

Attorneys at Law

David A. Hirsh  
202.973.7606  
dhirsh@harkinscunningham.com

1700 K Street, N.W.  
Suite 400  
Washington, D.C. 20006-3804  
Telephone 202.973.7600  
Facsimile 202.973.7610

**ENTERED**  
**Office of Proceedings**  
**February 22, 2016**  
**Part of**  
**Public Record**

February 22, 2016

**BY E-FILING**

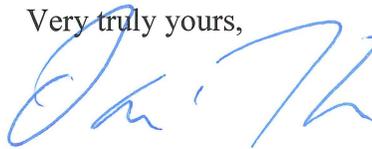
Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**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 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

---

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)

---

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

---

Theodore K. Kalick  
CN  
601 Pennsylvania Ave, N.W.  
Suite 500 North Building  
Washington, D.C. 20004-3608  
(202) 347-7840

Paul A. Cunningham  
David A. Hirsh  
Simon A. Steel  
Matthew W. Ludwig  
HARKINS CUNNINGHAM LLP  
1700 K Street, N.W., Suite 400  
Washington, D.C. 20006-3804  
(202) 973-7600

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

February 22, 2016

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

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)

---

**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 these comments in response to the Surface Transportation Board’s Notice of Proposed Statement of Board Policy 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)* (Dec. 28, 2015) (“Policy Statement”). As a host railroad for Amtrak, and as a participant in a pending proceeding begun by Amtrak in Docket No. NOR 42134, *Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry. Co.*, CN has a strong interest in the Policy Statement.

**INTRODUCTION**

CN appreciates both the helpful guidance provided by the Board’s Policy Statement and the opportunity to comment.<sup>1</sup> CN agrees with the Board’s essential conclusions regarding

---

<sup>1</sup> CN also joins in the comments of the Association of American Railroads (“AAR”) in this proceeding.

preference: (1) the preference requirement is not “absolute” (*see* Policy Decision at 3 (“a host rail carrier need not resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train”)), and (2) the Board should “take a systemic, global approach in determining whether a host carrier has granted [Amtrak] preference,” *id.*, and require “evidence of an identifiable and longstanding pattern of systemic failures to provide Amtrak . . . preference,” *id.* at 4.

CN also strongly agrees with the Board that preference issues should be just one potential aspect of a much broader “comprehensive and impartial on-time performance investigation, in which the Board considers Amtrak’s role in delays as well as the host carrier’s role.” *Id.* at 6. In 49 U.S.C. § 24308(f)(1), Congress plainly instructed the Board to go where the facts lead – whether that be to problems that could be addressed by a host (of which dispatching decisions that might implicate preference are a subset), problems that could be addressed by Amtrak (*e.g.*, equipment deficiencies, poor maintenance, trains arriving out of slot), problems caused by third parties (*e.g.*, crossing delays), problems relating to “scheduling,” problems relating to “congestion” and infrastructure limitations, or mixtures of problems. To fulfill that broad mission efficiently and fairly and generate “recommendations” with practical value, the Board has inherent discretion to control its own proceeding and focus its investigation on whatever significant problems may be at the root of performance issues.<sup>2</sup> If, for example, on-time performance (“OTP”) problems appear to arise primarily from an unrealistic schedule, the Board

---

<sup>2</sup> *See, e.g., Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543-544 (1978) (“Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’””) (citations omitted); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 142-43 (1940) (“Administrative agencies have power . . . when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest.”).

may conclude that delving into other possible issues would not be productive until there is experience operating under a realistic schedule.

Depending on such considerations, and on whether there is a sufficient allegation by Amtrak of an “identifiable and longstanding pattern of systemic failures to provide Amtrak . . . preference,” Policy Statement at 4, preference issues may or may not arise. Because the Board’s Policy Statement focuses primarily on preference issues, these Comments will do the same. However, we emphasize that, depending on the facts, preference issues may have little or no role in an investigation, and that the evidence relevant to the Board’s more general investigatory function of making findings and recommendations about the causes of poor OTP may be far broader than the evidence we discuss below concerning preference issues.

## **COMMENTS**

### **I. THE INTERPRETATION OF PREFERENCE**

#### **A. Preference Does Not Mean Total Subordination of Freight Traffic**

Implicit in the word “preference” is that Amtrak is not guaranteed to have every conflict or potential conflict with freight traffic resolved so that Amtrak avoids any and all delays. For example, federal law entitles eligible veterans to “preference” over other applicants for government jobs, but veterans’ preference “does not guarantee veterans a job”; it simply adds points to veterans’ scores in the numerical system used to rank applicants.<sup>3</sup>

As a matter of plain language, preference to Amtrak should be understood in the same way: when a dispatcher’s decision could affect one or more Amtrak trains and one or more freight trains, he should place a greater weight on avoiding delays to an Amtrak train than on avoiding delays to a freight train, but other factors can and sometimes will prove decisive.

