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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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

Dear Ms. Brown:

I am enclosing for filing in the above-captioned proceeding the reply comments of the Maryland Transit Administration (MTA). We appreciate the opportunity to offer the MTA's views on the Surface Transportation Board's proposed statement of policy.

Thank you very much for your assistance in this matter.

Sincerely,

Allison I. Fultz

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 728

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

**REPLY COMMENTS OF THE
MARYLAND TRANSIT ADMINISTRATION**

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Dated: April 13, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 728

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

**REPLY COMMENTS OF THE
MARYLAND TRANSIT ADMINISTRATION**

The Maryland Transit Administration (MTA), a modal administration of the Maryland Department of Transportation acting on behalf of the State of Maryland, strongly disagrees with the position of the Association of American Railroads (AAR), several of its members, and the Surface Transportation Board (the Board) that the preference accorded by statute to intercity *and commuter trains* operated by or for Amtrak is anything less than absolute. As stated by the National Railroad Passenger Corporation (Amtrak) in its opening comments, the plain language of 49 U.S.C. § 24308(c) requires each dispatching decision to prioritize the movement of intercity *and commuter trains* operated by or for Amtrak over the movement of freight trains. In addition, MTA is concerned that comments in this proceeding may be read to suggest that Amtrak's statutory preference over freight transportation extends as well to preference over commuter operations not operated by Amtrak. MTA offers the following reply comments to address statements in this proceeding that erroneously describe the types of operations statutorily entitled to preference over freight trains, and to urge the Board to withdraw the notice of its unauthorized revision of the clear language of the statute as proposed in this proceeding.

I. Background

The MTA operates the MARC Train Service, a commuter rail system with service to Washington, D.C., on three lines:

- Amtrak’s Northeast Corridor from Cecil County, Maryland (the MARC “Penn Line” service);
- CSX Transportation, Inc.’s (“CSXT”) “Camden Line” from Baltimore, Maryland; and
- CSXT’s “Brunswick Line” from Brunswick and Frederick, Maryland, and Martinsburg, West Virginia.

MARC’s Camden and Brunswick Line service is operated by a third-party contractor. Amtrak operates, that is, provides the train and engine crews (as well as dispatching and maintaining the line), on the Penn Line.

II. The Statutory Right to Preference Extends to Commuter Trains

Several statements by the Board and others may be misconstrued to suggest that commuter rail trains that are operated by or on behalf of Amtrak, such as MARC’s Penn Line service, are not entitled to preference identical to and equivalent with that which is accorded to Amtrak intercity trains. Indeed, the title of the Board’s proceeding is, “Implementing *Intercity Passenger Train* On-Time Performance and Preference Provisions.” STB Docket No. EP-728 (Service Date Dec. 28, 2015) (Proposed Policy) (emphasis added); *see also, e.g.*, Proposed Policy at 4 (“We therefore favor a systemic approach to preference – one that focuses on minimization of total delays affecting *intercity passenger train movements* while on the host carrier’s network, consistent with the statute.”) (emphasis added); Initial Comments of the AAR, STB Docket No. EP-728, at 2 (Filed Feb. 22, 2016) (referring to preference accorded to “Amtrak

trains,” without distinction). To the extent that these statements exclude commuter trains operated by or on behalf of Amtrak, they are inaccurate and must be corrected.

For as long as Amtrak has been authorized to operate commuter trains, they have enjoyed preference over the movement of freight trains. *See* Northeast Rail Service Act of 1981, Pub. L. No. 97-35, § 1188(c) (Aug. 13, 1981). Section 24308(c) provides:

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. A rail carrier affected by this subsection may apply to the Board for relief. 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.

49 U.S.C. § 24308(c) (emphasis added).

From the plain language of the statute, it is clear that commuter rail passenger transportation provided by or for Amtrak, such as the MARC Penn Line service, must be accorded preference over freight transportation coextensive with that accorded to intercity rail passenger transportation provided by or for Amtrak. There is simply no basis to conclude otherwise. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last.”) (citations omitted). The Board’s proposed “focus[] on minimization of total delays affecting *intercity passenger train movements* while on the host carrier’s network,” Proposed Policy at 4 (emphasis added), accordingly implements only half of host carriers’ obligation under 49 U.S.C. § 24308(c). Even if the Board does not rescind its proposed notice in this proceeding, it must ensure that its “focus” adequately considers a host carrier’s statutory obligation to accord preference to both intercity and commuter passenger trains provided by or for Amtrak.

That this proceeding arises in part from the Board's implementation of its investigatory authority under 49 U.S.C. § 24308(f), which is limited to the cause of poor *intercity* train on-time performance, does not render the preceding distinction insignificant. The Board's proposed policy does not suggest an interpretive gloss on preference only as it would apply in a proceeding under 49 U.S.C. § 24308(f), but rather seeks to define it for all purposes. *See Proposed Policy at 3* (“[B]ecause ‘preference’ is not defined by statute, we include guidance here regarding the Board’s interpretation of ‘preference.’”). For this reason, MTA agrees with Amtrak that the Board’s notice constitutes a “pronouncement[] that [is] binding on the public and yet it was not promulgated through notice and comment rulemaking,” rendering this proceeding procedurally invalid under the Administrative Procedure Act. *See Initial Comments of Amtrak at 4–6.*

If the Board intends to displace the settled interpretation of “preference” as it has existed for over forty years, it must take care to describe host carriers’ obligation accurately and completely. Even if the Board’s proposed interpretation could be understood to apply only in the context of an investigation under 49 U.S.C. § 24308(f), moreover, it is possible the failure of a host carrier to provide preference to an Amtrak-operated commuter train will arise. If, for example, an Amtrak intercity passenger train were following an Amtrak-operated commuter train that was not dispatched pursuant to its statutory right to preference, the Amtrak intercity passenger train may be delayed. Indeed, depending on the circumstances, even a commuter train *not* operated by Amtrak may need to be prioritized ahead of a freight train so as to ensure that a following Amtrak train was accorded its statutory right to preference. Particularly on congested rail corridors like those operated by MARC, it is critical that the Board adequately consider *all* failures of a host carrier to accord preference, and the ensuing impact on an intercity passenger train’s on-time performance under section 24308(f).

