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**BY E-FILING**

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

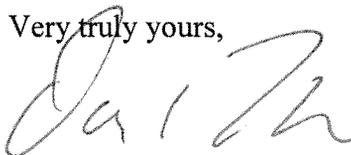
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**Re: *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)***  
**(Docket No. EP 728)**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find Reply Comments of Grand Trunk Western Railroad Company and Illinois Central Railroad Company.

Very truly yours,



David A. Hirsh

Counsel for Grand Trunk Western Railroad  
Company and Illinois Central Railroad Company

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. EP 728

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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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**REPLY COMMENTS OF GRAND TRUNK WESTERN RAILROAD  
COMPANY AND ILLINOIS CENTRAL RAILROAD COMPANY**

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POLICY STATEMENT ON IMPLEMENTING INTERCITY PASSENGER TRAIN ON-TIME  
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**REPLY COMMENTS OF GRAND TRUNK WESTERN RAILROAD  
COMPANY AND ILLINOIS CENTRAL RAILROAD COMPANY**

Grand Trunk Western Railroad Company and Illinois Central Railroad Company  
(collectively, “CN”) respectfully submit the following reply comments.<sup>1</sup>

Amtrak asks the Board to withdraw its Policy Statement and terminate this proceeding without providing any guidance regarding the interpretation of and evidence relevant to preference because, Amtrak claims, (1) the Board is improperly making binding pronouncements without notice-and-comment rulemaking; and (2) the Board’s interpretation is contrary to the “clear, plain and unambiguous words of the statute.” Amtrak Comments at 1. Amtrak is wrong on both points. The arguments made by Amtrak and its supporters do nothing to undermine either the essential points made in the Board’s Policy Statement or the additional points made in CN’s Opening Comments.

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<sup>1</sup> CN also joins in the reply comments filed by the Association of American Railroads (“AAR Reply Comments”).

## I. THE BOARD'S POLICY STATEMENT IS NOT AN IMPROPER LEGISLATIVE RULE

The Board's Policy Statement plainly states that it is intended as a non-binding guide:

[T]he Board is not making any binding determinations. Parties are still free to present any arguments or evidence they could have presented before the Board issued this policy statement. We provide this preliminary guidance merely as a starting point for parties to consider when developing evidence for § 24308(f) proceedings . . . .

Policy Statement at 3. As such, contrary to Amtrak's claim (Amtrak Comments at 4-6), it constitutes an "interpretative rule" or "general statement[] of policy," to which notice and comment requirements do not apply. 5 U.S.C. § 553(b)(3)(A). *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) ("the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers'" and "'do not have the force and effect of law . . .'" (quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995))); *Ass'n of Flight Attendants – CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) (a notice that "does not impose any obligation or prohibition on regulated entities" or "create a new basis for enforcement or liability," but is instead intended "to apprise the public of the agency's intentions, and to inform the decisions of those who exercise the agency's discretion," is an interpretive rule or policy statement that does not require notice-and-comment rulemaking).

The line between binding legislative rules, which require notice-and-comment rulemaking, and non-binding interpretive rules/policy statements, which do not, "sometimes may be 'enshrouded in considerable smog.'" *Huerta*, 785 F.3d at 717 (quoting *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987)). Amtrak argues that the Board's Policy Statement falls on the binding, legislative rule side of the line, relying on *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) ("*GE*"), *see* Amtrak Comments at 4-6, but *GE*'s facts and reasoning

only confirm that the Board’s Policy Statement is, indeed, a policy statement. The D.C. Circuit stated in *GE* that the “ultimate” test is whether the agency action creates a “binding” rule with “the force of law.” *GE*, 290 F.3d at 382 (citations omitted). The court approved various indicators of a binding rule, including:

- “whether the agency action (1) ‘imposes any rights and obligations’ or (2) genuinely leaves the agency and its decisionmakers free to exercise discretion,” *id.* at 382 (quoting *Cnty. Nutrition Inst.*, 818 F.2d at 946);
- whether the “agency is ‘simply unready to hear new argument’ in proceedings governed by the announcement,” *id.* (quoting *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988));
- “‘the Agency’s own characterization of its action,’” *id.* (quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999));
- whether “the agency pronouncement . . . appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding,” *id.* at 383;
- whether the document uses “mandatory language,” *id.*; and
- “[i]n 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,” *id.* at 383 (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)).

Each of these indicators points to the conclusion that the Policy Statement is not a legislative rule. While it provides “preliminary guidance” on how the Board approaches the pre-existing obligation of preference, it does not impose any new rights or obligations, and the Board clearly preserves both its discretion and the opportunity for parties to investigations to “present any arguments or evidence they could have presented before the Board issued this policy statement.” Policy Statement at 3. It does not use “mandatory language,” but instead states that the advice it provides is intended “as a potential starting point for parties to consider when developing evidence.” *Id.* And it does not state any hard-and-fast norms, criteria, or safe

harbors; it merely articulates a general approach to preference and identifies some potentially relevant evidence. All of this is in stark contrast to the facts of the *GE* case, where the “Guidance Document” set precise scientific standards that environmental cleanups “must” meet, and “appear[ed] to bind the agency” to accept applications meeting those standards without any further justification or questioning. *GE*, 290 F.3d at 384.

