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

Dear Ms. Brown,

Enclosed for filing in the above-referenced docket are CSX Transportation's comments to the Board's Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f). Thank you for your assistance with this matter.

Sincerely,



Michael K. Murphy

Counsel for CSX Transportation, Inc.

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP-728

**POLICY STATEMENT ON IMPLEMENTING INTERCITY PASSENGER TRAIN
ON-TIME PERFORMANCE AND PREFERENCE PROVISIONS
OF 49 U.S.C. § 24308(c) AND (f)**

COMMENTS OF CSX TRANSPORTATION, INC.

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Dated: February 22, 2016

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CSX Transportation, Inc. (“CSXT”) welcomes the opportunity to submit these comments in response to the Surface Transportation Board’s proposed *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, STB Docket No. EP-728.¹

CSXT agrees in large part with the Board’s statements and analysis regarding the nature of preference pursuant to 49 U.S.C. § 24308(c). First, preference should not be viewed as absolute priority, and should instead balance the interests of Amtrak passengers, commuter rail passengers, shippers, and host railroads. Second, Section 213 investigations should be circumscribed to the trains that are the subject of the corresponding complaint. Although some network-wide information will be relevant to Section 213 investigations, an entire host railroad’s network and operations should not be subjected to scrutiny when one Amtrak train meets the Section 213 investigation trigger during two calendar quarters. Finally, Congress did not intend for Section 213 investigations merely to analyze alleged preference violations; rather, such an investigation should function as a mechanism to uncover the root causes of delays, including whether delays are attributable to Amtrak’s unrealistic schedules and operational difficulties.²

¹ For the reasons expounded in Canadian National’s petition for reconsideration of the Board’s December 19, 2014 decision in the Illini/Saluki matter (Docket No. NOR 42134) and the motions to dismiss filed by CSXT and Norfolk Southern in the Capitol Limited matter (Docket No. NOR 42141), the Board should reconsider its conclusion that it has the power to create its own On-Time Performance standard and can then use the new, Board-created standard as a triggering mechanism to launch a Section 213 investigation. Because the trigger for a Section 213 investigation is a violation of the On-Time Performance standard or the “service quality” standards issued through the Section 207 rulemaking process, and because the constitutional status of those Metrics and Standards is in serious doubt, the Board cannot launch a Section 213 investigation.

² The Board’s Policy Statement also will be helpful to both host railroads and Amtrak, as it provides a reasonable foundation for discussions and negotiations concerning schedule development and operations.

A. Preference Is Not Absolute And Must Be Viewed Using A Systemic, Global Approach.

Preference should not be equated with absolute priority, meaning 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. An absolutist interpretation of preference would be an absurd standard—and one that could undermine shippers by creating systemic gridlock and effectively bringing freight rail operations to a halt throughout the United States. Today’s complex rail environment, which has changed dramatically since the early days of Amtrak, could not function if every dispatch decision was resolved blindly in favor of an Amtrak train. *See* Policy Statement at 4 (“Due to increased traffic density, the rail operating environment has become more complex since Congress first established a preference requirement in 1973. This environment requires complex decision-making by the host carriers’ dispatchers.”). Rather, preference contemplates a co-existence between freight rail, Amtrak, and commuter passenger rail that provides Amtrak with its statutory rights while at the same time ensuring that the entire rail network moves safely and fluidly. It must be applied in the context of particular trains and particular routes, taking into account not just the needs of Amtrak and its passengers, but also the millions of commuter rail passengers and the millions of consumers and businesses who depend on an effective freight rail network.

As demonstrated in its Policy Statement, the Board must be mindful that “rail transportation policy . . . directs the Board to regulate so as to promote efficiency in freight service.” Policy Statement at 3, citing 49 U.S.C. § 10101. Not only would an “absolute” priority view of preference “materially lessen the quality of freight transportation provided to shippers,” as Congress specifically prohibited, 49 U.S.C. § 24308(c), but it would also materially lessen the quality of *passenger* transportation. Resolving each and every individual dispatching decision

between freight and Amtrak's movements in favor of the Amtrak train regardless of whether that resolution preserves fluidity of the network would eventually lead to deleterious effects to passenger trains. See Policy Statement at 4 (“[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”). The Board has acknowledged—rightly—that Amtrak's preference is not equivalent to an absolute priority or “right of way” over other trains.

