

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**ON-TIME PERFORMANCE UNDER SECTION 213 OF THE
PASSENGER RAIL INVESTMENT IMPROVEMENT ACT OF 2008**

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Union Pacific Railroad Company is filing these comments in response to the Surface Transportation Board's Notice served December 28, 2015, seeking comments from interested persons on the Board's proposed definition of "on-time performance" for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA").¹

As we discuss below, Union Pacific believes Section 213's purposes would be best served if the Board's rules incorporate the existing measures of on-time performance contained in agreements between Amtrak and host carriers. If Amtrak and a host carrier have not entered into an agreement containing standards for on-time performance, a definition establishing delay allowances that increase as route mileage increases might be appropriate, but the Board should look to evidence of current transportation conditions rather than blindly use the "5 minute per 100 mile/30 minute maximum" formula the agency adopted back in 1973. We believe a delay allowance of at least 10% of the scheduled travel time as published in Amtrak's public time-

¹ Union Pacific's comments focus only on those routes where Amtrak trains move predominantly or entirely over lines operated by host freight carriers. Union Pacific also endorses the comments filed by the Association of American Railroads ("AAR") in this proceeding, including AAR's argument that the Board lacks jurisdiction to define "on-time performance" under Section 213.

tables, or at least 15 minutes per 100 route miles, would be more appropriate in the current transportation environment.

I. The Board’s Rules Should Incorporate Measures of “On-Time Performance” Contained in Agreements Between Amtrak and Host Carriers.

Union Pacific appreciates the Board’s concern for adopting a definition of “on-time performance” that “would be clear and relatively easy to apply.” Notice at 6. However, ease of application should not be the only objective. Any definition of on-time performance should also focus attention on situations in which it is likely that a failure to achieve minimum standards is “due to causes that could reasonably be addressed.” 49 U.S.C. § 24308(f)(1). The Board could advance both objectives simultaneously by adopting a definition that incorporates existing contractual measures of on-time performance.

The Board’s proposed definition does not advance the objective of focusing attention on situations that could reasonably be addressed by the railroads because it does not account for the many types of delay that inevitably arise in rail operations and are not attributable to problems with host railroad performance. As a result, application of the proposed definition would likely generate many false positives—that is, costly investigations might often be triggered where a host carrier is already doing all it reasonably can do to provide on-time performance.

We recognize that establishing a definition of on-time performance that includes a list of excused delays and a system for applying the definition to railroad operations would be difficult for the Board—if such measures had to be constructed from the ground up. However, the Board can readily make use of highly relevant information about causes of delay by incorporating into its rules the existing measures of on-time performance contained in contracts between Amtrak

and host carriers.² Adopting a definition that incorporates such existing measures of on-time performance would be consistent with congressional intent. As the Senate Commerce Committee stated in connection with legislation that became Section 207 of PRIIA, “[i]t is the Committee’s expectation that the freight railroads be consulted in the development of the metrics and that to the extent practicable, the metrics and standards developed not be inconsistent with measures of ontime performance included in the contracts between the freight railroads and Amtrak.” Report of the Committee on Commerce, Science, and Transportation on S. 294 (May 22, 2007), at 25.

Union Pacific’s operating agreement with Amtrak contains highly detailed standards for calculating on-time performance. These standards are already used to determine whether trains attain an on-time performance greater or less than 80% during a month, so they would be “clear and relatively easy [for the Board] to apply.” Notice at 6. Equally important, as a test of whether on-time performance is meeting reasonable expectations or should potentially be subject to an investigation, the contractual standards are vastly superior to the proposed “5 minute per 100 mile/30 minute maximum” formula: the contractual standards are route-specific; they address performance at intermediate points of routes as well as at end points; and they include detailed procedures for excluding delays from the calculations under circumstances Amtrak and Union Pacific mutually agreed are appropriate, thus reducing the risk of false positives. In addition, where an Amtrak train operates over lines of more than one host carrier, use of contractual standards should allow the Board to focus on the performance of individual rail carriers, so

² The Board should apply the same approach where a state and host railroad have a negotiated agreement for corridor service that addresses on-time performance. Otherwise, situations may arise in which a host carrier would face new legal requirements relating to on-time performance that impose obligations that are inconsistent with the negotiated agreement. Under the terms of some negotiated agreements for corridor service, the creation of new legal requirements could cause the agreements to unravel.

carriers that are plainly meeting their service obligations are not subjected to unnecessary, burdensome investigations.

