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April 13, 2016

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

**Re: Docket No. EP 728, Policy Statement on Implementing Intercity Passenger  
Train On-Time Performance and Preference Provisions of 49 U.S.C.  
§24308(c) and (f)**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket are the National Railroad Passenger Corporation's Reply Comments on the Board's Notice of Proposed Statement of Board Policy on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f).

If you have any questions, please contact me. [wherrmann@amtrak.com](mailto:wherrmann@amtrak.com)

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William H. Herrmann", written over a horizontal line.

William H. Herrmann  
VP & Managing Deputy General Counsel

Enclosures

Docket No. EP 728

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

**REPLY COMMENTS  
OF  
THE NATIONAL RAILROAD PASSENGER CORPORATION**

April 13, 2016

National Railroad Passenger Corporation (“Amtrak”) submits these reply comments regarding the Board’s December 28, 2015 Decision in Docket No. EP 728, “Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. §24308(c) and (f)” (the “Proposed Policy Statement”). For purposes of these comments, the Association of American Railroads (“AAR”), Grand Trunk Western Railroad Company and Illinois Central Railroad Company (collectively, “CN”), CSX Transportation (“CSX”), and Norfolk Southern (“NS”) may sometimes collectively be referred to as the “Freight Commenters”.

**A. Introduction**

In its Initial Comments, Amtrak urged the Board to withdraw the Proposed Policy Statement. As Amtrak showed, the Proposed Policy Statement ignores the plain and unequivocal language of Amtrak’s statutory right to preference embodied in 49 U.S.C. § 24308(c) (the “preference statute”); ignores a statutory “relief application” procedure prescribed by Congress (and interpreted by the Interstate Commerce Commission and the Department of Transportation) to account for instances in which granting preference would materially lessen the quality of freight transportation provided to shippers; and draws broad, erroneous conclusions about evidence that could be used to prove or disprove a preference violation in an investigation under 49 U.S.C. § 24308(f) (“PRIIA 213”).<sup>1</sup>

The comments filed by the Freight Commenters only serve to reinforce Amtrak’s position that the Proposed Policy Statement should be withdrawn, and that the Board should not pronounce policies

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<sup>1</sup> An independent basis for withdrawal is that the Proposed Policy Statement is invalid under the Administrative Procedure Act, because it makes pronouncements that are binding on the public and yet it was not promulgated through notice and comment rulemaking under 5 U.S.C. § 553. Amtrak Initial Comments at 4-6.

regarding the conduct of, and evidence in, PRIIA 213 investigations in the abstract, without a record developed in the course of an investigation. Specifically, the Freight Commenters – keying off of the Board’s erroneous finding that the preference statute permits it to take a “systemic, global approach” to determining if preference has been granted<sup>2</sup> -- propose that the Board adopt a litany of findings, exceptions, exclusions and tests about what does not constitute a preference violation, what interests may overcome an interest in efficient and expeditious service to Amtrak passengers; and when preference violations should be excused. As Amtrak will show, those proposals have no basis in the law, would significantly complicate and expand PRIIA 213 proceedings, and would effectively give the freight railroads free rein to continue denying preference to Amtrak trains and their passengers.

More generally, the Proposed Policy Statement, and the freight railroads’ comments in response to it, highlight the stark contrast between two competing visions of the overall statutory scheme enacted by Congress and embodied in the preference statute and PRIIA 213. As Amtrak has shown, the statutory scheme embodied in the preference statute sufficiently addresses both the meaning of Amtrak’s preference right, and how that right may be modified if it is shown that providing preference in a specific situation would cause a material lessening of freight transportation provided to shippers. Under that statutory scheme:

- As a matter of course, a freight railroad must accord Amtrak trains preference over freight traffic.<sup>3</sup>
- A freight railroad may apply to the Board for prospective relief from its obligation to provide preference (a “relief application”).<sup>4</sup> This self-contained inquiry provides the mechanism by which the Board can balance the interests of Amtrak’s passengers in receiving efficient and expeditious service, on the one hand, and the quality of freight transportation provided to shippers by the

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<sup>2</sup> Proposed Policy Statement at 3.

<sup>3</sup> “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.” 49 USC § 24308(c).

<sup>4</sup> “A rail carrier affected by this subsection may apply to the Board for relief.” *Id.*

freight railroad, on the other hand, and if necessary, to modify the rights of the freight railroad and Amtrak on reasonable terms.<sup>5</sup>

- The Board or interested parties may also initiate an investigation into the causes of delay to an Amtrak train when that train's on-time performance averages less than 80% for the prior two consecutive quarters, using a separate proceeding established under PRIIA 213, in which the Board will investigate the causes of delay, including any allegations that delays are caused by preference violations.<sup>6</sup>

The statute thus defines preference and prescribes under what circumstances and through what processes the Board may modify that right. Within those statutory requirements, and based upon evidence in a PRIIA 213 investigation or a preference relief application, the Board has discretion as to the format of the proceedings, the relevance of evidence, and the details of the relief awarded.<sup>7</sup> But the Board should not adopt any policy or guidance without the benefit of the experience, facts and evidence in an actual PRIIA 213 proceeding, and even then such policy or guidance must be consistent with the statutory requirements of § 24308(c) and (f).<sup>8</sup>

Amtrak therefore again urges the Board to withdraw the Proposed Policy Statement.

**B. The Freight Commenters' Proposals, Like the Proposed Policy Statement, Are Based On and Tainted By a Fundamental Misinterpretation of the Law.**

As Amtrak showed in its Initial Comments, Amtrak's statutory right to preference is the clear expression of Congress's intent to safeguard the viability of passenger service as part of the national transportation system and economy, by granting Amtrak a concrete and enforceable right to preference over freight traffic in using any rail line, crossing, or junction. As recently as 2008, Congress created a new avenue for preference enforcement through PRIIA 213 investigations in order to enhance that right, not to weaken it.

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<sup>5</sup> "If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms." *Id.*

<sup>6</sup> Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432, Div. B, Title II, § 213(f), 122 Stat. 4848, 4925-26 (2008).

<sup>7</sup> *Id.*

<sup>8</sup> See *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202 (1947) ("Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development ..."); *id.* ("[T]he agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule.")

At the same time, Congress left untouched the preference “relief application” procedure mandated in the last two sentences of 49 U.S.C. § 24308(c). This is the procedure that Congress provided as the mechanism to ensure that preference does not materially lessen the quality of freight transportation to shippers. If a freight railroad applies for preference relief and can demonstrate that preference will materially lessen the quality of freight service provided to shippers, then the Board has authority to establish the rights of the freight railroad and Amtrak on reasonable terms. If the freight railroad cannot so prove, then it is not entitled to relief from its preference obligations. The Board cannot pass the burden of proof on the issue of “material lessening of freight transportation” to Amtrak, or allow the freight railroads to circumvent that process by raising “material lessening of freight transportation” as a defense in a PRIIA 213 proceeding, only after Amtrak has initiated an investigation. Had Congress wanted to add new balancing tests, or import an “overall network efficiency test” or a “changed circumstance test” into the preference statute or PRIIA, it had the opportunity to do so when it amended 49 U.S.C. § 24308 in 2008. Instead, not only did Congress choose not to introduce new tests into the preference statute; it gave the Board new jurisdiction to award damages for violations of the preference statute as written.

The “policies” and “guidelines” that the Freight Commenters urge the Board to adopt would result in proceedings even further removed from the preference framework mandated by Congress than the Proposed Policy Statement. For example, the Freight Commenters’ proposals ignore, and indeed directly contradict, the relief application process prescribed in § 24308(c). In their comments, the fact that Congress required the freight railroads to meet the burden of proving a material lessening of the quality of freight transportation provided to shippers, and required a finding of such by the Board before modifying a freight railroad’s preference obligation, is simply read out of the statute.

The Freight Commenters also urge the Board, in addition to the single other interest identified by Congress (a material lessening of the quality of freight transportation provided to shippers), to adopt a long list of additional interests that must be weighed against the interests of Amtrak’s passengers; *e.g.* the interests of freight customers, businesses, consumers, the environment, the national economy, and the interests of the freight railroad.