Amtrak nonetheless claims that the Policy Statement is “binding” based on a phrase taken out of context from a law review article quoted in the *GE* opinion, which Amtrak argues means that a policy statement is “binding” if “private parties are reasonably led to believe that failure to conform will bring adverse consequences.” Amtrak Comments at 4, 6 (quoting *GE*, 290 F.3d at 383 (quoting Anthony, *Interpretive Rules*, 41 Duke L.J. at 1328)). Amtrak argues it faces “adverse consequences” in the form of a risk of not prevailing on a preference claim if, in an investigation, it does not direct its evidence and arguments as suggested by the Board’s guidance. *See id.* at 4-6.

Amtrak’s argument is meritless. If the risk of failing to persuade the Board in this instance was sufficient to render a policy statement binding, there could be no such thing as a non-binding policy statement. Every participant in Board proceedings faces the risk that it will not persuade the Board of its view, and even without the Policy Statement, Amtrak would face the risk that it could harm its case if it failed in a Section 213 proceeding to address factors that another participant persuaded the Board were important.

Moreover, the context of the passage relied upon by Amtrak is independently fatal to Amtrak’s argument. Just two paragraphs later, the quoted article reaffirms that when an agency gives a party the opportunity to challenge the policy in question and the agency “genuinely is open to reconsideration of the policy,” this demonstrates that the agency’s statement had “neither

the intent to bind nor such an effect.” Anthony, *Interpretive Rules*, 41 Duke L.J. at 1330. That is precisely the situation here: the Policy Statement would not bind anyone, because the Board made clear its views are preliminary and subject to change.

## **II. THE BOARD’S PROPOSED “SYSTEMIC, GLOBAL” APPROACH TO PREFERENCE IS SOUND**

Contrary to Amtrak’s objections, the Board’s essential interpretation and guidance on preference are sound. The key points on which CN agrees with the Board, but Amtrak disagrees, are that (1) preference does not require “absolute” subordination of freight traffic, Policy Statement at 3, CN Opening Comments at 3 – a host’s obligation is to “place a greater weight on avoiding delays to an Amtrak train than on avoiding delays to a freight train, but other factors will sometimes prove decisive,” *id.*; and (2) there should be no liability without “an identifiable and longstanding pattern of systemic failures to provide Amtrak trains with the statutory preference,” Policy Statement at 4; CN Opening Comments at 5-6 (further noting that such a pattern can be established only by examination of a substantial number of individual dispatching decisions).

### **A. Amtrak’s Arguments for an “Absolute” Conception of Preference Are Meritless**

Amtrak claims that “the Board’s approach to preference is a direct contradiction of the plain and unambiguous language of the statute,” Amtrak Comments at 6. But it fails to support that claim.

#### *1. Amtrak Relies on a Non-Existent “Statutory Definition” of Preference*

Amtrak claims that “[t]he first sentence of section 24308(c) . . . defines preference.” *Id.* at 13. But it plainly does not do so. That sentence 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.

49 U.S.C. § 24308(c). It is beyond dispute that (i) Amtrak has “preference over freight transportation”; (ii) that preference applies to rail lines, junctions, and crossings; and (iii) it is subject to exceptions for emergencies and contrary Board orders. But the statute resolves only when and where “preference” applies, not what it is – as the Board rightly stated, “‘preference’ is not defined by statute.” Policy Statement at 3. Accordingly, in providing guidance about what preference means, the Board is not “substituting its own judgment for that of Congress,” Amtrak Comments at 3-4.

The bulk of Amtrak’s Comments rest on the false assumption that by restating when and where it is entitled to “preference” – which is undisputed – Amtrak has somehow proven that the Board is wrong about what “preference” means. For example, Amtrak insists that:

- it is “clear and unambiguous” that “Amtrak trains are entitled to preference over freight transportation except in an emergency,” *id.* at 2;
- “the concept of preference for passenger transportation existed long before Amtrak’s inception,” *id.* at 7;<sup>2</sup>
- “Amtrak has preference over freight transportation ‘in using a rail line, junction, or crossing,’” *id.* at 10;
- “‘as a matter of Federal law,’ freight railroads ‘are required to give Amtrak trains preference over freight traffic when dispatching traffic over their rails,’” *id.* at 12 (quoting Senator Murray);
- “(absent emergency) preference applies unless the Secretary [now the Board] has a hearing, makes the requisite finding and sets alternative terms,” *id.* at 16;
- there is a “distinction,” recognized by the Interstate Commerce Commission (“ICC”), the Federal Railroad Administration (“FRA”), and the Department of

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<sup>2</sup> Similarly, Amtrak can draw no support from quotes using the undefined term “priority.” *See, e.g., id.* (“Congress expected that priority accorded to passenger trains should continue”).

Justice (“DOJ”), “between preference and the preference relief application procedure,” *id.* at 17; *see also id.* at 17-18; and

- “absent an emergency and assuming the Board has not granted a host railroad’s preference relief application, Amtrak has preference over freight transportation ‘in using a rail line, junction, or crossing.’” *Id.* at 19 (quoting 49 U.S.C. §24308(c)).

These repetitious points are obvious on the face of the statute and undisputed. None of these points, however, addresses the question at hand: What is “preference?” *See Brannan v. Elder*, 341 U.S. 277, 286 (1951) (statutory provision that ““preference shall be given”” in certain contexts “does not delineate what that preference shall be.”)<sup>3</sup>

2. *Amtrak Fails to Address the Plain Meaning of Preference and Instead Proposes an Interpretation That Makes No Linguistic or Policy Sense*

Despite accusing the Board of a “total misread of the plain meaning of the preference statute,” Amtrak Comments at 20, Amtrak fails to address the plain meaning of “preference” or discuss any dictionary or legal definitions of the word.