---

<sup>3</sup> See Veterans’ Preference, <https://www.fedshirevets.gov/job/vetpref>.

Preference means a weighted balancing of interests, not a total subordination of the interests of all other interested parties (shippers, non-Amtrak passengers, other carriers) to Amtrak.

As the Board's Policy Statement reflects, this conclusion is reinforced by the statutory, factual, and public policy context in which preference for Amtrak arises.<sup>4</sup> Consistent with common sense and the Rail Transportation Policy (49 U.S.C. § 10101), users of the complex and often congested rail network privately owned and maintained by the freight railroads must co-exist reasonably to permit efficient service both to Amtrak passengers and to other passengers and shippers. Dispatchers cannot and should not be expected to avoid all delays to Amtrak trains. They must manage a multitude of real-time problems and uncertainties to maintain network fluidity and to better serve both passengers and freight. Taking extreme measures to avoid delaying Amtrak would be inefficient and impose disproportionate costs on freight railroad and shipper interests. As Senator Murray explained in congressional hearings before the passage of PRIIA, "[i]t is simply not realistic to expect our freight railroads to put every coal and container train on a siding so passenger trains can breeze through."<sup>5</sup> Even Amtrak and its supporters have acknowledged this reality.<sup>6</sup>

---

<sup>4</sup> At one point, the Policy Statement suggests an inquiry into "whether or not a host carrier made identifiable, consistent efforts to minimize total delays" for Amtrak. Policy Statement at 4. Consistent with the Board's acknowledgement that preference is not an absolute concept, the focus should be on whether reasonable efforts were made to avoid delays to Amtrak – not on whether delays were somehow "minimized" in an absolute sense. Preference must involve a **reasonable** trade-off between potential delays to Amtrak and potential delays to freight, weighted in Amtrak's favor.

<sup>5</sup> *Transp. and 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).*

<sup>6</sup> As AAR notes in its comments, Amtrak's President acknowledged in congressional testimony on the bill that enacted the preference requirement that requiring dispatchers to "never let a freight train interfere, just is not a real-world approach." See AAR Comments at 9 (quoting *Financial Assistance to Amtrak: Hearings Before the Subcomm. on Transp. &*

**B. There Should Be No Liability for Failure to Accord Preference Without a Specific Pattern or Practice of Improper Dispatching Decisions**

Implementing preference necessarily involves numerous fact-specific circumstances and difficult judgments based on imperfect and uncertain information. CN dispatchers make thousands of dispatching decisions every month involving Amtrak and freight trains. In each decision, CN's policy is to give Amtrak preference, but many of them also implicate other considerations, such as safety, relative delays, and network fluidity. Amtrak does not – and, under a proper interpretation of preference, should not – expect that its trains will never be delayed due to freight traffic. Nor is it to be expected that every one of those thousands of complex dispatching decisions will in hindsight be optimal. That is a reality inherent to dispatching; it is not a refusal to accord Amtrak preference.

Given this reality, the Board is right to take a “systemic approach to preference.” Policy Statement at 4. It would be unfair to hold a host liable in the absence of “an identifiable and longstanding pattern of systemic failures to provide Amtrak trains with the statutory preference.” *Id.* And it would not be a productive or efficient use of the Board's resources to conduct a fishing expedition through thousands of individual dispatching decisions just to find a few individual decisions that might be subject to second-guessing. The requisite evidence can only

---

*Aeronautics of the H. Comm. on Interstate & Foreign Commerce*, 93d Cong., at 32 (1973) (testimony of R. Lewis)). Amtrak's schedules and operating agreements reflect the same understanding: its schedules incorporate time to allow for delays due to meets with freight trains (although, in many cases, not enough time), and its operating agreements have historically offered hosts affirmative performance payments if they succeed in reducing freight-related delays not to zero, but to delay levels that are commensurate with those anticipated in its schedules. Similarly, at the Board's February 11, 2009, hearing in STB Ex Parte No. 683, the National Association of Railroad Passengers testified that its members “certainly agree with delaying Amtrak one minute, rather than delaying a freight train an hour.” Transcript of Record at 173:1-5, *In re* Passenger Rail Inv. and Improvement Act of 2008, Docket No. EP 683 (2009).

be found by looking at a substantial number of individual instances in their full context to determine whether they constitute a significant pattern of unreasonable decisions.

