

April 13, 2016

VIA ELECTRONIC FILING

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Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

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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 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. 728

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

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 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).¹

In these reply comments, AAR focuses on the argument advanced by Amtrak that the Board should construe preference as requiring that every “individual dispatching decision” be made “in favor of Amtrak” trains over freight traffic. *See, e.g.*, Amtrak Comments at 10. Amtrak’s interpretation is not supported by the text or structure of the preference statute, and would cause gridlock on many routes. Amtrak offers no persuasive explanation for why Congress would have intended such a harmful and irrational result.

Amtrak’s interpretation is at odds with the way preference has always been understood. Individual dispatching decisions involving freight and passenger movements are not now, and never have been, resolved in favor of Amtrak in all situations. Were the Board to adopt Amtrak’s view, it would amount to a radical change upending the operating practices that have existed since Amtrak’s creation and that are in place today. There is no reason the Board should take such a leap into the unknown—and many

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

reasons for it not to. The Board should adhere to the reasonable approach set forth in its proposed policy statement.

The Board should also confirm its guidance concerning the types of evidence that might be relevant in a Section 24308(f) proceeding, and reject Amtrak’s criticism of the Board’s proposed approach. Amtrak’s arguments largely rest on its flawed legal premise that preference means that every individual dispatching decision must be made in favor of Amtrak. Amtrak’s misguided approach would result in a categorical, per se bar on numerous categories of evidence that would be highly relevant to a Section 24308(f) proceeding.

The Board should adhere to its proposed approach that the preference requirement is not absolute and reject Amtrak’s attempt to radically transform operating practices through an erroneous interpretation of the preference statute.²

OVERVIEW OF SECTION 24308(f)

A Section 24308(f) proceeding focuses on the reasons for the inadequate on-time performance of an Amtrak train. It is a *performance* investigation, not a *preference*

² Amtrak errs in claiming that the Board’s proposed policy statement is “procedurally invalid” because it was not issued through notice-and-comment rulemaking. Amtrak Comments at 4. The Board is fully justified in providing guidance in this way, especially in light of its statements that “the Board’s approach . . . will likely be refined” in individual proceedings, and that parties are “still free to present any arguments or evidence they could have presented before the Board issued this policy statement.” Policy Statement at 4, 5 n.3. Moreover, the implication that the Board did not adequately allow for public comment on its proposed policy statement rings hollow given that the Board invited two rounds of public comments on its proposal—and even extended the reply deadline to allow commenters ample time to convey their views.

investigation. Although a preference violation may be one possible cause of poor on-time performance, it is far from the *only* possible cause.

As the Board correctly recognized, a performance investigation must examine *all* possible root causes of an Amtrak train's inadequate on-time performance—not just the possibility of a preference violation. In some cases, “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. The fact that there are many possible causes of inadequate on-time performance underscores the importance of the Board undertaking “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.” *Id.*

The Board should adhere to the approach set forth in its proposed policy statement: a Section 24308(f) proceeding must examine all possible causes of deficient Amtrak on-time performance. And as discussed in more detail below, the Board should also adhere to its understanding of preference as not “absolute.” Policy Statement at 3.³

³ In submitting these reply 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 Comments 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) proceeding.

DISCUSSION

I. THE BOARD SHOULD REJECT AMTRAK'S INTERPRETATION OF PREFERENCE.

Amtrak urges the Board to adopt an understanding of preference that is at odds with the statutory text, structure and purpose—and that would lead to harmful and irrational results. In Amtrak's view, preference means that all individual dispatching decisions must be made in its favor. Amtrak argues that “[i]f a host railroad does not resolve an individual dispatching decision at a rail line, junction or crossing in favor of Amtrak, then Amtrak does *not* have preference over the freight train in using that rail line, junction or crossing.” Amtrak Comments at 10.

Amtrak's interpretation is wrong and should be rejected for many reasons. The Board was correct to interpret the preference requirement as not “absolute,” and in explaining 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.

A. Amtrak's Statutory Analysis Is Misguided.

1. The Statutory Text Does Not Support Amtrak's Reading.

Amtrak contends that the “plain meaning” of the preference statute is that every individual dispatching decision must be made in its favor. Not so. If Congress had intended the definition of preference urged by Amtrak, it would have said so in the statute. But it did not. Although it stated that Amtrak “has preference over freight transportation in using a rail line, junction, or crossing,” 49 U.S.C. § 24308(c), it did *not*

specify what “preference” entails, let alone endorse the absolutist view advanced by Amtrak.