We understand that most host carriers have similar measures of on-time performance in their operating agreements with Amtrak. This is to be expected, because when Amtrak enters into agreements to use facilities of a host carrier, the terms must address penalties for “untimely performance.” 49 U.S.C. § 24308(a)(1). Indeed, where a statute requires contracts to establish standards for “untimely performance,” it is eminently reasonable to apply existing timeliness standards where the same statute also requires a measure of “on-time performance.”

The Board’s use of a definition that incorporates existing contractual measures of on-time performance standards would not eliminate all false positives. There will almost certainly be instances where a contractual standard does not adequately address all the potential operating conditions that might cause delays that are not attributable to problems with a host railroad’s performance. However, the use of contractual standards should eliminate many false positives, allowing the Board to focus its investigatory efforts where they are most likely to be helpful in identifying problems “that could reasonably be addressed.” 49 U.S.C. § 24308(f)(1).

II. If Amtrak and a Host Carrier Have Not Entered into an Agreement Containing “On-Time Performance” Measures, the Board’s Rules Should Incorporate an Updated Formula for Calculating Delay Allowances.

If Amtrak and a host carrier do not have an agreement containing on-time performance measures, a simple formulaic approach to defining “on-time performance” may have merit, but the Board should not adopt the “5 minute per 100 mile/30 minute maximum” formula the agency adopted back in 1973. We believe a delay allowance of at least 10% of the scheduled travel time as published in Amtrak’s public time-tables, or at least 15 minutes per 100 route miles, would be more appropriate in the current transportation environment.

The 1973 formula is flawed in that it generates too many false positives, and thus could potentially be used to spur investigations that would ultimately prove the host carrier is already doing all it reasonably can do to provide reliable, on-time performance. We know that the 1973 formula is flawed because it produces results that are wildly inconsistent with results produced under our more nuanced contractual on-time performance standards.

According to the contractual standards in our operating with Amtrak, we achieved 80% on-time performance for the six Amtrak corridor trains that operate over portions of our tracks³ in 52 out of 60 calendar quarters from 3Q 2013 through 4Q 2015.⁴ By contrast, the 1973 formula would say that 80% on-time performance was achieved in only 34 out of 60 calendar quarters.⁵

The 1973 formula's flaws are also apparent when the formula is applied to other host carriers. Under the 1973 formula, host carrier performance on 29 out of 39 Amtrak routes outside the Northeast Corridor would be subject to Board investigation under Section 213 based on the most recent available quarterly data. These unrealistic results show that application of the 1973 formula would not provide an effective means of identifying on-time performance issues that may merit investigation.

³ We use the term "corridor" trains to refer to trains operating on routes of not more than 750 miles between endpoints operated by Amtrak. *See* 49 U.S.C. § 24102(5)(D). The six trains are the Capital Corridor, Cascades, Illinois Service, Missouri, Pacific Surfliner, and San Joaquin.

⁴ (6 routes) x (2.5 years) x (4 quarters per year) = 60 calendar quarters. For one route, over 5 quarters the contractual on-time performance measure was suspended due to federally funded high-speed rail construction. If those quarters are not considered as part of the analysis, Union Pacific achieved 80% on-time performance for the six Amtrak corridor trains in 52 out of 55 calendar quarters from 3Q 2103 through 4Q 2015.

⁵ Since 2010, the Federal Railroad Administration has submitted quarterly reports regarding the performance of Amtrak trains. *See* FRA, Rail Service and Performance Metrics Reports, *available at* <https://www.fra.dot.gov/Page/P0532>.

We do not claim to know for certain why the 1973 formula produces such unrealistic results when applied to today's operating conditions, but we suspect there are at least three factors at work:

