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February 22, 2016

VIA ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

Re: In Re: Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f) (Docket No. EP 728)

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are the comments of the Association of American Railroads.

Thank you for your assistance in this matter.

Sincerely,

/s/ Thomas H. Dupree, Jr.
Thomas H. Dupree, Jr.

Enclosure

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 728

Implementing Intercity Passenger Train On-Time Performance and
Preference Provisions of 49 U.S.C. § 24308(c) and (f)

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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February 22, 2016

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INTRODUCTION

The Association of American Railroads (AAR) respectfully submits these comments in response to the Surface Transportation Board’s Notice of Proposed Statement of Board Policy in Docket No. EP 728, *Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)* (Dec. 28, 2015). AAR’s freight railroad members, who host Amtrak trains, have a strong interest in the proposed policy statement.¹

The Board’s general approach is sound. As the Board correctly recognizes, the preference requirement is not “absolute,” and “a host rail carrier need not resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train.” Policy Statement at 3.

As explained below in Part I, a Section 24308(f) proceeding must examine *all* possible root causes of an Amtrak train’s inadequate on-time performance—not just the possibility of a preference violation. The Board has it exactly right in recognizing that “the statute calls for comprehensive consideration of the factors affecting performance in a § 24308(f) proceeding.” Policy Statement at 7. In some cases, unsatisfactory on-time performance may be attributable to “Amtrak’s own behavior,” which is all the more reason for the Board to undertake “a

¹ Amtrak is also a member of AAR, but these comments are filed on behalf of AAR’s freight members only and are not joined by Amtrak.

comprehensive and impartial on-time performance investigation, in which the Board considers Amtrak's role in delays as well as the host carrier's role." *Id.* at 5, 6.

As discussed in Part II, the Board's interpretation of the preference requirement as not "absolute" is faithful to the text of Section 24308. Giving Amtrak an absolute preference would violate the congressional caution that the Board not enforce the preference requirement in a way that would "materially lessen the quality of freight transportation provided to shippers." 49 U.S.C. § 24308(c). It would also violate the Board's general mandate to ensure an efficient nationwide rail system for freight and passenger traffic alike. *See* 49 U.S.C. § 10101. And it would violate common sense. Giving absolute preference to Amtrak trains would be a prescription for gridlock on certain routes.

In Part III, AAR identifies three ways in which the Board should clarify its proposed approach.

- First, as the Board recognizes, any proceeding under Section 24308(f) should take into account the operating agreement between Amtrak and the host railroad. If the parties have agreed on standards of acceptable performance, the Board should impose no penalties for a supposed preference violation in cases where those performance standards are being

achieved. A contrary approach would risk punishing the host railroad for a level of performance that Amtrak itself has deemed satisfactory.

- Second, any root-cause investigation must examine the reasonableness of the Amtrak schedule at issue rather than accept it at face value. Many Amtrak schedules are unrealistic and do not account for current conditions on the network. There can be no basis for penalizing the host railroad when the true cause of the poor on-time performance is an outdated schedule. In any case in which the schedule contributes to poor on-time performance, the Board's recommended remedy should include a schedule adjustment.
- Third, the Board should clarify that attempting to compare the relative on-time performance of passenger and freight trains may be of limited relevance because it is not an apples-to-apples comparison. Unlike Amtrak trains, whose schedules have remained relatively fixed over time, freight carriers are constantly evaluating the performance that they can provide to their customers and adjusting their schedules accordingly. Moreover, most freight trains do not have daily, specified departure and end point arrival times, whereas all Amtrak trains do. Without similar baselines, comparisons of on-time performance provide no insight into relative performance.

BACKGROUND

Section 24308(c) provides that “[e]xcept 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). Congress qualified the preference requirement by specifically providing that the Board should not enforce preference in a way that “materially will lessen the quality of freight transportation provided to shippers.” *Id.*

The preference requirement was not enacted as part of the legislation that created Amtrak—the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327, in which the freight railroads were relieved of their common carrier obligation to provide passenger service. Rather, the preference requirement was passed three years later, as part of the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 552.

