

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**EX PARTE 728**

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240497  
ENTERED  
Office of Proceedings  
April 13, 2016  
Part of  
Public Record

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

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**REPLY COMMENTS OF  
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: April 13, 2016

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Norfolk Southern Railway Company (“Norfolk Southern”) hereby submits these reply comments in response to the Surface Transportation Board’s (“Board’s”) *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, Ex Parte 728 (STB served Dec. 28, 2015) (hereinafter the “Policy Statement”) providing guidance regarding issues that may arise and the evidence to be presented in complaint proceedings under § 24308(f). In addition to submitting these comments, Norfolk Southern joins in the Reply Comments of the Association of American Railroads.

Norfolk Southern’s Opening Comments supported many of the ideas that the Board expressed in its Policy Statement. Norfolk Southern emphasized that § 24308(f) contains two distinct concepts if the statutory trigger of substandard performance is met: (1) a comprehensive investigation of performance under subsection (f)(1); and (2) resolution of allegations of preference violations under subsections (f)(2)-(4). *See* Norfolk Southern Opening Comments at 4-6. Norfolk Southern also strongly agreed that the meaning of preference is not “absolute,” but rather situational. *Id.* at 6-16. Finally, any finding of a preference violation would require an affirmative and specific finding that the host carrier had systemic failures involving dispatcher-avoidable delays. *See id.* at 16-23.

## I. Summary

Amtrak's Opening Comments in this proceeding left Norfolk Southern perplexed. The majority of that statement addresses the question of when statutory preference must be adhered to, arguing vociferously that the statutory preference obligation applies absent (a) emergency situations or (b) relief granted by the Board. *See, e.g.*, Amtrak Opening Comments at 6, 13-18. Norfolk Southern agrees wholeheartedly with this point; indeed, § 24308(c) cannot be read any other way. And in fact, there is no real disagreement on this point in the record.

The Board's Policy Statement rightly focused on the different question of what the word preference means in the context of such an obligation. The first sentence of 49 U.S.C. § 24308(c) reads simply: "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." The Board rightly points out that the word "'preference' is not defined by statute." Policy Statement at 2.

In response, Amtrak blurs these two distinct issues in order to divert attention from the fact that Amtrak offers no support whatsoever – authoritative or otherwise – for its assertion that the term "preference" means absolute priority. *See, e.g.*, Amtrak Opening Comments at 2 (arguing that the Board's Policy Statement "creates a new definition that eviscerates the right to preference"). First, Amtrak argues that defining preference – at least, differently than Amtrak would define it – "is beyond the Board's authority to act as a legislative body." *Id.* at 6. Then, Amtrak goes so far as to claim that Congress has defined, since 1973 and with "plain and unambiguous meaning," the word preference in accordance with Amtrak's own definition. *Id.* at 10; *see also id.* at 13 ("Congress defined preference . . ."). Amtrak ominously warns that "[i]f

the Proposed Policy Statement were adopted as written, it could effectively render the statutory right to preference a nullity.” *Id.* at 4.

Such imprecision and hyperbole should not dissuade the Board. Congress did not define the term “preference” in the statute, but it gave the Board the right to enforce the preference requirement through the Passenger Rail Investment and Improvement Act of 2008. Unlike Amtrak’s desire for absolute priority, the Board’s construction of the word preference matches its common meaning in other statutes and the legislative history. Moreover, this construction, along with the relevant evidentiary factors listed in the Policy Statement, is supported by the real-world necessity of how Amtrak trains must be, and are, handled by host railroads, including as explained in past statements by Amtrak itself. Finally, despite Amtrak’s attempt to rewrite administrative law, the Board’s non-binding guidance on these issues is in complete accordance with legal precedents on policy statements.

## **II. The Meaning of Preference**

### **A. Preference Applies Absent Emergency or Relief**

Amtrak and other commenters focus much of their attention on the question of when Amtrak trains shall be afforded “preference”:

The language of 49 U.S.C. § 24308(c) is clear and unambiguous. Amtrak trains are entitled to preference over freight transportation except in an emergency. Any deviation from this clear and plainly-stated obligation requires the host railroad to apply for relief from its statutory obligation, and to sustain its burden of proving that granting preference to Amtrak trains would materially lessen the quality of freight transportation to shippers.