**C. A Host Should Not Be Held Liable for Failing to Provide Preference if It Is Meeting the Standards of Performance Amtrak Contractually Agreed to Accept**

Under 49 U.S.C. § 24308(f)(2), the Board “may” in certain circumstances impose liability on a host found to have failed to provide preference, potentially yielding damages for Amtrak. For two reasons, the Board should not impose damages if the host has performed in accordance with its operating agreement with Amtrak – either by making a specific dispatching decision that is permitted by the operating agreement (or identified in the agreement as not being a basis for penalties), or by meeting or exceeding, for the train and the period at issue, performance standards contractually agreed to by the host and Amtrak.

If a host is meeting its responsibilities under its operating agreement, its doing so should be dispositive of whether it is violating preference. Because preference is properly understood as a general, context-dependent approach to helping Amtrak meet its goals of timeliness, if a host’s performance meets the requirements of its operating agreement, preference has been provided.

It would also be fundamentally unfair, and fundamentally contrary to the Rail Passenger Service Act scheme, to allow Amtrak to contract to pay for and accept one level of performance, and then turn around and claim damages on the basis that that agreed level of performance is not good enough. Amtrak’s operating agreements under 49 U.S.C. § 24308(a) specify what service it wants and will accept, and the parties (or, when necessary, the Board) fix a price for those services against the backdrop of the statutory requirement that the host be compensated for at least its incremental costs of providing that service.<sup>7</sup> Were the Board to require, under the rubric

---

<sup>7</sup> See *Application of Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Union Pac. R.R. and S. Pac. Transp.*, 3 S.T.B. 143, 155-56 & n.24 (1998) (holding that incremental cost

of preference, that a host subordinate its freight traffic to Amtrak traffic more than the parties effectively agreed, the parties' bargain, and the fair compensation principle that underlies it, would be fundamentally undermined. Awarding damages under 49 U.S.C. § 24308(f)(2) for a purported preference violation when the host had met its contractual obligations would provide an undue windfall to Amtrak and impose an unfair retroactive penalty on the host.

## **II. EVIDENCE AND INDICIA OF PREFERENCE**

### **A. The Board Should Not Consider a Preference Violation Absent Sufficient Claims and Evidence of a Systemic Pattern of Improper Dispatching Decisions.**

As the Board has previously determined (*Nat'l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry. Co.*, Docket No. NOR 42134, slip op. at 3 (STB served Jan. 3, 2013)), when Amtrak seeks a Section 213 investigation, the investigation should proceed through normal complaint procedures. Amtrak should state its claims with specificity, after which the parties should develop the record through discovery, evidentiary filings, and argument.

This has important implications for a preference claim. Because a preference violation requires a systemic pattern or practice of improper dispatching decisions, if Amtrak seeks a preference investigation, it must at a minimum outline the dispatching patterns or practices it claims constitute a violation. Amtrak may not just cite general concerns such as overall levels of delay, or poor OTP, or a few cherry-picked examples of delays allegedly due to sub-optimal dispatching. Without a specific claim regarding a pattern or practice of host dispatching, there

---

standard of 49 U.S.C. § 24308(a)(2)(B) entitles host railroad to “all costs that a freight carrier would not incur but for the operations of Amtrak.”).

can be no basis for a serious investigation. It would instead be an unfair, wasteful, and expensive fishing expedition.

Most important, without specific claims the host would be denied a fair opportunity to identify for close examination a subset of the thousands of dispatching decisions that affect a train's performance in order to test the pattern or practice claimed to deny preference. Any 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. Given the multitude of facts involved in dispatching, without such an examination the Board cannot hope to understand adequately the context, basis, and reasonableness of the host's relevant dispatching decisions, much less to impose penalties for a supposed preference violation consistent with the dictates of due process. The other forms of indirect evidence discussed in the Policy Statement and below cannot individually or collectively substitute for direct evidence of the context and facts surrounding specific dispatching decisions.

## **B. Evidence of How Policies Have Impacted Train Delays**

The more general and indirect evidence of impacts on trains outlined in the Board's Policy Statement may help demonstrate the host is not liable for a preference violation. But whether such evidence is necessary, and which types of indirect evidence are most important, will depend on the facts relevant to Amtrak's preference allegations.<sup>8</sup> With this point in mind, CN will comment on two potential forms of indirect evidence bearing on preference.

---

<sup>8</sup> CN agrees with AAR's general comments that for some of the types of evidence suggested by the Board (such as comparative OTP) it may be difficult, if not impossible, to construct meaningful, apples-to-apples comparisons.