In 2008, Congress enacted the Passenger Rail Investment and Improvement Act (PRIIA), Pub. L. No. 110-432, 122 Stat. 4907. Congress delegated authority to Amtrak and the Federal Railroad Administration (FRA) to jointly draft and promulgate metrics and standards “for measuring the performance and service quality of intercity passenger train operations, including . . . on-time performance and minutes of delay” *See* PRIIA § 207(a) (codified at 49 U.S.C. § 24101 note). Congress gave the Board the authority to conduct investigations in

situations 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 purpose of such an investigation is “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.” 49 U.S.C. § 24308(f)(1). Congress directed the Board to “obtain information from all parties involved” when conducting an investigation, and specifically granted the Board authority “to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays.” *Id.*

Congress authorized the Board to do two things at the end of its investigation. First, in every case, the Board is to “identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.” 49 U.S.C. § 24308(f)(1). Second, and only in the event the Board determines that Amtrak’s deficient performance is “attributable to” the host railroad’s failure to provide preference, the Board may award “reasonable and appropriate” relief. 49 U.S.C. § 24308(f)(2).

On December 28, 2015, the Board instituted this proceeding by issuing a proposed policy statement “to provide guidance to the public regarding complaint proceedings under 49 U.S.C. § 24308(f) and related issues under 49 U.S.C. § 24308(c).” Policy Statement at 1.

DISCUSSION

AAR appreciates the opportunity to comment on the Board’s proposed approach to complaint proceedings under Section 24308(f).²

I. A Section 24308(f) Proceeding Must Examine All Possible Causes Of Unsatisfactory On-Time Performance.

A Section 24308(f) complaint proceeding is not limited to the narrow question of preference. As the Board correctly recognizes, Section 24308(f)(1) calls for a “comprehensive and impartial on-time performance investigation, in which the Board considers Amtrak’s role in delays as well as the host carrier’s role.” Policy Statement at 6. The Board’s primary job in the proceeding is “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

² In submitting these comments, AAR respectfully maintains its position that the Board does not have the authority to entertain complaint proceedings under Section 24308(f) in the absence of valid metrics and standards issued under PRIIA § 207. If the D.C. Circuit invalidates the metrics and standards, there would be no basis for triggering an investigation and commencing a complaint proceeding. As AAR and its members have explained elsewhere in greater depth, *see* AAR Comment in EP No. 726, at 5-6, the Board lacks the statutory authority to issue its own definition of On-Time Performance for purposes of triggering a Section 24308(f) investigation.

over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.” 49 U.S.C. § 24308(f)(1). In making that determination, the Board “shall obtain information from all parties involved,” and may “review the accuracy of the train performance data and the extent to which scheduling and congestion may contribute to delays.” *Id.* As a result of its analysis, “the Board shall . . . identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.” *Id.*

To be sure, a failure to give preference may be one possible cause of unsatisfactory on-time performance. But it is far from the only possible cause. Poor on-time performance may also be attributable to schedules that are unrealistic (given, for example, existing infrastructure and congestion), Amtrak performance failures, host performance failures unrelated to preference, third-party failures (such as obstructions of the line or poor operation of interlockings), uncontrollable events (such as blizzards or flooding), or a variety of other factors. This point is illustrated by Amtrak’s own performance on the Amtrak-controlled Northeast Corridor, which varies significantly over time despite the inapplicability of preference issues. See Federal Railroad Administration, *Rail Service Metrics and Performance Reports*, <http://www.fra.dot.gov/Page/P0532>.

The Board correctly recognizes that “the statute calls for comprehensive consideration of the factors affecting performance in a § 24308(f) proceeding.” Policy Statement at 7. A narrow focus on the preference requirement would be inconsistent with the statutory language, and would increase the risk that the Board does not identify the true root cause of the on-time performance problem. Only by examining *all* possible causes of poor on-time performance can the Board ensure that its recommendations are likely “to improve the service, quality, and on-time performance of the train.” 49 U.S.C. § 24308(f)(1).

II. The Preference Requirement Is Not Absolute.

The Board has it exactly right when it says the preference requirement is not “absolute,” that “a requirement of absolute preference might not, in the long run, promote efficient passenger service,” and that “a host rail carrier need not resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train.” Policy Statement at 3. This reading is strongly supported by the text of Section 24308(c) itself, which provides “[i]f the Board . . . decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.” 49 U.S.C. § 24308(c). If Congress wanted all decisions to be resolved in Amtrak’s

favor, the resulting impact on the quality of freight transportation would be irrelevant.

