U.S.C. § 24308(f)(1)); and second, when an Amtrak train "for 2 consecutive calendar quarters" "fails to meet" minimum performance standards established by the Federal Railroad Administration and Amtrak under Section 207 of the Act. *Id.* As part of its investigation, the Board shall "identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *Id.*

The questions presented are:

1. Whether the Surface Transportation Board was correct in recognizing its statutory authority to

conduct a rulemaking for on-time performance under Section 213, and the Eighth Circuit thus erred as a matter of law when it rejected the Board's interpretation of Section 213 and vacated the Board's Final Rule.

2. Whether the impact of the Eighth Circuit's ruling on Section 213, in combination with the D.C. Circuit's ruling on Section 207, impermissibly creates a regulatory gap that no agency can fill and thereby contravenes and frustrates Congress' goal in PRIIA to reduce train delays that harm the millions of rail passengers who rely upon Amtrak to provide efficient and reliable on-time service.

PARTIES TO THE PROCEEDINGS

Petitioners were joint intervenors in the court of appeals, along with the National Railroad Passenger Corporation (generally called "Amtrak"). Respondents Union Pacific Railroad Company, Association of American Railroads, CSX Transportation, Canadian National Railway Company, Illinois Central Railroad Company, Grand Trunk Western Railroad Company and Norfolk Southern Railroad Company were appellants in the court of appeals. The appellees in the court of appeals were the Surface Transportation Board and the United States of America. SMART-Transportation Division-New York State Legislative Board was also an intervenor in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners National Association of Railroad Passengers, All Aboard Indiana, All Aboard Ohio, All Aboard Wisconsin, Environmental Law & Policy Center, Friends of the Cardinal, Michigan Association of Rail Passengers, Midwest High Speed Rail Association, Southern Rail Commission and Virginians for High Speed Rail each state that they have no parent companies, subsidiaries or affiliates.

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The National Association of Railroad Passengers, All Aboard Indiana, All Aboard Ohio, All Aboard Wisconsin, Environmental Law & Policy Center, Friends of the Cardinal, Michigan Association of Rail Passengers, Midwest High Speed Rail Association, Southern Rail Commission and Virginians for High Speed Rail ("Passenger Rail Organization Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1–21) is reported at 863 F.3d 816 (2017). The Board's Final Rule (App. 22–47) is reported at 81 Fed. Reg. 51,343 (Aug. 4, 2016). The Board's *Illini/Saluki* decision (App. 48–69) is unreported.

JURISDICTION

The court of appeals entered judgment on July 12, 2017. On October 5, 2017, Justice Gorsuch extended the time for filing a petition for a writ of certiorari to November 9, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AT ISSUE

In relevant part, 49 U.S.C. § 24308(f)(1) states:

> If 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, the Surface Transportation Board (referred to in this section as the "Board") may initiate an investigation . . . to determine 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 or reasonably

> addressed by Amtrak or other intercity passenger rail operators. . . . In making its determination or carrying out such an investigation, the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.

The Surface Transportation Board's Final Rule, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, 81 Fed. Reg. 51,343 (Aug. 4, 2016) is reproduced in the Appendix (App. 22–47).

STATEMENT OF THE CASE

I. Congress Creates Amtrak to Provide Efficient and Reliable Intercity Passenger Rail Service and Releases Freight Railroads of Passenger Service Duties and Obligations.

This case presents issues of great importance for the timely and efficient operations of national passenger rail service and the millions of Americans who rely on it to reach their jobs and conduct business, commute to colleges and universities, connect and join with families and friends, and enjoy tourism and recreational travel. Under the Rail Passenger Service Act of 1970 ("RPSA"), Congress created Amtrak, a federally chartered corporation, and released freight railroads from their passenger service and common-carrier duties and obligations. *See* Pub. L. No. 91-518, § 101, 84 Stat. 1327, 1328 (1970). RPSA permitted the freight railroads to transfer their passenger duties to Amtrak, on the

condition that the "host" freight railroads would allow Amtrak to use their tracks and other facilities. *See Nat'l R.R. Passenger Corp. v. Atchison, T& S.F.R. Co.*, 470 U.S. 451, 455 (1985).

After the passage of RPSA, freight railroads still prioritized their own freight trains over Amtrak's passenger trains, thereby skewing the bargain Congress struck to create Amtrak. On-time arrivals for Amtrak's long-distance passenger trains plummeted from over 70% in 1972 to 35% in 1973. *See Financial Assistance to Amtrak: Hearing on H.R. 8351 before the Subcomm. on Transp. & Aeronautics of the H. Comm. on Interstate & Foreign Commerce*, 93d Cong. 29–32 (1973). Some passenger trains were forced to run at speeds as slow as ten miles per hour on bad freight tracks—an operation that was described as a "public disservice." *Id.* at 7 (quoting *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)).

In 1973, Congress granted Amtrak a preference over freight trains for using a rail line, junction or crossing in order to help reduce these delays. *See* Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10(2), 87 Stat. 548, 552 (now codified at 49 U.S.C. § 24308(c)).

To enforce its statutory preference rights prior to the enactment of PRIIA in 2008, Amtrak relied on the Attorney General to commence civil actions against freight railroads. *See* 49 U.S.C. § 24103(a). The Department of Justice, however, filed only one such action since 1973, leaving freight railroads with little incentive to honor the passenger rail service priority on their tracks. *See* S. Rep. No. 110-67, Passenger Rail Investment and Improvement Act of

2007, 110th Cong. 10 (2007) ("long-distance services also suffer significant delays . . . caused by freight train interference").

Due to freight train interference on tracks and at crossings, Amtrak's passenger rail service was burdened with major delays. *See* Office of the Inspector Gen., U.S. Dep't of Transp., Report No. CR-2012-148, *Analysis of the Causes of Amtrak Train Delays*, 5 (July 10, 2012). The disruptions to passenger rail service imposed tremendous burdens on Amtrak, frustrated passengers and imposed $136.6 million in annual costs on taxpayers. Office of the Inspector Gen., U.S. Dep't of Transp., Report No. CR-2008-047. *Effects of Amtrak's Poor On-Time Performance* 4 (Mar. 28, 2008) ("OIG Effects Report").

II. Congress Codifies Amtrak's Statutory Preference on Tracks in Order to Address Freight Interference and Improve On-Time Performance.

In 2008, Congress passed the Passenger Rail Investment and Improvement Act ("PRIIA") in order to help improve the on-time performance of Amtrak trains. *See* Pub. L. No. 110-432, Div. B, 122 Stat. 4907 (2008). PRIIA created two "triggers" in Section 213 that require the Board to investigate substandard on-time performance. First, if on-time performance averages less than 80% for any two consecutive calendar quarters, then Amtrak, or states funding Amtrak operations, may file a complaint to the Board to initiate an investigation into the extent of delays and underlying causes (the "OTP trigger"). 49 U.S.C. § 24308(f)(1). Second, if minimum service quality standards established under Section 207 fail to be satisfied for two consecutive calendar quarters, then the Board may

be required to investigate (the "Section 207 trigger"). *Id.* Section 207 directs the Federal Railroad Administration ("FRA") and Amtrak to jointly promulgate these quality standards.

A Section 213 investigation requires the Board to "determine whether and to what extent delays or failure to achieve minimum standards" were caused by the host freight railroads or Amtrak, respectively. 49 U.S.C. § 24308(f)(1). As part of its investigatory authority, the Board "shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *Id.* Section 213 delegates power to the Board to award damages and provide other forms of relief if the delays are the consequence of the host freight railroad's breach of its statutory duties. 49 U.S.C. § 24308(f)(2).

III. Freight Railroads Challenge the Board's On-Time Performance Standards.

Pursuant to their mandate under PRIIA Section 207, FRA and Amtrak developed on-time performance standards in May 2010. In August 2011, the Association of American Railroads ("AAR") challenged the constitutional validity of Section 207 on the basis that it granted rulemaking power to Amtrak, asserted to be a private entity. Following remand from the Supreme Court which determined that Amtrak could be viewed as governmental, the D.C. Circuit nonetheless invalidated Section 207 as violating the Fifth Amendment's Due Process Clause. *Ass'n of Am. R.R. v. Dep't of Transp.,* 821 F.3d 19, 23, 34–36 (D.C. Cir. 2016).

The United States chose to not file a petition for a writ of certiorari and argued that Section 207 could be preserved by severing its unconstitutional parts.

The District Court for the District of Columbia found that the D.C. Circuit's decision "had resolved the remedial question decisively" and entered a judgment declaring the entirety of Section 207 void and unconstitutional. *Ass'n of Am. R.Rs. v. Dep't of Transp.*, No. 11-1499 (JEB), at 3–6 (Mar. 23, 2017). The severability of Section 207 is currently on appeal before the D.C. Circuit (No. 17-5123). Pending the D.C. Circuit's decision, Section 207 remains inoperative.

In January 2012, Amtrak filed a complaint with the Board based on substandard on-time performance on rail lines owned by the Canadian National Railway Company ("CN"). In November 2014, Amtrak filed a separate complaint based on substandard on-time performance on rail lines owned by CSX Transportation, Inc. and Norfolk Southern Railway Company. Amtrak contended that there was extremely poor on-time performance as a result of the freight railroads prioritizing their own operations. *See* Amtrak Compl. 21–24, Docket No. NOR 42134 (Jan. 19, 2012) (showing CN interference delaying 83% to 99% of trips on certain routes); Amtrak Compl. 2, Docket No. NOR 42141 (Nov. 17, 2014).

While the *Ass'n of Am. R.R. v. Dep't of Transp.* litigation was pending, the Board granted Amtrak's motion to amend its complaints. This amendment changed the basis of Amtrak's petitions for investigation from the "Section 207 trigger" to the "OTP trigger" under Section 213. *See* STB Decision, *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway* Company, Docket No. NOR 42134, at 9 (Dec. 18, 2014) ("*Illini/Saluki* Decision"). App. 53-57.

The Board's holding explained that Congress created two independent triggers for PRIIA Section 213 investigations, which allowed the Board to implement a definition of on-time performance regardless of whether the FRA and Amtrak had established Section 207 standards. The Board determined that "[t]he primary dispute between the parties is whether Section 213's below-80-percent on-time performance trigger for Board investigations is rendered inoperative by the D.C. Circuit's invalidation of Section 207 and the definition of on-time performance developed thereunder. We conclude that it is not and will deny CN's motion to dismiss the proceeding and grant Amtrak's motion to amend its complaint." App. 57.

Later in the *Illini/Saluki* proceeding, the Board prepared to decide the on-time performance standard through adjudication and directed the parties to brief "how to construe the term 'on-time performance' in this case as the term is used in PRIIA Section 213, 49 U.S.C. § 24308(f)." App. 67. AAR responded by petitioning the Board to initiate a rulemaking to define "on-time performance" instead of deciding the standard through adjudications. *See* On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 80 Fed. Reg. 28,928 (May 20, 2015).

The Board granted the AAR's petition for rulemaking. Passenger Rail Organization Petitioners, who include national, regional and state-based passenger rail advocacy organizations, and an interstate rail commission, intervened in this proceeding. These organizations have many members who regularly use Amtrak trains and suffer chronic and lengthy delays due to substandard on-time performance.

Following the evidentiary process, the Board then adopted the "All Stations" standard for measuring on-time performance in the context of a Section 213 investigation. Final Rule, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, 81 Fed. Reg. 51,343 (Aug. 4, 2016) ("Final Rule").

IV. The Eighth Circuit Rejects the Board's Interpretation of Section 213.

Even though AAR had petitioned the Board to conduct this rulemaking, several freight railroad companies and AAR itself then sought judicial review of the Board's Final Rule. In addition to challenging the Board's findings for the All Stations standard in the Final Rule, Respondents also argued that the Board lacked rulemaking authority to issue a definition of on-time performance in the context of Section 213. *Union Pacific Railroad Co. v. Surface Transp. Bd.*, 863 F.3d 816, 822 (8th Cir. 2017). The freight railroads' principal argument was that the D.C. Circuit's invalidation of Section 207 also rendered Section 213 inoperative in its entirety. Specifically, the railroads argued that the term on-time performance in Section 213(a) must refer to the same on-time performance standard assigned to the FRA and Amtrak under Section 207. *Id.* at 824. In the freight railroads' view, the Board had no statutory authority to develop on-time performance metrics through the very same rulemaking that AAR had itself requested.