1. *Head-to-head delays between Amtrak and high priority freight trains (e.g., intermodal)*

At least one type of indirect evidence concerning dispatching not mentioned in the draft Policy Statement – a comparison of head-to-head delays between Amtrak and other high priority freight trains – may be probative or even decisive in dismissing a claim that preference is not being provided. Many railroads, including CN, can produce data from which comparisons of at least some aspects of such delays can be made. Based on Amtrak and freight delay data it may be possible to compare the delays incurred by intermodal and other high priority freight trains caused by an Amtrak train to the delays caused to that Amtrak train by those same freight trains. Evidence that the freight train delays due to the Amtrak train exceeded the Amtrak delays due to the freight trains would provide a strong and potentially dispositive indication that the host carrier is giving Amtrak preference. Conversely, if reliable data showed, based on an apples-to-apples comparison, that the Amtrak train suffered more delay for the freight trains than vice versa, the burden would fall to the host carrier to explain why.

2. *Compilations of data based on CDRs*

Amtrak's initial complaint against CN in Docket No. NOR 42134 asserted that high levels of "host-responsible delay" in general, and "freight train interference" ("FTI") in particular, constituted evidence of preference violations by CN. CN strongly disputes that such aggregate data, compiled from Amtrak's coding of delays, can demonstrate a host's failure to provide preference.

Amtrak has no delay code that purports to isolate delays due to potential preference issues. Preference relates to dispatching decisions made in a specific context, where the host's obligation is to prefer Amtrak trains to freight trains. The only potentially relevant delays under Amtrak's coding system are those designated as FTI. But even delays coded as FTI may not

have any bearing on preference. Amtrak codes as FTI (1) delays that are outside the reasonable control of the host railroad (*e.g.*, delays due to cross traffic at automatic interlockings or interlockings controlled by non-host carriers, delays due to late-arriving Amtrak trains caught behind freight trains, and delays for which the root cause is not the host, but as per Amtrak’s protocol that fact is not recorded by the conductor), and (2) delays that arise from sound dispatching decisions that are necessary to preserve network fluidity in the overall interest of all network users, including Amtrak.

Moreover, Amtrak’s FTI delay data do not provide an accurate indication of the extent of delays to Amtrak trains caused by freight trains. Those data are generated by Amtrak’s own conductor delay reports (“CDRs”), which are not based on the root cause of a delay (*see* Policy Statement at 4 n.3). In addition, for many reasons, including the desire of slow-running Amtrak crews to avoid appearing themselves to cause added delay, CDRs may overstate the time attributable to FTI. Data based on Amtrak’s delay coding (and, more generally, based on CDRs) are not a substitute for the specific examination of dispatching decisions discussed in Section II.A.

### **C. Potential Factors to Mitigate Preference Failures**

CN agrees with the Board that a host carrier should be able to adduce evidence that excuses or mitigates any apparent failure to meet its preference obligation. In particular, if the evidence shows in the course of the investigation that preference would “materially . . . lessen the quality of freight transportation provided to shippers,” 49 U.S.C. § 24308(c), the host should be relieved of potential liability. It would be impractical and wasteful not to combine that inquiry with the Board’s overall investigation of delays and preference issues.

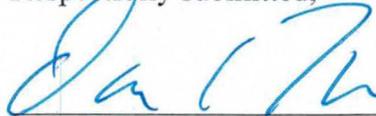
Conceptually, this and other examples cited by the Board as “evidence regarding other factors that may have prevented the host carrier from providing preference” (Policy Statement at

7) are best characterized not as preventing a carrier from providing preference, but as instances of dispatching decisions that are fully consistent with hosts' preference obligations. Again, preference does not mean that a freight train must always be delayed in order to avoid any possible Amtrak delay. Such things as emergencies (for which there is an explicit exception to preference (*see* § 24308(c)) and facts showing that interference may be beyond the reasonable control of the host (for example, as noted by the Board (Policy Statement at 7), when an Amtrak train arrives without warning significantly out of slot and is thus delayed behind freight trains) should be seen in any Board investigation as evidence the host has met its preference obligation, not as mitigating a failure to do so.

**CONCLUSION**

CN appreciates the opportunity to comment on the Board's proposed statement of policy.

Respectfully submitted,



Paul A. Cunningham  
David A. Hirsh  
Simon A. Steel  
Matthew W. Ludwig  
HARKINS CUNNINGHAM LLP  
1700 K Street, N.W., Suite 400  
Washington, D.C. 20006-3804  
(202) 973-7600

Theodore K. Kalick  
CN  
601 Pennsylvania Ave, N.W.  
Suite 500 North Building  
Washington, D.C. 20004-3608  
(202) 347-7840

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

February 22, 2016