



**U.S. Department of  
Transportation**  
Office of the Secretary  
of Transportation

**General Counsel**

1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

April 13, 2016

**FILED ELECTRONICALLY**

Ms. Cynthia Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

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April 13, 2016  
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**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:

Please find attached for filing in the above-referenced proceeding the Reply Comments of the United States Department of Transportation (DOT), signed by the Deputy General Counsel, Kristin Amerling. If you have any questions, please feel free to contact me.

Respectfully,

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**WASHINGTON, D.C.**

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**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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**No. EP 728**

**REPLY COMMENTS OF THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION**

Pursuant to the Board's Notice of Proposed Statement of Board Policy, served on December 28, 2015 (Policy Statement), the United States Department of Transportation (Department or DOT) and Federal Railroad Administration (FRA), an operating administration of DOT, respectfully submit their reply comments in this matter. As DOT explained in its opening submission, this proceeding involves issues that are of critical importance to the rail network, both now and into the future.<sup>1</sup> Consequently, DOT appreciates the Board's continued attention to these issues, as well as the thoughtful views expressed by other commenters.<sup>2</sup>

In enacting the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907 (2008), Congress sought to enhance the performance of the National Railroad Passenger Corporation (Amtrak). Congress recognized how Amtrak delays may result from the operations of host freight railroads, which have long been required by statute to provide "preference" to Amtrak. 49 U.S.C. § 24308(c); *see* Policy Statement at 2.

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<sup>1</sup> Opening Comments of the United States Department of Transportation at 3 (Feb. 22, 2016).

<sup>2</sup> DOT has also submitted views in the Board's related proceeding on the definition of "on-time performance" for passenger rail service. *See* Opening Comments of the United States Department of Transportation, STB No. EP 726, *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008* (filed Feb. 8, 2016); Reply Comments of the United States Department of Transportation, STB No. EP 726 (filed Mar. 30, 2016).

Thus, under section 213 of PRIIA, “[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters,” the Board “may initiate an investigation,” or Amtrak or other specified parties may file a complaint asking the Board to investigate. 49 U.S.C. § 24308(f)(1). In so doing, Congress granted the Board the authority to gather and evaluate a variety of information to determine the causes of the delays, as well as whether they “are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required” by law. *Id.* § 24308(f)(1), (2). In that case, the Board may order the host railroad to pay damages, or may fashion other appropriate relief. *Id.*

The Board now seeks input on the meaning of the statutory “preference” term. The Board “do[es] not view the preference requirement as absolute,” so 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. Instead, the Board proposes to “take a systemic, global approach in determining whether a host carrier has granted the intercity passenger trains preference.” *Id.* The Board proposes to consider a variety of forms of evidence on this question, including host carrier internal processes and incentives, evidence of how host carrier policies have impacted train delays, and more. *Id.* at 5-6. The Board would examine “whether or not a host carrier made identifiable, consistent efforts to minimize total delays for intercity passenger train movements while on the host carrier’s network and on whether or not such efforts have in fact done so.” *Id.* at 4.

Numerous parties have filed comments opining on the Board’s proposed approach. Amtrak contends that the Policy Statement is procedurally infirm and should be withdrawn.<sup>3</sup> On the merits, Amtrak contends that the Board has misinterpreted the statute, because the term

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<sup>3</sup> See Comments of the National Railroad Passenger Corporation at 4-6 (Feb. 22, 2016) (“Amtrak Comments”) (contending that the Administrative Procedure Act requires the Board’s proposal to be the product of notice and comment rulemaking pursuant to 5 U.S.C. § 553).

“preference” is plain and is inconsistent with the Board’s proposal. In Amtrak’s view, “[i]f a host railroad does not resolve an individual dispatching decision at a rail line, junction or crossing in favor of Amtrak, then Amtrak does *not* have preference over the freight train in using that rail line, junction or crossing,” contrary to Congress’s will. Amtrak Comments at 10 (emphasis in original). Moreover, Amtrak argues that the Board’s approach is at odds with the framework that Congress established, because by considering a variety of global, operational factors to interpret the term “preference,” the Board would effectively be conflating that term with the separate statutory provision that allows a host railroad to seek relief when the preference requirement would “materially . . . lessen the quality of freight transportation provided to shippers.” 49 U.S.C. § 24308(c); Amtrak Comments at 13-14. In sum, Amtrak argues that the adoption of the Board’s Policy Statement “could effectively render the statutory right to preference a nullity.” Amtrak Comments at 4.