On September 19, 2016, the Passenger Rail Organization Petitioners filed a motion to intervene on the side of the Surface Transportation Board before the Eighth Circuit.

In July 2017, a panel of the Eighth Circuit concurred with the freight railroads to expand the

scope of the constitutional invalidation of Section 207 to include Section 213, and vacated the Final Rule. The court found the Board's interpretation of Section 213 to be "reasonable . . . in isolation," but nonetheless held that it "fades in the light of the full text and context." *Union Pacific Railroad Co.*, 863 F.3d at 825. The Eighth Circuit found that "[t]he only place in the PRIIA where on-time performance is described and given an explicit source is §207(a)." The Eighth Circuit also questioned Congress "giv[ing] the FRA/Amtrak and the Board separate authority to develop two potentially conflicting on-time performance rules." *Id.* at 216.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review Because the Eighth Circuit Misinterpreted PRIIA and Erred as a Matter of Law.

A. PRIIA's Text and Purpose Support the Board's Interpretation.

Certiorari is warranted because the Eighth Circuit erred as a matter of law when it misinterpreted PRIIA, rejected the Board's valid interpretation of "on-time performance," and vacated the Board's rule. The plain language of the PRIIA statutory text provides that Section 213 creates two separate and independent triggers for an investigation. App. 64. The text provides that the Board must investigate if either "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 [PRIIA] fails to meet those standards for 2 consecutive calendar quarters." 49 U.S.C. §

24308(f)(1) (emphasis added). Congress' use of the word "or" emphasizes that these two triggers – (1) the OTP trigger, and (2) the Section 207 trigger – operate independently of each other. Only one must be satisfied to trigger an investigation under Section 213.

Reading these two triggers as Congress intended in PRIIA – separate and independent from each other – shows that the first trigger under Section 213 for on-time performance makes no reference to Section 207. Unlike the second Section 207 trigger (which expressly cross-references Section 207), the OTP trigger of Section 213 operates independently from any other section of PRIIA.

The plain language of the statute states that an investigation is triggered if the on-time performance averages less than 80 percent for two consecutive calendar quarters. The language makes no mention of metrics or minimum standards developed under Section 207. This reading accords with the Board's interpretation that Section 207 is wholly separate from and independent of the on-time performance trigger in Section 213.

In addition to the plain text, Congress' purpose in drafting Section 213 supports reading the OTP trigger separately from the Section 207 trigger. Congress designed PRIIA's Section 213 to empower the Board to resolve on-time performance disputes, intending "to provide a forum . . . for the adjudication of service disputes, including on-time performance problems." S. Rep. No. 110-67 at 26. Congress recognized that "the existing process is cumbersome and is almost never used . . . [although] the frustration of both Amtrak and the freight railroads. . . seems to be increasing, while passenger train performance continues to decline." *Id.*

The Eighth Circuit's interpretation that the Section 213 OTP trigger is operable only once FRA and Amtrak have jointly agreed upon Section 207 trigger standards undercuts the very purpose of Section 213, which was designed to streamline the "cumbersome" process. Consequently, to fulfill Congress' legislative purpose and enable the Board to effectively resolve disputes, its Section 213 OTP trigger must be read separately from its Section 207 trigger.

B. The Eighth Circuit's Decision Is Contrary to *Chevron* and Separation of Powers Principles.

Even if the text of Section 213 were somehow ambiguous, the Eighth Circuit failed to afford *Chevron* deference to the Board's interpretation. The panel hastily dismissed application of *Chevron* in this instance, stating that the Board received no congressional authority to interpret the statute, and even if it had, Congress' intent was clear. *See* App. 17.

The text of Section 213 explicitly grants authority to the Board to investigate and adjudicate issues regarding substandard performance. *See* 49 U.S.C. § 24308(f)(1). Encompassed within this authority is the power to define terms necessary to the administration of the statute, such as on-time performance. Under *City of Arlington v. F.C.C.*, *Chevron* deference extends to interpretations of an agency's own jurisdictional power. *See* 569 U.S. 290, 297 (2013); *see also UC Health v. Nat'l Labor Relations Bd.*, 803 F.3d 669, 672 (D.C. Cir. 2015) ("Absent plain meaning to the contrary, a court is obliged to defer to an agency's reasonable interpretation of its statutory jurisdiction pursuant to the familiar *Chevron* doctrine.").

Respondent AAR initially recognized such authority when it petitioned the Board to clarify the meaning of "on-time performance." *See* Fed. Reg. at 28,928. App. 26. Accordingly, the Eighth Circuit disregarded well-established principles of administrative law by rejecting the Board's authority to interpret its own statutory mandate.

Furthermore, when confronted with a constitutional flaw in a statutory provision, the judiciary must read the scope of the invalidation narrowly to preserve the remainder of the statute. *See Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985) ("[T]he normal rule [is] that partial, rather than facial, invalidation is the required course."); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (holding that remaining provisions must be sustained if capable of "functioning independently" of a constitutional invalidation) (internal quotations omitted); *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328 (2006) (holding that a court confronting a constitutional flaw in a statute must "sever its problematic portions while leaving the remainder intact.").

Because a Congressional act reflects the intent of elected representatives, a court violates separation of powers principles when it stretches a constitutional invalidation to nullify more of a statute than necessary. The Eighth Circuit in this case rejected the Board's reasonable application of the plain language of Section 213, which appropriately held that Section 207 functions independently of Section 213's OTP trigger to allow promulgation of on-time performance standards. The Eighth Circuit, therefore, invalidated more of

PRIIA than necessary and eschewed well-established constitutional principles.

II. The Court Should Grant Review Because the Eighth Circuit's Interpretation of Section 213 Creates an Unintended Regulatory Gap in a Federal Statute that No Agency Can Fill and Thus Defeats Congress' Purpose in Enacting PRIIA and Its Goal to Reduce Passenger Rail Delays.

This Court should grant review because the court of appeals has invalidated a core provision of an Act of Congress. Even in the absence of a circuit split, this Court has reviewed lower court decisions that render a federal law inoperable. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012) (circuit conflict arose after the Court granted certiorari); *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (same).

Even though the Eighth Circuit did not directly decide the constitutionality of Section 213, its statutory interpretation of Section 213 renders it inoperable. The D.C. Circuit's nullification of Section 207 removed the FRA's power to develop on-time performance standards. Now, the Eighth Circuit's interpretation of Section 213 has eviscerated the power of the Surface Transportation Board, which was the only agency left to carry out Congress' assignment to improve passenger rail on-time performance.

Consequently, no agency now remains to fulfill Congress' statutory mandate in PRIIA to enforce on-time performance standards. This gap thwarts the core intent of PRIIA, which Congress enacted to mitigate freight rail interferences, reduce intercity

passenger rail delays and improve Amtrak's on-time performance for its millions of passengers.

The Surface Transportation Board initiated its rulemaking specifically at the behest of the AAR. App. 67. The Board initially planned to develop on-time performance standards through an adjudication, but then switched to rulemaking in response to AAR's petition and specific request. App. 29. However, when the Board promulgated a Final Rule that adopted the All Stations standard for measuring on-time performance, instead of AAR's own End Points approach, AAR then responded by challenging both the Final Rule and the Board's statutory authority to issue it.

III. The Court Should Grant Review Because the Eighth Circuit's Nullification of Section 213 Will Cause Significant Adverse Nationwide Impacts by Adding Delays for Millions of Intercity Rail Passengers.

Millions of rail passengers depend on Amtrak's intercity passenger rail service. Whether commuting to work, pursuing business or educational opportunities, or visiting friends and family, they understandably expect efficient and reliable rail service. When Amtrak suffers increasing delays due to substandard on-time performance, millions of passengers lose time and money from the delays in addition to the aggrevation. In FY 2016, Amtrak provided intercity rail service to over 31.3 million customers, and 85,700 passengers each day depended on Amtrak for their daily commutes. Amtrak, *National Fact Sheet: FY 2016* 1 (2017).

Amtrak passenger trains operate primarily on tracks owned by the freight railroads. Without any regulatory mechanism to enforce Amtrak's

preference rights, intercity rail passengers often suffer undue delays from freight rail traffic interference on tracks and at crossings. The protracted litigation conducted by the Association of American Railroads and the several individual freight railroads has frustrated and impaired Congress' efforts to improve Amtrak's on-time performance and reduce passenger rail delays.

Because of the piecemeal dismantling of PRIIA, federal rail agencies can no longer fulfill their mandate to ensure the longstanding Amtrak passenger rail preference. Substandard on-time performance undercuts Amtrak's capacity to offer efficient and dependable nationwide rail service for millions of passengers. The U.S. Department of Transportation's Inspector General describes Amtrak's poor on-time performance record as a "national concern" that "significantly undermines the viability of intercity passenger rail as an option for travelers . . .." *OIG Effects Report* at 1.

After the D.C. Circuit's invalidation of Section 207, Passenger Rail Organization Petitioners explained to the Eighth Circuit the "numerous adverse impacts on the public and taxpayers. American business, passengers and workers have borne the negative consequences of these delays in terms of cost, time and threats to passenger safety." Joint Br. for Intervenors, at 3–4. Undercutting the efficiency and reliability of passenger rail service creates reverberating problems for passengers across the country, ranging from routine delays for oil workers commuting from their homes in Ohio to oil fields in North Dakota, stranded Amish passengers trying to return home to West Virginia, and even incidents such as a twelve-hour delay on the Lake

Shore Limited as the passenger train waited for a freight train to clear. *Id.* at 4.

Following the Eighth Circuit's invalidation of Section 213, freight railroads might unfortunately view themselves as now entirely unfettered to violate passenger rail preference rules. The invalidation of Section 213 undermines Congressional efforts to improve Amtrak's on-time performance. Without any clear agency mechanism to enforce Amtrak's preference rights – for example, so that passenger rail trains are not delayed by long and slow freight trains at crossings – on-time performance will likely further deteriorate for the 31 million rail passengers who rely on Amtrak's service. Rail passengers will be faced with the frustrating "Hobson's choice" of either declining to use Amtrak service or settling for unreliable and inefficient service for their intercity rail travel. Certiorari is accordingly warranted.

CONCLUSION

This Court should grant review of the Eighth Circuit's decision. Alternatively, this Court should hold this petition pending the D.C. Circuit's resolution of *AAR v. DOT*.

Respectfully submitted,

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App. 1

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Before SMITH,[1] BENTON and SHEPHERD, Circuit Judges.

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[1] The Honorable Lavenski R. Smith became Chief Judge of the United States Court of Appeals for the Eighth Circuit on March 11, 2017.

Opinion

SMITH, Circuit Judge.

When Congress expressly delegates rulemaking authority in a regulatory sphere to one agency, and that delegation is declared unconstitutional, may a different agency provide regulatory guidance in the same sphere on its own initiative? The Surface Transportation Board ("Board") said yes – and on that basis it promulgated a rule defining "on-time performance" under the Passenger Rail Investment and Improvement Act of 2008 after the Act's delegation to another agency was invalidated. Now the Board argues that the Act itself allows the Board to promulgate on-time performance standards. Because the Board's interpretation contradicts the Act's plain language, we grant these consolidated petitions and hold that the Board exceeded its authority.