The Board's interpretation of "preference" must also be clear that intercity and commuter trains provided by or for Amtrak are accorded preference *only* over freight transportation. Section 24308(c), by its plain language, does not accord such trains preference over *other* passenger train services, such as MARC's Camden and Brunswick line services which are operated by a third-party contractor other than Amtrak.

III. Host Carriers May Not "Balance Interests" As Between Amtrak-Operated Passenger and Freight Operations

MTA also disagrees with the AAR's, several of its members', and the Board's apparent disregard of the plain language of Section 24308(c) in concluding that the statutory right to preference is anything less than absolute. *See, e.g.*, Initial Comments of CSX at 1 (Filed Feb. 22, 2016) ("[P]reference should not be viewed as absolute priority, and should instead balance the interests of Amtrak passengers, commuter rail passengers, shippers, and host railroads."); Initial Comments of AAR at 10 ("Preference does not mean that Amtrak trains never yield to freight traffic. Rather, preference merely means a *weighting* in favor of Amtrak.") (emphasis in original); Proposed Policy at 3 ("[A] host rail carrier need not resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train. Under this view of preference, the Board would take a systemic, global approach in determining whether a host carrier has granted the intercity passenger trains preference."). The only support advanced for this proposition is a tortured reading of the statute that completely ignores a critical clause, and an appeal to the general terms of the Rail Transportation Policy (RTP) adopted by Congress and codified at 49 U.S.C. § 10101. The Board should not permit either to override Congress' clearly expressed, unqualified intent to provide preference to intercity and commuter trains provided by or for Amtrak.

Both AAR and the Board suggest that “Congress expressed its view that ‘preference for . . . passenger transportation . . . [should not] materially lessen the quality of freight transportation provided to shippers.’” Proposed Policy, at 3; *see also* Initial Comments of AAR, at 8 (claiming that Section preference is not absolute “if the Board . . . decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers” (citing 49 U.S.C. § 24308(c)) (first alteration in original). That is *not* what the statute says. The first clause of 49 U.S.C. § 24308(c) provides, “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 second clause provides, “A rail carrier affected by this subsection may apply to the Board for relief.” *Id.* And the third clause, in full, provides, “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.*

Read together, these clauses clearly indicate that Congress intended the Board to consider whether according Amtrak preference would materially lessen the quality of freight transportation provided to shippers, and only then on application by a rail carrier with an opportunity for hearing. The Board’s proposed policy and the position of AAR and several of its members eliminates this requirement, and tells each host railroad that it has the authority to stand in the shoes of the Board and decide for itself whether individual dispatching decisions would materially lessen the quality of freight transportation provided to shippers. *See, e.g.*, Initial Comments of CSX at 1 (suggesting that it should “balance the interests of Amtrak passengers,

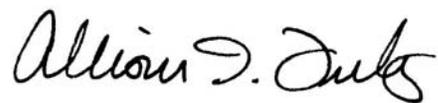
commuter rail passengers, shippers, and host railroads” in according preference). That approach, however, is unsupported by the clear language of section 24308(c). The Board’s proposed policy and the initial comments of AAR and several of its members “flout[] the rule that ‘a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.’” *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

Finally, the Board must not countenance AAR’s and its members’ appeal to the RTP, directing the Board “to regulate so as to promote efficiency in freight service.” *See* Initial Comments of CSX at 2; Initial Comments of AAR at 9; Proposed Policy at 3. First, the *actual* language of the RTP directs the Board to “to promote a safe and efficient rail transportation system *by allowing rail carriers to earn adequate revenues*, as determined by the Board,” 49 U.S.C. § 10101(3) (emphasis added), not by resolving dispatching decisions in favor of some amorphous concept of overall “network fluidity.”¹ Second, even if the RTP could be construed to state a general obligation to act in favor of the overall efficiency of the system, it must not override a clearly expressed Congressional directive, even if they may stand in conflict from time to time. *See Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (“Where, as here, the language of a provision is sufficiently clear in its context and not at odds with the legislative history, there is no occasion to examine the additional considerations of policy that may have influenced the lawmakers in their formulation of the statute.”) (alterations and quotations omitted). Accordingly, the Board should withdraw the notice of its erroneous interpretation of the statute proposed in this proceeding.

¹ If “network fluidity” were the measure, slower-moving freight trains would *always* be required to yield to faster-moving, regularly scheduled passenger operations.

MTA appreciates the opportunity to submit the foregoing reply comments and looks forward to continuing to participate in an ongoing dialogue about the Board's implementation of the mandate to accord "preference" to passenger service, as it was originally intended and remains intended by Congress, and the Passenger Rail Investment and Improvement Act's clearly articulated concern for improving the on-time performance of Amtrak's passenger rail operations.

Respectfully submitted,



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