Amtrak’s construction of preference as meaning that every individual dispatching decision must be resolved in Amtrak’s favor is an impermissible reading of the statute. The ordinary meaning of preference means a *weighting* in favor of something. No one would understand the statements “I have a preference to eat fish instead of meat,” or “I have a preference to go to bed early,” as meaning that the person *never* eats meat or *never* stays up late. All it means is that the scales are not in perfect equipoise: they tilt in favor of the preferred option, but the balance can shift depending on the facts and circumstances arising in an individual case.

Amtrak contends that the statutory language implies a focus on individual trains, rail lines, crossings and junctions, and that the Board has improperly “aggregate[d]” all of these in adopting a “systemic, global approach.” Amtrak Comments at 10. But Amtrak overlooks that the preference statute does *not* refer to individual Amtrak trains, but rather refers generally to “rail passenger transportation provided by or for Amtrak,” 49 U.S.C. § 24308(c), underscoring that the Board’s reading of the statute is correct.

Amtrak’s argument that the phrase “in using a rail line, junction or crossing” requires resolving every individual dispatching decision in favor of Amtrak gives those words a weight they cannot bear and ignores the statute’s historical background. Amtrak Comments at 10-11. This phrase merely identifies the circumstances in which the preference requirement *applies*; it does not purport to define the preference requirement itself. To say that Amtrak gets preference in certain specified circumstances does not

remotely suggest that preference means an absolute requirement that freight traffic be held for or cleared in advance of Amtrak.

In fact, this provision can be understood in the historical context as *limiting* the scope of Amtrak's entitlement to preference. At the time the preference statute was enacted, Amtrak was in its infancy and was contracting with the railroads for many types of services, facilities and machinery. Congress was considering the appropriate level of access for Amtrak to different types of freight railroad support. Indeed, only months later, in passing the Amtrak Improvement Act of 1974, the same Congress rejected the Senate-passed requirement that freight railroads "accord a higher priority to maintenance and repair of passenger equipment than to maintenance and repair of equipment used in freight transportation." H.R. Rep. 93-1441 (Conf. Rep.) at 40 (1974).

Amtrak's argument that Congress has legislated in this area but "did not see fit to change the basic definition of preference," Amtrak Comments at 12, mistakenly assumes the conclusion that Congress not only defined preference—but defined it in a way that conflicts with the Board's interpretation. Nor does Amtrak's quotation of a statement from Senator Murray help its cause. She merely paraphrased the statute and asked whether Amtrak's poor on-time performance meant that the railroads were ignoring the preference requirement. But Congress addressed that concern through its statute, which authorizes the Board (in certain specified circumstances) to conduct an investigation into *why* particular Amtrak trains have inadequate on-time performance. If a preference violation were the only possible explanation for poor on-time performance, an investigation would not be necessary.

In fact, Amtrak has truncated Senator Murray's comments in a misleading way.

After making the statement excerpted in Amtrak's comments, she went on to say:

There is no question that we need our freight railroads to move cargo. Freight mobility is essential to our economy—especially in an agricultural and trade state like mine. **It is simply not realistic to expect our freight railroads to put every coal and container train on a siding so passenger trains can breeze through.**

See 2007 WLNR 614849 (emphasis added). Amtrak has cropped Senator Murray's remarks to create the false impression that Congress agrees with Amtrak's interpretation, when in fact the Senator's full remarks demonstrate precisely the opposite.

For all of these reasons, Amtrak's interpretation is foreclosed by the statute's plain language. But even if Amtrak's interpretation of the statute were a permissible one—which it is not—it plainly would not be the *only* permissible interpretation. The Board's understanding of preference as not "absolute" is—at a minimum—a reasonable and permissible construction. As the Supreme Court explained in *Brannan v. Elder*, 341 U.S. 277 (1951), the simple statutory directive "that 'preference shall be given' [to certain individuals in certain federal employment decisions] does not delineate what that preference shall be." *Id.* at 286 (citing former 5 U.S.C. § 851). The Board has provided a very reasonable interpretation here.