Moreover, the Freight Commenters ask the Board to adopt policies adding a number of new findings, exceptions, tests and defenses that would have the effect of categorically excluding a finding

that a preference violation occurred. For example, the Freight Commenters argue that the Board could not find a preference violation:

- unless Amtrak shows an “identifiable and longstanding pattern of systemic failures” to grant preference (CN Initial Comments at 5; *see* AAR Initial Comments at 11);
- unless the preference violation is “improper” based on “conditions known to the dispatcher at the time of the decision” (NS Initial Comments at 19);
- unless Amtrak proves that delays were an “intended or foreseeable consequence” of the preference violation (NS Initial Comments at 21).
- if granting preference would involve “extreme measures” (undefined) by the freight railroad (CN Initial Comments at 3);
- with respect to any train received by the freight railroad “significantly late” or more than 30 minutes late or out of slot (*See* CN Initial Comments at 11; CSX Initial Comments at 8; AAR Initial Comments at 11);
- if the preference violations are not found to be the “primary cause” of poor overall performance (NS Initial Comments at 17);
- if the freight railroad is meeting so-called “standards of performance” in the parties’ operating agreements (CN Initial Comments at 6-7; AAR Initial Comments at 13).<sup>9</sup>
- if the preference violation results in a delay that is “inherent in operating or maintaining a railroad” (NS Initial Comments at 18);
- if the preference violation arises from a freight train blocking the Amtrak train following a variety of “excepted” occurrences (NS Initial Comments at 19);
- if the preference violation is associated with “schedule-driven changes in the number or degree of delays” (NS Initial Comments at 19; *see* AAR Initial Comments at 3).<sup>10</sup>

None of the exceptions and exclusions proposed by the Freight Commenters is permissible under either the preference statute or PRIIA 213. The only explicit exception to Amtrak’s right to preference, besides emergencies, is a showing by the freight railroad that granting preference would

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<sup>9</sup> As discussed more fully in Section E.1. below, what the Freight Commenters refer to as “standards of performance” are in fact compensation provisions, which cannot, as a legal or practical matter, substitute for Amtrak’s statutory right of preference.

<sup>10</sup> This is an illustrative rather than an exhaustive list.

materially lessen the quality of freight transportation provided to shippers. When Congress expressly provides exceptions to a general rule, no additional exceptions may be implied. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001); *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1259-60 (D.C. Cir. 2007).

Finally, several of the Freight Commenters attempt to diminish Amtrak's rights by purporting to find a narrow definition to the term "preference" as used in the statute. CN posits (Initial Comments at 6) that Amtrak's statutory right to "preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise" should be interpreted to be no more than "a general, context-dependent approach to helping Amtrak meet its goal of timeliness..." NS (Initial Comments at 22) suggests that it be redefined as "a relative indication of how Amtrak trains should be handled in comparison to freight traffic, in light of relevant conditions at the time." The Board should explicitly reject these attempts to redefine – and thereby significantly undermine – the statutory preference obligation. These tortured definitions ignore the plain and common meaning of the term "preference": "the selecting of someone or something over another or others." *Drake v. Pierce*, 698 F. Supp. 1523, 1527-28 (W.D. Wash. 1985). In *Freeman v. Morton*, 499 F.2d 494, 502 (D.C. Cir. 1974), the court rejected the argument that a statute granting "preference" permitted any element of choice, noting that "[t]he statute makes the choice," and recognizing that the "clear meaning of the Act" granted unequivocal preference. At the time the preference language was being considered by Congress, both opponents and supporters recognized that the statutory right of preference was "mandatory" and "unconditional" save for the exceptions explicitly contained in the statute.<sup>11</sup> If the Board interprets Amtrak's right to preference as conditional, relative, and subject to the freight railroads' own judgment, as urged by the Freight Commenters, then Congress's admonition that preference must be provided "unless the Board orders otherwise" would be rendered superfluous. Given the strong presumption that a "legislature says in a statute what it means and means in a statute what it says," *Arlington Co. Sch.*

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<sup>11</sup> *See, e.g.*, Letter from Secretary of Transportation John A. Volpe to Rep. Harley O. Staggers (Feb. 8, 1972) (observing that the statutory preference right "would create a mandatory preference"); Letter from Amtrak President Roger Lewis to Sen. Vance Hartke, Chairman of the Surface Transportation Subcommittee of the Senate Commerce Committee (Dec. 16, 1971) (characterizing statutory right under consideration as "an unconditional preference of passenger trains over freight trains"); Letter from the American Association of Railroads to Rep. Brock Adams (Feb. 7, 1972) (characterizing statutory preference right under consideration as a "rigid statutory constraint"); Hearings on H.R. 8351 before the Subcomm. on Transp. and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93<sup>rd</sup> Cong. 1<sup>st</sup> Sess., at 335 (statement of Anthony Haswell, National Association of Railroad Passengers). After fully considering the testimony, Congress rejected more discretionary language in favor of the unequivocal preference language, which remains in effect today.

*Dist. v. Murphy*, 126 S. Ct. 2455, 2459 (2006), the Board should reject any qualifications or exceptions to the preference right not contained in the plain language of the statute itself.<sup>12</sup>

The existing statutory structure provides an avenue for freight railroads to raise, and the Board to address, concerns about the effect of Amtrak preference on the quality of freight transportation provided to shippers; i.e., through the relief application procedure set out in the last two sentences of the preference statute. Therefore, there is no need for the Board to revise the meaning of “preference” or to formulate non-statutory exceptions or tests, when the statutory definition of preference for use in PRIIA 213 investigations and the statutory relief standard already exist.

### **C. Effect on Amtrak of Diminishing Its Preference Rights.**

The practical effect on Amtrak passengers of issuing a policy that redefines or otherwise diminishes Amtrak’s preference rights cannot be understated. The on-time performance issues in the years immediately prior to 2008, and which led Congress to enact PRIIA 213, illustrate the potentially devastating consequences to Amtrak’s intercity passenger rail service of an environment, such as that which would result from the Proposed Policy Statement, in which every opportunity to grant Amtrak trains preference becomes a decision left up to the freight railroads to make unilaterally and they are at minimal risk of being held accountable for their actions.

In 2006, for example, Amtrak trains arrived at stations more than four hours late over 22,000 times, and more than eight hours late over 3,500 times. On two long distance services, nearly half of trains were over four hours late. Late passenger trains created unsustainable cascading effects on Amtrak’s service quality, network, and cost structure, such as:

- Lost ridership and revenue due to poor service.
- Passengers missing connections to other Amtrak trains, in some cases adding an entire day to their trip and requiring hotel accommodations at either their or Amtrak’s expense.<sup>13</sup>

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<sup>12</sup> The Freight Commenters also suggest a number of analogies in support of their “definitions” of preference, such as motorcades and ambulances travelling through traffic. Analogies are not necessary here, since the term “preference” has a plain meaning that makes such interpretive tools unnecessary. In any event, the analogies are inapposite. Unlike ambulances or motorcades, Amtrak trains operate on regular, published schedules and all traffic is visible to, and controlled by, the host railroad’s dispatchers.

- Crew shortages resulting in even further delays to other Amtrak trains. In some cases Amtrak had to resort to putting replacement crews on airplanes to meet trains that would otherwise be stranded without crews.
- Insufficient rolling stock to meet equipment turns, leading to cascading delays and train cancellations.

The Board should not revise the preference statute, because doing so would return Amtrak to the era of deplorable on-time performance that existed before PRIIA.

**D. The “Relief Application” Process Mandated By § 24308(c), Ignored in Both the Proposed Policy Statement and by the Freight Commenters, Is An Integral Part of the Board’s Jurisdiction Over On-Time Performance and Preference Matters.**

Although the relief application procedure has been part of the preference law since its enactment in 1973, no freight railroad has ever prospectively sought relief from its preference obligations. Instead, the freight railroads, which control the dispatching of Amtrak trains, weigh the effects of giving preference to Amtrak’s passengers against their own interests, and unilaterally decide what Amtrak’s right of preference means and when to grant it. Even under PRIIA 213, a freight railroad’s decisions will only be scrutinized by an impartial third party, in hindsight, long after the damage of preference delays to Amtrak passengers has been done. The result of this lack of accountability has been a continuation of the chronically poor on-time performance for Amtrak passengers, the exact opposite of what Congress intended.<sup>14</sup> Nothing in the Proposed Policy Statement or in the proposals advanced by the Freight Commenters would change the motivation a freight railroad now has to prioritize freight trains over Amtrak passengers, and to worry about the consequences, if any, later.