Amtrak offers the following explanation of what it thinks “preference” means:

[P]reference means that evidence and argument regarding total delays to Amtrak trains are not relevant to determination of preference violations in a section 24308(f) investigation. . . . A host railroad must resolve individual dispatching decisions between Amtrak movements and freight movements in favor of Amtrak.

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<sup>3</sup> The same flaw infects the comments of the Environmental Law and Policy Center, National Association of Rail Passengers (“NARP”), Southern Rail Commission, States for Passenger Rail Coalition, Inc., and Virginia Rail Policy Institute (“VRPI”), all of which assume a statutory definition of “preference” which simply does not exist. The comments of Senators Durbin, Wicker, and Booker also focus on when preference applies, without giving it meaning.

VRPI supplies one quote from a governmental source that arguably suggests a conception of preference at odds with the Board’s Policy Statement – a quote from a DOJ litigation filing asserting that unless exceptions apply, “the statutory preference must be accorded, without regard to the effect of preference on freight operations.” VRPI Comments at 2-3. But that unexplained litigating position is not authoritative. Congress never delegated authority to DOJ to define preference by rulemaking or adjudication – much less, in litigation filings – and the case in which the brief was filed was settled without any ruling on the merits.

*Id.* at 19.

This vague formulation and Amtrak's comments suggest that Amtrak believes host railroads must do more than "prefer" Amtrak in their dispatching. Instead, Amtrak's formulation suggests that host railroads are bound to ignore (i) delays to freight trains; (ii) potential delays to other Amtrak trains; and (iii) network fluidity, whenever (except in cases of emergency) they make a dispatching decision that could result in a delay to an Amtrak train. Amtrak's position appears to be that a host must hold a freight train for two hours if doing so has a chance of saving an Amtrak train from being delayed behind that freight train for two minutes (since, Amtrak says, it "must resolve" any Amtrak/freight decision in Amtrak's favor); and that it must always clear the main line, even when it is a single-track line, to allow an Amtrak train to proceed unimpeded, regardless of whether doing so destroys network fluidity and may ultimately result in more delays to both freight and Amtrak trains (since, Amtrak says, network fluidity and "total delays to Amtrak trains are not relevant").

That "absolute" position should be rejected out of hand. First, it makes no sense as a matter of plain language. Congress did not require host railroads to "resolve individual dispatching decisions between Amtrak movements and freight movements in favor of Amtrak," Amtrak Comments at 19;<sup>4</sup> it required them to give Amtrak "preference" over freight trains. In

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<sup>4</sup> Nor did Congress require host railroads to "do whatever is necessary to run the passenger trains on time," as VRPI claims. *See* VRPI Comments at 5. VRPI goes on to claim that host railroads "should not be excused for a failure to . . . provide adequate facilities to run all of the traffic – passenger and freight – reliably and expeditiously. . . . Lack of investment and ineffective control should not be excuses for poor passenger train performance." *Id.* at 5-6. But VRPI does not explain what that has to do with "preference"; why it would need to be "excused"; why it assumes that "poor passenger train performance" is the sole responsibility of the host railroad, when 49 U.S.C. § 24308(f)(1) requires the Board to investigate schedule, congestion, and other potential causes; or why host railroads should be held responsible for a "lack of investment" necessary to ensure good Amtrak performance when, under 49 U.S.C.

both ordinary and legal usage, “preference” for X over Y does not mean that X always wins. “Preference” means “the act, fact or principle of giving advantages to some over others”<sup>5</sup> – not entirely ignoring the interests of those others. In the legal context, as CN pointed out before, employment “preferences” such as veterans’ preference mean that a weight is placed on the decision-making scales in favor of the preferred class, but not that the member of the preferred class always gets the job. *See* CN Opening Comments at 3 & n.3. This understanding of preference is reflected in Amtrak’s own hiring practices. Some Amtrak job listings state a “preference” for people trained by Class I carriers (*see* Exhibit 1, attached), but Amtrak does not exclusively hire former Class I employees for such positions.

Second, an “absolute” position would be poor public policy. To be sure, “preference” represents a policy decision that, other things being equal, it is more important to avoid delays to Amtrak trains than to avoid delays to freight trains. But that does not mean that it is more important to avoid the possibility of a two-minute delay to an Amtrak train than incur a certain two-hour delay to a freight train, or that it is more important to avoid a direct, immediate, short delay to an Amtrak train than it is to avoid multiple delays and losses of network fluidity that will ultimately cause greater delays to freight and other passenger trains. Moreover, Amtrak’s argument that preference must be given in each dispatching decision without regard to broader network consequences (Amtrak Comments at 10) would undermine efficient dispatching and network efficiency. In order to maintain network fluidity and efficiency, dispatchers are trained to use computer and tracking technologies to integrate more information, not less, including accounting for the broader network implications of specific – often local – dispatching decisions.

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§ 24308(a)(2)(B), Amtrak is responsible for the incremental costs associated with its performance.

<sup>5</sup> *See* <http://www.merriam-webster.com/dictionary/preference>.

