

Ex Parte 728

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Re: Policy statement on preference

The law is quite explicit on the point of “preference” for passenger trains operating over freight railroads. 49 USC 24308 (c) Preference Over Freight Transportation:

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. A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under [section 553 of title 5](#), 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.”

The two narrow exceptions noted above do not apply here, and the Board’s “policy statement” creates a situation in which the Board is attempting to amend a statute in the face of clear Congressional intent to improve passenger train service. To wit:

- Rail Passenger Service Act (1970)
- Amtrak Improvement Act of 1973
- Amtrak Improvement Act of 1974
- Amtrak Improvement Act of 1975
- Amtrak Improvement Act of 1976
- Amtrak Improvement Act of 1978
- Amtrak Reorganization Act of 1979
- Amtrak Improvement Act of 1981
- Amtrak Reauthorization Act of 1985
- Amtrak Reauthorization and Improvement Act of 1990
- Amtrak Accountability Act of 1997
- Passenger Rail Investment and Improvement Act of 2008

From the very creation of Amtrak to the present day, Congress has made it clear that it demands that passenger trains have priority over freight. It is difficult to understand why the Board cannot follow the plain language of the statute which mandates “preference” of passenger trains over freight. “Preference” is mandatory, but the Board’s proposal attempts to place the burden of proving non-compliance on the passenger carrier in contradiction of statute. The freight railroads agreed to this preference provision in order to abandon their own money-losing passenger train services. As anyone who has ridden an Amtrak train with a private railroad business car attached can attest, that train will run precisely on time. The host carriers can operate on time whenever it is in their interest to operate a train on time.

The right to preference is absolute (with the two narrow exceptions cited above) and 49 USC 24308 f (1) only requires that on-time performance should not fall below 80% for two consecutive quarters. This provision allows considerable leeway for those instances in which it is practical to give freight trains priority over passenger trains.

The Board should consider passengers or at least their representative associations as “interested parties”, to the same extent that shippers are considered as interested parties. Both are paying money for transportation by rail, and it seems reasonable that a train full of paying passengers should have the same interest and weight as a container hauling auto parts.

The proposed policy statement flies in the face of Congress’s clear intent to improve passenger train service by creating an endless series of hoops for passenger carriers to jump through in order to make their complaints heard. This policy statement should be withdrawn.