B. The Scope Of An Investigation Should Be Limited To The Train Subject To The Complaint.

Preference must not be analyzed on a dispatch decision-by-decision basis. But the Board's investigation also should not be so extensive as to require scrutiny of every Amtrak route hosted by a railroad simply because the 80 percent On-Time Performance standard is triggered for one train over two calendar quarters. And under no circumstances should the Board award damages or other relief for delays “attributable to a rail carrier's failure to provide preference” to Amtrak trains that are not the subjects of the investigation.

Congress stated that Section 213 investigations are performed if “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) (emphasis added). Indeed, the statute is specific that the subject of the Board's investigation is circumscribed to the train at issue in the complaint: “the Board shall initiate such 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.” *Id.* (emphasis added); see also *id.* § 24308(f)(3) (stating that the Board shall consider “what reasonable measures would adequately

deter future actions which may reasonably be expected to be likely to result in delays to Amtrak *on the route involved*” in an investigation when “awarding damages and prescribing other relief” (emphasis added)); *id.* § 24308(f)(4) (Amtrak shall use damages “on the routes over which delays or failures to achieve minimum standards were the result of a rail carrier’s failure to provide preference”).

Although the investigation should be narrowly focused on the trains that are identified in the complaint, some broader network-wide information will be relevant to investigations of individual trains. For example, the Board’s call for evidence of host carriers’ internal policies that pertain to preference, as well as for evidence of how such policies have impacted performance and delays, is relevant to an investigation of a single train. Similarly, some Amtrak policies and performance data also will be relevant to determine the root cause of delays to the subject train and to analyze damages, if any. Yet, to the extent that an investigation seeks to determine how these broader policies and information are applied to determine “whether and to what extent delays . . . are due to causes that could reasonably be addressed by a rail carrier . . . or reasonably addressed by Amtrak,” the inquiry should be focused to the extent possible on the Amtrak train under investigation. This approach will reduce the burden on all parties subject to an investigation and help to conserve scarce Board resources.

C. Comments On The Board’s Proposals Regarding Evidence For Section 213 Investigations

1. Realistic, Fact-Based Schedules Are The Touchstone Of Both The On-Time Performance *And* Preference Inquiries.

The Board also correctly recognizes that an investigation should “include analysis of the timetables of the service in question, showing all major components of scheduled running time.” Policy Statement at 6. Indeed, it is critical that the Board conduct a comprehensive analysis of

the root cause of such delays. *See* Policy Statement at 6 (“In determining whether delays are ‘attributable to’ the host freight carrier, [the Board] will need to take into account the reality that delays may be caused by host carriers, but also by the intercity passenger rail operator or other factors such as weather.”). Whether Amtrak’s schedules are reasonably achievable and fact-based are integral aspects of this root-cause analysis.

CSXT has worked closely with Amtrak for decades. Through this process, it has become evident to CSXT that Amtrak interprets preference as an absolute priority. Amtrak’s inaccurate interpretation formed the basis for its recent complaints seeking Section 213 investigations. *See, e.g., Petition For Relief By Amtrak Requiring The Initiation Of An Investigation Of Substandard Performance Under Section 213 Of The Passenger Rail Investment And Improvement Act Of 2008* at 8, Docket No. NOR 42134 (Jan. 19, 2012) (“Federal law requires that host railroads give Amtrak trains the right of way *whenever* freight and Amtrak trains have competing rail needs.”).

Amtrak’s fundamental misunderstanding of preference has led directly to its adoption of unrealistic, unachievable schedules—designed for a network in which Amtrak trains are afforded an absolute right of way (akin to emergency vehicles and presidential motorcades) and in which fluidity concerns and the threat of gridlock are ignored. The Board should consider the reasonableness of Amtrak’s schedules at the trigger stage of a Section 213 investigation. *See* Comments of CSX Transportation at 4-7, Docket No. EP-726 (Feb. 8, 2016). This is not to say, however, that whether an Amtrak’s train schedule is reasonable plays no part once the Section 213 investigation has been triggered. To the contrary, the Board must consider “whether and to what extent delays or failure to achieve minimum standards” are due to Amtrak’s unrealistic schedules as a part of a Section 213 investigation.

2. The Board Must Review The Accuracy Of Train Performance Data.

PRIIA directs that “the Board has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays.” 49 U.S.C. § 24308(f)(1). Although the Board urges parties to submit information on this issue in a case-by-case fashion, the problems with Amtrak’s delay data are significant and generally applicable across all Amtrak routes and host railroads. The Board is correct that host railroads and state agencies “have questioned the reliability of [Amtrak’s Conductor Delay Reports] 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.” Policy Statement at 4 n.3. Amtrak conductors are now using handheld electronic devices to record delays *en route*. CSXT is hopeful that this new protocol will improve the accuracy of the reported minutes of delay.³ Nonetheless, improved recording technology will not allow a conductor to determine the *root cause* of a delay. It only permits the conductor to more conveniently *record* the immediate, perceived cause of the delay from the conductor’s vantage point.