Amtrak makes no attempt to defend its “absolute” position as a matter of policy. As the Board has explained, an extreme, “absolute” conception of preference “might not, in the long run, promote efficient passenger service.”<sup>6</sup> Policy Statement at 4. And as Amtrak has admitted, without meaningful relief for hosts, its vision of preference “could cause rail traffic in certain areas of high traffic volume and chokepoints to shut down.” *See* Office of Inspector General, DOT, Report No. CR-2008-076, ROOT CAUSES OF AMTRAK TRAIN DELAYS (Sept. 8, 2008) at 5 (“ROOT CAUSES”). Even Amtrak’s ally, NARP, testified in 2009 that its members “certainly agree with delaying Amtrak one minute, rather than delaying a freight train an hour.” *In re Passenger Rail Inv. & Improvement Act of 2008*, STB No. EP 683, Tr. at 173:3-5 (Feb. 11, 2009). Given the adverse consequences for freight and passenger rail of the interpretation of preference urged by Amtrak, at a minimum it is incumbent on Amtrak to identify countervailing policy goals that would have led Congress to adopt such an inefficient and harmful dispatching requirement. Tellingly, Amtrak identifies none. Dispatching decisions are, and must be, about complex networks involving multiple trains. Amtrak’s “absolute” position – which would require dispatchers to ignore indirect effects, even to Amtrak trains, *see* Amtrak Comments at 19 – is irrational, and no way to run a railroad.

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<sup>6</sup> Amtrak suggests that the Board should ignore this problem because issues of preference will only arise in a Section 213 investigation in which there will be a further issue as to whether preference violations have harmed on-time performance. *See* Amtrak Comments at 11. But that is not true. The issue of preference arises whenever dispatchers are making decisions involving Amtrak and freight trains, and it arose long before Section 213 was enacted. If preference were interpreted as Amtrak proposes, dispatchers would be required to make efficiency-destroying decisions focused solely on minimizing delays to the individual Amtrak train immediately before them, regardless of the harm to all network users.

### 3. *Amtrak's Statutory Construction Arguments Are Meritless*

In support of its “absolute” position, Amtrak makes two arguments about the language of the statute.<sup>7</sup> Neither supports Amtrak’s position.

First, Amtrak notes that it has preference “in using a rail line, junction, or crossing,” and argues that the Board’s proposed “systemic, global” approach to preference errs by “aggregat[ing] the individual rail lines, crossings, and junctions” despite Congress’s use of the “singular, indefinite article (‘a’).” Amtrak Comments at 10 (quoting 49 U.S.C. § 24308(c)). Amtrak’s criticism appears to be directed at a straw man – in espousing a “global” approach, neither the Board nor anyone else is suggesting that if, say, a railroad makes dispatching decisions favorable to Amtrak on three out of four rail lines, it can consistently ignore Amtrak’s interests on the fourth. And insofar as Amtrak criticizes what the Board actually proposed, the statute does not support Amtrak’s position. The Board recognized that preference must be understood in terms of whether the host’s pattern and practice of dispatching decisions favor Amtrak, without requiring that “every individual dispatching decision” do so, Policy Statement at 3, and by taking into account not just individual train movements but “efficiency consequences for the network,” *id.* at 4. The statute’s delineation of *where* preference applies (*e.g.*, on “a rail line”) does not resolve *what* preference is or whether it is to be evaluated in terms of patterns or in terms of individual instances. And saying preference must be provided on, for example, a “rail line” – which may encompass hundreds of miles of track on which multiple trains are running and to which multiple trains are coming at any given time – certainly does not

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<sup>7</sup> The Midwest Interstate Passenger Rail Commission (“MIPRC”) makes essentially the same arguments. *See* MIPRC Comments at 1.

mean that dispatchers must myopically ignore network effects and abandon their essential function of preserving network fluidity and efficiency.<sup>8</sup>

Second, Amtrak argues that delays to freight must be irrelevant to whether preference has been provided, because if they were given any weight in a preference determination, that “would render the second and third sentences in section 24308(c) without any purpose, because there would be no reason for a host railroad to apply for relief from preference.” Amtrak Comments at 14; *see generally id.* at 13-18.<sup>9</sup> In other words, Amtrak argues that because the Board is authorized to order an *exception* to preference when a host demonstrates in advance, by a formal application procedure, that giving Amtrak preference would result in a “material[]...lessen[ing] [of] the quality of freight transportation provided to shippers,” 49 U.S.C. § 24308(c), the general *rule* of preference must be applied without any regard whatsoever to freight delays.<sup>10</sup>

Amtrak’s premise is wrong. Giving weight to freight delays when interpreting preference would not render the second and third sentences of section 24308(c) superfluous. The relief

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<sup>8</sup> Further, as AAR explains, Amtrak ignores the historical purpose of the phrase it quotes, which was not to isolate individual parts of the network but (at a time when Amtrak sometimes relied on hosts to supply equipment and personnel as well as rails) to clarify that preference applies only to rail lines, junctions, and crossings, and not to, say, use of locomotives. *See* AAR Reply Comments, § I.A. In advocating a narrow focus on individual trains at individual locations, Amtrak also ignores Congress’s choice to provide not that preference applies in favor of each individual Amtrak train, but instead that it applies more generally in favor of “rail passenger transportation provided by or for Amtrak,” 49 U.S.C. § 24308(c).