The Board's interpretation is bolstered by 49 U.S.C. § 10101. That statute defines the rail policy of the United States to include minimizing regulation, promoting efficient freight service, and ensuring the development and continuation of a fluid rail transportation system. According absolute preference to Amtrak would frustrate these goals. As the Board correctly observed, "a requirement of absolute preference" would not even promote efficient *passenger* service in the long run. Policy Statement at 4. That is because "[a]n individual dispatching decision involving two trains may have efficiency consequences for the network." *Id.* Thus, "a dispatching decision that may appear, in isolation, to favor freight over passenger efficiency may ultimately promote efficiency and on-time service for passenger trains on the network generally (including, for the long run, trains on the particular route at issue)." *Id.* In short, granting Amtrak traffic absolute preference over freight traffic would ultimately undermine the performance of both.

Amtrak itself has rejected an absolutist approach. In 1973, in congressional testimony concerning the preference requirement (enacted that year), the President of Amtrak stated that absolute preference "just is not a real-world approach." *Financial Assistance to Amtrak: Hearings Before the Subcomm. on Transp. and*

Aeronautics of the H. Comm. on Interstate and Foreign Commerce, 93d Cong. 32 (1973) (testimony of Amtrak president Roger Lewis). In fact, Amtrak's President discussed situations in which it would make sense to put the Amtrak train on the siding to allow the freight train to proceed. He testified:

Well, this question of freight train interference is complicated. There are cases in railroad operations, a number of them, where freight train interference might be justified. For example, maybe in an operation in an area where you had a siding that would take five cars, which would be enough to accommodate that particular passenger train, but would not accommodate a 100-car freight train, it would be sensible to put the passenger train aside and get the freight train out of the way, not only for that segment, but for all of the operations that that train might later interfere with. The difficulty on freight train interference, from our point of view, is that somebody must dispatch the trains that go on that track, both freight or passenger. These decisions are made in the field on a local basis. I feel, and I have felt, that to try to legislate that and say, "You will always give preference to the passenger train, or never let a freight train interfere," just is not a real-world approach.

Id. The Amtrak President's testimony underscores that implicit in the concept of "preference" is the notion that it is not absolute. Preference does not mean that Amtrak trains never yield to freight traffic. Rather, preference merely means a *weighting* in favor of Amtrak.

Accordingly, the Board is correct to take a “systemic, global approach” to preference. Policy Statement at 3. Absent a demonstrable pattern of a host carrier failing to accord preference to Amtrak trains, there is no basis for finding host liability. The Board properly notes that on-time performance problems can result from many root causes unrelated to preference. For example, weather and other uncontrollable events can affect all traffic on the network. *See id.* at 6. Similarly, maintenance and repair work necessary for either passenger or freight service to continue using a line can affect Amtrak’s on-time performance even if its trains are receiving preference. And in many cases a delay may be attributable to Amtrak itself. *Id.* (noting that under Section 24308(f), the Board must “consider[] Amtrak’s role in delays”).

The Board correctly identifies timeliness of arrival to the host segment as a critical issue. *See* Policy Statement at 5-6 (noting the possibility that “Amtrak’s own behavior—for example, failing to hand off trains originating on Amtrak-owned right of way to another host carrier on time—[could] contribute[] to deficient performance”). If an Amtrak train arrives behind schedule, outside the anticipated window, it simply may not be feasible for the host to avoid further delays to the late-arriving Amtrak train.

The Board is also right to note the need for caution in relying on Amtrak’s Conductor Delay Reports as evidence of the cause of a delay. *See* Policy

Statement at 4 n.3 (explaining that “host railroads and some state agencies have questioned the reliability of CDRs because conductors are recording what they believe is a cause of delay based on the information available to them at the time and may be unaware of the delay’s primary cause, which could have occurred miles away and cascaded across the host carrier’s system”). CDRs are not based on the root cause of delays. Amtrak conductors are instructed by Amtrak to record what they observe, and Amtrak makes no effort to correct CDRs to record the true cause of a delay. And in some cases, there is no assurance of data integrity—that the data reported by the conductor has been preserved as it existed at the time it was captured.