- *First*, the on-time performance standards created by the 1973 formula may never have been a realistic measure of on-time performance. Even as it adopted the formula, the agency acknowledged that the standards would provide “a real challenge to the operators.” *See Adequacy of Intercity Rail Passenger Service*, 344 I.C.C. 758, 777 (1973); *see also id.* at 799 (“The one-half hour maximum limitation, in my view, is too drastic particularly insofar as concerns those trains that operate more than 1,000 miles”) (Commissioner MacFarland, concurring). The agency likely was not concerned about creating this “real challenge” because the potential consequences of failing to achieve on-time performance were relatively insignificant—they focused on reimbursements to passengers that could prove the delay resulted in out-of-pocket expenses. *See* 344 I.C.C. at 805, App. C (Regulations 6, 23 & 24).
- *Second*, the 1973 formula's 30-minute maximum allowance for routes over 500 miles long never had a sound operational basis. The types of events that justify increasing the allowance as distances increases do not stop occurring once routes exceed 500 miles. To the contrary, the longer the route, the higher the chance of experiencing random, unavoidable delays at station stops or as a result of track or signal-related problems, equipment-related problems, weather-related problems, or interference from other passenger operations.
- *Third*, railroad operating conditions have changed dramatically since 1973 in ways that increase the possibility of unavoidable delays and decrease opportunities to make up lost time en route. Among other things, railroad traffic increased significantly as statutory and regulatory changes allowed freight railroads to become more efficient and attract substantially more traffic to their lines. Notably, just as these dramatic changes were starting to take shape, in 1979 Congress repealed the statutory provision under which the agency had established the formula.⁶

Whatever the explanation for the unrealistic results produced by application of the 1973 formula to today's operating conditions, the Board cannot use that formula without revising or updating it to reflect current transportation conditions.

⁶ *See Interstate Commerce Commission, Regulations Governing the Adequacy of Intercity Rail Passenger Service; Revocation*, 45 Fed. Reg. 14216 (1980).

One way the Board might explore what would constitute reasonable on-time performance standards in the current environment is to review the standards used in other modes of passenger transportation. In regard to other regulated modes, the airline industry provides a useful source of information. In the airline industry, federal regulations define a flight as “chronically delayed” if it arrives more than 30 minutes late more than 50 percent of the time during a month.⁷ To put the 30-minute standard in perspective, a Chicago-San Antonio flight takes approximately 3 hours from gate to gate,⁸ so the flight could regularly take 15% longer than scheduled without ever being classified as “chronically delayed” (*i.e.*, 30 minutes is 16.67% of 3 hours). A Chicago-San Francisco flight takes about 4.75 hours from gate to gate,⁹ so the flight could regularly take 10% longer than scheduled without ever being classified as “chronically delayed” (*i.e.*, 30 minutes is 10.1% of 4.75 hours).

By contrast, Amtrak’s Chicago-San Antonio “Texas Eagle” train is scheduled to take more than 31 hours to complete its 1,305-mile route. The Board’s proposed 30-minute delay allowance for routes over 500 miles would give host carriers BNSF, CN, and UP just a 1.6% allowance (*i.e.*, 30 minutes is 1.6% of 31 hours 17 minutes). Amtrak’s Chicago-San Francisco “California Zephyr” train is scheduled to take 52 hours, or more than two days, to complete its

⁷ See 14 C.F.R. § 399.81(c)(2). Federal regulations provide that a flight is considered “on-time” if it arrives less than 15 minutes after its published arrival time, but there is no consequence if flights are not “on time.” See 14 C.F.R. § 234.2. By contrast, federal regulations state that the “holding out of a chronically delayed flight for more than four consecutive one-month periods . . . is an unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712”—the statutory provision under which the Secretary of Transportation may investigate an airline and order it to stop a practice or method. 14 C.F.R. § 399.81(c)(2).

⁸ See oneworld timetable, <http://www.trvlink.com/download/oneworld/oneworld.pdf> (last visited Feb. 1, 2016).

⁹ See *id.*

2,438-mile route. The Board's proposed delay allowance would give host carriers BNSF and UP just a 1% allowance (*i.e.*, 30 minutes is 1% of 52 hours 10 minutes).

If one considers the operating challenges and passenger expectations facing railroads as compared with airlines, federal regulators plainly apply a much more forgiving delay allowance for airlines than the Board has proposed here for railroads. This should not be the case. Airline passengers have justifiably higher expectations of on-time performance than railroad passengers, especially for travel over longer-distance routes. Airlines need a smaller allowance for delay than railroads. Once a plane leaves the gate, it faces few obstacles in reaching its destination. Planes also have a significant opportunity to make up any ground delays during flight, where they face no speed restrictions once they reach 10,000 feet.¹⁰ The fact that most airline delay arises from ground events and airlines can make up time in the air explains why it makes sense for airline regulators to use a performance standard that does not increase with distance.

Unlike airplanes, passenger trains remain on the ground and face multiple possible delays as they move from origin to destination. Amtrak's Texas Eagle has 28 scheduled stops between Chicago and San Antonio; the California Zephyr has 36 scheduled stops between Chicago and San Francisco. Trains cannot increase their speed to make up for lost time. And trains must deal with a wide range of issues that inevitably arise from the challenges of maintaining track and equipment in an environment that is constantly exposed to the elements and stresses of carrying millions of tons of freight.

