FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

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: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (Board) is proposing a definition of "on-time performance" for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA).

DATES: Comments are due by February 8, 2016. Reply comments are due by February 29, 2016.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the "E-FILING" link on the Board's website, at "http://www.stb.dot.gov." Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 726, 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written comments and replies will be posted to the Board's website and will be available for viewing and self-copying at the Board's Public Docket Room, Room

131. Copies will also be available (for a fee) by contacting the Board's Chief Records Officer at (202) 245-0238 or 395 E Street, S.W., Washington, DC 20423-0001.

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: By decision served on May 15, 2015, the Board instituted a rulemaking proceeding to define "on-time performance" for purposes of Section 213 of PRIIA, 49 U.S.C. 24308(f). The Board instituted this proceeding in response to a petition for rulemaking filed by the Association of American Railroads (AAR). Any rule promulgated in this proceeding would apply to complaints under 24308(f) currently pending before the Board, as well as future complaints or investigations under that section.[1]

Background. 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 Serv. Act of 1970, Public Law No. 91-518, 84 Stat. 1328 (1970). As a condition of relieving the freight railroads of their common carrier obligation to provide passenger service, Congress required that the freight railroads

[1] AAR requested a rulemaking only if the Board did not grant Canadian National Railway's (CN's) petition for reconsideration in Docket No. NOR 42134 and the motions to dismiss in Docket No. NOR 42141—the two complaint cases under 24308(f) now pending before the Board. While the Board has not ruled on those pleadings, the Board decided to institute a rulemaking proceeding and invite public participation because AAR's petition raised a number of important issues.

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 freight railroads to give Amtrak trains preference over freight trains when using the lines and facilities of freight railroads: "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 No. 93-146, 10(2), 87 Stat. 552 (initial version).

In 2008, Congress enacted PRIIA to address, among other things, issues related to the performance of passenger rail service, including the concern that one cause of Amtrak's inability to achieve reliable on-time performance was the failure of host freight railroads to honor Amtrak's right to preference. See Passenger Rail Inv. & Improvement Act, Public Law No. 110-432, Div. B, 122 Stat. 4907 (2008); S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007). Section 207 of PRIIA 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.

Under Section 213(a) of PRIIA, if the on-time performance of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the Board may initiate an investigation, or Amtrak and other eligible complainants may file a complaint with the Board requesting that the Board initiate an investigation. 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 choose to "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).

On August 19, 2011, AAR filed a lawsuit in the United States District Court for the District of Columbia challenging the constitutionality of Section 207 of PRIIA. See Ass'n of Am. R.Rs. v. Dep't of Transp., 865 F. Supp. 2d 22 (D.D.C. 2012). On January 19, 2012, prior to the issuance of a decision in that case, Amtrak filed a complaint with the Board pursuant to Section 213 of PRIIA in Docket No. NOR 42134, requesting that the Board initiate an investigation into alleged "substandard performance of Amtrak passenger trains" on certain rail lines owned by CN.[2] Amtrak's complaint was subsequently held in abeyance for the purposes of mediation; the mediation period expired on October 4, 2012. Later, the Board granted the parties' request that the case again be held in abeyance to permit them to continue discussions and potentially reach a settlement. This abeyance was extended several times; most recently, on August 19, 2013, the Board extended the abeyance period to July 31, 2014, which the parties argued was warranted by their ongoing discussions and to provide additional time that may be

[2] Amtrak Complaint, NOR 42134, at 2 (Jan. 19, 2012).

necessary for final resolution of the lawsuit challenging the constitutionality of Section 207(a) of PRIIA. Ultimately, however, the mediation and discussions were unsuccessful.

Meanwhile, on May 31, 2012, the District Court upheld the constitutionality of Section 207. Ass'n of Am. R.Rs. v. Dep't of Transp., 865 F. Supp. 2d at 25. AAR then appealed to the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit). The D.C. Circuit reversed the District Court, holding that Section 207 of PRIIA impermissibly delegates regulatory authority to a "private entity" (Amtrak) and, therefore, is an unconstitutional delegation of legislative power. Ass'n of Am. R.Rs. v . Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013). The D.C. Circuit's decision was then appealed to the United States Supreme Court, which agreed to review the case.

While review was pending before the Supreme Court, on August 29, 2014, Amtrak filed a motion to amend its complaint against CN in Docket No. 42134 (the "Illini/Saluki" case). Specifically, Amtrak sought to narrow the focus of the complaint to the performance of Amtrak's Illini/Saluki service rather than all of the Amtrak services on lines owned by CN addressed in the original complaint. In addition, on November 17, 2014, Amtrak filed a new complaint under Section 213 of PRIIA in Docket No. NOR 42141, alleging "substandard performance of Amtrak's Capitol Limited service between Chicago, IL and Washington, D.C." on rail lines owned by CSX Transportation, Inc. and Norfolk Southern Railway Company (the "Capitol Limited" case).[3]

On December 19, 2014, while the Supreme Court case was still pending, the Board issued a decision in the Illini/Saluki case (December 2014 Decision) (1) granting Amtrak's motion to amend its complaint against CN, and (2) concluding that the pending

[3] Amtrak Complaint, NOR 42141, at 2 (Nov. 17, 2014).

court litigation involving the constitutionality of Section 207 did not preclude Amtrak's complaint before the Board from moving forward. The Board also directed the parties to provide arguments and replies addressing how to construe the term "on-time performance" as the term is used in Section 213. In dissent, Commissioner Begeman stated that 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.