2. The Statute's Structure Does Not Support Amtrak's Reading.

Amtrak argues that the Board has improperly conflated "preference" with "the separate preference relief application procedure." Amtrak Comments at 13-18. Not so. Unlike Amtrak, the Board has properly construed the statute as a harmonious whole.

There is nothing in the preference statute that prohibits the Board from taking into account the impact on freight traffic in construing the preference requirement. To the contrary, ignoring the impact on freight traffic would undermine the Board's obligation under 49 U.S.C. § 10101 to minimize regulation, promote efficient freight service, and ensure the development and continuation of a fluid rail transportation system. Even if turning a blind eye to the impact on freight traffic in determining the nature of the preference requirement were a permissible approach (and it is not), there is nothing in the statute that *compels* that outcome.

Amtrak errs in suggesting that considering the impact on freight traffic would render "the preference relief application procedure" superfluous because "there would be no reason for a host railroad to apply for relief from preference." Amtrak Comments at 14. The provision allowing host carriers to seek relief from their preference obligation does not dictate that the Board may not consider the impact on freight traffic in construing preference. The relief provision simply accounts for the possibility that preference (even when properly understood) may occasionally require categorical relief.

In fact, it is *Amtrak's* approach that would be unworkable. Freight railroads make tens of thousands of dispatching decisions every day. When an individual dispatcher is confronted with a particular situation where allowing the Amtrak train to move first or hold the mainline would substantially jeopardize network fluidity, he or she obviously is not in a position to prepare and file a relief application with the Board and obtain relief in a matter of minutes. A relief application process is not well suited to situations where the dispatching decision needs to be made on the ground in real time.

Moreover, if the Board were to accept Amtrak's absolutist understanding of preference, the immediate consequence would likely be an overwhelming number of relief applications filed with the Board, as giving Amtrak absolute priority would "materially lessen the quality of freight transportation provided to shippers," 49 U.S.C. § 24308(c), on numerous routes throughout the country. Adjudicating a tidal wave of relief applications would not be a good use of the Board's scarce resources.

Amtrak relies on several other sources to support its interpretation, but none has merit. There is no conflict with the legislative history underlying the 1973 statute. *See* Amtrak Comments at 16. The legislative history simply states the preference requirement and identifies how host carriers may be relieved of the obligation. Next, Amtrak relies on a proposed ICC regulation from 1971. But that proposal never became law, and it would have imposed a requirement that differs from what Amtrak advocates, one that would have only applied to the practice of side-tracking passenger trains.

Amtrak cites the 1987 ICC decision in the *Soo Line* case, but that decision merely identified the preference requirement and did not purport to define it. Amtrak fares no better in citing to a 1980 FRA regulation concerning the relief application procedure. Amtrak Comments at 17-18. That regulation notes the preference requirement and explains how host carriers may obtain relief. Amtrak also relies on a brief it filed jointly with the Department of Justice in the 1979 *Sunset Limited* case. But a joint litigation filing by Amtrak and DOJ (to which Congress delegated no role regarding preference aside from enforcement) carries no interpretive weight. Under pre-2008 law, the job of interpreting preference in enforcement proceedings was assigned to the courts, and the

court in *Sunset Limited* never ruled on the issue; rather, the matter was held in abeyance for several years and then dismissed by stipulation.

In sum, Amtrak's effort to distinguish between the preference requirement and the relief application procedure does not help its case. In determining the nature of a host carrier's preference obligation, the Board can and should adopt a "systemic, global approach," Policy Statement at 3, that takes into account the impact on freight traffic. If the Board determines that giving Amtrak preference "materially will lessen the quality of freight transportation provided to shippers," the Board shall then "establish the rights of the carrier and Amtrak on reasonable terms." 49 U.S.C. § 24308(c). Nothing in this structure prevents the Board from taking into account the impact on freight traffic in determining the precise obligations imposed by the preference requirement separate and apart from the question whether the host carrier should be granted relief.

B. Amtrak's Interpretation Would Upend Current And Historic Operating Practices And Cause Harmful And Irrational Results.

Amtrak's absolutist approach to preference would work a radical change in the way the preference requirement has always been applied. Amtrak is not now, and never has been, given absolute priority of the type suggested in its comments. And the fact that only one preference enforcement action was ever brought from the enactment of the preference statute through the enactment of the Passenger Rail Investment and Improvement Act of 2008 strongly indicates that the Board's understanding of preference was shared by all parties as well as the government.