I. *Background*

A. *Statutory Background*

The National Railroad Passenger Corporation ("Amtrak") and freight railroad companies share the nation's railways. Congress created Amtrak as a passenger railroad in 1970. *Dep't of Transp. v. Assoc. of Am. R.Rs.*, ___ U.S. ___, 135 S.Ct. 1225, 1228, 191 L.Ed.2d 153 (2015). Amtrak relieved freight railroads of their common-carrier obligation to offer passenger service, and in exchange it received the right to use freight-railroad tracks and facilities at rates set by agreement or by the Interstate Commerce

Commission, a now-defunct agency. *Id.* at 1229. Congress later granted Amtrak a statutory preference over freight railroads on shared track. *Id.* But in 2008, the Department of Transportation's Inspector General reported that this preference right was weak. Office of Inspector Gen., Fed. R.R. Admin., CR-2008-076, Root Causes of Amtrak Train Delays 4 (2008). He noted that freight railroads could "adjust their dispatching practices" to give their own trains an advantage over Amtrak. *Id.*

To address this situation, Congress enacted the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4907 (PRIIA). Two sections of the Act are relevant here. The first, § 207(a), instructs the Federal Railroad Administration (FRA) and Amtrak, jointly and in consultation with other groups, 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." *Id.* § 207(a) (codified at 49 U.S.C. § 24101 (note)). These metrics must include "measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier." *Id.*

The metrics and standards have at least four uses: (1) they are the basis for quarterly reports published by the FRA, *id.* § 207(b); (2) they are the basis for an annual evaluation by Amtrak, *id.* § 210(a) (codified at

49 U.S.C. § 24710); (3) they are a benchmark for a performance improvement plan to be developed by Amtrak, *id.*; and (4) at least some of the metrics and standards trigger Board investigations into freight railroads' compliance with Amtrak's statutory preference right, *id.* § 213(a) (codified at 49 U.S.C. § 24308(f)).

The second relevant section is § 213(a). Congress added § 213(a) to 49 U.S.C. § 24308, the Code provision containing Amtrak's statutory preference right. *See* 122 Stat. at 4925. Section 213(a) authorizes, and sometimes requires, the Board to investigate when an Amtrak train fails to meet certain performance standards. PRIIA § 213(a). If the Board determines that the failure is attributable to the host railroad's failure to honor Amtrak's preference right, then the Board may award damages and other relief. *Id*. An investigation is authorized

> [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. . . .

Id. This case addresses how "on-time performance" is defined for purposes of § 213(a).

B. *Procedural Background*

This case developed from agency proceedings and court litigation addressing §§ 207 and 213.

1. *The § 207 On-Time Performance Rule and Ensuing Litigation*.

In May 2010, the FRA and Amtrak issued the § 207 metrics and standards. *See* 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 12, 2010). These included a metric for on-time performance. Fed. R.R. Admin., Metrics and Standards for Intercity Passenger Rail Service 26 (2010), https://www.fra.dot.gov/eLib/Details/L02875.

In 2011, the Association of American Railroads sued to have § 207 declared unconstitutional on the grounds that it (1) unlawfully delegated rule-making authority to a private entity in violation of the nondelegation doctrine and the separation-of-powers principle, and (2) unlawfully vested government power in an interested private party in violation of the Due Process Clause. *Assoc. of Am. R.Rs.*, 135 S.Ct. at 1230. The district court rejected both claims on summary judgment, but the D.C. Circuit reversed on the nondelegation and separation-of-powers claim, concluding that Amtrak was a private entity and therefore could not be granted regulatory power. *Id.* at 1230-31. In 2015, the Supreme Court vacated the D.C. Circuit's judgment and remanded, holding that for purposes of the constitutional

issues at play, Amtrak was "a governmental entity, not a private one." *Id.* at 1233.

On remand in April 2016, the D.C. Circuit found § 207 unconstitutional on a different ground. It concluded that § 207 "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor to regulate its competitors." *Assoc. of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19, 23 (D.C. Cir. 2016). The government did not seek Supreme Court review. In March 2017, on remand from the D.C. Circuit, the district court entered judgment for the Association of American Railroads.[2] Consequently, the FRA and Amtrak lacked authority to establish on-time performance rules under § 207 of the PRIIA. The 2010 on-time performance metric is therefore currently unenforceable.

2. *The § 213(a) On-Time Performance Rule*

While the D.C. Circuit litigation was proceeding, the Board also addressed the question of on-time performance. In December 2014, while the FRA's on-time performance rule was unenforceable and awaiting Supreme Court review, the Board considered Amtrak complaints about on-time performance on the "Illini/Saluki" service between Chicago and Carbondale, Illinois. *Nat'l R.R. Passenger Corp. Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry. Co.*, No. NOR 42134, 2014 WL

[2] The case is now back on appeal to the D.C. Circuit. *See* No. 17-5123 (D.C. Cir.).

7236883 (S.T.B. Dec. 19, 2014). The Board concluded that the lack of an enforceable on-time performance standard under § 207 did not preclude on-time performance investigations under § 213(a). *Id.* at *2. The Board determined that it possessed authority to "initiate investigations of on-time performance problems under Section 213 of PRIIA because the . . . on-time performance trigger in Section 213 is severable from the mechanism for promulgating standards of 'on-time performance' under Section 207." *Id.* at *2. The Board acknowledged that it did not have its own definition of on-time performance and thus authorized itself to "construe" that term in § 213(a). *Id.* at *1. It then requested the parties' input in giving meaning to § 213(a)'s on-time performance metric. *Id.* at *8.

The Association of American Railroads and others asked the Board to define on-time performance through a rulemaking proceeding rather than as part of the Illini/Saluki adjudication proceeding. In May 2015, the Board obliged. *See* On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 80 Fed. Reg. 28,928 (May 20, 2015). In December 2015, the Board posted its proposed rule for public comment. *See* On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 80 Fed. Reg. 80,737 (Dec. 28, 2015). And in August 2016, the Board published a final on-time performance rule. *See* On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 81 Fed. Reg. 51,343 (Aug. 4, 2016).

The instant petitions for review concern the August 2016 final rule ("Final Rule"). Various individual railroads and the Association of American Railroads (together, the "Freight Railroads") challenge the Final Rule's content and the Board's authority to issue it.[3] The Board justified the Final Rule on the basis of necessity: "the only way for the Board now to fulfill its responsibilities under [§ 213] is to define [on-time performance] as a threshold for such investigations." *Id.* at 51,345. In other words, "the invalidation of Section 207 of PRIIA leaves a gap that the Board has the delegated authority to fill by virtue of its authority to adjudicate complaints brought by Amtrak" under § 213(a). *Id.* "Any other result," said the Board, "would gut the remedial scheme, a result that Congress clearly did not intend." *Id.* Thus, the Board claimed authority to "fill the definitional gap exposed by the invalidation of a statutory provision." *Id.* at n.3.

II. *Discussion*

Agency action taken without statutory authority must be set aside. 5 U.S.C. § 706(2)(C). "An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these

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[3] As to content, the Final Rule defines on-time performance as arriving at or departing from a given station 15 minutes after the scheduled time based on an "all stations" approach. *Id.* at 51,343; *see also* 49 C.F.R. § 1040.2. Because we decide this appeal on the basis of the Board's authority, we do not address the Freight Railroads' challenges to the Final Rule's content.

regulations aside." *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998). Indeed, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). The Board advances two arguments for its authority to promulgate an on-time performance rule under § 213(a). The first is situational; the second is textual.

A. *Gap-Filling*

The Final Rule expressly bases its authority on the need to fill the vacuum created by the invalidation of the on-time performance rule announced by the FRA and Amtrak under § 207. The Final Rule invokes the Board's "implicit authority to fill a gap exposed by the . . . invalidation of a portion of a statute." 81 Fed. Reg. at 51,345. If the Board is to investigate alleged violations of Amtrak's statutory preference right, the argument goes, then the Board must have implied authority to develop an on-time performance rule when the § 207 rule is invalidated.

The Final Rule cites two agency gap-filling cases as precedent for its assertion of authority. Those cases affirmed the Social Security Commissioner's reassignment of some retired coal miners to new benefits providers under the Coal Act after the Supreme Court invalidated certain prior assignments. *See Sidney Coal Co. v. Soc. Sec. Admin.*, 427 F.3d 336, 346 (6th Cir.

2005); *Pittston Co. v. United States*, 368 F.3d 385, 392, 401-04 (4th Cir. 2004). But in those cases, unlike this one, Congress had already directed the Commissioner to make assignments in the first place. *See Pittston Co.*, 368 F.3d at 399. And the reassignments did not "violate[] or disturb[] the structure of the Coal Act," or "change the wording of the statute." *Id.* at 404. Here, on the other hand, the Final Rule acknowledges that Congress initially charged a different agency with developing the relevant rule.

We consider *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013), to be the more analogous precedent. There, Congress had delegated limited rulemaking authority to the Department of Labor for a program governing agricultural workers but had not done so for a similar program governing non-agricultural workers. *Id.* at 1083. The Department nonetheless issued rules for the non-agricultural program. *Id.* The Eleventh Circuit affirmed an injunction against these rules as exceeding the Department's authority. *Id.* at 1084-85. "The absence of a delegation of rulemaking authority to [the Department] over the non-agricultural H-2B program in the presence of a specific delegation to it of rulemaking authority over the agricultural worker H-2A program" persuaded the court that "Congress knew what it was doing when it crafted these sections." *Id.* at 1084. In response to the Department's appeal to the "text, structure and object" of the statute, the court noted that Congress had expressly delegated the authority at issue to a different agency. *Id.* "[W]e would

be hard-pressed," said the court, "to locate [rule-making authority] in one agency where it had been specifically and expressly delegated by Congress to a different agency." *Id.* at 1085. So too in this case. Congress's express delegation to the FRA and Amtrak in § 207(a) overcomes any implied situational authority claimed by the Board under § 213(a). In sum, the gap-filling rationale does not allow one agency to assume the authority expressly delegated to another.

The Board also casts its gap-filling rationale as an application of the principle expressed in *United States v. Booker* that courts must "refrain from invalidating more of the statute than is necessary." 543 U.S. 220, 258, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion)). *Booker* retained portions of the Sentencing Reform Act that were constitutionally valid, capable of functioning independently, and consistent with the congressional objectives behind the Act. *Id.* at 258-59, 125 S.Ct. 738. The Board's reliance on *Booker*, however, fails. Saying that § 213(a) of the PRIIA may function independent of § 207 assumes the very issue in dispute: that § 213(a) provides independent authority for developing an on-time performance rule. If § 213(a) does not provide this authority, then it cannot function independent of § 207. This case therefore depends on the text of § 213(a).

B. *Textual Authority*

Before reaching the merits of the Board's textual argument, we must address whether we may even consider it, and, if so, whether the Board's interpretation is entitled to deference.

1. *New Basis?*

In this review proceeding, the Board has moved away from the gap-filling rationale it asserted when adopting the Final Rule. It now focuses on the text of § 213(a), arguing that the term "on-time performance" in § 213(a) does not mean the on-time performance metric entrusted to the FRA and Amtrak under § 207(a), but rather a different metric entrusted to the Board itself. In response, the Freight Railroads point out that we may uphold the Final Rule only on the basis given when it was adopted. *See Michigan v. Envtl. Prot. Agency*, ___ U.S. ___, 135 S.Ct. 2699, 2710, 192 L.Ed.2d 674 (2015).

The record reflects that in adopting the Final Rule, the Board principally relied on its gap-filling rationale rather than a textual analysis of § 213(a). The Final Rule repeatedly invokes situational necessity and demonstrates that this rationale was not merely an alternative explanation, as the Board now suggests. We note, however, that the Final Rule does cite the Illini/Saluki decision, and the Illini/Saluki decision does invoke the "plain language of Section 213" to support the conclusion that § 213(a)'s on-time performance standard is separate from § 207(a)'s. *Nat'l R.R.*

Passenger Corp., 2014 WL 7236883, at *5; *see Gatewood v. Outlaw*, 560 F.3d 843, 847 (8th Cir. 2009) (noting that it is sometimes appropriate to discern the reasons for a final rule from prior statements reflecting a consistent policy). We will therefore give the Board the benefit of the doubt and consider its textual argument on the merits.

2. Chevron *Deference*

The Board argues that § 213(a) calls for *Chevron* deference.[4] We disagree. "[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington v. F.C.C.*, 569 U.S. 290, 133 S.Ct. 1863, 1874, 185 L.Ed.2d 941 (2013). As we will see below, the Board received no such authority here. Moreover, even if *Chevron* deference applied, it would not actually afford the Board any deference – Congress's intent in § 213(a) is clear, so "that is the end of the matter." *Id.* at 1868.