CN filed a petition for reconsideration in the Illini/Saluki case on January 7, 2015. AAR also submitted a conditional petition for rulemaking in this docket on January 15, 2015. In response, the Board, on January 16, 2015, served a decision postponing the filing deadlines in the Illini/Saluki case established by the December 2014 Decision, pending further order of the Board. In the Capitol Limited case, the Board served a decision on April 7, 2015, directing the parties to engage in mediation. The mediation period concluded on August 14, 2015, without success.

On March 9, 2015, the Supreme Court reversed the D.C. Circuit's decision, finding that Amtrak is a governmental entity for purposes of analyzing the constitutional issues surrounding the delegation of authority in Section 207. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015). However, the Court remanded the case to the D.C. Circuit for consideration of AAR's other arguments regarding the constitutionality of Section 207, which the D.C. Circuit had declined to reach. Id. at 1234. Currently, the legality of Section 207 of PRIIA remains in dispute.

As noted, on May 15, 2015, the Board instituted this rulemaking proceeding in response to a petition filed by AAR. In that decision, the Board stated that it intended to

issue a notice of proposed rulemaking and a procedural schedule in a subsequent decision. The Board found persuasive the arguments regarding the advantages of rulemaking in this situation: there are multiple on-time performance cases pending in which the Board's definition could apply; it would be efficient to obtain the full range of stakeholder perspectives in one docket, rather than piecemeal on a case-by-case basis; and defining on-time performance by rulemaking would provide clarity regarding the trigger for potential adjudications and would avoid the potential relitigation of the issue in each case, thereby conserving party and agency resources.

The Proposed Rule. The proposed rule's definition of on-time performance, which is derived from a previous definition of on-time performance used by the Interstate Commerce Commission (ICC), reads as follows:

> a train is deemed to be "on time" if it arrives at its final destination within five minutes of its scheduled arrival time per one hundred miles of operation (capped at 30 minutes).

The ICC's on-time performance regulations (former 49 CFR 1124.6) provided that an intercity passenger 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." The ICC explained that "[t]he public should be able to rely on the established train schedule so that plans can be made with a modicum of certainty and trains may once again be attractive to travelers for whom on-time

performance is imperative." Adequacy of Intercity Rail Passenger Serv., 344 I.C.C. 758, 776 (1973).[4] We believe that the ICC's prior sentiment is equally valid today.

Under Section 1040.2 of the proposed rule, *Definition of "On Time,"* a train would be considered "on time" if it arrives at its final terminus no more than five minutes after its scheduled arrival time for each 100 miles the train operated, or 30 minutes after its scheduled arrival time, whichever is less. Section 1040.3 of the proposed rule, *Table of Maximum Allowances*, sets forth the following table specifying the maximum number of minutes after a scheduled arrival time that an "on-time" train may arrive at its final terminus for each distance-variable band.

Distance Operated (Miles)		**Maximum Allowance (Minutes)**
Over	**Up to and including**	
0	100	5
100	200	10
200	300	15
300	400	20
400	500	25
500	No limit	30

[4] Subsequently, in the Amtrak Reorganization Act of 1979, Pub. L. 96-73, 96 Stat. 537, Congress repealed the ICC's adequacy-of-service jurisdiction over Amtrak while establishing an internal Amtrak organization with similar functions. This transfer of responsibilities, however, implied no Congressional judgment on the merits of the ICC's definition of on-time performance.

As set forth in the table, a train operating up to 100 miles would be "on time" if it arrives at its final terminus no more than five minutes after its scheduled arrival time. Likewise, a train operating over 100 miles but no more than 200 miles would be considered "on time" if it arrives at its final terminus no more than 10 minutes after its scheduled arrival time, and a train operating a distance over 500 miles would be considered "on time" if it arrives at its final terminus no more than 30 minutes after its scheduled arrival time.

The proposed rule also provides a framework for calculating quarterly on-time performance for purposes of filing or initiating a complaint. As proposed in Section 1040.4, *Calculation of Quarterly On-Time Performance*, on-time performance would be calculated as a percentage for each individual calendar quarter (e.g., January 1 through March 31, April 1 through June 30, and so on) by dividing the total number of "on-time" trains that calendar quarter, as determined by distance-variable thresholds in Sections 1040.2 and 1040.3, by the total number of trains that operated during that calendar quarter. Trains that did not operate from scheduled origin to scheduled destination would be excluded from this calculation.[5] If the on-time performance percentage, calculated as described above, falls below 80% in each calendar quarter for two consecutive calendar quarters, an eligible complainant could file a complaint requesting an investigation pursuant to Section 213(a) of PRIIA, or the Board could initiate an investigation on its own.