The relief application process mandated by Congress changes this dynamic. Use of this process would protect the interests of Amtrak passengers in being accorded preference over freight trains, while providing the means by which the Board can address claims that doing so would materially and

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<sup>13</sup> For more specific, personal accounts of these effects on Amtrak passengers, see Comments filed in EP 726 and EP 728 by the National Disability Rights Network (filed April 12, 2016), and the National Association of Rail Passengers (filed Feb. 8, 2016 and Feb. 22, 2016).

<sup>14</sup> “When you look at the on-time performance of these Amtrak trains you have to question whether the [p]reference law is being ignored.” *Amtrak Reform and FY 2008 Budget: Hearing Before the Senate Appropriations Subcomm. on Transp. and House. and Urb. Dev.*, 2007 WL 614849 (Feb. 28, 2007) (statement of Sen. Murray).

negatively impact freight transportation provided to shippers -- *i.e.*, the concept of “network fluidity.”<sup>15</sup> Where there are “long-standing” and “systemic” situations where a freight railroad believes that granting preference would materially lessen the quality of freight transportation (*see, e.g.*, Proposed Policy Statement at 4; NS Initial Comments at 16), the freight railroad should present evidence of that effect to the Board, which, by “establishing the rights of Amtrak and the carrier on reasonable terms,” could determine how the relative interests should be balanced in a prospective and proactive way, rather than in the context of punishing past behavior in a PRIIA 213 investigation.<sup>16</sup> Because delays that are the most chronic are also foreseeable to the freight railroads, there is no reason they could not apply to the Board for modification of their preference obligations, provided the parties have not been able to reach a private accommodation themselves.<sup>17</sup>

Use of the relief application has other positive, practical effects. The relief application hearing would be narrowly focused on the question of whether granting preference in a specific situation would materially lessen the quality of freight transportation provided to shippers and, if so, what “reasonable terms” are appropriate, unburdened by the many other issues that likely will arise in a PRIIA 213 investigation. As experience and precedent accumulate, the proceedings would provide clarity as to how the Board might balance Amtrak’s preference right against the prospect of a material lessening of freight transportation in a variety of situations, which in turn would reduce the incidence of preference violations while providing Amtrak and freight railroads a framework on which they could build

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<sup>15</sup> The exception for *materially lessening* the quality of freight transportation provided to shippers requires a much more stringent test than the mere showing that granting preference would affect “efficiency” in freight service. (Proposed Policy Statement at 2). 49 U.S.C. § 10101, cited by the Board and the Freight Commenters in support of weighing freight traffic “efficiency” against Amtrak’s preference rights, speaks only of a goal to promote a safe and efficient rail transportation system “by allowing rail carriers to earn adequate revenues, as determined by the Board,” not by changing what it means for Amtrak trains to have preference. The policy enumerated in §10101(3) therefore cannot defeat or diminish Amtrak’s preference rights.

<sup>16</sup> 49 U.S.C. § 24308(c). The Freight Commenters concede that analyzing preference decisions in hindsight is not ideal. CN Initial Comments at 5; NS Initial Comments at 22.

<sup>17</sup> Amtrak and the freight railroads have a longstanding and successful history of cooperation in accommodating service disruptions, when host railroads are willing to cooperate. For example, from February 2014 through October 2015, when BNSF was faced with rapid and unprecedented increases in oil train traffic originating in North Dakota, Amtrak and BNSF agreed to operate the *Empire Builder* on a schedule three hours longer than the then-current schedule, and to operate periodically over an alternative route. The longer schedule required Amtrak to add an additional train set to the *Empire Builder* operation, and to bus passengers to and from several stations that were bypassed whenever the *Empire Builder* operated on the alternative route, but this adjustment was made without the need for any Board action. *See also* Amtrak Reply Comments in EP 726 at 9-10 and Track Work Advisories attached thereto as Exhibit C.

collaborative efforts to improve on-time performance without the need for initiating PRIIA 213 proceedings.

While relief proceedings thus should play a critical role in the Board's exercise of its statutory jurisdiction with respect to preference and on-time performance, Amtrak anticipates that the need for such proceedings would be relatively rare. Experience shows that where freight railroads are incentivized to provide preference, they are able to do so, without materially lessening the quality of freight transportation provided to shippers.<sup>18</sup> The times when there is both an ongoing and systemic network issue, and the potential for preference to materially lessen the quality of freight transportation, should therefore be limited.

Finally, using the relief application process to decide when preference rights should be modified in specific situations should aid in simplifying and streamlining any PRIIA 213 investigations involving the affected Amtrak train. To the extent a freight railroad prospectively seeks and obtains a modification of its preference rights, the inquiry into those delays would already have occurred. To the extent a freight railroad did not seek or obtain such relief, the Board has discretion to decide what effect the failure to seek relief prospectively would have on the relevant evidence and permissible defenses in a PRIIA 213 proceeding. PRIIA 213 gives the Board broad discretion with respect to the format of the investigation, the information to be sought from the parties, the potential causes of delay to be explored, the recommendations for improving performance, and the relief to be awarded for preference violations, providing only that the relief be "reasonable and appropriate." Amtrak expects that the Board would focus its investigation, and fashion relief, in a way that is commensurate with the nature and severity of the violations.

Importantly however, the Board's discretion can and should only be exercised in the context of a proceeding on the basis of the facts and evidence before the Board, rather than issued in a statement of policy developed on the basis of hypothetical situations, analogies, and generalizations. Thus, it would be premature for the Board to issue the Proposed Policy Statement in final form, or any advisory opinion on most of the matters suggested by the Freight Commenters, such as the role of different types of indirect evidence, the usefulness of statistics, and the probative value of comparing freight delays or velocity to passenger train delays or velocity.

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<sup>18</sup> See charts attached hereto as Exhibit A.

## E. Other Arguments Advanced By the Freight Commenters.

The Freight Commenters ask the Board to issue policy statements on a wide variety of additional issues; for example, the weight to be given individual dispatcher decisions versus patterns of violations, the probative value of various types of evidence, the use of statistics and sampling, and suggested “mitigating factors.” Some of these proposals are irrelevant to the policy under consideration,<sup>19</sup> or are based on inaccurate information.<sup>20</sup> As discussed above, none is justified by the plain language of the law. Amtrak will not address each comment individually, but draws the Board’s attention to the following issues.

### 1. The Board should not substitute the parties’ contractual compensation provisions of the statutory right of preference.

CN and the AAR argue that a freight railroad should not be held liable for preference violations if it is being paid incentives under its operating agreement with Amtrak. AAR Initial Comments at 14; CN Initial Comments at 6-7. In Docket EP 726, CN also argued that the parties’ contractual compensation provisions should provide the definition of “on-time performance” for purposes of triggering a PRIIA 213 investigation, and Amtrak explained why those contractual provisions are an inappropriate and unworkable measure of on-time performance in that context. See CN Initial Comments in EP 726 at 4-6; Amtrak Reply Comments in EP 726 at 14-16. Simply put, the Board’s statutory authority does not include the interpretation or enforcement of private contracts. *Burlington Northern R.R. – Order for Just Compensation – National Railroad Passenger Corp.*, 7 I.C.C.2d 74 (1990) (the “Commission does not enforce contracts”). Moreover, Congress was aware of the terms of the parties’ operating agreements when it enacted PRIIA,<sup>21</sup> but accorded Amtrak an independent statutory right to seek relief, including damages, for preference violations. See *Grand Trunk Western Rr. Co. v. National Railroad Passenger Corp.*, Civil Action No. 80-72888, Memorandum Opinion and Order (E.D. Mich. 1980) (attached hereto as Exhibit B) (purported contractual obligation is subject to Amtrak’s “superior, independent right” set out in 45 U.S.C. § 562(f)).<sup>22</sup>

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<sup>19</sup> See CN Initial Comments at 10-11.

<sup>20</sup> For example, CSX makes several untrue statements regarding Amtrak’s Conductor Delay Reports (CSX Initial Comments at 6).

<sup>21</sup> See, e.g. 49 U.S.C. § 24308(a).