Amtrak Opening Comments at 2; *see also* Opening Comments from Senators Wicker and Booker at 2 (“We believe Congress’s intent was that Amtrak trains be given preferential treatment over freight transportation save for the two limited exceptions stated in the law itself.”); Opening Comments of the Environmental Law and Policy Center at 3 (“Accordingly,

Congress . . . created a passenger train preference as a statutory requirement subject to two exceptions.”). Norfolk Southern is in complete agreement with these statements. Pursuant to the statute, preference applies absent an emergency or a Board decision that preference “materially will lessen the quality of freight transportation provided to shippers.”

Norfolk Southern finds this focus perplexing, however, because the Board’s Policy Statement addresses the different question of what preference means, and takes no issue with Amtrak’s view of when that preference should be provided. The Board focuses overwhelmingly on “Interpretation” of the term “Preference” under 49 U.S.C § 24308(c) and the “Evidence” that might be relevant to evaluating an alleged violation. Policy Statement at 3. The Board’s statement under this section that it does “not view the preference requirement as absolute” is clearly an indication of how the Board interprets the meaning of “preference.” The Board rightly spends most of its discussion on this unsettled question, rather than the statutorily prescribed matter of when preference applies. In its final section, the Board specifically raises the two statutory exceptions and recognizes that it makes eminent sense to consider evidence about them within the context of a § 24308(f) investigation if they are raised, rather than requiring the unnecessary complexity of another entire proceeding. *Id.* at 7.

Indeed, the only paragraph of the Board’s Policy Statement that might be seen as unclear on this point is the first paragraph on page 7. *Id.* There, the discussion about late handoffs of passenger trains is under the heading of “Potential Factors to Mitigate Preference Failures,” but the issue is more about the meaning of preference and whether it is being provided, rather than whether the preference obligation applies. Moving that discussion to the prior section and some minor rewording should assuage any lingering concerns. But Norfolk Southern sees no evidence of real disagreement about the application of preference in the record.

B. But the Statute Does Not Define Preference To Mean Absolute Priority

The simple fact that preference applies, however, says nothing about what that preference obligation means. Yet Amtrak repeatedly confuses this simple distinction in its opening comments. For example, Amtrak states that the Board's Policy Statement "creates a new definition that eviscerates the right to preference." Amtrak Opening Comments at 2. But the "right to preference" is an issue of application and is undisputed as addressed above. The "definition" of preference, in contrast, is not found in the statute or in any binding precedent. The Board is entirely within its authority to consider and opine in its Policy Statement on the meaning of this undefined term.

The Board indicates that it "do[es] not view the preference requirement as absolute," such 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. Put another way, the Board clearly states that the preference to which Amtrak is entitled requires that Amtrak be advantaged over freight transportation, but not to such a degree that Amtrak trains will always trump freight trains in every single individual dispatching decision, regardless of conditions or circumstances. In Norfolk Southern's words, preference is situational. See Norfolk Southern Opening Comments at 6-16.

Such a view is entirely consistent with the legislative history concerning the use of the word preference in the Interstate Commerce Act ("ICA"), as detailed in the House Judiciary Committee Report accompanying the 1978 recodification of the ICA. Specifically, that report stated:

Throughout the bill, the term "reasonable" is substituted for "just and reasonable" and "discrimination" is substituted for "preference", "prejudice", "advantage", and "disadvantage" for clarity, consistency, and to conform to modern usage. See *Missouri, Kansas & Texas Railway Co. v. Harriman*, 227 U.S. 657, 1913; *United States v. P. Koenig Coal Co.*, 270 U.S. 512, 1926; *Arizona Grocery Co. v.*

*Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 1932; *Union Pacific R. Co. v. United States*, 313 U.S. 450, 1941; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 1942; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 1944; *United States ex rel. Morris v. Delaware, L. & W.R. Co.*, 40 F. 101, Cir. Ct. N.Y., 1889. The change does not affect the substantive law. The words for which the substitutions are made are used inconsistently throughout the Interstate Commerce Act and related laws and are often used in series with other synonymous words. As the editors of the U.S. Code Service point out in an explanatory note to section 2 of title 49:

Explanatory note. – In using the annotations following, it must be borne in mind that the words “unjust discrimination” [the term employed in this section] and “preference and prejudice” [the terms employed in § 3(1) of this title] have been used in innumerable instances by the courts and by the commission as interchangeable. . . .