3. *Merits*

We turn now to the text at issue:

> If 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

[4] *See Chevron, U.S.A. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> 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, the Surface Transportation Board (referred to in this section as the 'Board') may initiate an investigation, 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, the Board shall initiate such an investigation. . . .

PRIIA § 213(a). The Board's argument is simple: this text creates two separate triggers for Board investigations. The first is the failure to achieve on-time performance at least 80 percent of the time, and the second is the failure to meet "service quality" standards as established under § 207. Because the § 207 metrics and standards are mentioned only in connection with the second trigger, the on-time performance trigger is separate, and therefore the Board may develop its own on-time performance metric apart from § 207.

Reading § 213(a) in isolation, the Board's interpretation is reasonable. The "established under section 207" reference modifies "service quality," not "on-time performance." And Congress knew how to tie § 213(a) to § 207, so its failure to expressly do so for "on-time performance" might suggest that it chose to leave the § 213(a) definition of on-time performance in the Board's hands. *See Loughrin v. United States*, ___ U.S. ___, 134 S.Ct. 2384, 2390, 189 L.Ed.2d 411 (2014)

(inclusion of particular language in one section but not another raises a presumption that Congress "intended a difference in meaning"). But discrete grammar rules and canons of construction are "not an absolute and can assuredly be overcome by other indicia of meaning." *Lockhart v. United States*, ___ U.S. ___, 136 S.Ct. 958, 963, 194 L.Ed.2d 48 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003)). And such rules "need not be applied 'in a mechanical way where it would require accepting "unlikely premises."'" *Id.* at 965 (quoting *Paroline v. United States*, ___ U.S. ___, 134 S.Ct. 1710, 1721, 188 L.Ed.2d 714 (2014)). Importantly, "text and context" may supply even an "awkwardly phrased" statute with a "straightforward reading." *Id.* at 962.

The Board's interpretation fades in the light of the full text and context. First, despite § 213(a)'s heading – "Investigation of Substandard Performance" – "on-time performance" is not a defined term in the statute. In the absence of a statutory definition, we will give a term its ordinary dictionary meaning. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 132 S.Ct. 1997, 2002, 182 L.Ed.2d 903 (2012). But "on-time performance" is a term of art. *See F.A.A. v. Cooper*, 566 U.S. 284, 291-92, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012) (general dictionary definition not used for terms of art). We therefore look to context for guidance. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). The only place in the PRIIA where on-time performance is described and given an explicit source is § 207(a), which instructs the

FRA and Amtrak 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." PRIIA § 207(a). Section 207(a), then, is the natural source for the meaning of "on-time performance" in § 213(a). This follows, too, from the principle that a term is presumed to have the same meaning throughout the same statute. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 132 S.Ct. 1702, 1708, 182 L.Ed.2d 720 (2012). This presumption of course "yields readily to indications that the same phrase used in different parts of the same statute means different things." *Barber v. Thomas*, 560 U.S. 474, 484, 130 S.Ct. 2499, 177 L.Ed.2d 1 (2010). But there are no such indications in the PRIIA.

Second, Congress likely did not give the FRA/Amtrak and the Board separate authority to develop two potentially conflicting on-time performance rules. *See Lockhart*, 136 S.Ct. at 963 (interpretation should not rest on an unlikely premise). The § 207 on-time-performance metric was, to the extent practicable, to be incorporated into Amtrak's contracts with host railroads. PRIIA § 207(c). If the Board could separately adopt its own metric for investigations under § 213(a), then host railroads could be investigated under a stricter § 213(a) metric even while complying with the § 207 metric embedded in their contracts. The Board responds that there were never actually two standards, because the § 207 rule was invalidated. Yet we focus on what Congress intended when it spoke. It likely

did not intend to establish potentially competing standards.

A common-sense reading of how on-time performance functions in the PRIIA reveals that the FRA and Amtrak develop metrics and standards, including for on-time performance, and then the FRA publishes quarterly reports showing Amtrak's performance under the metrics. If Amtrak's on-time performance is worse than 80 percent for two consecutive quarters, then the Board may investigate. In any event, on-time performance in § 213(a) means on-time performance as developed by the FRA and Amtrak under § 207(a). We therefore reject the Board's interpretation of § 213(a).

III. *Conclusion*

Accordingly, we grant the petitions and vacate the Board's Final Rule defining on-time performance.

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SURFACE TRANSPORTATION BOARD

49 CFR Part 1040

[Docket No. EP 726]

On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008

AGENCY: Surface Transportation Board.
ACTION: Final rule.

SUMMARY: The Surface Transportation Board (STB or Board) is adopting a final rule to define "on time" and specify the formula for calculating "on-time performance" for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008. The Board will use these regulations only for the purpose of determining whether the "less than 80 percent" threshold that Congress set for bringing an on-time performance complaint has been met. In light of comments received on the Board's notice of proposed rulemaking issued on December 28, 2015, the proposed rule has been modified to deem a train's arrival at, or departure from, a given station "on time" if it occurs no later than 15 minutes after its scheduled time and to adopt an "all-stations" calculation of "on-time performance."

DATES: This rule is effective on August 27, 2016.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman at (202) 245-0386. Assistance for the

hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The National Railroad Passenger Corporation (Amtrak) was established by Congress in 1970 to preserve passenger services and routes on the Nation's railroads. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383-384 (1995); *Nat'l R.R. Passenger Corp. v. Atchison, Topeka, & Santa Fe R.R.*, 470 U.S. 451, 454 (1985); *see also Rail Passenger Sew. Act of 1970*, Public Law 91-518, 84 Stat. 1328 (1970). As a condition of relieving the railroad companies of their common carrier obligation to provide passenger service, Congress required them to permit Amtrak to operate over their tracks and use their facilities. *See* 45 U.S.C. 561, 562 (1970 ed.). Since 1973, Congress has required railroads to give Amtrak trains preference over freight service when using their lines and facilities: "Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing. . . ." 49 U.S.C. 24308(c); *see* Amtrak Improvement Act of 1973, Public Law 93-146, section 10(2), 87 Stat. 552 (initial version).

Prior to 2008, the Board was not involved in the adjudication of Amtrak's preference rights. The only way that Amtrak could enforce its preference rights was by asking the Attorney General to bring a civil action for equitable relief. 49 U.S.C. 24103. Further, the Secretary of Transportation had the authority under section 24308(c) to grant a host rail carrier relief from the preference obligation and to establish the usage

rights between Amtrak and the host carrier if the Secretary found that Amtrak's preference materially lessened the quality of freight transportation provided to shippers. In 2008, Congress enacted Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. 24308(f), to address, among other things, the concern that one cause of Amtrak's inability to achieve reliable on-time performance was the failure of host railroads to honor Amtrak's right to preference. *See Passenger Rail Inv. & Improvement Act*, Public Law 110-432, Div. B, 122 Stat. 4907 (2008); S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007). Section 207 of PRIIA, 49 U.S.C. 24101 note, charged Amtrak and the Federal Railroad Administration (FRA) with "jointly" developing new, or improving existing, metrics and standards for measuring the performance of intercity passenger rail operations, including on-time performance and train delays incurred on host railroads.

PRIIA also transferred from the Secretary of Transportation to the Board the administration and enforcement of Amtrak's preference rights. Thus, PRIIA amended 49 U.S.C. 24308(c) to provide that: "Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless *the Board* orders otherwise under this subsection" (emphasis added). Congress likewise transferred to the Board the authority under section 24308(c) to determine if "preference for intercity and commuter rail passenger

transportation materially will lessen the quality of freight transportation provided to shippers" on a freight carrier's line, and, if so, to "establish the rights of the carrier and Amtrak on reasonable terms."

Under Section 213(a) of PRIIA, 49 U.S.C. 24308(f)(1), if the "on-time performance" (OTP) of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the Board may initiate an investigation, or upon complaint by Amtrak or another eligible complainant, the Board "shall" do so. The purpose of such an investigation 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. Following the investigation, should the Board determine that Amtrak's substandard performance is "attributable to" the rail carrier's "failure to provide preference to Amtrak over freight transportation as required" by 49 U.S.C. 24308(c), the Board may "award damages" or other appropriate relief from a host railroad to Amtrak. 49 U.S.C. 24308(f)(2). If the Board finds it appropriate to award damages to Amtrak, Amtrak must use the award "for capital or operating expenditures on the routes over which delays" were the result of the host railroad's failure to grant the statutorily required preference to passenger transportation. 49 U.S.C. 24308(f)(4).

Thus, 49 U.S.C. 24308(f) sets up a two-stage process involving, first, a "less than 80 percent" threshold to indicate whether a train's OTP allows for an investigation; and second, if this prerequisite is satisfied,

the Board may investigate (or on complaint, shall investigate) the causes of the deficient OTP, which could lead to findings, recommendations, and other possible relief as detailed in the statute.

On May 15, 2015, the Board instituted this rulemaking proceeding in response to a petition filed by the Association of American Railroads (AAR). *See On-Time Performance Under Sec. 213 of the Passenger Rail Inv. & Improvement Act of 2008*, EP 726 (STB served May 15, 2015). In that decision, the Board stated that a rulemaking would provide clarity regarding the "less than 80 percent" OTP threshold in all applicable cases and allow the Board to obtain the full range of stakeholder perspectives in one docket and avoid the potential relitigation of the issue in each case, thereby conserving party and agency resources.[1]

On December 28, 2015, the Board issued a Notice of Proposed Rulemaking (NPRM) that proposed a definition for OTP derived from a previous definition used by our predecessor, the Interstate Commerce

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[1] By that point Amtrak had filed two complaints (both pending, but in abeyance based on this rulemaking) requesting that the Board initiate an investigation pursuant to section 24308(f), and claiming that host Class I carriers have not given Amtrak preference as required under section 24308(c). *See Nat'l R.R. Passenger Corp. – Sec. 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry.*, NOR 42134; *Nat'l R.R. Passenger Corp. – Investigation of Substandard Performance of the Capitol Ltd.*, NOR 42141.

Commission (ICC).[2] The Board's proposed rule read: "A train is 'on time' if it arrives at its final terminus no more than five minutes after its scheduled arrival time per 100 miles of operation, or 30 minutes after its scheduled arrival time, whichever is less." NPRM, slip op. at 4-9. The Board sought comments on this definition but also encouraged the public to propose other alternatives, including the alternative adopted here: factoring into the calculation a train's punctuality at intermediate stops rather than the final terminus only. *See* NPRM, slip op. at 6. The Board also established a procedural schedule providing for comments and replies.

The Board received 121 comments and replies on its proposed rule from the railroad industry (both passenger and freight), states, the U.S. Department of Transportation, elected officials at all levels of government, individual members of the traveling public, and various stakeholder groups.

Shortly after the comment period in this docket closed, in *Association of American Railroads v. Department of Transportation*, 821 F.3d 19 (D.C. Cir. 2016), the United States Court of Appeals for the District of Columbia Circuit held that the structure of Section 207 of PRIIA violates the Due Process Clause of the U.S. Constitution because, in the court's view, it authorized Amtrak, "an economically self-interested

[2] The NPRM contains additional background on the court and agency litigation and controversies that led the Board to initiate the rulemaking.

actor," to "regulate its competitors" – that is, the railroads that host Amtrak passenger trains outside the Northeast Corridor. Accordingly, the FRA and Amtrak metrics are currently invalid.

Discussion of Issues Raised in Response to the NPRM.

The Board's Authority. Several freight rail interests argue that – even though section 24308(f)(1) allows, and in some circumstances requires, the Board to investigate the causes of poor "on time performance," including whether a host rail carrier has failed to provide preference to Amtrak over its rail line as required by section 24308(c) – the Board lacks authority to give meaning to the term "on-time performance." They argue this even though PRIIA provides that if the on-time performance of an Amtrak passenger train falls below 80% for two consecutive quarters, such performance may warrant an investigation by the Board.