Moreover, there is no mechanism for Amtrak to validate delay data entered by its conductors or to hold conductors accountable for inaccuracies. And there is no mechanism for a “true up” of conductor delay reports so that errors are corrected before Amtrak transmits delay information. These deficiencies plague Amtrak’s delay data nationwide, and particularly on long-distance routes whether the actual root cause of a delay may be hundreds of miles from the location of an Amtrak conductor. Thus, the Board must review the accuracy of train performance data with a critical eye as a part of any investigation.

³ Accuracy of this data, however, is completely dependent on the conductor.

3. Data Comparing Passenger And Freight On-Time Performance Is Of Little Probative Value.

As the Board stated in its Policy Statement, a Section 213 investigation may include submission of evidence “indicating how policies have impacted train delays,” and that such evidence “may ultimately consist largely of statistical analyses of available data.” Policy Statement at 5. But the Board should reconsider whether “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) would have probative value to the Board and the parties in an investigation.

On-time performance is a comparison between a train’s performance and a baseline—its schedule. CSXT’s operating plans are designed with reasonable and realistic schedules. Most of Amtrak’s schedules are not. Comparing performance data of trains with and without realistic schedules would not provide the Board with probative information. Moreover, “on-time” has different connotations in the freight and passenger worlds, and comparing statistics between the two would be unhelpful. In addition, few if any freight trains operate between the same origins and destinations as Amtrak trains. These incongruities between the scheduling and operations of Amtrak and freight trains render a comparison of their on-time performance exceedingly misleading.

Thus, as a part of a Section 213 investigation, the Board should not focus on data comparing Amtrak’s on-time performance across a route with the performance of “the highest class of freight service” operated on that route.

4. A Comprehensive Analysis Of Amtrak’s Operations Is Critical.

Because preference is just one part of determining the root causes of delays, a Section 213 investigation should not focus solely on preference or on the policies and practices of host

railroads. The Board must investigate whether such delays are “due to causes” that could be “reasonably addressed by Amtrak.” 49 U.S.C. § 24308(f)(1). The Board again correctly notes 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—contributes to deficient performance.” Policy Statement at 5-6. For this reason, a comprehensive analysis of Amtrak’s operations of trains subject to an investigation is critical. To carry out this aspect of an investigation, the Board and host railroads must be allowed to conduct discovery and obtain information from Amtrak on its policies and operations.

5. Relative Speed Is Highly Probative Of Host Railroad’s Efforts To Provide Preference.

The Board should look to the *relative* speed of freight and passenger traffic on the route (or portions of it) subject to investigation because this measure is highly relevant to the preference inquiry. That Amtrak trains travel at a markedly higher speed than freight trains on average on CSXT’s tracks indicates that Amtrak trains receive preference over freight trains and operate without significant interference from slower freight trains. The Board’s Policy Statement therefore should identify relative average speed as probative to the preference inquiry.

6. Late-Received Trains Pose Serious Problems To Host Carriers And Should Not Result In Preference Violations And Damages.

Finally, the Board also correctly states that an investigation must “analyze how late handoffs of passenger trains affect the efficiency and reliability of scheduled freight services.” Policy Statement at 7. As an initial matter, trains received by a host railroad more than 30 minutes late should be excluded from On-Time Performance calculations. *See* Comments of CSX Transportation at 15-16, Docket No. EP-726 (Feb. 8, 2016). Similarly, late-received trains should not form the basis of a preference violation and damages. CSXT builds its schedules around Amtrak’s schedules and other passenger rail services’ schedules. CSXT plans many of

its freight train departures around passenger train schedules in order to prevent delays to Amtrak trains. When an Amtrak train reaches CSXT's segment of a route well after its planned time, dispatchers are forced to improvise. This means weaving the Amtrak train around freight traffic that it was not intended to confront if it had arrived on time. Because of this, late-arriving trains that miss their planned slots cause deleterious ripple effects through the network.

* * *

CSXT commends the Board for its thoughtful Policy Statement regarding Section 213 investigations and looks forward to providing additional comments and assistance to the Board.

Respectfully submitted,



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