Report of the Committee of the Judiciary, House of Representatives, on H.R. 10965, Report No. 95-1395, at 13-14 (July 25, 1978) (emphasis added). In short, the word preference as used in the ICA was synonymous with discrimination, prejudice, advantage, and disadvantage. All of those terms support a relative favoritism of one thing over another. Notably absent is any synonym, expression, or implication that preference equates to absolute priority, whereby one thing is always chosen before another.

The Board’s view also is consistent with other usages of the word preference in the United States Code. For example, in the employment context, the federal government gives veterans preference in hiring by statute. *See generally* 5 U.S.C. § 2108(3) (defining “preference eligible” individuals for purpose of the statute). This preference does not mean that any veteran that applies for a job receives absolute priority and necessarily receives the job over any non-veteran applicants. Instead, veterans receive added weighting in their application scores, such that a veteran will receive a job over a similarly qualified applicant but still may lose out to a more qualified non-veteran. *See, e.g.*, 5 U.S.C. § 3309 (providing for 5 or 10 points to be added to the application of a preference eligible). Under Buy-American provisions, domestic firms receive preference over foreign firms, but a foreign bidder still will be selected if its price is

more than 6 percent cheaper than the domestic bids. *See* 49 U.S.C. § 50103(b) (“Preference”). Other statutes equate preference with discrimination similarly to the ICA discussion above.<sup>1</sup>

In contrast to all of this persuasive authority that strongly supports the Board’s view that the meaning of preference is not absolute, Amtrak baldly asserts that preference instead means that Amtrak has absolute priority in use of the rail system. *See* Amtrak Opening Comments at 10 (“If 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.”). Doubling down, Amtrak further claims that “Congress defined preference” in the first sentence of § 24308(c), such that the Board’s approach is contrary to the plain and unambiguous language of the statute. *Id.* at 13-14. Such an argument simply is not credible. Notably absent from § 24308(c) is any definition of the term “preference.” As Norfolk Southern has demonstrated above and on opening, preference is best understood in the context of the ICA’s statutory scheme to mean a relative favoritism or weighting, not absolute priority. *See* Norfolk Southern Opening Comments at 6-16.

Unsurprisingly, Amtrak cannot and does not support its assertion that preference actually means absolute priority. Most of its citations simply address the uncontested point that the preference obligation is separate from the preference relief application procedure, rather than the meaning of the term “preference.” *See* Amtrak Opening Comments at 15-18 (discussing the Amtrak Improvement Act of 1973, Interstate Commerce Commission (“ICC”) statements in

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<sup>1</sup> See, for example, 47 U.S.C. § 202(a) “Discriminations and Preferences”: “It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

1987, the Federal Railroad Administration (“FRA”), and *United States v. Southern Pacific*). Others unhelpfully predate the preference statute itself. *See id.* at 7-8 (discussing statements in 1970-72); *id.* at 16 (discussing the ICC’s view of an entirely different regulation). In fact, the only citation Amtrak provides that speaks directly to its assertion that preference equals absolute priority is a single sentence plucked out of an unrelated 78-page study of freight capacity prepared by a private company, describing a specific train type used in the study. *Id.* at 10 n.9.

Nor is Amtrak’s position bolstered by its preoccupation with the statutory phrase “in using a rail line, junction, or crossing.” *Id.* at 10-12. Akin to the question of “when” preference is to be provided, the statutory list of facilities simply defines “where” the preference obligation applies, and does not say anything about what preference means.

