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March 30, 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: On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (Docket No. EP 726)

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are the reply 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. 726

On-Time Performance under Section 213 of the Passenger Rail  
Investment and Improvement Act of 2008

**REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS**

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## INTRODUCTION

The Association of American Railroads (AAR) respectfully submits these reply comments in connection with the Surface Transportation Board's Notice of Proposed Rulemaking in Docket No. EP 726, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*. AAR maintains its position that the Board lacks the statutory authority to define On-Time Performance for purposes of a Section 213 investigation, and submits these reply comments subject to that objection.<sup>1</sup>

These reply comments focus on Amtrak's proposal, echoed by other commenters, that the Board should use an "all-stations" on-time performance metric as an investigation trigger. As explained below, the Board should *not* adopt an all-stations metric. Instead, the Board should use those on-time performance metrics Amtrak and the host railroads have adopted in their operating agreements, if applicable. Switching to an all-stations metric would create false positives for investigation because of the back-loading of recovery time in many of Amtrak's schedules, in addition to conflicting with the operating agreements.

If parties do not have an on-time performance metric in their operating agreement (or if the Board declines to adopt an approach based on the operating agreements), the Board should use an endpoint metric rather than an all-stations metric because an

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<sup>1</sup> As a trade association whose freight railroad members host Amtrak trains, AAR has a strong interest in the proposed rule. These reply comments are submitted on behalf of AAR's freight members only and are not joined by Amtrak.

endpoint metric will provide a more indicative trigger for investigations for a simple reason: It measures the collective impact of all events that occur over the course of a train's trip.

As discussed in more detail below:

- Most parties' operating agreements measure on-time performance through arrival at the endpoint of each host's segment (or at specified checkpoints) rather than at all intermediate stations. The Board should respect those parties' chosen on-time performance measures and not adopt a conflicting investigation standard.
- An all-stations metric would not accurately reflect issues with the performance of Amtrak trains because many of Amtrak's schedules have back-loaded recovery time. Relying on an all-stations metric as the trigger for investigations would lead to false positives—investigations arising from flaws in recovery time allotment and distribution, rather than from excessive train delays or preference violations.
- Adopting an all-stations metric would delay and add complexity to the Board's establishment of an investigation trigger because it could not be meaningfully applied before Amtrak and host railroads renegotiate schedules to ensure that adequate time is allocated to every segment of the route.
- Amtrak's arguments for an all-stations metric are unavailing. First, it is not correct that Congress and the ICC have "recognized" all-stations as the appropriate metric. Congress did not specify a particular way of measuring on-

time performance for purposes of a PRIIA investigation trigger. Had it done so, this proceeding would not have been necessary. Further, to the extent substantive performance standards have any relevance here, following the ICC's 1976 modification relied upon by Amtrak, Congress *rejected* an all-stations approach enforceable by fines in favor of requiring on-time performance to be addressed in operating agreements, leaving it to Amtrak and the host railroads to decide for themselves how to measure and incentivize on-time performance. Amtrak suggests that an endpoint metric "ignores the experience" of Amtrak passengers who disembark at an intermediate station. Amtrak Comment at 7. But Amtrak and host carriers alike have long recognized that the on-time performance measures in many of their operating agreements and endpoint OTP both provide strongly correlated indications of overall on-time performance on a route, including performance at intermediate stations. And in cases where endpoint on-time performance is satisfactory but all-stations on-time performance is not, the immediate focus should not be a full investigation of all operations for the train, but review and consideration of whether recovery time for that train has been appropriately set for the entire route.

## DISCUSSION

The Board should not adopt an all-stations metric for assessing On-Time Performance.<sup>2</sup>

### **I. The Board Should Use The On-Time Performance Metric That Amtrak And The Host Railroad Agreed To In Their Operating Agreement, If Applicable.**

The Board's approach to on-time performance should respect the existing operating agreements between Amtrak and the freight railroads. As the Senate Commerce Committee stated in connection with the legislation that became Section 207 of the Passenger Rail Investment and Improvement Act, "[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 on-time performance included in the contracts between the freight railroads and Amtrak." S. Rep. 110-67, at 25 (2007).

Many of the operating agreements between Amtrak and the freight railroads use a host-segment endpoint metric in defining or measuring the on-time performance of Amtrak trains. Some measure on-time performance by looking to specified checkpoints along the segment. None uses an all-stations metric. The Board should respect these agreed-upon provisions where they exist and not adopt a different way of measuring on-time performance. Otherwise, many freight railroads would be unfairly held to a

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<sup>2</sup> As AAR explained in its opening comments, in situations where a train is hosted by more than just one railroad, the on-time performance calculation should be based on the on-time performance at the checkpoints established in Amtrak-host operating agreements for the individual hosts' portions of the routes (generally endpoints).

standard for initiating investigations that conflicts with the on-time performance standards in their operating agreements with Amtrak.

Amtrak's schedules exacerbate this problem. Because many Amtrak train schedules reflect the use of an overall route or endpoint metric in operating agreements (or in some cases a select number of checkpoints), host railroads might not have had any contractual reason to object to the achievability of the scheduled arrival times for each intermediate station stop. Adopting a new investigation standard based on performance at every intermediate station stop under such schedules would do a poor job of identifying trains worthy of investigation.