[5] Thus, excluded from the calculation would be, for example, trains that do not operate, for any reason; trains that terminate prematurely at an intermediate point rather than the scheduled final terminus; and trains that originate at an intermediate point rather than the scheduled origin.

The Board proposes to adopt the ICC's definition because relying on a comparison between Amtrak's scheduled arrival time and the time an Amtrak train actually arrives at its final destination would be clear and relatively easy to apply. In particular, adoption of this definition would simplify the record-keeping and production of evidence that may otherwise be necessary for Amtrak and the host carriers if on-time performance were defined using a number of additional factors, such as the amount of delay at intermediate stops or construction on the host carrier's line.

The Board seeks comments from all interested persons on the proposed rule. Importantly, the Board encourages interested persons to propose and discuss potential modifications or alternatives to the proposed rule. Examples of such alternatives might include, but are not limited to: factoring into the calculation of on-time performance a train's punctuality at intermediate stops, rather than the final terminus only; implementing alternative tables of maximum allowances with respect to either the distance-variables or the maximum allowance of minutes for each distance-variable band; or calculating the "on-time" thresholds under an entirely different methodology, such as approaches that Amtrak or other public agencies and host carriers have implemented. The Board will carefully consider all recommended proposals, and may take further comment, if appropriate, in an effort to establish the most meaningful and straightforward definition of on-time performance.

Procedural Schedule. On June 12, 2015, Amtrak requested that the Board limit the comment period in this proceeding to 30 days. AAR filed a request for procedural schedule on July 16, 2015, in which it requested that the Board schedule two rounds of pleadings (opening comments and replies) before issuing a proposed rule and allow 45

days for parties to submit each (essentially, an Advanced Notice of Proposed Rulemaking).

The Board will allow six weeks for parties to file opening comments in response to this notice of proposed rulemaking and three weeks for parties to file reply comments. Given the significance of the issue at hand, the Board finds that the 30-day comment period requested by Amtrak would provide insufficient time for parties to provide comments on the proposed rule. A procedural schedule allowing reply comments is appropriate because the Board here invites comments on not only the proposed rule, but potential modifications or alternatives (on which the Board may take further comment if appropriate). This approach is intended to balance the need to provide sufficient opportunity for public comments, as urged in part by AAR, with the need to complete this proceeding as expeditiously as possible.

Regulatory Flexibility Act. 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. 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities." 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The proposed regulation would not create a significant impact on a substantial number of small entities. As noted above, 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 proposed rule seeks only to define "on-time performance" for the purpose of implementing the rights and obligations already established in Section 213 of PRIIA. Thus, the proposed rule does not place any additional burden on small entities, but rather clarifies an existing obligation.

Even assuming for the sake of argument that the proposed regulation were to create an impact on small entities, which it does not, the number of small entities so affected would not be substantial. The proposed definition of on-time performance would apply 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,[6] and Class I carriers generally do not fall within the Small Business Administration's definition of a small business for the rail transportation industry.[7] Of a total of approximately 560 smaller carriers that do fall within the SBA's definition of a small entity, only approximately 10 currently host

[6] Under the Board's regulations, Class I carriers have annual carrier operating revenues of $250 million or more in 1991 dollars (adjusted for inflation using 2014 data, the revenue threshold for a Class I rail carrier is $475,754,803).

[7] The Small Business Administration's Office of Size Standards has established a size standard for rail transportation, pursuant to which a line-haul railroad is considered small if its number of employees is 1,500 or less, and a short line railroad is considered small if its number of employees is 500 or less. 13 CFR 121.201 (industry subsector 482).

Amtrak traffic.[8] Therefore, the Board certifies under 5 U.S.C. 605(b) that this proposed 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, D.C. 20416.

This proposal would not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1040

On-time performance of intercity passenger rail service.

It is ordered:

1. Comments are due by February 8, 2016. Reply comments are due by February 29, 2016.

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

3. Notice of this decision will be published in the Federal Register.

4. This decision is effective on its service date.

Decided: December 16, 2015.

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

[8] 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 website.

Brendetta S. Jones

Clearance Clerk

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend 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. 721 and 24308(f).

§ 1040.1 Purpose.

This section defines "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."

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. This definition shall be implemented in accordance with the table provided in § 1040.3.

§ 1040.3 Table of maximum allowances.

The following table sets forth the maximum number of minutes after the scheduled arrival time that a train may arrive at its final terminus and be considered on time for the purpose of implementing 49 U.S.C. 24308(f).

Distance Operated (Miles)		**Maximum Allowance (Minutes)**
Over	**Up to and including**	
0	100	5
100	200	10
200	300	15
300	400	20
400	500	25
500	No limit	30

§ 1040.4 Calculation of quarterly on-time performance.

In any given calendar quarter, on-time performance shall be calculated as a percentage using the following formula:

(a) The denominator shall be the number of trains that operated during that calendar quarter, excluding any train not operating from its scheduled origin to its scheduled destination; and

(b) The numerator shall be the number of trains included in the denominator that also satisfy the definition of "on-time performance," as set forth in §§ 1040.2 and 1040.3.

[FR Doc. 2015-32411 Filed: 12/24/2015 8:45 am; Publication Date: 12/28/2015]