Although regulatory agencies like the Board typically have the authority to define the terms in provisions of the statutes that they administer, AAR and freight railroad commenters (Canadian National Railway Company (CN), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS)) argue that the Board does not have the authority to define on-time performance because Congress gave that responsibility jointly to Amtrak and FRA in Section 207 of PRIIA. We disagree.

In *National Railroad Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway (Illini/Saluki)*, NOR 42134, slip op. at 2 (STB served Dec. 19, 2014), the Board concluded that the unconstitutionality of Section 207 of PRIIA does not prevent the Board from initiating investigations of on-time performance problems under section 24308(c). Indeed, the only way for the Board now to fulfill its responsibilities under 49 U.S.C. 24308(f) is to define OTP as a threshold for such investigations.

CN and AAR in their initial comments (*see* CN Feb. 8 Comment 4; AAR Feb. 8 Comment 6) raise concerns that host freight railroads may be faced with two inconsistent sets of regulations (*i.e.,* issued by (1) FRA/Amtrak and (2) the Board) if section 24308(f) investigations are instituted using the OTP definition established in this final rule and the courts ultimately uphold the validity of the PRIIA Section 207 metrics and standards. However, at present there are not two different operative standards, and there may never be. We will, therefore, address the issue of conflicting OTP definitions if and when the issue should arise.

CN and AAR argue that the issue is not whether section 24308(f) survives if Section 207 of PRIIA is unconstitutional, but whether Congress delegated to the Board in section 24308(f)(1) the authority to define on-time performance. They contend that because Congress explicitly delegated the authority to define on-time performance to FRA and Amtrak in Section 207 of PRIIA, the Board lacks that authority even if FRA

and Amtrak are found not to have the legal authority to meet the statutory command.[3]

An agency has implied authority to implement "a particular statutory provision . . . when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).[4]

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[3] In support, they cite *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453,458 (1974) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") and *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013). But neither case has any bearing on the Board's authority to fill the definitional gap exposed by the invalidation of a statutory provision. *National Railroad Passenger Corp.* did not involve agency delegation; that case addressed the question whether the predecessor to 49 U.S.C. 24103, which allows the Attorney General to bring suit against Amtrak or host freight railroads to enforce obligations related to Amtrak, created a private right of action to allow third parties to sue to prevent what they regarded as the unlawful discontinuance of certain passenger trains. In *Bayou Lawn*, the court held that the Department of Labor's general rulemaking authority did not give it delegated authority to issue legislative rules for visa applications for non-agricultural workers where Congress had expressly delegated that authority to the Department of Homeland Security. There was no suggestion there that the express delegation to Homeland Security had been invalidated, or that Homeland Security was otherwise incapable of carrying out the Congressional delegation.

[4] *See ICC v. Am. Trucking Assns.*, 467 U.S. 354, 364-67 (1984) (agency may "modify express remedies in order to achieve specific statutory purposes" if the "discretionary power . . . further[s] a specific statutory mandate [and] the exercise of that

"Sometimes, the legislative delegation to an agency on a particular question is implicit rather than explicit." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Several federal courts of appeals have held that an administrative agency with rulemaking authority has implicit authority to fill a gap exposed by the Supreme Court's invalidation of a portion of a statute. *See Pittston Co. v. United States*, 368 F.3d 385, 403-04 (4th Cir. 2004); *Sidney Coal Co. v. Social Security Admin.*, 427 F.3d 336, 346 (6th Cir. 2005).[5]

Here, as in *Pittston* and *Sidney Coal,* the invalidation of Section 207 of PRIIA leaves a gap that the Board has the delegated authority to fill by virtue of its authority to adjudicate complaints brought by Amtrak against host freight railroads for violations of Amtrak's statutory preference and to award damages where a preference violation is found. Any other result

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power [is] directly and closely tied to that mandate"); W. *Coal Traffic League v. STB*, 216 F.3d 1168 (D.C. Cir. 2000).

[5] CN argues that the Fifth Circuit held in *Texas v. United States*, 497 F.3d 491,504 (5th Cir. 2007) that a later court decision cannot affect or create ambiguity for purposes of *Chevron* delegation. But Chief Judge Jones' opinion cited by CN is not the majority opinion on the issue of implicit delegation. Both Judge King, who concurred in the result, and Judge Denis, who dissented, agreed that a court decision invalidating a portion of a statute creates implicit authority to the agency administering the statute to engage in gap-filling. 497 F.3d at 511-12, 513-14. Judge King and Judge Denis disagreed over whether the agency's authority to fill gaps included overriding portions of the statute that remained in effect. There is no such problem here because the Board is simply defining the term "on-time performance," which remains in effect.

would gut the remedial scheme, a result that Congress clearly did not intend.

All-Stations OTP. As summarized below, the Board's NPRM proposed to calculate OTP solely on the basis of train arrivals at endpoint termini (Endpoint OTP). The Board proposed Endpoint OTP as an appropriate threshold for bringing OTP cases under 49 U.S.C. 24308(f)(1) because it would be "clear and relatively easy to apply," *i.e.,* comprehensible to the traveling public and simple to describe and implement. In addition, Amtrak's public OTP data[6] suggest that under either an Endpoint OTP or All-Stations OTP standard, the threshold for initiating a case could be triggered in a comparable number of cases, if long-established trends continue. Nevertheless, many commenters perceived that in proposing an Endpoint OTP threshold, the Board was devoting insufficient attention to intermediate stations, their passengers, and even the states in which the intermediate stations are located. That was not the Board's intent; rather, the intent was solely to set a threshold for accepting cases.

Except for the freight railroad industry, virtually all commenters urge the Board to define "on time" based on train punctuality at all stations, rather than just at the endpoints (as originally proposed), because the majority of the traveling public are destined for intermediate rather than endpoint stations. (*See, e.g.*,

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[6] *See* Amtrak's Monthly Performance Reports on Amtrak.com, as well as the quarterly OTP statistics published by the Federal Railroad Administration (http://www.fra.dot.gov/Page/P0532).

Amtrak Feb. 8 Comment 7.) Moreover, the examples provided by individual passengers – *e.g.*, of waiting for hours at unattended stations in remote or unsecured locations at night for late trains that would be deemed "on time" at their endpoints – convince us that an "all-stations" definition will more appropriately reflect the principle that rail passengers destined for every station along a line, regardless of its size, should have the same expectation of punctuality. This principle underlies the Congressional aspiration that "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) (emphasis added).[7] We therefore will incorporate an all-stations calculation in the threshold for bringing cases to the Board under 49 U.S.C. 24308(f).

As the freight railroads point out, and as FRA and Amtrak themselves acknowledged in their final metrics and standards under PRIIA Section 207 (in which they deferred application of an all-stations test for OTP for two years to allow for schedule adjustments), some schedules, particularly for long-distance trains, may need to be modified to more realistically distribute recovery time in light of an all-stations threshold. (*See* CN Mar. 30 Reply 3-4; AAR Mar. 30 Reply 6-7.) For example, as CSXT notes considerable care must be exercised in distributing recovery time along a route, to avoid site-specific operational concerns. (*See* CSXT Mar. 30 Reply 10.) Moreover, a number of current

[7] *See also Adequacy of Intercity Rail Passenger Sew.*, 351 I.C.C. 883 (1976).

passenger rail schedules insert a very large share of recovery time between the last stations on a route. To support all stations OTP on such a route could require a reevaluation and potential reallocation of recovery time across the entire route. We are confident, however, that following adoption of an all-stations approach to OTP in this rulemaking, rail operations planners from all affected parties will be able to devise appropriate, realistic, and up-to-date modifications to published schedules that are consistent both with all-stations OTP and with Congress' explicit intent in PRIIA to improve intercity passenger rail service. Furthermore, considerations regarding the published schedules may enter into the investigation stage of the two-stage process contemplated in the statute.

The 15-Minute Allowance. In the NPRM, the Board proposed that an Amtrak train would be considered on-time if it arrives at its final terminus no more than five minutes after its scheduled arrival time per 100 miles of operation, or 30 minutes after its scheduled arrival time, whichever is less. Based on the comments received,[8] the Board has decided to deem a train's arrival or departure "on time" if it occurs no later than 15 minutes after its scheduled time. In our view, this 15-minute allowance has several advantages. First, it is consistent with the Congressional

[8] *See, e.g.*, Capital Corridor Joint Powers Authority March 30 Reply 4 n.3; Amtrak February 8 Comment 8; Virginia Rail Policy Institute February 8 Comment 1.

goal set forth in 49 U.S.C. 24101(c)(4).[9] Second, in comparison with the tiered proposal, it is simple and easy to apply. Third, it treats all stations and all passengers equally. Finally, Amtrak has long been calculating All-Stations OTP with a constant 15-minute allowance at each station,[10] so the data needed to apply this final rule are readily available to the public and stakeholders.

Contract On-Time Performance Versus Published Schedules. The freight railroads generally argue that OTP should be measured in accordance with the criteria contained in their private contracts with Amtrak (contract OTP) rather than the published Amtrak timetables. (*See* Union Pac. R.R. (UP) Feb. 8 Comment 3; AAR Feb. 8 Comment 10; CN Feb. 8 Comment 5.) However, the Congressional goal at 49 U.S.C. 24101(c)(4) refers to the "time established in public timetables." In addition to being consistent with the Congressional goal, a comparison of publicly scheduled train timings with actual train timings is also the simplest and most transparent way to compare a train's OTP, as experienced by the traveling public, with the "less than 80 percent" threshold mandated in 49 U.S.C. 24308(f)(1). Although the private contracts between Amtrak and its host carriers will not enter into the

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[9] "Amtrak shall . . . operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables."

[10] The only exception is Amtrak's Acela service in the Northeast Corridor, to which Amtrak applies a 10-minute lateness allowance.

threshold stage of an OTP case, such contracts could be relevant in the investigation stage.

Several freight railroads and AAR claim that if the Board does not account for the problems with the schedules and simply relies on the published schedules as they are, it could result in an avalanche of complaints and "false positives" – trains that technically fall below the OTP threshold but are not necessarily poor performers because the schedules are allegedly "unrealistic." (*See* AAR Mar. 30 Reply; CN Mar. 30 Reply; UP Mar. 30 Reply; NS Mar. 30 Reply; CSXT Mar. 30 Reply.) Because the complainant has the primary burden of proving its case and litigation is resource intensive, the adopted approach is not expected to result in an overwhelming number of claims.

Finally, some commenters (*e.g.*, Virginia DOT, Michigan DOT, States for Passenger Rail Coalition) argue that the Board should set standards for the development of route schedules or conduct further study of the schedules prior to adopting rules. However, while section 24308(f) permits the Board, in conducting a particular investigation, to review the extent to which scheduling may contribute to the delays being investigated and to identify reasonable measures to improve OTP, the statute does not include generalized authority, outside a particular investigation, for the Board to set standards for the development of schedules. Thus, what these commenters are asking the Board to do is beyond the scope of our authority and this rulemaking.

Third-Party (State) Agreements. A number of states and others expressed concern that the Board's OTP rule could undermine or preempt separate agreements entered into between states, operators, hosts, and others for the improvement of passenger rail service in specific corridors – for example, service outcomes agreements under FRA's High-Speed Intercity Passenger Rail (HSIPR) Program. (*See* States for Passenger Rail Coalition, Inc. Feb. 8 Comment 3; Cal. State Transp. Agency Feb. 8 Comment 3.) We reiterate, however, that the Board is defining "on time" and describing the calculation of OTP only for the purpose of determining whether the "less than 80 percent" threshold for bringing an OTP complaint has been met. The Board neither intends nor expects that its OTP definition here will have any applicability beyond that limited purpose.

Multicarrier Routes. Several commenters, including freight railroad interests, argue that for routes where there are multiple host carriers, OTP should not be measured for the entire route, but for each host carrier's segment. The commenters argue that this would allow the Board to determine if the delays are occurring on one carrier's segment and, if so, to properly narrow the investigation solely to that carrier's conduct. The commenters argue that if the Board does not do so, a carrier that is meeting its statutory duty could be unfairly drawn into an investigation.