<sup>22</sup> In any event, the incentive/penalty provisions are an inappropriate proxy for preference violations because they calculate incentives and penalties based on factors wholly unrelated to freight train interference, for the reasons explained in more detail in Amtrak’s Initial Comments (Highly Confidential – Filed Under Seal version) at 14.

**2. The Board should not require a showing of intent, foreseeability or other “state of mind” element into proof of a preference violation.**

NS argues that finding a preference violation requires proof that other dispatching decisions “would have had direct and foreseeable impacts on the amount of delays to specific trains” and that “the specific decision was more than just an imperfect exercise of discretion in hindsight.” NS Initial Comments at 22-23. In other words, NS proposes that the Board issue a policy requiring proof of the dispatcher’s state of mind at the time the decision was made. The preference statute contains no such *mens rea* requirement, even if it were possible for Amtrak to prove a dispatcher’s state of mind months (if not years) after the event. In any event, it is the freight railroad’s (and its employees’) actions that matter, not their state of mind.

**3. The Board should not prejudge the nature of the preference violations it will admit into evidence.**

CN proposes that the Board issue a policy that it will only recognize, allow evidence of, and/or grant relief if Amtrak makes “a specific claim regarding a pattern or practice of host dispatching.” CN Initial Comments at 7; see NS Initial Comments at 16 (interpreting the Proposed Policy Statement to say that Board will only target “systemic or longstanding patterns” of violations); *id.* at 17 (Amtrak must show “patterns” of “improper handling”). Neither the statute, nor the Policy Statement, contains any such limitation, and none should be adopted. Amtrak agrees that identifying patterns and practices could be an efficient way to address and remedy preference violations in many situations, and Amtrak may well focus its allegations on such patterns and practices. However, the Board should decline to deny Amtrak or a third party applicant the right to offer the allegations and evidence it deems most appropriate for each particular PRIIA 213 investigation.

**4. The Board should not disregard preference violations that occur when Amtrak trains are not received by the freight railroad at the scheduled time.**

The Proposed Policy Statement suggests, and the Freight Commenters insist, that if an Amtrak train is not received by the freight railroad at the scheduled time, the freight railroad may thereafter violate preference with impunity. AAR Initial Comments at 11; CN Initial Comments at 11; CSX Initial Comments at 8. The Board should disclaim this policy, since it is not based on the statute, and if approved would cause unacceptable results in practice.

First, if a freight railroad receives an Amtrak train significantly late it is rarely caused by Amtrak's own actions. In fact, Amtrak's initial terminal performance for FY15 was 93%, meaning that 93% of all Amtrak trains departed their initial terminals within 3 minutes of schedule. In the rare cases where Amtrak trains do depart late, the largest category of initial terminal delay was attributable to waiting for a late inbound consist, which could be due, for example, to freight train interference to the incoming train. Second, if the first freight railroad on a line delays the Amtrak train, every other freight railroad further down the line will have a "free pass" to prioritize its freight trains over Amtrak trains, leading to longer and longer delays at every station. Finally, such a rule ignores the fact that dispatchers have visual and aural information about the location of Amtrak's trains before they are received, and therefore can arrange to provide preference to the Amtrak train when it is received.<sup>23</sup>

**E. Conclusion.**

For the reasons discussed in its Initial Comments and in this Reply, Amtrak urges the Board to withdraw the Proposed Policy Statement.

Respectfully submitted,



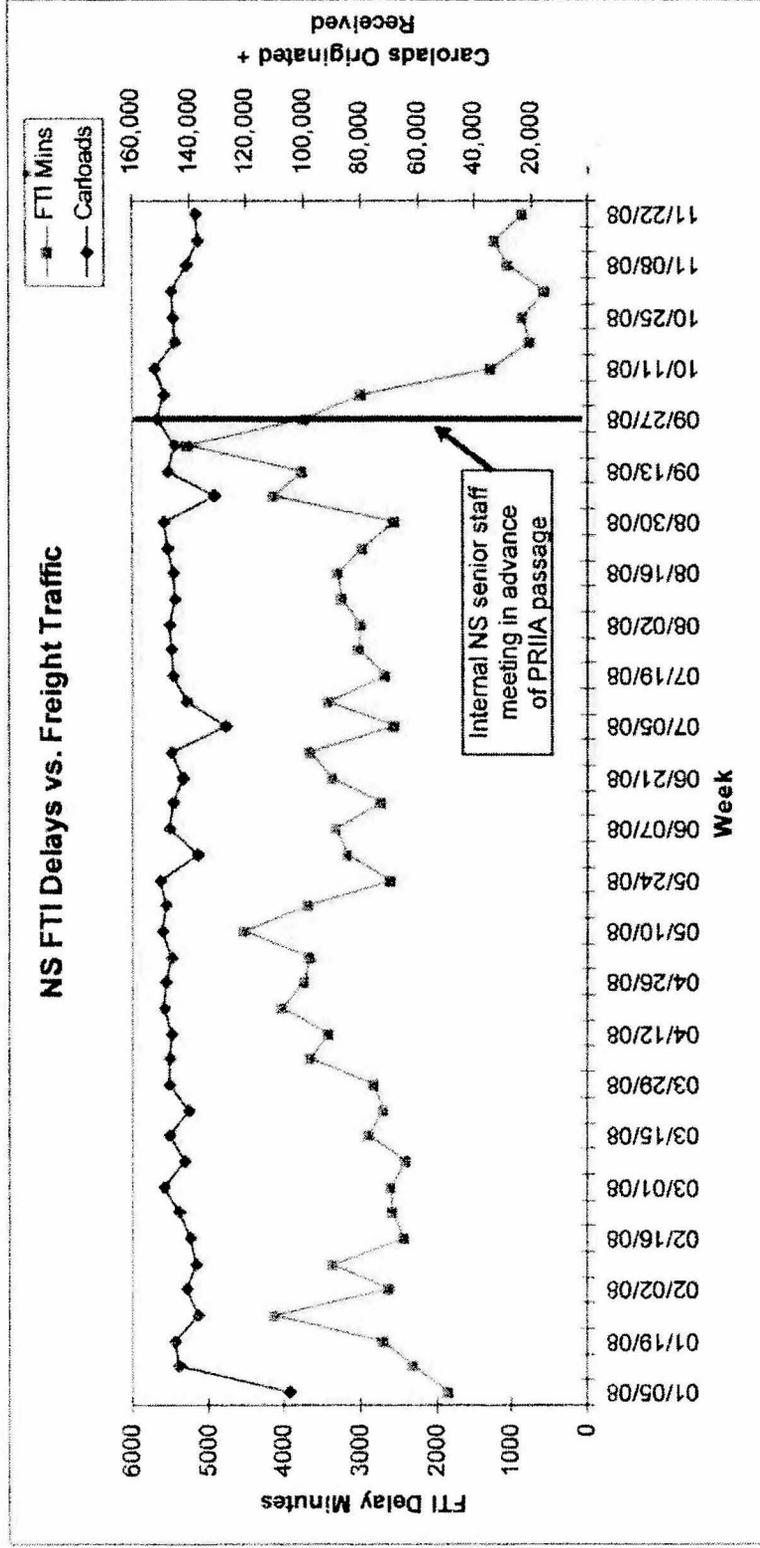
William H. Herrmann  
Vice President and Managing Deputy General Counsel  
National Railroad Passenger Corporation  
Dated: April 13, 2016