<sup>9</sup> In support of this argument, Amtrak cites statements noting that the basic preference obligation in the first sentence of the subsection is “separate” from the procedure for obtaining relief therefrom in the second and third sentences of the subsection. *See* Amtrak Comments at 15-18. That observation, however, reveals nothing about what preference means.

<sup>10</sup> Amtrak appears to go even further and argue that because it has a limited power to order exceptions to preference *ex ante*, the Board’s entire “systemic, global” approach to applying preference should be rejected. But, of course, an exception designed specifically to protect the “quality of *freight* transportation” cannot address the Board’s concern that a “requirement of absolute preference” could operate to the detriment of *passenger* service as a whole, *see* Policy Statement at 4.

provision intrinsically has limited utility because of the difficulty of determining appropriate dispatching outcomes in an *ex ante* regulatory proceeding. Indeed, to CN's knowledge it has never been invoked. But that is not the result of the Board's interpretation of preference, and under the Board's interpretation of preference the relief provision would retain its essential utility for resolving recurring dispatching issues *ex ante*. It could be used, for example, in connection with a particular freight or passenger train or a particular segment of track, where relief from the preference obligation would avoid the risk of an adverse decision based on hindsight. Preference is a meaningful obligation – one to which CN devotes substantial resources every day – so the ability to delineate specific exceptions to it matters.

Further, Amtrak's argument amounts to the tail wagging the dog. The existence of the Board order exception should not be read to undermine the common-sense, plain-language meaning of preference. The Board's power to grant relief from preference is neither inconsistent with nor a substitute for the exercise of sound judgment that is a critical part of dispatching. New conflicts and different scenarios arise every hour on a complex, multi-user rail network, and it would be impossible – and intolerably inefficient and burdensome for host railroads and the Board – to anticipate and attempt to resolve them in advance through Board-imposed dispatching protocols.<sup>11</sup> Moreover, even if it were administratively feasible, it would be bad policy to prohibit hosts from ever making dispatching decisions that delay Amtrak trains unless they can

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<sup>11</sup> The Department of Transportation's Inspector General raised this concern in the 2008 ROOT CAUSES report: "Theoretically, the freight railroads could avoid a shutdown [that would otherwise result from Amtrak's broad definition of preference] by seeking an exemption from their preference obligations, as permitted under the statute. As a practical matter, it is unclear how well this provision would work given the dynamic nature of the rail network, which requires frequent, real-time decisions to address unplanned events." ROOT CAUSES at 5 n.15.

prove that those delays are necessary to avoid “materially . . . lessen[ing] the quality of freight transportation provided to shippers” or because of emergencies. For example, whether or not a two-hour delay to a freight train “materially” harms “the quality of freight transportation,” hosts should not be required to incur such delays to avoid the possibility of a short Amtrak delay.

4. *Legislative and Regulatory History Supports the Board’s Systemic, Global Approach, Not Amtrak’s Criticisms*

Amtrak’s Comments include scattered references to legislative and regulatory history, but, as explained above, they merely recognize and paraphrase the statutory provisions regarding where and when preference applies. None addresses what preference means or requires when it applies. There are, however, other indications in the legislative and regulatory history of what preference means, and they indicate that the Board’s essential interpretation of preference is correct, and Amtrak’s is not. For example:

- Amtrak notes that preference had its roots in the pre-Amtrak “voluntary policy established by the freight railroads themselves for their own passenger service.” Amtrak Comments at 7. But it does not say what that “voluntary policy” was. The freight railroads did not “voluntar[il]y” delay their freight trains for disproportionate periods to avoid relatively minor delays to their passenger trains, and they did not “voluntar[il]y” sacrifice network fluidity to avoid such minor delays. The “voluntary policy” related to preference was based on pragmatic, reasonable railroading judgments, not impractical absolute rules. As the ICC noted a month before Congress enacted the Rail Passenger Service Act, “[i]n the day-to-day operation of any railroad discretion must b[e] given to the dispatcher to assure safe movement of all trains[,] and there are bound to be meets and passes requiring [delays to passenger trains to permit prompt movement of freight trains].” *Penn Cent. Transp. Co. Discontinuance of 34 Passenger Trains*, 338 I.C.C. 380, 464 (1970). And the ICC had recognized, just three years earlier, that “[o]perating conditions may dictate that passenger trains be sidetracked for long freight trains which will not fit the length of sidetracks, or for trains which are fleet operated, as where two to four trains, often including a passenger train, are operated in tandem.” *S. Pac. Co. Discontinuance of Trains Nos. 39 and 40 Between Tucumcari, N. Mex., and Los Angeles, Calif.*, 330 I.C.C. 685, 693 (1967).