Although Amtrak's comments claim that the Board is proposing a "new" approach to preference, *see, e.g.*, Amtrak Comments at 2, it offers no evidence supporting its view. The best "evidence" Amtrak can muster is various documents that essentially restate the statutory language. None of this is evidence supporting Amtrak's reading of the preference requirement as absolute.

In fact, Amtrak officials have long acknowledged that they are not given absolute priority at all times. In 2004 testimony before the Board, Amtrak's head of freight railroad relations, Paul Vilter, readily admitted that absolute priority was *not* the reality in daily operations, even when an Amtrak train was on schedule:

COMMISSIONER BUTTREY: I'm just curious. Do Amtrak trains have priority on the track when they come through on a scheduled basis? All the Amtrak trains are scheduled trains presumably and when they want to come through the line, do they have priority? Do the other trains have to get off the track and let you through or do they just stay on the track and you take a siding and get through whenever you can?

MR. VILTER: Well, there is a Federal statute, The Rail Passenger Service Act, which calls for Amtrak trains to have priority. There is also in the real world in terms of trying to get two trains across a single-track railroad, it is sometimes more efficient for an Amtrak train to wait for a freight to come through. **We are not always given priority either on this line [for Cardinal service] or on any line in the country. Not always.**

Hearing in FD No. 34495 at 68:4-20 (Oct. 13, 2004), <http://1.usa.gov/1MdYRAx> (emphasis added). Amtrak's claim that the Board is advancing a "new" interpretation at

odds with current and historic operating practice is therefore mistaken. It is *Amtrak's* interpretation that would dramatically alter current operating practices.⁴

Accepting Amtrak's view of preference would have dramatic and harmful consequences. It would upend current operating practices and work a radical transformation in the law. It would cause gridlock on many routes, bringing rail traffic to a standstill and triggering a cascading effect that would radiate throughout the national network.

The Board was exactly right to recognize that “a requirement of absolute preference” might not even promote efficient *passenger* service in the long run. Policy Statement at 4 (emphasis added). 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

⁴ Notably, before and around the time Amtrak was created, passenger trains were *not* generally given the type of absolute priority Amtrak demands here. *See, e.g., Penn Cent. Transp. Co. Discontinuance of 34 Passenger Trains*, 338 ICC 380, 464 (1970) (“Complaints were made that the passenger trains are delayed to permit prompt movement of freight trains. In the day-to-day operation of any railroad discretion must b[e] given to the dispatcher to assure safe movement of all trains and there are bound to be meets and passes requiring such actions. There were delays of passenger trains because of the carrier's freight traffic. But the instances shown of record do not establish that such delays were the result of carrier policy to give freight traffic preference over passenger trains.”); *S. Pac. Co. Discontinuance of Trains Nos. 39 and 40 Between Tucumcari, N. Mex., and Los Angeles, Calif.*, 330 ICC 685, 693 (1967) (“Operating conditions may dictate that passenger trains be sidetracked for long freight trains which will not fit the length of sidetracks, or for trains which are fleet operated, as where two to four trains, often including a passenger train, are operated in tandem.”).

the network generally (including, for the long run, trains on the particular route at issue)”.
Id.

It is common sense that there will be situations where allowing a freight train to move before an Amtrak train will clear the route and allow *all* traffic to move more quickly. Resolving every individual dispatching decision in Amtrak’s favor will ultimately harm Amtrak as well as freight and commuter traffic.

Amtrak offers no reason for why Congress—particularly after declaring efficient freight service a policy goal of the United States, *see* 49 U.S.C. § 10101—would possibly have intended the harmful and irrational results from a law requiring the absolute subordination of all freight traffic to Amtrak at all times and in all situations. As Amtrak’s President stated, in testifying on the legislation that encompassed the preference requirement, *see* AAR Comments at 9-10, “to legislate . . . 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.”

II. AMTRAK’S EVIDENTIARY OBJECTIONS REST ON ITS FLAWED UNDERSTANDING OF PREFERENCE.

Amtrak challenges many of the types of evidence the Board identifies as potentially relevant in Section 24308(f) proceedings. Amtrak’s arguments should be rejected because they depend on its misconceptions regarding the meaning of preference. Amtrak also fails to note that even if certain categories of evidence might be deemed irrelevant to whether preference violations have occurred, they could still relate to other aspects of a Section 24308(f) investigation, including the Board’s investigation of other

causes of poor Amtrak on-time performance under Section 24308(f)(1) and the Board's exercise of remedial discretion under Section 24308(f)(2) if it finds that preference violations occurred and contributed to that poor performance.