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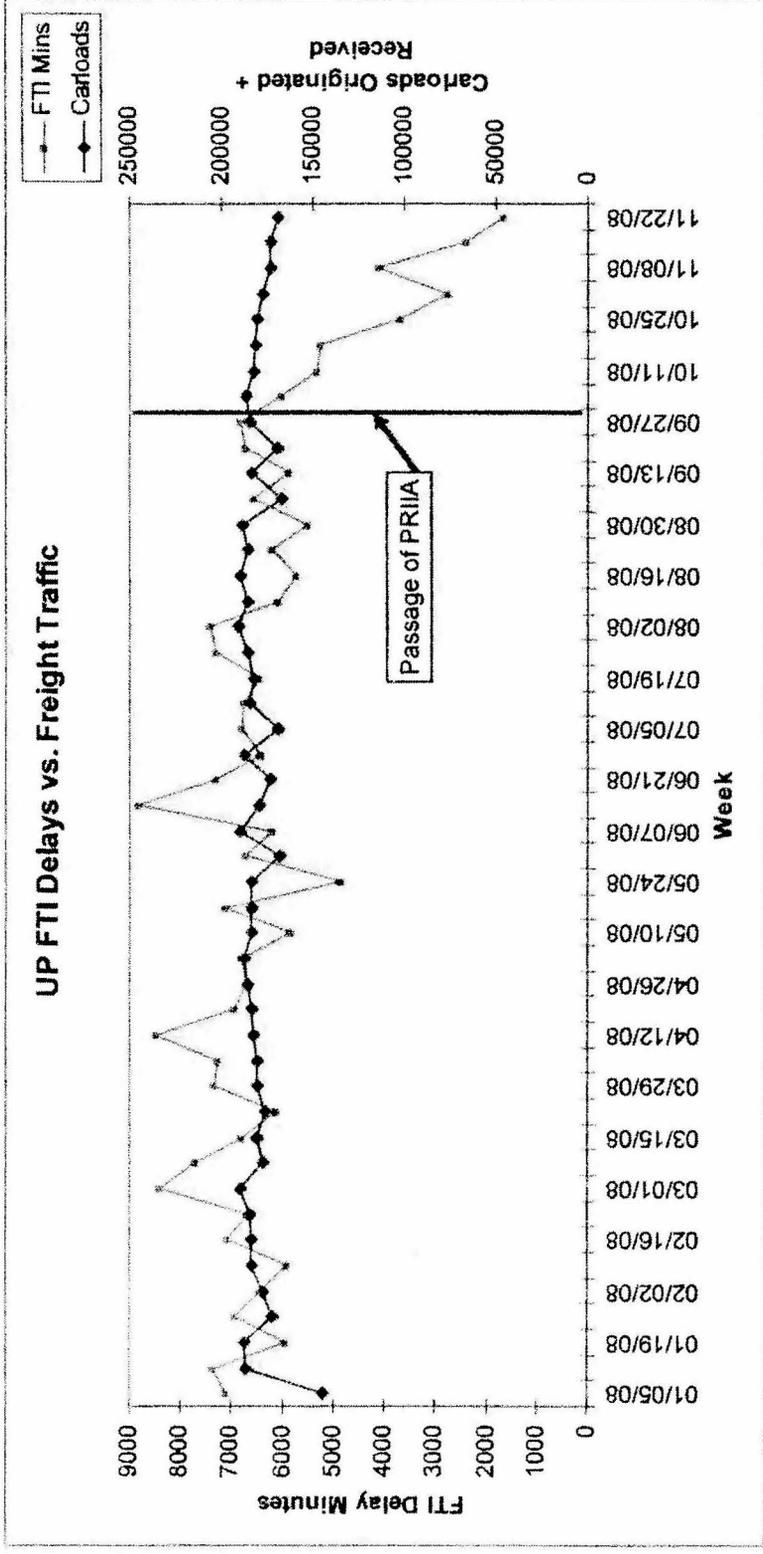
<sup>23</sup> The proposed rule also ignores the fact that the freight trains operating on a freight railroad's tracks are so loosely scheduled, and the operating plans changed so often, that if an unplanned meet occurs it is much more likely that it was the freight train, and not the Amtrak train, that was "out of slot."