Although the Board understands that concern, the attribution of delays to hosts and specific causes more properly pertains to – indeed, would likely be among

the initial topics addressed in – the investigatory phase of a case. Moreover, the statutory mandate (49 U.S.C. 24308(f)) specifically refers to the "on-time performance of any intercity passenger train," irrespective of the number of host carriers involved in the train's operation. Therefore, the adopted approach is consistent with the statute.

Calculation of OTP. Two individuals take issue with the Board's proposal to exclude from the OTP analysis any train that does not operate "from its scheduled origin to its scheduled destination." The commenters argue that these trains should be accounted for, because they might represent instances of the most severe service failures.

The changes adopted in this final rule will lessen the potential impact of this issue. Endpoint OTP, as proposed in the NPRM, would not have included any train that does not serve both its scheduled endpoints. By contrast, under the all-stations calculation method, every departure from origin and every arrival at subsequent stations that actually occurs – regardless of whether the train originates at its scheduled origin or completes its run to its scheduled destination – will enter into the denominator. The Board will exclude, from its prescribed calculation method, only trains that do not operate at all, or stations on a curtailed train's route that do not actually receive service. This is consistent with the statute, which provides that Congressionally-mandated investigations in 49 U.S.C. 24308(f)(1) should analyze "delays" (not cancellations). In addition, in a train operation that does not

take place, there typically would be no practical way to determine whether preference (the focus of 49 U.S.C. 24308(f)(2)) was granted or withheld. Finally, because Amtrak generally cancels or curtails its services only in the event of emergencies or extreme weather events (such as the severe flooding in South Carolina in the Fall of 2015), it is doubtful that inclusion of such incidents in the denominator of the calculation would shed light on what is taking place under typical operating conditions for a particular train. To clarify this point, language is being added to the final rule making clear that the OTP calculation includes only "actual" arrivals and departures.

Additional issues, including the following, were raised by certain commenters, but the issues are beyond the scope of this rulemaking.

Per-Train vs. Per-Route Calculation. Some railroad interests argue that the Board should not calculate OTP for all trains on the route, but rather, for each individual train that operates on that route. This argument goes to the question of what constitutes a "train," an issue that this rulemaking does not address and was not intended to address.

International Service. Some commenters note that the proposed OTP standard rule does not provide any guidance for cross-border routes (*i.e.,* those that go into Canada). No such issue has arisen in a case brought to the Board, and this issue goes to the question of what constitutes a "train," an issue that, again, this

rulemaking does not address and was not intended to address.

Eligible Complainants. The Michigan Association of Railroad Passengers argues that the Board should expand the pool of the parties that can file complaints to include passengers. However, the parties eligible to bring complaints under section 24308(f) are specified by that statute, and we are not at liberty to expand it in this rulemaking.

Time Limits on Data. Some freight railroad commenters also state that without a time limit on the period during which the OTP deficiency at issue is alleged to have occurred *(e.g.,* the most recent four quarters), outdated and unnecessary claims could be filed regarding a train that is currently performing well. (*See* CN Feb. 8 Comment 6; AAR Feb. 8 Comment 14.) This issue, too, is beyond the scope of this rulemaking, which was intended solely to define "on time" and specify the formula for calculating OTP for purposes of 49 U.S.C. 24308(f).

Summary of the Final Rule

For the reasons discussed above, we are modifying the rule as initially proposed and adopting the all-stations approach. This approach will be codified at 49 CFR 1040. The final regulations are attached at the end of this decision.

Section 1040.1 makes explicit the strictly limited purpose of the rulemaking, as discussed above: To

define "on time" and specify the formula for calculating OTP so as to trigger implementation of 49 U.S.C. 24308(f).

Section 1040.2 states that a train's arrival at or departure from a particular station is "on time" if it occurs no later than 15 minutes after its scheduled time. This section embodies the 15-minute allowance contained in the longstanding Congressional goal for Amtrak at 49 U.S.C. 24101(c)(4).

Section 1040.3 implements the "all-stations" option that was suggested as an alternative to endpoint OTP in the NPRM. Pursuant to 49 U.S.C. 24308(f)(1), which states that a train can be the subject of an OTP complaint if its OTP "averages less than 80 percent for any two consecutive calendar quarters," Section 1040.3 describes the method for calculating a train's OTP in each quarter. Specifically, OTP is the percentage equivalent to the fraction (1) whose denominator is the total number of the train's actual (a) departures from its origin station, (b) arrivals at all intermediate stations, and (c) arrivals at its destination station, during that calendar quarter, and (2) whose numerator is the total number of such actual departures and arrivals that are "on time" under § 1040.2 – i.e., that occur no later than 15 minutes after their scheduled time.

Regulatory Flexibility Act Statement

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, generally requires a description and analysis of new rules that would have a significant

economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. 601-604. Under section 605(b), an agency is not required to perform an initial or final regulatory flexibility analysis if it certifies that the proposed or final rules will not have a "significant impact on a substantial number of small entities."

Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. *White Eagle Coop. Ass'n v. Conner*, 553 F.3d 467, 478, 480 (7th Cir. 2009). An agency has no obligation to conduct a small entity impact analysis of effects on entities that it does not regulate. *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

In the NPRM, the Board already certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The Board explained that the proposed rule would not place any additional burden on small entities, but rather clarify an existing obligation. The Board further explained that, even assuming for the sake of

argument that the proposed regulation were to create an impact on small entities, which it would not, the number of small entities so affected would not be substantial. A copy of the NPRM was served on the U.S. Small Business Administration (SBA).

The final rule adopted here uses a different measure of "on time" and "on-time performance" for purposes of Section 213 of PRIIA than those proposed in the NPRM. However, the same basis for the Board's certification of the proposed rule applies to the final rule adopted here. The final rule would not create a significant impact on a substantial number of small entities. Host carriers have been required to allow Amtrak to operate over their rail lines since the 1970s. Moreover, an investigation concerning delays to intercity passenger traffic is a function of Section 213 of PRIIA rather than this rulemaking. The final rule only defines "on-time performance" for the purpose of implementing the rights and obligations already established in Section 213 of PRIIA. Thus, the rule does not place any additional burden on small entities, but rather clarifies an existing obligation. Moreover, even assuming, for the sake of argument, that the final rule were to create an impact on small entities, which it does not, the number of small entities so affected would not be substantial. The final rule applies in proceedings involving Amtrak, currently the only provider of intercity passenger rail transportation subject to PRIIA, and its host railroads. For almost all of its operations, Amtrak's host carriers are Class I rail carriers, which are not small businesses under the Board's

new definition for RFA purposes.[11] Currently, out of the several hundred Class III railroads ("small businesses" under the Board's new definition) nationwide, only approximately 10 host Amtrak traffic.[12] Therefore, the Board certifies under 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

The final rule is categorically excluded from environmental review under 49 CFR 1105.6(c).

List of Subjects in 49 CFR Part 1040

On-time performance of intercity passenger rail service.

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[11] At the time the Board issued the NPRM, the Board used the SBA's size standard for rail transportation, which is based on number of employees. *See* 13 CFR 121.201 (industry subsector 482). Subsequently, however, pursuant to 5 U.S.C. 601(3) and after consultation with SBA, the Board (with Commissioner Begeman dissenting) established a new definition of "small business" for the purpose of RFA analysis. Under that new definition, the Board defines a small business as a rail carrier classified as a Class III rail carrier under 49 CFR 1201.1-1. *See Small Entity Size Standards Under the Regulatory Flexibility Act*, EP 719 (STB served June 30, 2016).

[12] This number is derived from Amtrak's Monthly Performance Report for May 2015, historical on-time performance records, and system timetable, all of which are available on Amtrak's Web site.

It is ordered:

1. The final rule set forth below is adopted and will be effective on August 27, 2016. Notice of the rule adopted here will be published in the **Federal Register.**

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. This decision is effective on the date of service.

Decided: July 28, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Kenyatta Clay,
Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board amends title 49, chapter X, subchapter A, of the Code of Federal Regulations by adding part 1040 as follows:

PART 1040: ON-TIME PERFORMANCE OF INTERCITY PASSENGER RAIL SERVICE

Sec.

Authority: 49 U.S.C. 1321 and 24308(f).

§ 1040.1. Purpose.

This part defines "on time" and specifies the formula for calculating on-time performance for the purpose of implementing Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 49 U.S.C. 24308(f).

§ 1040.2. Definition of "on time."

An intercity passenger train's arrival at, or departure from, a given station is on time if it occurs no later than 15 minutes after its scheduled time.

§ 1040.3. Calculation of quarterly on-time performance.

In any given calendar quarter, an intercity passenger train's on-time performance shall be the percentage equivalent to the fraction calculated using the following formula:

(a) The denominator shall be the total number of the train's actual: Departures from its origin station, arrivals at all intermediate stations, and arrivals at its destination station, during that calendar quarter; and

(b) The numerator shall be the total number of the train's actual: Departures from its origin station, arrivals at all intermediate stations, and arrivals at its destination station, during that calendar quarter, that are on time as defined in § 1040.2.

44076 SERVICE DATE – DECEMBER 19, 2014
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42134

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

Digest:[1] The Board grants the motion of the National Railroad Passenger Corporation (Amtrak) to limit its complaint against Canadian National Railway Company under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) to on-time performance issues with respect to a single route between Chicago and Carbondale, Illinois. Further, the Board concludes that pending court litigation involving the constitutionality of metrics and standards developed under PRIIA Section 207 does not preclude this case from moving forward. In addition, the Board seeks the parties' views regarding the term "on-time performance" under Section 213 in this case.

Decided: December 18, 2014

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. *Policy Statement on Plain Language Digests in Decisions*, EP 696 (STB served Sept. 2, 2010).

The National Railroad Passenger Corporation (Amtrak) seeks to amend its complaint, which was brought pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. § 24308(f)(1), to initiate an investigation by the Board into service issues (including on-time performance issues) affecting Amtrak trains on rail lines owned by Canadian National Railway Company and its subsidiaries, Grand Trunk Western Railway Company and Illinois Central Railroad Company (collectively, CN). Originally, the complaint addressed service issues on eight lines, but the amended complaint would reduce the scope to a single route, the "Illini/Saluki service" between Chicago and Carbondale, Ill. Furthermore, Amtrak seeks to establish an independent basis to determine on-time performance under Section 213 of PRIIA, in light of the decision by the U.S. Court of Appeals for the District of Columbia Circuit, presently under review by the Supreme Court, holding Section 207 of PRIIA unconstitutional.[2] Unless the Supreme Court reverses the D.C. Circuit's decision, Amtrak cannot rely on the on-time performance metrics and standards promulgated under Section 207. Consequently, in its amended complaint, Amtrak relies solely

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[2] *Ass'n of Am. R.Rs. v. DOT (AAR v. DOT)*, 721 F.3d 666 (D.C. Cir. 2013), *rev'g* 865 F. Supp. 2d 22 (D.D.C. 2012), *cert. granted* 134 S. Ct. 2865 (June 23, 2014) (No. 13-1080). In that case, the D.C. Circuit determined that Section 207 is an impermissible delegation of legislative power to Amtrak because it provides that Amtrak shall participate, along with the Federal Railroad Administration (FRA), in "jointly" developing or improving metrics and standards for measuring passenger rail performance (including "on-time performance").

on the portion of PRIIA Section 213 which mandates that the Board initiate an investigation where "the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters." 49 U.S.C. § 24308(f)(1).

The critical question presented by Amtrak's motion is whether the Board may investigate the Illini/Saluki service's potential failure to achieve 80-percent "on-time performance" under Section 213 of PRIIA in the absence of an operative definition of "on-time performance" under Section 207 of PRIIA (due to the D.C. Circuit's decision). Amtrak asserts that Section 213's 80-percent on-time performance level is unaffected by the D.C. Circuit's decision. CN disagrees and has moved to dismiss this proceeding on the ground that the D.C. Circuit's decision entirely forecloses Amtrak's ability to bring a complaint. In the alternative, CN has asked the Board to hold the proceeding in abeyance until the Supreme Court has completed its review of the D.C. Circuit's decision.