Finally, applying any metric to an individual host railroad other than the one found in its operating agreement would have anomalous consequences. Amtrak could be contractually required to pay an incentive to the host railroad under the operating agreement, but could simultaneously file a complaint with the STB triggering an investigation of that train—with the consequent threat of fines and damages—because the service failed to meet a conflicting metric.

## **II. All-Stations OTP Is A Deficient Metric.**

Amtrak now contends that an all-stations metric is the best way to measure on-time performance, but it did not advocate for an all-stations metric in its operating agreements with the freight railroads even though virtually all of the arguments Amtrak now makes in its comments were available when it negotiated those agreements. In any event, even if parties do not have an on-time performance metric in their operating agreement (or the Board thought it advisable to use an on-time performance standard to

trigger investigations other than one rooted in the operating agreement), there are many flaws in selecting an all-stations metric for that function.

**A. An All-Stations Metric Would Wrongly Subject Trains To Potential Investigation Because Recovery Time Is Often Back-Loaded In Amtrak's Schedules.**

AAR's opening comments argued that Amtrak schedules should never be used as a baseline for measuring on-time performance unless the parties' operating agreement does not address on-time performance *and* the schedule has been shown to be reasonable. Most of Amtrak's schedules are stale and many of them do not reflect current operating conditions on the network. Many have never consistently been achieved in the real world, as documented in Amtrak's own published reports.

These problems would be compounded by using an all-stations metric because Amtrak schedules typically fail to include adequate recovery time between intermediate stations, concentrating recovery time instead at the end of a run. On many Amtrak trains, the first few stations have little if any recovery time; the remaining intermediate stations have approximately half of the allocated recovery time; and the endpoint station has the remaining half. That is why the Federal Railroad Administration and Amtrak acknowledged in 2010 that "introduction of [an] All-Stations OTP standard will involve a challenging process of readjustment, in which Amtrak, its railroad hosts, and (where applicable) State sponsors of service" would be required to make "operational and scheduling adjustments." Response to Comments, *Metrics and Standards for Intercity Passenger Rail Service* at 18 (May 12, 2010), <http://1.usa.gov/1nYiXmw>. FRA and

Amtrak specifically deferred implementing their all-stations metric for two years to provide time for these adjustments (they merely published it for informational purposes during that period). *Id.* The necessary schedule adjustments, however, have not generally been accomplished, which underscores why the Board should not now adopt an all-stations metric as its investigation trigger.

Where recovery time is not appropriately set in Amtrak's schedule, as is often the case, an all-stations metric will not provide a good indication of whether an investigation into delays is warranted. Back-loading recovery time produces very demanding and often unrealistic arrival times at intermediate stations, and does not attempt to provide adequate time for typical delays on each individual segment. Thus, under an all-stations metric, train performance to intermediate station stops would be evaluated under an unreasonably high standard.

The distribution of recovery time requires Amtrak and the railroads to balance several interests including the overall schedule length, on-time performance, and cost. Schedules that distribute recovery time at key checkpoints and/or endpoints versus at all-stations allow Amtrak to provide passengers with shorter schedules and avoid certain costs. Adopting an all-stations on-time performance metric, in contrast, would require the total amount of recovery time contained within schedules to increase (and with it the overall trip duration) in order to ensure adequate time on each segment for potential delays, rather than simply providing one pool of time that can be applied to offset delays wherever they may occur. Additionally, under an all-stations approach, given the inherent variability associated with delays, the segment-specific allocations

would not be utilized on every run. As a result, Amtrak trains would hold longer at intermediate stations than they currently do as they await their scheduled departure times. Those waits are likely to cause delays to other trains (whether passenger or freight), particularly at the numerous stations where Amtrak has not built a station track and its platform is located on the host railroad's main line. The distribution of recovery time at key checkpoints and/or endpoints instead allows the parties to hold trains where unused recovery time may burn off without holding up other rail traffic and avoids the need for additional station tracks and platforms. The current operating agreements allow the parties to balance these various interests, while an all-stations trigger would require lengthening Amtrak schedules and would increase the number of conflicts with other trains (both passenger and freight).

Given these dynamics, it is unsurprising that adopting Amtrak's proposed all-stations trigger and applying it to present schedules would immediately expose a large percentage of Amtrak trains in the United States to root-cause investigations—potentially overwhelming the Board and its staff with unnecessary and wasteful proceedings.<sup>3</sup> Due to other Amtrak schedule issues, the same is true for the endpoint metric proposed in the NPRM. The only way to avoid this problem is by using the on-time performance metrics in Amtrak-host operating agreements as the triggers for investigations where applicable, and otherwise requiring that the underlying schedule be reasonable.

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<sup>3</sup> In order for an all-stations trigger to be meaningful, Amtrak schedules would first have to be adjusted to ensure that adequate time, including recovery time, is allocated to every segment of the run. Any such revamping of schedules would substantially delay establishment and use of a trigger for investigation.