# Exhibit A

# NS reduced Freight Train Interference delays overnight when PRIIA first became law

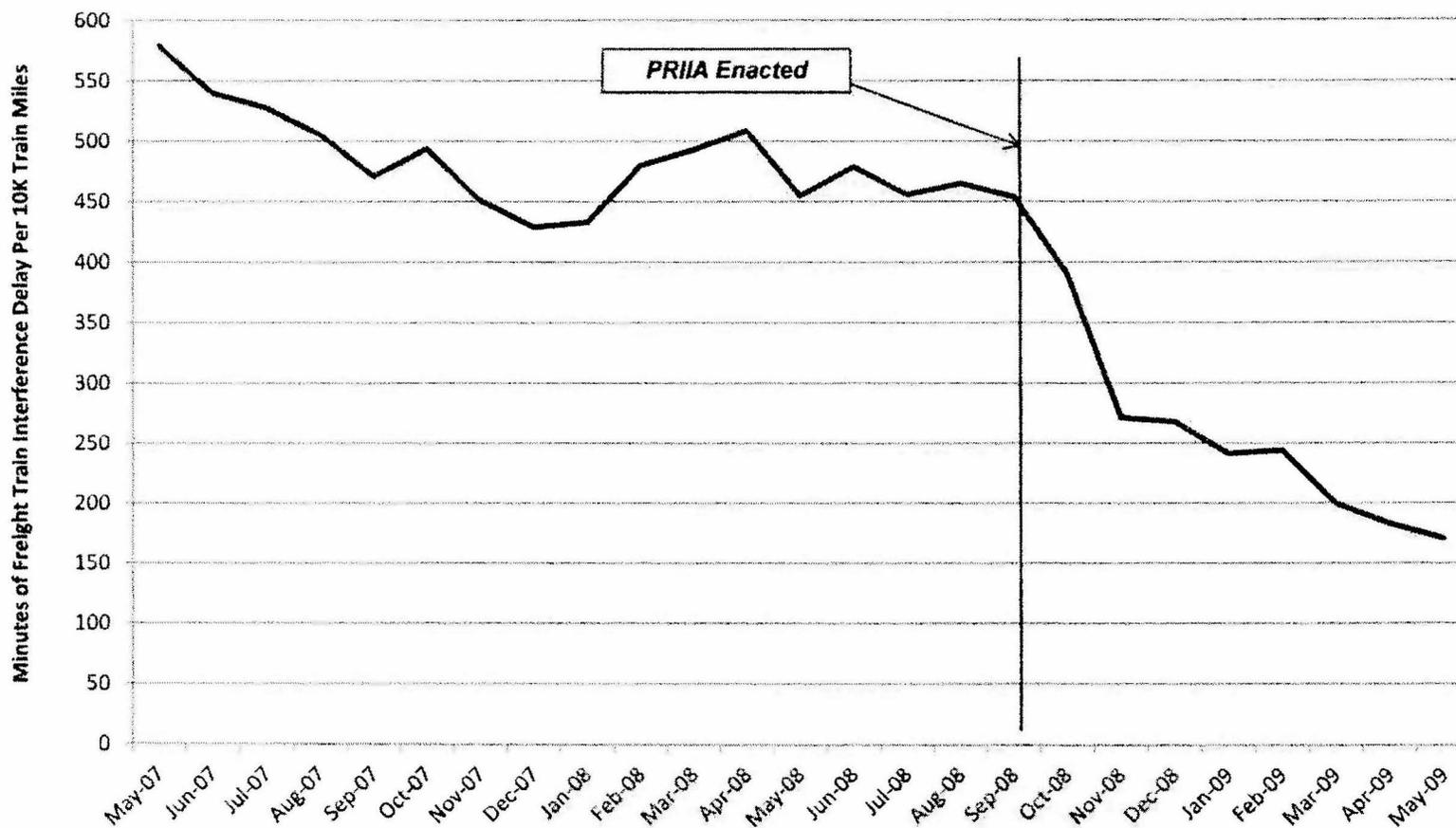


# UP also substantially reduced Freight Train Interference delays when PRIIA first became law



## The same trend was apparent among the major freight host railroads overall

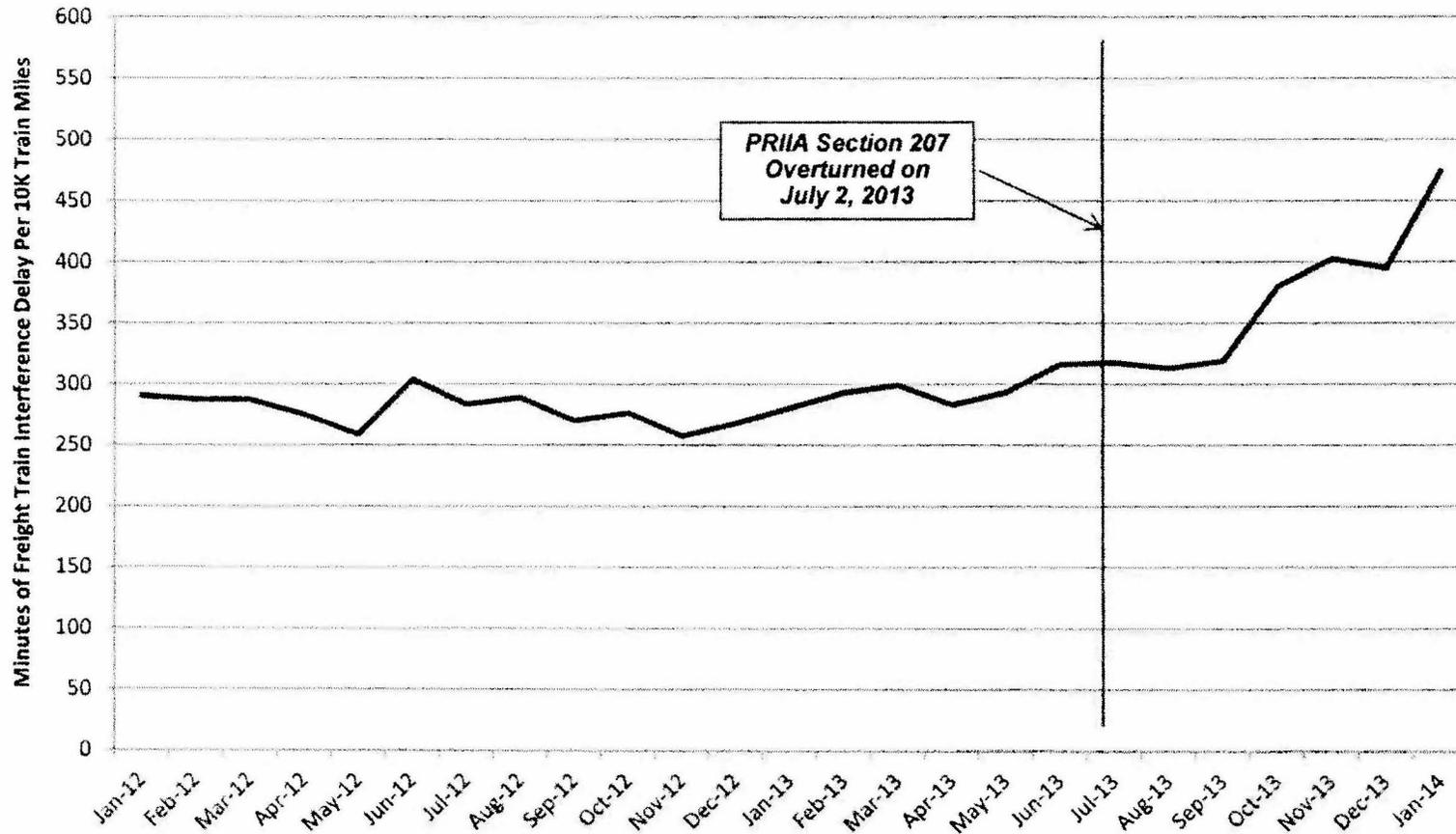
Freight Train Interference Delay to Amtrak Trains  
on Major Host Railroads



Major Freight Hosts are BNSF, CN, CP, CSX, NS, and UP.

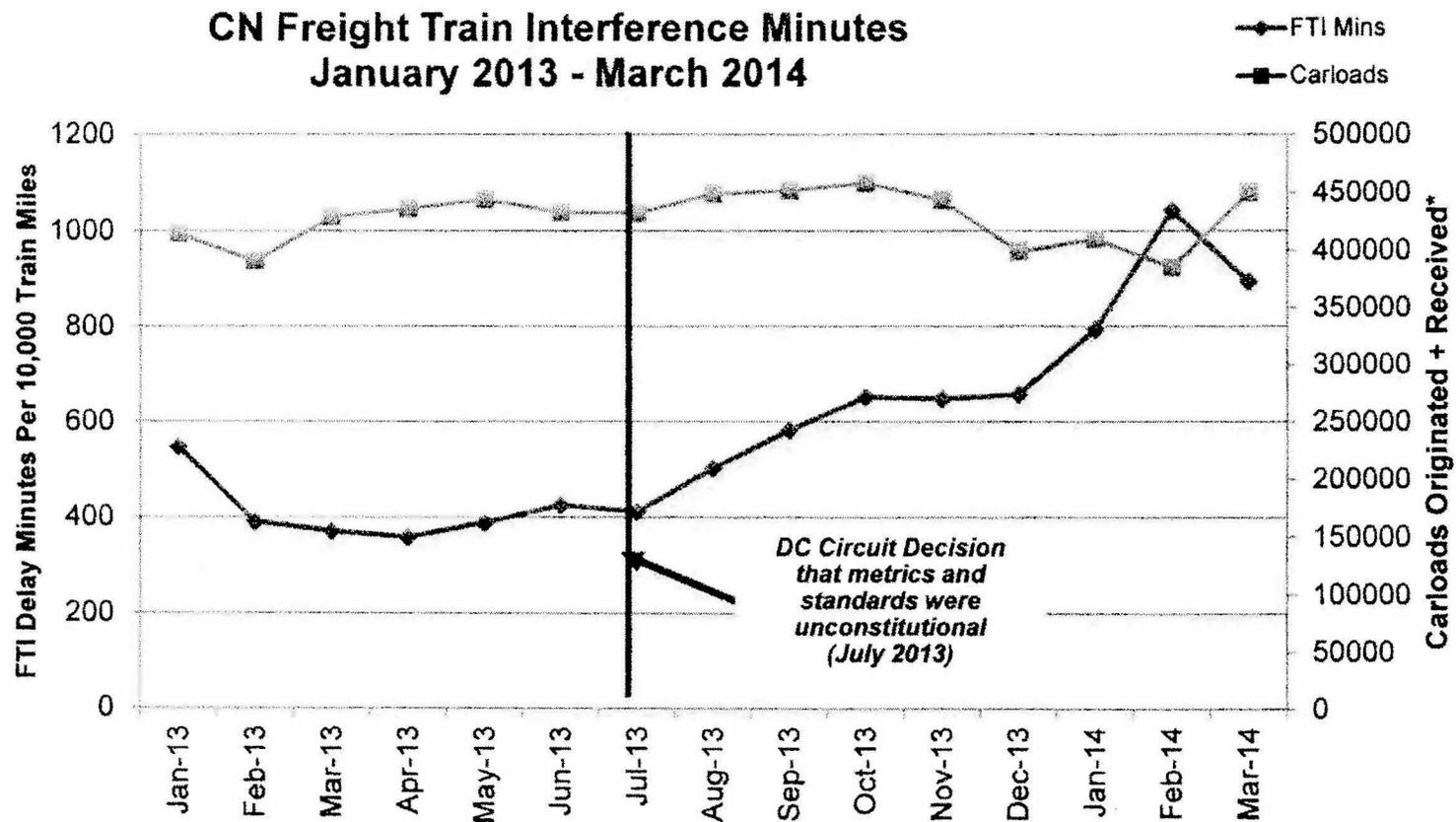
# Freight Train Interference delays on the major freight host railroads increased substantially when PRIIA 207 was overturned

Freight Train Interference Delay to Amtrak Trains on Major Host Railroads



Major Freight Hosts are BNSF, CN, CP, CSX, NS, and UP.

# Freight Train Interference delays on Canadian National more than doubled when the DC Circuit held performance standards to be invalid



\*Carload data are from published AAR weekly data prorated to monthly data



# Exhibit B

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

OCT 23 1980

RODERICK D. DENNEHY, JR.

GRAND TRUNK WESTERN  
RAILROAD COMPANY,

Plaintiff,

vs.

CIVIL ACTION

NATIONAL RAILROAD PASSENGER  
CORPORATION,

NO. 80-72888

Defendant.

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MEMORANDUM OPINION AND ORDER

This case originates out of defendant National Railroad Passenger Corporation's (Amtrak's) demand that plaintiff (Grand Trunk) increase the speed of passenger trains between Port Huron and Battle Creek. Plaintiff operates those trains for defendant pursuant to contract. Defendant filed a petition with the Federal Railroad Administration (FRA) on June 17, 1980, seeking an order directing plaintiff to permit accelerated speeds. In turn, plaintiff filed a Notice of Intent to Arbitrate with the National Arbitration Panel (NAP) on August 4, 1980, asking for resolution of the following issue:

Whether under the Agreement Amtrak can require Grand Trunk immediately and without negotiation to increase the speed of Amtrak's passenger trains from 65 m.p.h. to 79 m.p.h. between Battle Creek and Port Huron, Michigan.