The Board will grant Amtrak's motion to amend its complaint and deny CN's motion to dismiss the proceeding. As discussed below, even if the definition of "on-time performance" under Section 207 of PRIIA is inoperative due to the unconstitutionality of that section, we conclude that the Board nonetheless may initiate investigations of on-time performance problems under Section 213 of PRIIA because the less-than-80-percent on-time performance trigger in Section 213 is severable from the mechanism for promulgating standards of "on-time performance" under Section 207.

Furthermore, we reject CN's request to hold the proceeding in abeyance until the Supreme Court decides whether Section 207 is an unconstitutional delegation of legislative power. Even a Supreme Court decision upholding the constitutionality of Section 207 of PRIIA may not end the pending lawsuit, as the Court could remand the case to the D.C. Circuit for further proceedings on other unresolved challenges to the constitutionality of Section 207. Moreover, the Board believes that any further delay of the present proceeding would thwart Congress's clear intent that the Board resolve disputes over Amtrak delays in an efficient manner.

BACKGROUND

On January 19, 2012, Amtrak filed a petition requesting that the Board initiate an investigation pursuant to Section 213 of PRIIA, 49 U.S.C. § 24308(f), regarding the alleged "substandard performance of Amtrak passenger trains" on rail lines owned by CN.[3] Five months earlier, the Association of American Railroads (AAR) had filed a lawsuit in the United States District Court for the District of Columbia challenging the constitutionality of Section 207 of PRIIA, which provides that Amtrak and the FRA shall "jointly" develop or improve metrics and standards for measuring the performance of passenger rail operations. *AAR v. DOT*, 865 F. Supp. 2d at 24-27. Therefore, when CN filed its answer to Amtrak's petition on March 9, 2012, it also filed a motion to hold the proceeding in abeyance

[3] Amtrak Complaint 2 (Jai. 19, 2012).

until after the District Court ruled on AAR's constitutional challenge to Section 207.

On March 27, 2012, Amtrak and CN filed a joint motion requesting Board-supervised mediation regarding the issues raised in Amtrak's complaint. On April 4, 2012, the Board granted that request and held the proceeding in abeyance until July 3, 2012. At the parties' request, the Board extended the abeyance period three times to allow mediation to continue. The last of these extensions ended on October 4, 2012.

While Amtrak's complaint before the Board was in abeyance, the District Court, on May 31, 2012, upheld the constitutionality of Section 207. After mediation failed, the Board, on November 5, 2012, issued a notice that agency proceedings had been reactivated. On January 3, 2013, the Board served a decision (*January 2013 Decision*) dismissing as moot CN's[4] motion to hold the proceeding in abeyance and setting a procedural schedule. The Board also directed the parties to develop a sampling method to provide a representative subset of evidence regarding all movements subject to the petition.

On January 23, 2013, CN filed a petition to reconsider, seeking clarity with respect to (or modification of) the Board's *January 2013 Decision.*[5] On February

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[4] *AAR v. DOT*, 865 F. Supp. 2d 22. Shortly thereafter, AAR filed an appeal in the D.C. Circuit.

[5] Because the Board is now granting Amtrak's motion to amend its complaint, the procedural schedule established in the *January 2013 Decision* is moot. To the extent that CN's January

6, 2013, the parties filed a joint motion to stay the proceeding and hold it in abeyance because the parties were in productive discussions towards addressing the issues raised in the complaint. The Board granted the request for abeyance, as well as later joint requests to extend the abeyance. The last of these extensions ended on July 31, 2014. On July 21, 2014, Amtrak filed notice with the Board that it intended to amend its complaint.

Meanwhile, on February 19, 2013, the D.C. Circuit reversed the District Court's ruling, holding that Section 207 of PRIIA impermissibly delegated regulatory authority to a "private entity" (Amtrak) and therefore was an unconstitutional delegation of legislative power.[6] The U.S. Department of Transportation petitioned the United States Supreme Court for a writ of certiorari, which the Court granted on June 3, 2014.[7] Briefing before the Supreme Court is complete, and oral argument was held on December 8, 2014.

PARTIES' POSITIONS AND ARGUMENTS

On August 29, 2014, Amtrak filed a motion to amend the complaint and an amended complaint under Section 213 of PRIIA, 49 U.S.C. § 24308(f). Amtrak states that it has narrowed the focus of the complaint to the performance of Amtrak's Illini/Saluki service,

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23, 2013 petition to reconsider concerns that obsolete procedural schedule, it will be denied as moot.

[6] *AAR v. DOT*, 721 F.3d 666.

[7] *See* 134 S. Ct. 2865.

rather than all of the Amtrak services addressed in the original complaint. On September 19, 2014, CN filed a motion to dismiss or, in the alternative, to stay the proceeding. Amtrak filed a reply to CN's motion on October 7, 2014.[8] CN filed a response to Amtrak's reply on October 14, 2014.[9]

The relevant portion of Section 207 of PRIIA states:

> 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, onboard services, stations, facilities, equipment, and other services.[10]

The relevant portion of Section 213 of PRIIA, 49 U.S.C. § 24308(f), states:

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[8] In addition to the parties' pleadings, the Board has received letters and support statements from U.S. Senator Richard J. Durbin, Governor Pat Quinn of Illinois, multiple cities, and a university.

[9] Replies to replies, such as CN's October 14, 2014 pleading, are not permitted under 49 C.F.R. § 1104.13(c). However, in the interest of developing a full record, and because Amtrak has not objected to its filing, we will accept CN's response to Amtrak's reply.

[10] Passenger Rail Investment & Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4916 (codified at 49 U.S.C. § 24101 note) (emphases added).

> *If 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 [PRIIA] fails to meet those standards for 2 consecutive quarters, the Surface Transportation Board . . . may initiate an investigation, or *upon the filing of a complaint by Amtrak . . . , the Board shall initiate such an investigation.* . . . [11]

Section 213 gives Amtrak a forum to enforce its access rights on the lines of rail carriers that host Amtrak service. Under 49 U.S.C. § 24308(c), which was in effect long before PRIIA, Amtrak's intercity and commuter rail operations have "preference over freight operations using a rail line. . . ." Moreover, § 24308(c) allows the Board, after providing an opportunity for a hearing, to establish the rights of Amtrak and a complaining freight carrier if the Board determines that Amtrak's preference "materially will lessen the quality of freight transportation provided to shippers." In Section 213 of PRIIA, Congress gave the Board authority to enforce and regulate the statutory preference of § 24308(c). In a service investigation under Section 213, 49 U.S.C. § 24308(f)(2), the Board "may award damages against a host rail carrier" and may prescribe other relief if it finds that Amtrak's failure to achieve the 80-percent minimum level of on-time performance for a particular route is "attributable to a rail carrier's

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[11] 49 U.S.C. § 24308(f)(1) (emphases added).

failure to provide preference to Amtrak over freight transportation as required by [49 U.S.C. § 24308(c)]." However, the Board cannot conduct an investigation and give Amtrak the opportunity to enforce its preference rights unless it first finds that Amtrak's service failed to attain Section 213's 80-percent on-time performance threshold.

Amtrak asserts that the Board has a statutory duty to initiate an investigation under Section 213 of PRIIA because the on-time performance of its Illini/Saluki service has fallen below 80 percent for two consecutive quarters.[12] CN responds that Amtrak's complaint cannot move forward because, following the D.C. Circuit's decision invalidating Section 207 of PRIIA, there remains no operative definition of "on-time performance" for purposes of assessing the below-80-percent investigation threshold under Section 213.[13] CN argues that, without the definition for on-time performance that was developed under Section 207, "there is no trigger" or basis for a Board investigation under Section 213.[14] CN further contends that even if Amtrak's amended complaint is accepted, the Board should hold the proceeding in abeyance until the Supreme Court has ruled on the constitutionality of Section 207.[15]

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[12] Amtrak Motion to Amend the Complaint 6-7.

[13] CN Motion to Dismiss 10-12.

[14] *Id*.

[15] CN Motion to Dismiss 13-14. CN also requests that it be given 20 days to respond to Amtrak's motion and amended complaint, if the Board denies CN's motion to dismiss. *Id*. at 1 n.2. To

Amtrak counters that Congress intended to create two distinct triggers for a Board investigation – (1) on-time performance below 80 percent "or" (2) the failure to meet Section 207's minimum standards – and that the Board can independently construe the meaning of "on-time performance" for purposes of implementing Section 213.[16] CN responds that, because Congress expressly assigned to FRA and Amtrak the task of developing the metrics and standards (including "on-time performance"), Congress could not have intended to allow the Board to separately define that term.[17]

DISCUSSION AND CONCLUSIONS

The primary dispute between the parties is whether Section 213's below-80-percent on-time performance trigger for Board investigations is rendered inoperative by the D.C. Circuit's invalidation of Section 207 and the definition of on-time performance developed thereunder.[18] We conclude that it is not and will deny CN's motion to dismiss the proceeding and grant Amtrak's motion to amend its complaint.

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the extent that CN has reply arguments to the motion to amend the complaint, those arguments should have been addressed in its motion to dismiss. Because the amended complaint is not accepted into the record until the Board grants Amtrak's motion to amend, CN will be given 20 days from the service date of this decision to answer the amended complaint.

[16] Amtrak Reply 5-9.

[17] CN October 14, 2014 Reply 3-6.

[18] *See* CN October 14, 2014 Reply.

Section 213's 80-percent trigger for Board investigations is not rendered inoperative by the D.C. Circuit's decision, which held that the Section 207 metrics and standards are unconstitutional due to Amtrak's participation in their development. Generally, courts refrain from invalidating more of a statute than is necessary on grounds of unconstitutionality by severing any problematic portions while leaving the remainder of the statute intact. *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).[19]. Accordingly, when a court invalidates a portion of a statute based on unconstitutionality, it "must retain those portions of the Act that are constitutionally valid, capable of functioning independently, and consistent with Congress' basic goals in enacting the statute." *U.S. v. Booker*, 543 U.S. 220, 258-59 (2005). See also *Regan v. Time, Inc.*, 468 U.S. 641, 652-53 (1984) (plurality opinion). Here, although "on-time performance" is listed as a metric to be improved under Section 207, Congress

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[19] *See also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006) (Because the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of the remaining portions, the "normal rule" is that partial, rather than facial invalidation is the "required course."); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."); *Champlin Ref. Co. v. Corp. Comm'n of State of Okla.*, 286 U.S. 210, 234 (1932) ("The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

expressly prioritized the enforcement of Amtrak's on-time performance by making it a separate basis, apart from "service quality," for a Board investigation under Section 213. The plain language of Section 213 allows Amtrak to bring a complaint either when "the on-time performance of any intercity passenger train averages less than 80 percent" "or" when "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 any two consecutive calendar quarters. 49 U.S.C. § 24308(f)(1); *see also id*. (titled "Passenger Train Performance and Other Standards"). In addition, Congress deemed on-time performance to be so important that, as CN acknowledges,[20] it expressly established a statutory minimum level (80%) with respect to the on-time performance metric. 49 U.S.C. § 24308(f)(1).[21]

Section 207 also acknowledges that certain metrics and standards were *already* "existing" at the time of PRIIA's passage. 49 U.S.C. § 24101 note (calling for FRA and Amtrak to "develop new or improve existing metrics and minimum standards"). Standards for on-time performance fall into this category. In the 1970s, the Board's predecessor, the Interstate Commerce Commission (ICC), adopted rules defining end-point

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[20] CN October 14, 2014 Reply 6 n.10.