- Amtrak cites a regulation proposed by the ICC in 1971 that would have prohibited “the sidetracking of passenger trains for freight trains . . . except in an emergency.” Amtrak Comments at 8-9 (citing *Adequacy of Intercity Rail Passenger Service*, 36 Fed. Reg. 23,636, 23,638 (I.C.C. Dec. 3, 1971)). But the regulation as finally adopted in 1973, shortly after the Amtrak Improvement Act of 1973 enacted the statutory preference requirement, did not include that language, and while it required “priority” for intercity passenger trains over freight trains, *Adequacy of Intercity Rail Passenger Service*, 344 I.C.C. 758, 809 (1973), it did not define “priority” or “preference.”
- In 1973, in congressional testimony on the bill that enacted the preference requirement, Amtrak’s President stated that requiring dispatchers to “‘never let a freight train interfere,’ just is not a real-world approach.” *Financial Assistance to Amtrak: Hearings before the Subcomm. on Transp. & Aeronautics of the H. Comm. on Interstate & Foreign Commerce*, 93d Cong., at 32 (1973) (testimony of R. Lewis).
- In 1976 congressional testimony, Amtrak’s President rejected the notion that “putting a passenger train into a sidetrack should never happen.” As he explained: “Being a former operating man, I would disagree with that. We can actually get faster passenger trains in some cases, depending upon the situation, by putting a passenger train, which is short, into the siding and getting that freight past it on the main line, particularly when the freight train won’t fit in the siding. This is just prudent operation.” *Dep’t of Transp. and Related Agencies Appropriations for Fiscal Year 1977: Hearings before a Subcomm. of the S. Comm. on Appropriations*, 94th Cong., 2nd Sess. (1976), at 548 (testimony of P. Reistrup).
- In 1982, Amtrak’s President reiterated that Amtrak’s statutory preference is not “absolute,” testifying that “the law provides that the passenger train operation shall be without undue interference with the freight operation.” *Dept. of Transp. and Related Agencies Appropriations for 1982: Hearings before a Subcomm. of the H. Comm. of Appropriations*, 97th Cong., 1st Sess. (1981), at 483 (testimony of A. Boyd).
- In 2007, Chairman Murray, the Senator quoted by Amtrak in support of the (undisputed) point that hosts have a preference obligation (*see* Amtrak Comments at 12), rejected the absolutist interpretation of preference that Amtrak now champions as “simply not realistic.” *See* CN Opening Comments at 4 (quoting *Transp., Hous. and Urban Dev., and Related Agencies Appropriations for Fiscal Year 2008: Hearing on S. 294 before the Subcomm. on Transp., Hous. and Urban Dev., and Related Agencies, of the S. Comm. on Appropriations*, 110th Cong., at 2 (Feb. 28, 2007) (opening statement of Sen. Patty Murray, Chairman).

**B. Amtrak's Further Arguments Regarding Relevant Evidence Are Meritless**

Amtrak claims that the Board's guidance regarding relevant evidence in a Section 213 investigation is pervasively "tainted by the fundamental misinterpretation of the preference law demonstrated" in Amtrak's Comments. Amtrak Comments at 19. Since it is Amtrak, not the Board, that misinterprets preference, it is Amtrak's comments on evidence that are tainted and wrong.<sup>12</sup>

First, Amtrak claims that evidence and argument regarding "total delays to Amtrak trains" are not relevant to the determination of a preference violation. *Id.* But as explained in the Board's Policy Statement (at 3) and in CN's Opening Comments (at 3-6), preference is properly understood in "systemic, global" terms. Moreover, a Section 213 investigation potentially examines not only whether preference violations occurred, but also their role, if any, along with other causes, in Amtrak train on-time performance failures, and also what, if any, remedies should be imposed if preference violations occurred and caused such failures. *See* 49 U.S.C. § 24308(f)(2). Thus, even if preference violations could somehow be identified without looking at the broad, systemic context and the pattern of dispatching behavior (which they cannot), that discretionary remedial decision would require a broader look at host railroad efforts to reduce Amtrak delays.

Second, Amtrak claims that evidence of effects on freight transportation, or of other "mitigating factor[s]," is irrelevant. Amtrak Comments at 20-23. Again, Amtrak is wrong for

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<sup>12</sup> CN and Amtrak agree on one point: statistical sampling may sometimes be appropriate. *See* Amtrak Comments at 20. As CN explained in its Opening Comments, "a preference violation requires a systemic pattern or practice of improper dispatching decisions," and "[a]ny finding that a host has not provided preference must be grounded in a close factual examination of at least a representative number of specific dispatching decisions that are relevant to the practice or pattern Amtrak challenges." CN Opening Comments at 7-8.

the same two reasons. Properly understood, preference means balancing Amtrak's interests against the interests of shippers and freight carriers, albeit with a thumb on the scale in Amtrak's favor. The interests of shippers and freight carriers, and the particular circumstances of a dispatching decision, must therefore be considered in any judgment on preference. In addition, if a preference violation is found, the Board's discretionary remedial decision and recommendations must take into account both the reasons why the offending dispatching decisions were made and the potential impact of any remedy on shippers and rail carriers.<sup>13</sup>

Third, Amtrak argues that the emergency exception in 49 U.S.C. § 24308(c), which by its terms is self-executing, should be read as inapplicable unless a host railroad invokes it at the time the emergency occurs. *See* Amtrak Comments at 23. Amtrak's argument is unsound both as a matter of law and as a matter of policy. Congress could have chosen to impose such a requirement, but it did not. And, when the evidence shows that a host took appropriate action in response to an emergency, it would make no sense for the Board to penalize it based on a conclusion informed by hindsight that the host should have provided notice that on its face the statute does not require.

### **III. AMTRAK'S COMMENTS PROVIDE NO REASON TO REJECT THE ADDITIONAL POINTS MADE BY CN**

Amtrak raises specific arguments (in addition to its general "absolute" preference argument, discussed above) that bear on two additional points discussed in CN's Opening Comments.

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<sup>13</sup> For example, if, on Amtrak's theory, there were a technical "violation" of preference because a host had failed to apply for a Board order before denying "preference" – as construed by Amtrak – to an Amtrak train, but evidence at the Section 213 proceeding showed that providing such "preference" would materially lessen the quality of freight transportation, that evidence would be highly relevant to the appropriate remedy.