Finally, the Board’s construction of preference does not render the preference relief process superfluous. *Contra id.* at 14. Even though preference does not mean absolute priority, host railroads may at times have reason to seek Board approval to treat Amtrak trains equal to, or with less favoritism than, freight transportation on a long-term basis on particular lines to avoid negative consequences not associated with the overall fluidity of the railroad. For example, a railroad might seek prospectively to institute a uniform speed limit and strict slotting system that would treat all trains the same to homogenize traffic to maximize capacity on a constrained line. *See generally* Mark H. Dingler, et al., “Impact of Train Type Heterogeneity on Single-Track Railway Capacity,” 2009 Trans. Res. Record 41 (“A key factor affecting rail capacity is the interaction of different train types. Heterogeneity in train characteristics causes greater delays than a corresponding number of homogeneous trains would.”). In all respects, the Board is both correct and on solid legal footing to suggest that the meaning of preference is not absolute.

C. Amtrak, Not the Board, Is Proposing a Major Shift in the Status Quo that Amtrak Previously Has Admitted Would Shut Down the Rail Network in Some Places

The Board's construction of preference is on solid operational grounds as well. Amtrak's position that the term preference means absolute priority is not supported by past statements from Amtrak or current real-world practice on the rail network. As Norfolk Southern (among others) noted on opening, contemporaneous with the adoption of the preference statute, Amtrak's President himself recognized that preference cannot mean absolute priority:

Well, this question of freight train interference is complicated. There are cases in railroad operations, a number of them, where freight train interference might be justified. . . . I feel, and I have felt, that to try to legislate that 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.

Financial Assistance to Amtrak: Hearings Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce, 93d Cong. 32 (1973) (testimony of Amtrak president Roger Lewis).

Moreover, Amtrak's position is simply unworkable when applied to real-world railroading. As Norfolk Southern explained in its opening comments, traffic conditions can make it impossible for Amtrak to get absolute priority in dispatching decisions. *See* Norfolk Southern Opening Comments at 10-11. For example, on a route with upwards of 100 freight trains a day, there simply are not enough sidings and too many trains to assume that every freight train can be held out of the way of Amtrak. Having Amtrak always hold the main track soon would result in Amtrak ending up nose-to-nose with another train, and that section of the network would grind to a complete halt.

Despite the absolutist position Amtrak has put forward to the Board in this proceeding, it had admitted in the past that its approach is unworkable in practice. Amtrak confirmed to the Department of Transportation Office of Inspector General ("DOT OIG") that an absolute

definition of preference would shut down the rail network in some circumstances. *See* DOT OIG, CR-2008-076, “Root Causes of Amtrak Train Delays,” at 19 (Sept. 8, 2008) (“In addition, AAR strongly believes that adhering strictly to Amtrak’s definition of preference would quickly shut down the rail network. Amtrak agrees that this could happen in some circumstances but takes issues with how frequently those circumstances would arise.”). And Paul Vilter, Amtrak’s AVP for Host Railroads, testified to the Board in 2004: “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.” *Buckingham Branch R.R. Co. – Lease – CSX Transportation, Inc.*, Finance Docket No. 34495 (Oct. 13, 2004). In short, Amtrak knows that absolute priority is an unreasonable, unworkable definition that will negatively impact the efficiency and efficacy of the rail network.

#### D. Amtrak’s Definition Is Not a Sound Regulatory Approach

By comparison, Norfolk Southern is concerned that Amtrak’s opening comments suggest that Amtrak now feels no need even to acknowledge the consequences of the extreme position it is pushing on the Board. Amtrak states that any consideration of freight delays when considering the definition of preference “is simply not appropriate,” and that “[a] more flagrant example of an ‘apples and oranges’ comparison is difficult to imagine.” Amtrak Opening Comments at 22. In short, according to Amtrak, preference means Amtrak goes without delay, no matter how long other traffic may have to wait, no matter how the network is impacted, and no matter what costs are imposed by the absoluteness of Amtrak’s claimed entitlement.