Several other parties have expressed views consistent with Amtrak’s, and opining that the Policy Statement would have a negative impact upon the provision of passenger rail service. For example, the National Association of Railroad Passengers contends that the statutory preference term is clear, and that the adoption of the Board’s proposal would lead to further Amtrak delays and hardship to passengers. *See* Comments of the Nat’l Ass’n of R.R. Passengers at 1-4 (Feb. 22, 2016). Furthermore, the States for Passenger Rail Coalition, Inc., oppose the Board’s proposal, arguing that it would effectively “redefine preference” and would undermine federal, state and local investments in the passenger rail system. Comments of the States for Passenger Rail Coalition, Inc. at 2-3 (Feb. 22, 2016); *see* Letter from Sens. Roger F. Wicker and Cory A. Booker at 2 (Feb. 25, 2016) (“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”);

Letter from Sen. Richard J. Durbin at 2 (Feb. 22, 2016) (expressing “concern[] that the STB views passenger rail’s priority preference over freight when sharing track as not absolute”).

By contrast, the host freight railroads have expressed support for the Board’s proposal, particularly with respect to the Board’s interpretation of “preference.” The Association of American Railroads (AAR) is of the view that “[t]he Board’s general approach is sound,” and that the preference requirement is not “absolute.” Comments of the Association of American Railroads at 1 (Feb. 22, 2016). AAR contends that an absolute preference requirement was not what Congress intended, and “would also violate the Board’s general mandate to ensure an efficient nationwide rail system for freight and passenger traffic alike.” *Id.* at 2 (citing 49 U.S.C. § 10101). AAR also argues that the Board should investigate the “root-cause” of Amtrak delays, which, in AAR’s view, are grounded substantially in Amtrak’s “unrealistic” schedules. *Id.* at 14. Similarly, Norfolk Southern contends that Amtrak’s proposed definition of preference would undermine the “fluidity” of the rail network as a whole and cause further delays. Opening Comments of Norfolk Southern Railway Co. at 9-10 (Feb. 22, 2016); *see* Comments of Grand Trunk Western R.R. Co. and Ill. Central R.R. Co. at 4 (Feb. 22, 2016) (“Taking extreme measures to avoid delaying Amtrak would be inefficient and impose disproportionate costs on freight railroad and shipper interests.”).

DOT has considered the other parties’ submissions and understands the concerns that have been expressed in the opening comments. Based upon its review of these comments, as well as its regulatory experience and its knowledge of the rail network, DOT is of the view that the Policy Statement is premature and unnecessary, and that the current statutory language of § 24308 provides sufficient direction and authority for the Board to determine whether preference has been appropriately afforded, and to adjudicate the fact-specific preference

requirement issues that may arise in the course of a PRIIA § 213 proceeding. As the Board acknowledged in its proposal, § 24308(c) preference issues are of a “fact-specific nature,” and we believe the Board should address these issues on a case-by-case basis. Policy Statement at 3. Indeed, the Board has not yet fully adjudicated a PRIIA section 213 proceeding. DOT believes that the data and views that the Board receives in these proceedings may bear upon and serve to inform the Board’s interpretation of the statutory preference requirement. Further, DOT respectfully recommends that for the sake of clarity the Board should unambiguously set aside the proposed Policy Statement as it deliberates the cases before it.

Moreover, Congress recently charged the Secretary of Transportation, in consultation with the Board and others, with leading a study to specifically evaluate the shared use of right-of-way by passenger and freight rail systems, including the operational, institutional, and legal structures that would best support improvements to the shared use of right-of-way by passenger and freight rail systems. *See* Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, § 11311 (2015) (FAST Act). There may be additional lessons learned in the course of DOT’s work under this provision of the FAST Act that bear upon the Board’s efforts with respect to passenger rail issues. Nonetheless, DOT encourages the Board to move forward with the two PRIIA § 213 proceedings currently pending before it, along with other proceedings that may be brought in the future. DOT looks forward to working with the Board and other stakeholders in the course of those specific proceedings.

April 13, 2016

Respectfully submitted,



**Kristin Amerling**

Deputy General Counsel

United States Department of Transportation