If Amtrak believes that certain types of evidence are irrelevant, it should raise those arguments in the context of a Section 24308(f) proceeding, where the Board can evaluate whether the particular evidence has a bearing on the particular dispute. It would make little sense to categorically rule these entire categories of evidence per se irrelevant and inadmissible—without knowing how the evidence might shed light on particular disputes that could come before the Board.

First, Amtrak contends that evidence regarding total delays to Amtrak trains is not relevant to preference violations. Amtrak Comments at 19. But this just underscores the error in Amtrak's myopic view of preference as limited to individual dispatching decisions. As the Board correctly explained, Policy Statement at 3, preference must be evaluated broadly rather than through a rigid and narrow focus on individual decisions. For that reason, evidence of total delays to Amtrak trains is relevant.

Second, Amtrak argues that evidence regarding materially lessening the quality of freight transportation is not relevant to preference violations. Amtrak Comments at 20. This argument is a rehash of Amtrak's mistaken claim that the impact on freight traffic may not be considered in construing the preference requirement, but only becomes relevant in the context of a preference relief application procedure. As discussed above, it is entirely proper—indeed, it is required—for the Board to take into account the impact

on freight traffic in determining the nature of a host carrier's preference obligation. For that reason, this category of evidence is highly relevant to the Board's determination.

Third, Amtrak argues that the operating agreements between Amtrak and the host railroad are not relevant to preference violations. Amtrak Comments at 21. The Board should reject this contention. As AAR explained in its opening comments (at 12-14), operating agreements must include a measure of the host's performance, *see* 49 U.S.C. § 24308(a)(1), and the Board should not allow Amtrak to demand levels of performance that conflict with what it had agreed by contract was acceptable. In fact, the Board should clarify 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. This approach would fulfill the parties' expectations when they signed their operating agreements and negotiated performance measures.⁵

Fourth, Amtrak argues that host-to-host interchanges are not relevant to preference violations. Amtrak Comments at 22. But this information is highly relevant. If a host carrier receives an Amtrak train late (or early, for that matter), it makes it more difficult to move the Amtrak train through the network. The impact on freight traffic and other passenger traffic caused by a late-arriving Amtrak train can be substantial, and it may simply not be feasible for the host to avoid further delays to the Amtrak train. The

⁵ For the reasons stated in its opening comments (at 15-16), AAR agrees that attempts to compare the percentages of on-time performance of passenger and freight traffic would not provide meaningful insight into whether Amtrak trains were given preference. *See* Amtrak Comments at 21-22.

preference requirement does not obligate a host railroad to hold all other traffic on the network to accommodate a delayed Amtrak train.

Fifth, Amtrak argues that absent an emergency or a granted relief application, other factors are not relevant to preference violations. Amtrak Comments at 22. Amtrak's suggestion that there is *no* evidence or circumstances "that the Board lawfully could find to be . . . 'an appropriate mitigating factor,'" *id.* at 23 (quoting Policy Guidance at 7), is extreme and cannot be credited. It rests on Amtrak's interpretation of preference, which is flawed for the reasons discussed above, and ignores the remedial aspects of a Section 24308(f) proceeding.

Sixth, Amtrak contends that "[e]mergencies are relevant, but should not be asserted for the first time in an investigation." Amtrak Comments at 23 (capitalization and emphasis omitted). Amtrak ignores that this provision in 49 U.S.C. § 24308(c) is self-executing. It does not require notice to Amtrak or pre-application to the Board; Amtrak's demand for notice thus conflicts with the statute. Nor is there reason to credit Amtrak's unwarranted speculation that a host railroad might "use the emergency exception as a *post hoc* rationalization for preference violations." *Id.* If a host railroad did assert an emergency situation for the first time in an investigation, the Board could take the timing into account and give that fact whatever weight it deserves.

CONCLUSION

Amtrak's view of preference is not supported by the statutory text or structure, and would lead to harmful consequences. It would represent a radical change from current and historic operating practices. The Board should adhere to its proposed approach that the preference requirement is not absolute. In addition, the Board should clarify its proposed policy statement in the three ways discussed in AAR's opening comments.

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