**B. Amtrak’s Arguments In Support Of An All-Stations Metric Are Meritless.**

Amtrak presents a variety of other arguments in urging the Board to adopt an all-stations metric. None has merit.

First, Amtrak argues that Congress must have intended an all-stations metric because it provided in 49 U.S.C. § 24101(c)(4) that Amtrak shall have as a “goal” to operate “to the maximum extent feasible” to all station stops within 15 minutes of the scheduled arrival time. Amtrak Comment at 4-5. That is a logical goal shared by all concerned. But it does not dictate the appropriate trigger for investigations of sub-par performance. When Congress enacted PRIIA § 207, it did *not* specify the precise measure of “on-time performance.” Had it done so, this proceeding would be unnecessary. If anything, the fact that Congress referred in 49 U.S.C. § 24101(c)(4) to “all station stops,” but chose not to insert a similar reference in PRIIA § 207, is evidence that Congress did *not* intend an “all-stations” metric for purposes of PRIIA § 207. Additionally, the AAR’s proposal to incorporate contractual standards is a superior way to address intermediate points: Amtrak could continue to evaluate whether and where to prioritize performance at intermediate stations when negotiating schedules, taking into account the impact of doing so on overall trip length and costs.

The legislative history also cuts against Amtrak’s interpretation. The Senate had originally passed a “penalty for untimely performance” providing “that when a passenger train arrives more than 15 minutes late at a station due to interference by a freight train, the responsible railroad must pay a fine to Amtrak ... determined by the [ICC].” 127

Cong. Rec. 19500, 19519 (Aug. 4, 1981). But the Senate then “recede[d]” from this approach and instead agreed to require only that the *operating agreements* “include a penalty provision for untimely performance”—the language now found at 49 U.S.C. § 24308(a)(1). 127 Cong. Rec. 19500, 19519 (Aug. 4, 1981). In the same statute, Congress also added the “goal” language in Section 24101(c)(4). Congress thus left it up to Amtrak and the host railroads to decide for themselves how to measure and incentivize performance—exactly the appropriate approach for any Board-defined investigation trigger.

Second, Amtrak notes that the Board’s definition of On-Time Performance tracks the 1973 ICC regulation with regard to permissible delay minutes, but argues that an all-stations metric should be adopted as a trigger for investigations because in 1976 the ICC modified the regulation to encompass intermediate stops. Amtrak Comment at 3-4. This argument is misplaced. As AAR discussed in its opening comments, the 1973 ICC regulation is not an appropriate model for a 2016 on-time performance metric. Among other things, the 1973 regulation does not allow enough time for permissible delays given the realities of the modern rail network. But if the Board disagrees, and believes that the 1973 regulation should be the model for permissible tolerance, it should likewise use the 1973 regulation’s endpoint metric.

Third, Amtrak argues that using an endpoint metric will not provide an investigation trigger that is as “meaningful” or “fair” as an all-stations metric because it “ignores the experience” of Amtrak passengers who disembark at intermediate stations. Amtrak Comment at 7-8. But Amtrak overlooks that the Board’s NPRM is aimed at

developing a trigger for investigations, not a substantive standard to be used in any actual investigation. The goal of passengers is not to have every station where they disembark be included in a triggering metric. Their interest with respect to a triggering metric is that it function properly to ensure that the Board and parties efficiently use their limited resources for investigation of trains with significant delays. For the reasons discussed above, an all-stations metric would presently fail this test because so many of Amtrak's schedules are not designed with adequate recovery time between stations.

Amtrak cites several services that had sub-par intermediate station OTP but high endpoint OTP during various quarters. Of course, no single metric short of requiring 100% on-time performance for every train can reliably identify every problem in every segment of a movement. Nor was that Congress's intent, since it set on-time performance at only 80%. In any event, Amtrak's references to particular services fail to show that this supposed problem is widespread or explain how this issue could possibly outweigh the problems with applying an all-stations metric to Amtrak's current schedules.<sup>4</sup> Further, the key scenario relied upon by Amtrak—instances where there appears to be sufficient overall schedule time but poor interim station performance—does not justify adoption of an all-stations metric as a trigger because it is not a strong candidate for an investigation of the root causes of all delays. Instead, the primary issue in such scenarios is the apparent need for a schedule adjustment to add recovery time for the intermediate stations. An investigation should not be required to accomplish that.

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<sup>4</sup> The highly selective nature of the examples is underscored by the fact that they are drawn from widely disparate time periods, often far in the past.

Finally, Amtrak asserts that measuring performance at all stations is the only way to avoid “distortions” in the data. Amtrak Comment at 7. To the contrary, it would distort the data, at the expense of the majority of passengers, to give equal weight to the many intermediate stations that are lightly used. This is an example of the added complications that would result from using all-stations OTP as a trigger for investigations. Again, as explained above, adopting a trigger based on contractual standards or the reasonability of the schedule are superior ways to address intermediate points.

## CONCLUSION

The Board should terminate this proceeding for lack of authority to define On-Time Performance under PRIIA § 213. If the Board proceeds with this rulemaking, it should not adopt an all-stations On-Time Performance metric, and should modify its proposed rule as discussed in AAR's opening comments.

Respectfully submitted,

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