Plaintiff's Motion, Exhibit 2 (page 3).

On August 5, 1980 plaintiff Grand Trunk filed its Complaint in this case, seeking injunctive and declaratory relief. Plaintiff also filed a motion for a preliminary injunction compelling defendant to proceed to arbitration and to withdraw its FRA

petition until arbitration is completed. Defendant then filed a motion to dismiss for failure to state a claim upon which relief can be granted. Having considered the oral and written submissions of the parties, the Court will proceed to resolve the pending motions.

The first aspect of this case is no longer in controversy. At oral argument defendant assured plaintiff and the Court that defendant was willing to proceed with arbitration on the issue plaintiff has presented to the NAP. So plaintiff's request for an injunction compelling arbitration is moot.

This leaves the question of whether the Court should enjoin defendant from pursuing its FRA petition until arbitration is completed. <sup>1/</sup> Plaintiff's position is that defendant's request for accelerated speeds must be submitted for arbitration in accordance with the parties' contract. The contract (entitled "The National Railroad Passenger Corporation Agreement") states in Article Six:

" . . . any claim or controversy between NRPC [defendant] and Railroad [plaintiff] concerning the interpretation, application, or implementation of this Agreement shall be submitted to binding arbitration . . ."

Plaintiff's Exhibit A at 18.

Plaintiff argues that the parties' disagreement over accelerated speeds concerns the application of Article Three of the Agreement, which provides for, among other things, requests by defendant for modified or additional services (section 3.2) and the obligation

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<sup>1/</sup> That remnant of plaintiff's prayer for relief which is not moot hinges on this question. In paragraphs 2 - 4 of the prayer for relief plaintiff seeks a preliminary and permanent injunction prohibiting defendant from taking the accelerated speeds dispute before any body other than the NAP, as well as a declaratory judgment holding that defendant waived any statutory rights it had to take the dispute elsewhere.

of plaintiff to provide on time and efficient passenger service (section 3.3).

Defendant claims a statutory right to take its request for accelerated speeds to the FRA, rather than to arbitration, pursuant to 45 U.S.C. § 562(f). That statutory provision states:

"If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable." <sup>2/</sup>

Defendant argues that plaintiff is seeking to enjoin defendant from exercising its Congressionally-authorized right to apply for administrative relief concerning accelerated speeds.

Plaintiff has several responses to defendant's statutory argument. First plaintiff contends that § 562(f) is inapplicable because statutory prerequisites have not been met. Plaintiff argues that § 562(f) should be read as conferring a right to petition for accelerated speeds only after there has been a categorical refusal to increase speeds and only after the issue has been arbitrated. Second, plaintiff argues that defendant waived any statutory rights under § 562(f) when, after that statute became effective, defendant reaffirmed the agreement to arbitrate.

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<sup>2/</sup> The Secretary's authority under this section is delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(1).

Third, plaintiff contends that § 562(f) is unconstitutional to the extent that it overrides the parties' contractual agreement to arbitrate.

A. THE EFFECT OF § 562(f)

Plaintiff argues that defendant's FRA petition is premature because defendant has not refused to permit accelerated speeds. Plaintiff offers the affidavit of William G. Litfin, an officer of Grand Trunk, in support of this contention. Mr. Litfin states that plaintiff has agreed to some increases in train speeds and, as to defendant's current demand for an increase to 79 m.p.h., plaintiff has merely advised defendant that the increased speed could not be implemented until after a joint study of the feasibility and safety of such a change.

The Court is of the opinion that plaintiff's refusal to increase to 79 m.p.h. pending a full study of the ramifications of such an increase is a refusal for purposes of § 562(f). It is true that plaintiff leaves open the possibility that it may accede to the accelerated speed request sometime in the future, but plaintiff makes no commitment at all in this regard. If such a provisional refusal does not trigger Amtrak's right to petition the FRA, then a railroad could prevent Amtrak from pursuing its statutory recourse indefinitely, as long as the railroad was considering the question, that is, as long as the railroad made no final decision. Such stalling would eviscerate § 562(f). Moreover, the plain language of the statute gives Amtrak the right to petition for accelerated speeds after any refusal by a railroad; the statute does not condition that right on refusals which occur after completion of joint feasibility studies.

Plaintiff next argues that § 562(f) provides for administrative review of arbitration rulings concerning Amtrak requests for accelerated speeds; in other words, defendant may only take advantage of § 562(f) after prior submission of its request to arbitration and the decision thereon.

The primary flaw in this argument is that the statute makes no reference to arbitration at all. Again, the language is plain and clear-cut: defendant may apply for an order requiring accelerated speeds "if, upon request of the Corporation, a railroad refuses to permit accelerated speeds". Section 562(f) does not impose a condition precedent that the defendant first seek arbitration of its request.

Furthermore the administrative proceeding described in § 562(f) has none of the characteristics of a procedure to review arbitration awards. Section 562(f) provides for an administrative "hearing"; rather than a mere review of a record made at prior arbitration proceedings. Also § 562(f) requires an original determination of the advisability of increased speeds, rather than limited appellate consideration of the rationality of a prior determination made in another forum. Finally, § 562(f) establishes standards which are to guide the administrative decision: safety, practicality, justness, and reasonableness. Section 562(f) does not state that the ultimate touchstone of the decision is the parties' intent as embodied in their contract nor the scope of a contractual limitation; yet these would be the type of standards to be applied if the administrative remedy in § 562(f) was meant for review of contractual arbitration awards.

Even if § 562(f) is not intended to be a procedure for reviewing arbitration awards, plaintiff insists that § 562(f) still means that Amtrak must exhaust its arbitration remedy first before

petitioning the FRA. Yet on this theory, § 562(f) would result in an absurd procedural labyrinth. The statute does establish the standards which must guide the FRA's decision, and these standards appear to be entirely independent of the terms of the contract. The statute evidently does not authorize the FRA to focus on the parties' rights under the contract or to determine the correctness of the arbitrator's decision. Because the FRA could, under this reasonable interpretation of the statute, ignore the arbitration award, the arbitration stage of this procedure would be pointless and wasteful. Prior resort to arbitration would not protect the railroad's contractual rights, but would senselessly protract and postpone the ultimate administrative ruling, which would be decided on independent statutory grounds.

Of course, the cardinal reason for rejecting plaintiff's construction of § 562(f) is that the statute is clear and unequivocal--it does not require Amtrak to take a claim for accelerated speeds to arbitration first. In this vein, the parties have debated the import of the legislative history of § 652(f), although resort to legislative history is not strictly necessary here. U.S. v. Oregon, 366 U.S. 643, 648 (1961).

"Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."

Caminetti v. U.S., 242 U.S. 470, 485 (1917).

Still, the Court is not precluded from considering legislative history insofar as it may illumine Congress' intent. March v. U.S., 506 F.2d 1306 (D.C. Cir. 1974).

Plaintiff has challenged the probative worth of the legislative history cited by defendant, and to a degree the Court shares this skepticism. See plaintiff's Brief in Opposition to Motion to Dismiss, pp. 5-10. The legislative history of § 562(f) is slight, for the most part it discloses the obvious--Congress, concerned about the need for faster passenger rail service, decided to give Amtrak the right to petition administratively for increased speeds.

Defendant attempts to draw from the legislative history the lesson that Congress intended this administrative remedy to be an expeditious option to time-consuming arbitration proceedings. This plausible inference does not rest on an entirely firm foundation. However, there is some evidence in the legislative history which does suggest that the statutory remedy was deliberately meant to supersede resolution of accelerated speeds disputes in other forums (such as in arbitration). For example, Congressman Stoggers, the House manager of the Bill, stated on the floor of the House that the statute

"allows the Secretary of Transportation to resolve any controversy--between Amtrak and railroads . . . over speed of Amtrak trains."  
Cong. Rec. H 7597. (daily ed., Sept. 6, 1973) (emphasis supplied), quoted in defendant's Brief in Opposition, page 16.