No person should reasonably expect a 1,305-mile or a 2,438-mile journey by passenger train to provide the same *absolute* level of on-time performance as a plane between the same

¹⁰ See 14 C.F.R. § 91.117.

origins and destinations—but that is essentially what the Board would be requiring under its proposed rules.

Although there are significant differences in the nature of railroad and airline operations, we believe airline regulations can provide useful guidance for developing on-time performance standards, if standards are considered on a percentage basis, rather than an absolute basis. More specifically, a delay allowance of 10% of the scheduled travel time as published in Amtrak’s public time-tables for long-distance routes (*i.e.*, routes of more than 750 miles between endpoints operated by Amtrak) and 15% for short-distance corridors (*i.e.*, routes of not more than 750 miles between endpoints operated by Amtrak) seems appropriate.¹¹ A larger allowance in percentage terms for short-distance corridors would appropriately mimic the regulatory framework that applies to airlines.¹²

The Board should also consider examining on-time performance in the passenger bus industry. Although there are no regulated on-time performance standards, at least some data are available that help shed light on the issue of appropriate standards. For example, MegaBus, an established intercity bus service, warns customers through its website that they may arrive two hours later than scheduled.¹³ On its Chicago-New York route, which appears to be the longest

¹¹ See 49 U.S.C. § 24102(5)(C) & (D) (defining “long-distance routes” and “short-distance corridors”).

A larger allowance in percentage terms for short-distance corridors would appropriately mimic the regulatory framework that applies to airlines. More specifically, when the 30 minute airline threshold is applied to a short flight of just 1 hour or 2 hours, 30 minutes represents a cushion of 25% or 50%. Thus, a higher threshold of 15% would be more appropriate for corridor routes, which are shorter than routes for long-distance trains.

¹² A larger allowance on percentage terms for shorter routes is appropriate because an incident causing a delay of any particular length will have a relatively larger impact on the on-time performance of shorter routes.

¹³ See MegaBus, Making Your Connections, <http://us.megabus.com/makingyourownconnections.aspx> (last visited Jan. 26, 2016).

direct route that Megabus serves (approximately 800 miles), a two-hour delay is equivalent to 11% of scheduled travel time¹⁴—very similar to delay allowances under airline regulation. If the bus industry can provide profitable service with delay allowances equal to or exceeding 10% of scheduled travel time, there appears to be no justification for the Board to hold host railroads to the much stricter standards in its proposed rules.¹⁵

Basing delay allowances on the scheduled travel time as published in Amtrak’s public time-tables, rather than route mileage, makes sense, because the allowances would then account for route-specific conditions that would affect both the published schedule and the subsequent likelihood of delay—for example, the predominance of double-track or single-track on a route. However, we recognize that the Board might conclude after further study that a mileage-based allowance would be easier to apply. If that is the case, then guidance from a travel-time based approach could be used to develop a mileage-based approach.

For example, on one of the shortest corridor routes on which Union Pacific is a host carrier, the 177-mile Cascades route from Seattle to Portland, 15% of scheduled travel time is 33 minutes, which is equivalent to approximately 19 minutes per 100 miles. On the 284-mile Illinois/Lincoln route, 15% of scheduled travel time is 51 minutes, which is equivalent to approximately 18 minutes per 100 miles. On the longest long-distance route on which Union Pacific is a host carrier, the 2,438-mile California Zephyr, 10% of scheduled travel time is 313 minutes, which is equivalent to approximately 13 minutes per 100 route miles. Thus, if the Board

¹⁴ A two-hour delay allowance would produce even higher percentages and higher minutes per route mile on shorter routes.

¹⁵ As with airlines, one would expect buses to need even lower delay allowances than railroads. Buses have important advantages over railroads in mitigating delay. Buses have more alternative routes available, and buses are much more likely to be on roads with more than one lane in each direction. In contrast, trains cannot easily deviate from their routes, and they travel for the most part on single-track with traffic moving in both directions.

wanted to use a fixed scale, rather than a sliding scale based on route length, a uniform standard of 15 minutes of delay per 100 route miles would seem appropriate.¹⁶

As shown in Appendix A, our analysis of the number of Amtrak trains operated each week reveals that 48% of trains are 200 miles or less, another 16% are 300 miles or less, and another 16% are 400 miles or less. Thus, with a 15 minute per 100 route mile allowance, 80% of trains would have a theoretical delay allowance of 1 hour or less. In practice, however, the on-time performance standards for most routes would be governed by negotiated contracts between Amtrak and host carriers.