Amtrak attempts to make its unworkable definition palatable by contending that the preference relief application procedure is meant to serve as the singular “mechanism to ensure that preference does not materially lessen the quality of freight transportation to shippers.” *Id.* at

15. Amtrak suggests that the “Board should consider promulgating procedural rules to process host railroad relief applications modelled [sic] on those promulgated by [DOT].” *Id.* at 15 n.14.

But when defining preference, the Board should bear in mind two important policy considerations. First, it must remember that Congress has tasked the Board with regulating “so as to promote efficiency in freight service” as part of the rail transportation policy. *See* Policy Statement at 3; 49 U.S.C. § 10101. The presence of the preference relief process itself provides direct evidence that Congress did not desire for § 24308(c) to “materially lessen the quality of freight transportation provided to shippers.” Congress could not have intended a definition of preference that would result in the freight railroads constantly petitioning for relief in making daily dispatching decisions to avoid adverse consequences.

Yet applying Amtrak’s proposed definition of absolute priority would result in just such a lessening of freight transportation. The Board must reject any attempt to define preference in a way that would disrupt the rail system unless parties successfully petitioned for relief via a yet-to-be developed process. Instead, the Board should construct preference in a way that encourages, not prohibits, railroads to operate their networks in an efficient and economic manner.

Second, the Board cannot willfully ignore the wide-reaching consequences of the meaning of preference. One of these consequences, ironically, would redound directly to Amtrak’s own disadvantage, though Amtrak fails to acknowledge the point. As Norfolk Southern explained on opening, defining preference to mean absolute priority necessarily would impact the incremental cost of hosting Amtrak trains. *See* Norfolk Southern Opening Comments at 13-15. “If the Board were to decide that the freight railroads have a statutory obligation to ensure that every dispatching decision is resolved in favor of Amtrak, even to the detriment of

network fluidity, the financial costs of hosting Amtrak on a line would skyrocket.” *Id.* at 13. Amtrak would be required by statute to compensate the host railroads for these higher costs. *See generally* 49 U.S.C. § 24308(a)(2)(B). Defining preference to be situational provides Amtrak relative favoritism in dispatching without depriving Amtrak of the choice of whether to pursue a higher level of service through its operating agreement with host railroads.

### **III. The Board Is Correct To Take An Open View of Potential Evidence**

#### **A. Evidence Relevant to an Allegation of a Preference Violation under § 24308(f)(2)**

Turning to the evidence relevant in an investigation of an alleged preference violation under 49 U.S.C. § 24308(f)(2), Amtrak correctly states that preference turns on individual dispatching decisions. *See* Amtrak Opening Comments at 19. Norfolk Southern explained on opening that the only delays that potentially could support allegations of a preference violation are those that could be avoided through different dispatching decisions, given the conditions known to the dispatcher at the time of the decision and the intended or foreseeable consequences. *See* Norfolk Southern Opening Comments at 18-21. Identifying such delays requires a root-cause analysis. *Id.* at 18-19. Norfolk Southern supports the Board’s guidance that it will focus on evidence of systemic failures in such regard, rather than on isolated or occasional instances that are not a primary driver of Amtrak’s performance. *See id.* at 17.

From there, however, Amtrak’s critique of the Board’s guidance about potential evidence falls apart in concert with its suggested approach to defining preference. Amtrak’s myopic view of preference as absolute priority causes it to disregard all consequences of dispatching decisions. Amtrak argues that all that matters is if Amtrak gets the right of way, regardless of delays to other trains or the impact on network fluidity. *See* Amtrak Opening Comments at 19 (“A host railroad must resolve individual dispatching decisions between Amtrak movements and

freight movements in favor of Amtrak and, on preference issues in section 24308(f) investigations, parties should submit evidence and arguments on whether the host railroad has done so.”).