First, CN explained in its comments that it would be unfair and unwarranted for the Board to “impose damages if the host has performed in accordance with its operating agreement with Amtrak.” CN Opening Comments at 6. Amtrak, however, claims that “[p]reference is not dependent on or limited by Amtrak/host railroad agreements and therefore such agreements are not relevant to whether a host has complied with preference.” Amtrak Comments at 21.

Amtrak’s position on this point is indefensibly self-serving. The preference requirement does not exist in a vacuum. It is part of a provision – 49 U.S.C. § 24308 – that (i) requires Amtrak and host railroads to set the terms of their relationship by contract, 49 U.S.C. § 24308(a)(1); (ii) requires them, in doing so, to provide for “reasonable compensation” to the host railroad that covers at least its “incremental costs” of “providing the services” it is required to provide to Amtrak, 49 U.S.C. § 24308(a)(2)(B);<sup>14</sup> and (iii) conditions all of Amtrak’s rights on the payment of that compensation, 49 U.S.C. § 24308(a)(3). In that context, Amtrak is entitled only to the levels of preference and other services for which it contracts with its host carrier and for which it pays through its host operating agreement all associated incremental costs.<sup>15</sup>

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<sup>14</sup> Amtrak’s extreme position regarding preference underscores the need for the Board to ensure that Amtrak is held responsible, as required under 49 U.S.C. § 24308(a)(2)(B), for the full incremental costs its presence imposes on host carriers. Amtrak’s economic incentives regarding levels of service from host carriers will be aligned properly only when Amtrak bears the cost of the service it seeks. Once it is recognized that Amtrak is required to pay all incremental costs that it would impose on hosts, it is unlikely Amtrak will find its absolutist conception of preference to be economically desirable or sustainable.

<sup>15</sup> As even Amtrak’s ally NARP recognized long ago, an extreme conception of preference would impose costs that must be paid for: *See United States Railway Ass’n Preliminary System Plan: Hearings Before the Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. (1975), at 1085 (statement of O. Beaty, President, Nat’l Ass’n of R.R. Passengers) (“It would make no sense, to take an extreme example, to bring a long, speeding freight train to a halt so that an off-peak commuter*

Second, CN explained that comparison of head-to-head delays between Amtrak and high-priority freight trains can be highly probative in demonstrating that preference has been provided. CN Opening Comments at 8-9. Amtrak claims that “[p]reference is not comparative or relative to freight train performance and thus comparative evidence [of passenger and freight train performance] would be of no probative value.” Amtrak Comments at 21.<sup>16</sup> Amtrak’s premise is wrong on its face. Of course preference is “comparative” – preferring X to Y does not mean X gets everything it wants; it means that X gets *more than Y*. And, as CN explained before, evidence showing that Amtrak trains suffer fewer delays than freight trains when the two meet would provide a compelling demonstration that Amtrak trains are, indeed, being preferred to freight trains. *See* CN Opening Comments at 8-9.

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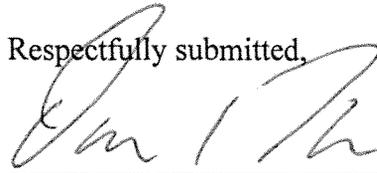
train would avoid a three-minute delay (unless, perhaps, the passenger agency had negotiated a contract whereby it reimbursed the freight carrier for the true costs of such delays).”).

<sup>16</sup> There are, certainly, potential “apples and oranges” problems with some such comparisons, *id.* at 22. For example, as AAR has explained, comparing Amtrak on-time performance with freight on-time performance might not be meaningful since “on-time performance” for the two classes of traffic involves very different schedules, tolerances, and other criteria. AAR Opening Comments at 15-16.

**CONCLUSION**

CN appreciates the opportunity to submit these reply comments on the Board's proposed statement of policy.

Respectfully submitted,



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*Counsel for Grand Trunk Western Railroad  
Company and Illinois Central Railroad Company*

April 13, 2016

# **EXHIBIT 1**

# Job & Career News from the Memphis Public Library

BY ROBYN | FEBRUARY 7, 2011 · 1:46 PM

## AMTRAK Job Opening

### AMTRAK Job Opening in Meridian, MS

**Note: Meridian, MS is 250 miles from Memphis, TN**

Passenger Engineer Trainee/Meridian, MS/90074358

02/03/2011

E-90074358

\$65K-\$90K Annually

Passenger Engineer Trainee (2)

Amtrak

Transportation

**SUMMARY OF DUTIES:** Consistently and safely operates locomotives and trains in compliance with federal regulations and corporate policies. Operates equipment during varying work hours within a 24/7 transportation environment maintaining alertness, situational awareness and vigilance. Thinks and functions independently and utilizes clear and effective verbal communication skills in interaction with fellow crew members and other personnel responsible for safe and efficient train movement.

**EDUCATION:** High School diploma or GED required. Some college or vocational training preferred.

**WORK EXPERIENCE:** Some work experience demonstrating the ability to maintain alertness, awareness and vigilance, as well as clear, effective verbal communication skills in the performance of work. Satisfactory attendance and safe work record. Prior railroad operating experience and work history that demonstrates ability to adapt to variable and often changing work hours preferred. **Preference given to individuals who were trained**

Job Posting Title	Effective Date	Reference Code	Additional Information	Job Title	Company	Department
<b>Tasks/Requirements</b>						

by a Class 1 carrier or equivalent passenger railroad and are currently certified as Class 1 Train Service Engineers.