We have attached a draft of proposed travel time-based and mileage-based definitions of “on-time performance” as Appendix B.

III. Conclusion

Union Pacific appreciates the opportunity to comment on the Board’s proposed definition of “on-time performance” under Section 213 of PRIIA. We believe the Board’s rules would best serve Congress’s objectives if they incorporate the existing measures of on-time performance contained in agreements between Amtrak and host carriers. If Amtrak and a host carrier do not have an agreement containing such measures, the Board should apply delay allowances that reflect current conditions, rather than resurrect an abandoned formula from 1973. We believe delay allowances of at least 10% of the scheduled travel time as published in Amtrak’s public time-tables, or at least 15 minutes per 100 route miles, would be appropriate.

¹⁶ To complete the Megabus comparison, on Megabus, a two-hour delay on the approximately 800-mile Chicago-New York route is equivalent to approximately 15 minutes per 100 route miles.

Respectfully submitted,

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Appendix A

Amtrak Trains by Distance

Distance	Route Name	# of Trains per Week	Scheduled Mileage	Cumulative % of Trains
0-100	Capital Corridor	86	Various	6%
	Hiawatha	96	86	14%
101-200	Downeaster	70	116	19%
	Cascades	42	Various	22%
	Pacific Surfliner - LAX-SAN	91	128	29%
	Empire Service NY-Albany	91	141	36%
	Capital Corridor	108	Various	44%
	Piedmont	28	173	46%
	Pere Marquette	14	176	47%
	Hoosier State	8	196	47%
201-300	Heartland Flyer	14	206	48%
	Pacific Surfliner	49	Various	52%
	Ethan Allen Ex.	14	241	53%
	IL Zephyr/Carl Sandberg	28	258	55%
	San Joaquin - SAC-BFD	28	282	57%
	Missouri	28	283	59%
	Lincoln Service (Illinois)	56	284	64%
301-400	Wolverine	42	304	67%
	Illini/Saluki	28	310	69%
	Cascades	35	Various	71%
	San Joaquin - OKJ-BFD	56	316	76%
	Blue Water	14	319	77%
	Pacific Surfliner - SLO-SAN	21	351	78%
	Adirondack	14	381	79%
401-500	Pennsylvanian	14	444	80%
	Empire Service NY-Niagara Falls	28	460	82%
	Maple Leaf	14	544	83%
601-700	Vermont	14	611	84%
701-800	Carolinian	14	704	86%
	Capitol Ltd.	14	764	87%
801-900	Palmetto	14	829	88%
	Auto Train	14	855	89%
901-1000	City of N. Orleans	14	926	90%
1001-1100	Lake Shore Ltd.	14	1,018	91%
1101-1200	Cardinal	6	1,147	91%
1301-1400	Texas Eagle	14	1,305	92%
	Coast Starlight	14	1,377	93%
	Crescent	14	1,377	94%
	Silver Meteor	14	1,389	95%
1501-1600	Silver Star	14	1,522	96%
1901-2000	Sunset Limited	6	1,995	97%
2201-2300	Empire Builder	14	2,208	98%
	Southwest Chief	14	2,265	99%
2401-2500	California Zephyr	14	2,438	100%
Total		1,339		

Available at <https://www.amtrak.com/train-schedules-timetables>

Appendix B

Proposed Definition

§ 1040.2 Definition of On-Time Performance

An Amtrak train is “on time” if under an agreement entered into pursuant to 49 U.S.C. § 24308(a), the train is considered on-time.

Travel Time-Based Alternative:

If no 49 U.S.C. § 24308(a) agreement exists, then a train travelling a route of not more than 750 miles between endpoints operated by Amtrak is “on-time” if its actual travel time is no more than 115% of its scheduled travel time, and a train travelling a route of more than 750 miles between endpoints operated by Amtrak is “on time” if its actual travel time to is no more than 110% of its scheduled travel time. “Travel time” is the amount of time between a train’s departure from its schedule origin and its arrival at its final terminus as reported in Amtrak’s public time-table/schedule.

Mileage-Based Alternative:

If no 49 U.S.C. § 24308(a) agreement exists, then a train is “on-time” if it arrives at its final terminus within no more than 15 minutes after its scheduled arrival time per 100 miles of operation.