But when preference is properly understood as a relative weighting, not an absolute prescription, the Board is correct to take an open view and consider all potentially relevant factors in deciding whether a host railroad has met its statutory obligation. An investigation must be a fulsome fact gathering exercise driven by the facts of the particular case. *See* Policy Statement at 3 (highlighting “the fact-specific nature of § 24308(c) preference issues”). Depending on the circumstances, a variety of different types of evidence may provide particular insights into the handling of particular Amtrak trains. “[C]omparative evidence on passenger and freight train performance” which Amtrak attempts to dismiss, Amtrak Opening Comments at 21, is a perfect example. Such evidence may be very informative in certain cases, not because Amtrak passengers should take “comfort” in knowing that freight traffic had greater delays, *id.* at 22, but because it would be very difficult to support an allegation that declines in Amtrak performance were due to a failure to provide favoritism in dispatching if those declines were mirrored or exceeded by declines in freight performance. *See* Norfolk Southern Opening Comments at 23-25 (providing just such an example with the performance of the Capitol Limited from 2013 to 2015).

B. Evidence Relevant to General Investigation under § 24308(f)(1)

Parties also must not lose sight of the fact that the resolution of alleged preference violations is a limited portion of much broader Board investigations of substandard performance under 49 U.S.C. § 24308(f)(1). *See generally id.* at 4-6 (contrasting wide-reaching investigation and recommendations under subsection (f)(1) with much narrower focus for preference

allegations and potential damages under subsections (f)(2)-(4)). Delays arising out of freight volume and capacity, maintenance needs, and other causes are major contributors to performance but are not relevant to preference allegations. *Id.* at 18-21. Amtrak itself noted recently with approval that Amtrak schedules would be reviewed under § 24308(f)(1) as part of any triggered investigation. *See* Amtrak Reply Comments at 6, *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Ex Parte 726 (filed Mar. 30, 2016) [hereinafter “Amtrak EP 726 Reply”].

Focus on these factors in an investigation is important because Amtrak frequently asserts that preference failures are the cause of poor train performance that is in fact driven by other factors. For example, Amtrak recently repeated its claim that the freight railroads, and Norfolk Southern in particular, immediately improved the performance of Amtrak’s trains in response to the passage of PRIIA in 2008. *See, e.g.*, Amtrak EP 726 Reply at 8. Such claims conveniently ignore that FRA’s and Amtrak’s Metrics and Standards were not finalized until May 12, 2010, and what actually did happen in the fall of 2008 was a substantial drop in freight volumes associated with the economic recession, which in turn led to improved performance for all of the trains remaining on the line, freight and Amtrak alike. Indeed, DOT OIG has rejected comparisons of Amtrak delay data from 2008 to earlier years for precisely that reason. *See* DOT OIG, CR-2012-148, “Analysis of the Causes of Amtrak Train Delays,” at 2 (July 12, 2012) (“Our sample covered fiscal years 2002 through 2007. Since the marked reductions in freight traffic caused by the economic recession that began in late 2008 resulted in different usage patterns, we did not include post-fiscal year 2007 data in our analysis.”) (emphasis added).

Amtrak can be similarly selective when discussing schedules. Amtrak recently highlighted a small amount of time added to its Capitol Limited schedule since 1991. *See*

Amtrak EP 726 Reply at 10 (“[T]he schedules for those trains have been lengthened by 20 minutes in the westbound direction and 28 minutes in the eastbound direction.”). That statement omitted the fact that Amtrak added three new station stops to those schedules during that time, with additional station dwell of 31 minutes (eastbound) and 23 minutes (westbound).<sup>2</sup> Amtrak also highlighted a few examples of short-term adjustments to schedules to accommodate major infrastructure or program maintenance projects as proof that it takes maintenance needs into account in scheduling. *See* Amtrak EP 726 Reply at 9-10. Completely lacking from those examples is any acknowledgment (or evidence of accommodation) of day-to-day maintenance needs. All of these examples show why the Board is correct to provide broad and general guidance on these issues through its Policy Statement. The particular facts will drive what evidence is most relevant in individual investigations.