In addition there is evidence that Congress viewed § 562(f) as a means for Amtrak to bypass its contractual arrangements with the railroads. The House Commerce Committee in its Report on the Bill including § 562(f) stated:

"the Committee also gave Amtrak the right to request the Secretary to issue an order to force railroads to permit accelerated speeds of Amtrak trains."  
H.R. Rept. No. 93-415, 93d Cong. 1st Sess. at 10, quoted in defendant's Reply Brief in Support of Motion to Dismiss, page 5.

See also, statement that a statutory right like § 562(f) could be an "alternative" to a contract which did not give sufficient precedence to passenger travel. Surface Transportation Subcommittee of the Commerce Committee, U.S. Senate, 93d Cong., 1st Sess., '36-121 (1973) at 165, quoted in defendant's Brief in Opposition at 14-15.

In sum, the legislative history, while thin and not entirely conclusive, favors defendant's interpretation of § 562(f). Moreover, plaintiff has not cited a single passage in the legislative history which supports its view of § 562(f). Yet, given the plain meaning of the statute, the burden is on plaintiff to offer legislative history to demonstrate a Congressional intent different from that readily apparent in the statutory language. What evidence there is suggests that Congress wanted to give Amtrak a right to accelerated speeds over and above any contract rights Amtrak might have. And the plain language of the statute does not in any way suggest that Amtrak may only seek administrative relief after arbitrating the matter of accelerated speeds.

In conclusion, § 562(f) gives defendant Amtrak a statutory right to seek an administrative order of increased speeds immediately upon a railroad's refusal to increase the speeds.

#### B. THE EFFECT OF THE CONTRACT

Whatever the meaning and effect of § 562(f), plaintiff argues, the defendant is contractually bound to arbitrate the accelerated speeds question before seeking relief in any other forum. Plaintiff contends that defendant voluntarily agreed to this both in the parties' original agreement in 1971 (which preceded the passage of § 562(f), and in amendments to the agreement in 1974 and 1976 (after § 562(f) became law).

Defendant agreed in the original contract to submit any controversy concerning the "application" of the contract to binding arbitration. Plaintiff asserts that defendant's contractual duty to arbitrate entails a corollary obligation not to pursue arbitrable claims or controversies before any other tribunal. Plaintiff further maintains that the dispute over increased speeds is an arbitrable dispute regarding the effect of contractual provisions for modified or efficient services. See page 2, supra.

It is at least arguable that the accelerated speeds dispute falls within the zone of contract-related matters which are the subject of mandatory arbitration. It is also arguable that the parties, by their arbitration agreement, intended that arbitrable disputes would not be taken to any body other than the NAP, even if Congress specifically made available some other proceeding or remedy. Assuming arguendo that these arguable propositions are correct, Congress, by enacting § 562(f), altered the parties' contractual responsibilities by affording Amtrak an administrative recourse regarding the accelerated speeds question. The legislative history makes clear that Congress was aware of the terms of the nationwide railroad agreement, including the provision for mandatory arbitration. Despite the arbitration provision in the contract, § 562(f) gives defendant the legal right to seek relief from the FRA without taking the accelerated speeds issue to arbitration. <sup>3/</sup>

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<sup>3/</sup> Defendant has consented to arbitrate the issue presented to the NAP by plaintiff; in addition, at oral argument defendant expressed willingness to arbitrate related issues concerning defendant's right to increased speeds under the contract. As a result, the Court need not decide whether the defendant could lawfully refuse to arbitrate on the theory that the statutory remedy totally supplants arbitration of these issues. Further, the Court need (continued on page 10)

In its initial brief, plaintiff complained that this Congressional modification of the railroads' contract rights constitutes an unconstitutional deprivation of property without due process of law. Plaintiff has offered no case authority in support of this constitutional argument. Defendant cites numerous cases holding that Congress may constitutionally enact laws regulating interstate commerce even though these laws may alter private contractual arrangements. The Court concludes that Congress could constitutionally provide for a co-existing, optional administrative remedy, in addition to the contractual provision for arbitration.

Plaintiff also argues that by agreeing to the 1974 and 1976 amendments to the parties' original agreement, defendant voluntarily abandoned its rights under § 562(f). Plaintiff concedes that defendant did not expressly waive these rights. Plaintiff also concedes that the 1974 and 1976 amendments did not involve the arbitration provisions of the contract. Acknowledging that the amendments were not in any way related to the question of accelerated speeds, plaintiff nonetheless contends that by agreeing to the amendments without seeking to except acceleration questions from mandatory arbitration, defendant tacitly gave up its rights under § 562(f).

This argument is unconvincing. In the first place, as discussed supra, § 562(f) overrides the mandatory arbitration provision with respect to claims for accelerated speeds, at least

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Footnote 3/ continued from page 9:

not, and does not, now decide questions concerning the nature and scope of the respective inquiries of the NAP and FRA, nor other questions regarding the relationship between the jurisdictions of the NAP and FRA.

to this extent: if the arbitration agreement by itself would preclude defendant from taking its claim for accelerated speeds to any tribunal other than the NAP, then § 562(f) legally overrides the agreement by allowing plaintiff to take this dispute directly to the FRA. Assuming that defendant did reaffirm the arbitration agreement, the arbitration agreement itself is still subject to defendant's superior, independent right set out in § 562(f). Moreover, there is no basis for inferring that defendant intended to give up its statutory rights. Defendant's failure to ask for modification of the arbitration agreement regarding accelerated speeds could very well indicate that defendant viewed § 562(f) as giving it a right to petition the FRA regardless of the terms of the contract.

The Court concludes that enjoining Amtrak from petitioning the FRA for accelerated speeds would frustrate the intent of Congress in passing § 562(f). Plaintiff's Motion for a Preliminary Injunction is DENIED; defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.



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PHILIP PRATT  
United States District Judge

Dated: October 21, 1980

Detroit, Michigan

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GRAND TRUNK WESTERN  
RAILROAD COMPANY,  
Plaintiff

vs.  
NATIONAL RAILROAD PASSENGER  
CORPORATION,

CIVIL NO. 80-72888

Defendant

PROOF OF MAILING

UNITED STATES OF AMERICA )  
 ) SS  
EASTERN DISTRICT OF MICHIGAN )

Helen M. Ogger, being first duly sworn deposes and says that she is the Secretary to the Honorable Philip Pratt, United States District Judge for the Eastern District of Michigan, and while acting in such capacity did send a copy of the \_\_\_\_\_  
MEMORANDUM OPINION AND ORDER; JUDGMENT; and

PROOF OF MAILING

by enclosing the same in an envelope, with first class postage fully prepaid and depositing same in a United States Postal Service receptac. on the undersigned date, to the following persons:

- 100  
Carson C. Grunewald, Esq., 34th Floor, /Ren Cen, Detroit, MI 48243
- John C. Danielson, Esq., 131 W. Lafayette Blvd., Detroit, MI 48226
- T. Patrick Durkin, Esq., Ste. 1476, 100 Ren Cen, Detroit, MI 48243
- Roderick C. Dennehy, Jr., Esq., 400 N. Capitol St., N.W., Washington, D.C 2000

*Helen M. Ogger*  
Helen M. Ogger  
Secretary

Dated: October 21, 1980

Subscribed and sworn to before me  
this 21st day of October, 1980.

*Ray Luxton*  
Ray Luxton, Notary Public

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GRAND TRUNK WESTERN  
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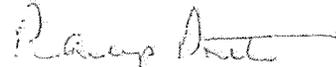
Defendant.

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JUDGMENT

The above-entitled matter having come on before the Court upon the defendant's Motion to Dismiss; and the matter having been considered in oral argument and briefs of counsel and the Court having filed its written Opinion herein,

IT IS ORDERED that the defendant's Motion to Dismiss be and it is hereby granted and that the plaintiff's Complaint be and it hereby is dismissed.



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PHILIP PRATT  
United States District Judge

Dated: October 21, 1980

Detroit, Michigan

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GRAND TRUNK WESTERN  
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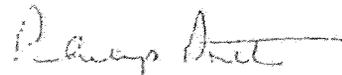
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IT IS ORDERED that the defendant's Motion to Dismiss be and it is hereby granted and that the plaintiff's Complaint be and it hereby is dismissed.



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PHILIP PRATT  
United States District Judge

Dated: October 21, 1980

Detroit, Michigan