OTHER REQUIREMENTS: 1. Although a driver’s license is not required, applicants with a driver’s license must provide a certified copy of motor vehicle driving record from the chief of the state driver’s licensing agency in which the applicant was last issued a license(s) issued or reissued from other state(s) within the preceding 60 months. Motor vehicle records must be void of any drug and alcohol violations within the previous 36 months. 2. Must have a motor vehicle driving record void of any convictions or state canceling, revoking, suspending or denying a driver’s license for operating a motor vehicle while under the influence of or impaired by alcohol or a controlled substance within the last 36 months or a record of refusal to undergo such testing as required by state law within the last 36 months. 3. Must sign a release of records authorizing all previous railroad employers to provide Amtrak with background information, if applicable. In accordance with FRA regulations, previous railroad service records must be void of any drug and alcohol violations within the previous 60 months.

OTHER: If selected, incumbent will be required to successfully complete Engineer Training as follows: Individuals not previously certified as Class 1 Train Service Engineers: 7-10 weeks classroom and field work while headquartered at Amtrak’s Training Center in Wilmington, DE; followed by on-the-job training associated with the Crew Base for which hired; paid at incumbent achieves certification as a Class 1 Train Service Engineer( currently \$ 20.85/hour straight time)

TRAVEL REQUIRED: Yes

Regular

Meridian Station

Meridian



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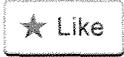
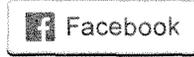
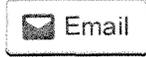
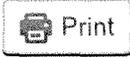
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**Oakland, CA**

*Posted: 12/24/2015*

**Description**

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Amtrak connects businesses and communities across the country and we move America's workforce toward the future. We employ more than 20,000 diverse, energetic professionals in a variety of career fields throughout the United States. The safety of our passengers, our employees, the public and our operating environment is our priority and the success of our railroad is the result of our employees.

### **Are you ready to join our team?**

#### **SUMMARY OF DUTIES:**

Consistently and safely operates locomotives and trains in compliance with federal regulations and corporate policies. Operates equipment during varying work hours within a 24/7 transportation environment maintaining alertness, situational awareness and vigilance. Thinks and functions independently and utilizes clear and effective verbal communication skills in interaction with fellow crew members and other personnel responsible for safe and efficient train movement.

#### **PREFERRED EDUCATION:**

Some college or vocational training.

#### **WORK EXPERIENCE:**

Some work experience demonstrating the ability to maintain alertness, awareness and vigilance, as well as clear, effective verbal communication skills in the performance of work. Satisfactory attendance and safe work record. Prior railroad operating experience and work history that demonstrates ability to adapt to variable and often changing work hours preferred. Preference given to individuals who were trained by a Class 1 carrier or equivalent passenger railroad and are currently certified as Class 1 Train Service Engineers.

#### **OTHER REQUIREMENTS:**

1. Although a driver's license is not required, applicants with a driver's license must provide a certified copy of motor vehicle driving record from the chief of the state driver's licensing agency in which the applicant was last issued a license and any license(s) issued or reissued from other state(s) within the preceding 60 months. Motor vehicle records must be void of any drug and alcohol violations within the previous 36 months. 2. Must have a motor vehicle driving record void of any convictions or state action canceling, revoking, suspending or denying a driver's license for operating a motor vehicle while under the influence of or impaired by alcohol or a controlled substance within the last 36 months or a record of refusal to undergo such testing as required by state law within the last 36 months. 3. Must sign a release of records authorizing all previous railroad employers to provide Amtrak with background information, if applicable. In accordance with FRA regulations, previous railroad service records must be void of any drug and alcohol violations within the previous 60 months.

#### **OTHER:**

If selected, incumbent will be required to successfully complete Engineer Training as follows: Individuals not previously certified as Class 1 Train Service Engineers: 7-10 weeks classroom and field work while headquartered at Amtrak's Training Center in Wilmington, DE; followed by extensive qualifying and on-the-job training associated with the Crew Base for which hired; paid at the student training rate until incumbent achieves certification as a Class 1 Train Service Engineer.

Individuals currently certified as Class 1 Train Service Engineers: 9-12 weeks classroom and field work while headquartered at Amtrak's Training Center in Wilmington, DE, followed by additional qualifying associated with the Crew Base for which hired; paid at the rate determined by the agreement schedule.

Incumbents are subject to periodic medical examinations including random drug and alcohol screenings.

**SUPERVISORY RESPONSIBILITIES:**

No

**COMMUNICATION AND INTERPERSONAL SKILLS:**

Must have excellent verbal and written communication skills.

**Requisition ID:**18909

**Posting Location(s):**California

**Job Family/Function:**Transportation

**Relocation Offered:**No

**Education Requirements:**High School/GED

**Travel Requirements:**Up to 100%

**Employment Experience Requirements:**Under 1 year of experience

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We proudly support and encourage U.S. Veterans to apply for Amtrak job opportunities.

All positions require pre-employment background verification, medical review and pre-employment drug screen. Amtrak is an equal opportunity employer and all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, disability status, protected veteran status, or any other characteristic protected by law.

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