#### **IV. Board’s Policy Statement is Proper Under the Administrative Procedure Act (APA)**

Finally, Amtrak’s claim that the Board’s Policy Statement somehow improperly binds the public, *see* Amtrak Opening Comments at 4-6, is wrong. Norfolk Southern explained on opening that the Board is entirely within its authority to issue its non-binding Policy Statement. *See* Norfolk Southern Opening Comments at 25. “A general statement of policy . . . is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.” *Pac. Gas & Elec. Co. v. Fed. Power Com.*, 506 F.2d 33, 38 (D.C. Cir. 1974). As the Board expressly indicated, “[p]arties are

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<sup>2</sup> Compare the Capitol Limited schedule effective January 11, 2016, *see* Capitol Limited, <https://www.amtrak.com/ccurl/122/207/Capitol-Limited-Schedule-011116.pdf> (last accessed Apr. 8, 2016), with that of the Capitol Limited effective on October 27, 1991, *see* Museum of Railway Timetables, “October 27, 1991 (System),” <http://www.timetables.org/browse/?group=19911027&st=0001> (last accessed Apr. 8, 2016).

still free to present any arguments or evidence they could have presented before the Board issued this policy statement.” Policy Statement at 3.

The only precedent Amtrak cites in support of its argument actually bolsters the Board’s legal authority when reproduced in full:

A document will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as ... denial of an application. If the document is couched in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced. In some circumstances, if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter.

*Gen. Elec. Co. v. Environmental Protection Agency*, 290 F.3d 377, 383 (D.C. Cir. 2002) (quoting Robert A. Anthony, “Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?,” 41 DUKE L.J. 1311, 1328-29 (1992)) (emphasis added). The D.C. Circuit went on to find the statement at issue in that case was a legislative rule because “[o]n its face the Guidance Document impose[d] binding obligations upon applicants to submit applications that conform to the Document.” *Id.* at 385. Here, far from binding future investigations or mandating behavior, the Board’s Policy Statement announces no set rule or binding norm. Further, it is expressly couched in non-mandatory language and subject to future exercise of discretion. *See, e.g., Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (indicating that the courts will give some deference to an agency’s characterization of its own actions and highlighting the importance between conditional and definitive language).

Amtrak’s concern that “a party would be taking a sufficient risk if it did not focus on evidence and arguments consistent with the Board’s stated view,” Amtrak Opening Comments at 5, does not equate to a binding effect. Instead, courts have recognized that parties benefit from

having such notice of an agency's current thinking on issues ahead of substantively deciding them in a rulemaking or adjudication.

In this sense, a policy statement is "like a press release" in that it "presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications." *Id.*; see also *American Hosp. Ass'n v. Bowen*, 266 U.S. App. D.C. 190, 834 F.2d 1037, 1046-47 (D.C. Cir. 1987) (analyzing the nature of policy statements).

This advance-notice function of policy statements yields significant informational benefits, because policy statements give the public a chance to contemplate an agency's views before those views are applied to particular factual circumstances. This opportunity to anticipate the agency's actions "facilitates long range planning within the regulated industry and promotes uniformity in areas of national concern." *Pacific Gas*, 506 F.2d at 38. This period of foreshadowing is made even more useful by the fact that, unlike substantive rules, ["a general statement of policy ... does not establish a 'binding norm.'"]

*Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999). On the most basic level, no agency could ever issue a policy statement without potentially influencing the thinking or decision-making of regulated parties. Yet agencies legally issue policy statements all the time in accordance with 5 U.S.C. § 553(b)(A). The Board has correctly interpreted the APA.

## **V. Conclusion**

In conclusion, although the application of preference is resolved by statute, the Board is correct that the meaning of preference remains unsettled. The Board should provide non-binding guidance that preference is situational and that the Board will examine dispatcher-avoidable delays in resolving any allegations of a preference violation after an investigation has been triggered. Such a position is supported by legislative history, comparable statutes, current practice, real-world operational concerns, and even Amtrak's own historical statements. In contrast, Amtrak's position that preference instead means absolute priority would degrade the efficiency of the national rail system and have other unintended consequences. Finally, the

Board should reject all calls to withdraw its Policy Statement. The Board's non-binding guidance is firmly within its legal authority under the APA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James A. Hixon", written over a horizontal line.

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April 13, 2016