III. The Board Should Make Three Clarifications To Its Proposed Policy Statement.

While the Board’s general approach is sound, AAR respectfully submits that the Board should nonetheless clarify three aspects of its proposed policy statement.

First, any proceeding under Section 24308(f) must take into account the operating agreement between Amtrak and the host railroad. Just as any terms of an operating agreement defining on-time performance should be highly relevant in determining whether to begin an investigation, *see* AAR Comment in EP No. 726 at 10-11, terms addressing the host’s on-time performance should remain highly relevant at the root-cause or merits stage in determining whether the host carrier has failed to provide preference to Amtrak trains. Operating agreements provide a

measure of the host's performance, *see* 49 U.S.C. § 24308(a)(1). The Board should not allow Amtrak to demand levels of performance that conflict with what it had agreed by contract was acceptable.

The Policy Statement recognizes the relevance of operating agreements to a preference analysis. It states that “the parties should provide operating agreements and any other agreements between Amtrak, its host carriers, and other entities (under seal if necessary), that bear on on-time performance, dispatching priorities, train delays, and related incentives, disincentives, and measurement protocols; and evidence on how these agreements pertain to the meaning of preference as applied to the case.” Policy Statement at 5.

The Board should be clear on the significance of the operating agreement: If it incorporates standards of performance applicable to the Amtrak train at issue, and the host was meeting those standards, that should create a strong presumption that the host was according preference to Amtrak. This approach would fulfill the parties' expectations when they signed their operating agreements and negotiated measures for determining when Amtrak trains are on time. If the host railroad is achieving the performance levels Amtrak agreed to pay for and accept as not subject to penalty, Amtrak should not be permitted to turn around and claim that those performance levels violate its rights and should result in damages. Indeed, under those circumstances, Amtrak should not be awarded *any* relief. Similarly, if

an operating agreement provides that a particular freight train may operate in a way that delays an Amtrak train, or that a particular delay to an Amtrak train is not attributable to the host railroad, those operations should not be treated as evidence of a preference violation.

Second, the reasonableness of Amtrak's schedule for the train in question must be an important element of any root-cause investigation. This approach would be consistent with Section 24308(f)(1), which authorizes the Board to investigate "the extent to which scheduling and congestion contribute to delays," as well as with the Board's recognizing the importance of "analysis of the timetables of the service in question, showing all major components of scheduled running time." Policy Statement at 6. Because many of Amtrak's published schedules are unrealistic and may not have been updated to reflect conditions on the modern rail network, the Board should not accept Amtrak's schedules at face value. Instead, the Board should examine the Amtrak schedule at issue without any presumption that the schedule is reasonably achievable. The Board should ask whether the schedule is realistic, and consistently achievable as a practical matter, in light of (among other things) the distance of the route and the speed at which Amtrak trains are capable of traveling on that route, the quantity and nature of both freight and commuter traffic on that route (including fluctuations in traffic),

ongoing maintenance or capital improvement projects, and the complexities inherent in operating different kinds of rail service over the same track.

Moreover, the Board must consider the possibility of adjusting the schedule as a recommended remedy under 49 U.S.C. § 24308(f)(1), which requires the Board to “identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.” An unrealistic or outdated schedule is plainly a “cause” of substandard performance that could be “reasonably addressed” by the parties. *Id.*

Third, the Board should clarify the limited relevance of “data showing that the on-time performance for passenger service was consistently higher or lower than that of the highest class of freight service operated by the host carrier over the same route.” Policy Statement at 5. Comparing passenger and freight schedules is not an apples-to-apples comparison. Among other things, freight traffic runs at different times and under different operating conditions than passenger trains. Freight carriers constantly re-evaluate their performance in providing reliable freight service to customers. The number of trains on a particular freight train symbol, their consists, and the times at which they operate can and do vary from day to day based on market demand and other factors. Amtrak, in contrast, operates the same number of trains with the same consist on the same day and at the same time on a particular route. For these and other reasons, attempting to

compare the on-time performance of passenger and freight traffic would not provide meaningful insight into whether Amtrak trains were given preference.

CONCLUSION

The Board should adhere to its views that a Section 24308(f) proceeding must examine all possible root causes for unsatisfactory on-time performance, and that the preference requirement is not absolute. In addition, the Board should clarify its proposed policy statement in the three ways discussed above.

Respectfully submitted,

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