[21] As Amtrak notes, Congress also took care to separate the consequences of delays from the consequences of failure to meet other Section 207 metrics, using the phrase "delays *or* failure[s] to achieve minimum standards" several times in 49 U.S.C. § 24308(f). *See* Amtrak October 7, 2014 Reply 8-9.

on-time performance. *See, e.g.*, *Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. 758, 809 (1973) (prescribing, under former 49 C.F.R. § 1124.6, that "the train shall arrive at its final terminus no later than 5 minutes after scheduled arrival time per 100 miles of operation, or 30 minutes after scheduled arrival time, whichever is the less"); *Adequacy of Intercity Rail Passenger Serv.*, 351 I.C.C. 883, 910, 988 (1976) (same).[22] Under that standard, a 15-minute arrival window would have applied for the Illini/Saluki route at issue here. Moreover, since 1981, Congress has explicitly set an all-stations on-time performance goal, which states that "Amtrak shall . . . operate Amtrak trains, to the maximum extent feasible, to all station stops within 15

[22] Although these rules were repealed by the Amtrak Reorganization Act of 1979, in which Congress decided to assign to Amtrak the task of evaluating and reporting on its own performance, Amtrak continued to use the 5-minutes-per-100-miles standard long afterward, and that standard was used by the FRA and Amtrak *as* a basis for the Section 207 standards. *See* Amtrak Reorganization Act of 1979, at § 111(b), Pub. L. 96-73, 96 Stat. 537; United States Government Accountability Office, *INTERCITY PASSENGER RAIL: National Policy and Strategies Needed to Maximize Public Benefits from Federal Expenditures* (November 2006), at 38 n.51 (discussing Amtrak's delay tolerances); Federal Railroad Administration, Department of Transportation, *Final Metrics and Standards for Intercity Passenger Rail Service: Response to Comments and Issuance of Metrics and Standards* (May 12, 2010), at 26 n.16, *available at* http://www.fradot.gov/eLib/Details/ 02875 (last visited Nov. 21, 2014) ("A train is considered 'late' if it arrives at its endpoint terminal more than 10 minutes after its scheduled arrival time for trips up to 250 miles; 15 minutes for trips 251-350 miles; 20 minutes for trips 351-450 miles; 25 minutes for trips 451-550 miles; and 30 minutes for trips of 551 or more miles. These tolerances are based on former ICC rules.").

minutes of the time established in public timetables."[23] *See* 49 U.S.C. § 24101(c)(4) (originally codified at 45 U.S.C. § 501a(6), *see* Amtrak Improvement Act of 1981, at § 1172, Pub. L. 97-35, 95 Stat. 357, 688). Given the importance of on-time performance and the existence of such metrics prior to PRIIA's passage, it is highly likely that Congress would have intended for Section 213's below-80-percent investigation trigger to remain fully operative in the event the Section 207 procedures were declared unconstitutional.[24]

Legislative history further supports the enforceability of Section 213's below-80-percent on-time performance trigger under the present circumstances. The Senate Report discussing the nearly identical provision to Section 213 in the Senate bill (then-numbered Section 209) states that this provision was intended to allow parties to "petition STB directly for an investigation of Amtrak delays" and to determine whether such delays resulted from "the failure of a freight railroad to provide preference to Amtrak" under existing 49 U.S.C. § 24308(c). S. Rep. 110-67, at 25-26 (May 22, 2007). The Senate Report stated further that the "intent of this section is to provide a forum" (and a less

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[23] This comports with the measure of on-time performance used by the Federal Aviation Administration for the on-time performance of commercial passenger airlines, against which Amtrak competes. *See* 14 C.F.R. § 234.2 ("On-time means a flight that arrives less than 15 minutes after its published arrival time.").

[24] We therefore disagree with CN that the term "on-time performance" has "no legal meaning under Section 213 apart from [the Section 207] standards." CN Motion to Dismiss 9.

"cumbersome" process) "for the adjudication of service disputes, including *on-time performance problems*." *Id*. at 26 (emphasis added). Congress intended for the Board to resolve on-time performance disputes between Amtrak and host carriers because of "increasing frustration" under the prior dispute resolution process, "while passenger train performance continues to decline or remain dismal on certain routes." *Id*. Section 213 was to address both "on-time performance *and* service issues impacting intercity passenger trains," and Congress specifically intended for *either* to be the trigger for a Board investigation. *Id*. at 11 (emphases added). Thus, Congress made it a priority to facilitate, and to separately provide for, the investigation of on-time performance problems. Congress also stated that it expected the Board to "consider [such] disputes in an efficient and evenhanded manner." *Id*. at 26. Given the importance Congress placed on the efficient adjudication of on-time performance, the Board is persuaded that Congress would have intended for the below-80-percent on-time performance trigger of Section 213 to be severable from the specific definition of "on-time performance" developed under Section 207.

CN, however, argues that because on-time performance is not defined in Section 213, the Board must rely on the on-time performance metric developed under Section 207, which is currently inoperative.[25] However, nothing in PRIIA requires the below-80-percent on-time performance threshold of Section 213 to be

[25] CN Motion to Dismiss 8-11.

defined pursuant to Section 207 where, as here, Section 207 has been declared unconstitutional. To hold otherwise would thwart Congress's purpose in enacting Section 213 by significantly delaying the resolution of preference disputes like this one until the constitutionality of Section 207 is finally resolved and/or a new Section 207 definition for "on-time performance" is developed – outcomes that may be years away. Even if the Supreme Court rules that Section 207 did not improperly delegate legislative authority to a private entity, the Court may nevertheless remand the case back to the Court of Appeals to resolve the additional question of whether Section 207 is unconstitutional under the Due Process Clause – an issue that was identified but not resolved by the D.C. Circuit. Furthermore, there are no pending legislative actions suggesting that Congress intends to revise Section 207. The Board finds no persuasive reason to disregard Section 213's below-80-percent on-time performance trigger because of ongoing litigation regarding Section 207's metrics and standards, when reasonable definitions of "on-time performance" already exist or may be crafted by the Board to further Congress's clear desire for an "efficient" resolution of on-time performance disputes.[26]

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[26] CN claims the D.C. Circuit concluded that Section 213 is not independent from Section 207, citing the court's statement that the Section 207 "metrics and standards lend definite regulatory force to an otherwise broad statutory mandate." CN Motion to Dismiss 10-11 (quoting *AAR v. DOT*, 721 F.3d at 672). However, the D.C. Circuit was merely responding to the Government's argument that the Section 207 metrics themselves impose no liability. That issue is distinct from the issue of whether the

CN also argues, in its response to Amtrak's reply, that the Board lacks authority to construe the meaning of "on-time performance" here because Congress has expressly assigned to FRA and Amtrak the task of developing such metrics and standards.[27] However, the statute is silent, or at least ambiguous, regarding whether the Board may independently define "on-time performance" for the purpose of determining whether the on-time performance of Amtrak trains falls below Section 213's 80-percent standard for two consecutive calendar quarters, under the circumstances of this case. Here, where the definition of on-time performance under Section 207 is presently inoperative due to an ongoing court challenge regarding the constitutionality of Amtrak's role in the standard-setting process, the Board concludes that it may independently set forth and implement a definition, in order to further Congress's purpose under another valid section of PRIIA, Section 213 (49 U.S.C. § 24308(f)(1)). *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (unless "Congress has directly spoken to the precise question at issue" a court must affirm the agency's interpretation as long as it is "based on a permissible construction of the statute," even if it is not the only permissible one, and even if it is not the one that the court would prefer). The Board believes that its position is a permissible construction

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80-percent on-time performance standard in Section 213 is severable from the Section 207 metrics in the event Section 207 is deemed unconstitutional. The D.C. Circuit never addressed the latter question. *AAR v. DOT*, 721 F.3d at 672.

[27] CN October 14, 2014 Reply 4-5.

of the statute. *See id*. In fact, such a construction is necessary (given the present cloud over Section 207's constitutionality) to effect Congress's clear intent to facilitate the "efficient" resolution of passenger rail delays. *See supra* pp. 8-9. Adopting CN's position that the Board cannot define the meaning of on-time performance under any circumstances (even the invalidity of Section 207)[28] would mean that the Board is unable to initiate investigations under Section 213 or enforce the long-established statutory preference in favor of Amtrak trains under 49 U.S.C. § 24308(c). CN's position also disregards the legislative history of Section 213 and the Board's historic role in defining on-time performance.

Finally, CN argues that FRA and Amtrak have previously stated that Section 207's on-time performance metric would operate as the on-time performance trigger under Section 213.[29] CN also points to a comment from Board staff acknowledging that issuance of the Section 207 standards was an essential step for PRIIA to become effective.[30] However, even if the quoted statements could be interpreted as CN proposes,[31] nothing in those statements suggests that

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[28] CN Motion to Dismiss 8-11.

[29] *Id*. at 9.

[30] *Id*. at 11 n.10.

[31] The cited passage from the FRA's Section 207 rulemaking states more generally that "percent on-time standards" (not necessarily as defined under Section 207) will "be used by the STB as a basis for initiating investigations" under Section 213. Federal Railroad Administration, Department of Transportation, *Final Metrics and Standards for Intercity Passenger Rail Service:*

Section 213's below-80-percent on-time performance trigger should become a nullity if the Section 207 definition is rendered inoperative. In any event, when determining the severability of Section 213's below-80-percent trigger from Section 207's definition of on-time performance, the guiding principle is Congress's intent in enacting the statute, which supports the Board's determination here.

CONCLUSION

For the foregoing reasons, we conclude 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 Amtrak's Illini/Saluki service has fallen below 80 percent for two or more consecutive calendar quarters. We will deny CN's motion to dismiss this proceeding and grant Amtrak's motion to amend its complaint. We will also deny CN's alternative request to hold this proceeding in abeyance pending the outcome of the Supreme Court's decision regarding Section 207. Because the Supreme Court's decision will not necessarily resolve the question of Section 207's constitutionality or affect our conclusions here, an abeyance of this proceeding would unnecessarily delay a potential Board

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Response to Comments and Issuance of Metrics and Standards (May 12, 2010), at 17, *available* at http://www.fradot.gov/eLib/Details/02875 (last visited Nov. 21, 2014).

investigation of on-time performance issues, which runs directly contrary to Congressional intent.

Further, the Board seeks the parties' views regarding how to construe the term "on-time performance" in this case, as the term is used in PRIIA Section 213, 49 U.S.C. § 24308(f). By January 20, 2015, the parties shall provide opening arguments on how to construe the term "on-time performance' for purposes of this proceeding. Replies will be due by February 2, 2015. In their pleadings, the parties should include Amtrak arrival time data so that the Board can apply whatever standard is ultimately adopted to the Illini/Saluki service. CN may also file an answer to Amtrak's amended complaint by January 8, 2015.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CN's January 23, 2013 petition to reconsider is denied as moot.
2. Amtrak's motion to amend the complaint is granted.
3. CN's motion to dismiss the proceeding is denied.
4. CN's alternative request to hold the proceeding in abeyance is denied.
5. CN may answer Amtrak's amended complaint by January 8, 2015.

6. Opening arguments on how to define on-time performance for the purpose of this proceeding are due by January 20, 2015.

7. Replies to opening arguments on how to define on-time performance for the purpose of this proceeding are due by February 2, 2015.

8. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman dissented with a separate expression.

COMMISSIONER BEGEMAN, dissenting:

Assuming Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) is severable from the Section 207 provisions currently under review by the U.S. Supreme Court, I believe the 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. The initiation and completion of a rulemaking is especially appropriate here (rather than using the case-by-case adjudicatory process) because we have *two* pending on-time performance cases brought by Amtrak to consider.

All interested stakeholders should be given an opportunity to offer public comment and the Board should use that input in order to develop the most appropriate standard. A notice and comment rulemaking would provide that inclusive approach, and allow the

development of a complete record that would not only address the legality of the Board's basic assumptions (e.g., severability), but also present the Board with a wide-ranging analysis of the potential standards. The Board could then use that complete rulemaking record *as* sound support for its ultimate decision. Instead, the majority will use a much more limited record assembled by only two parties – Amtrak and a single carrier – to establish a Section 213 standard that will most assuredly be used in all other current and future cases, and have a far-reaching impact on the entire industry.

As Amtrak previously suspended this case, and is now seeking to greatly narrow its scope, there is no compelling reason to bypass the most appropriate method of determining the Section 213 standard by saddling this case with that significant challenge. I dissent.