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February 22, 2016

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

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

Dear Ms. Brown:

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

If you have any questions, please contact me.

Respectfully submitted,

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

William H. Herrmann
Vice President & Managing Deputy Counsel

Enclosures

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

COMMENTS OF THE NATIONAL RAILROAD PASSENGER CORPORATION

The National Railroad Passenger Corporation (“Amtrak”) submits these comments in response to the Board’s December 28, 2015 Decision in Docket No. EP 728, “Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions” of 49 U.S.C. § 24308(c) and (f) (the “Proposed Policy Statement”).

I. Introduction

The Board’s Proposed Policy Statement, which sets forth (at p. 3) “guidance...regarding the Board’s interpretation” of Amtrak’s right to preference – a right established over 40 years ago by federal statute -- ignores the clear, plain and unambiguous words of the statute, and substitutes instead a balancing test that looks to overall network efficiency; mitigating factors; policies, practices and procedures; contractual provisions; statistics, econometrics, and modeling; and a host of other factors. The one thing missing is what Amtrak trains are entitled to under the plain language of the statute itself: the right to be accorded by host railroad dispatchers “preference over freight transportation in using a rail line, junction, or crossing...”49 U.S.C. § 24308(c) .

The Proposed Policy Statement should be withdrawn, for either of two independent and sufficient reasons: *First*, the Proposed Policy Statement is procedurally defective. It makes pronouncements that are binding on the public, but was not issued through notice and comment rulemaking as required by the Administrative Procedure Act. *Second*, as a substantive matter the

Proposed Policy Statement ignores the plain and unequivocal language of Amtrak's statutory right to preference, creates a new definition that eviscerates the right to preference, and draws broad, erroneous conclusions about relevant evidence based on that fundamental misinterpretation.

The language of 49 U.S.C. § 24308(c) is clear and unambiguous. Amtrak trains are entitled to preference over freight transportation except in an emergency. Any deviation from this clear and plainly-stated obligation requires the host railroad to apply for relief from its statutory obligation, and to sustain its burden of proving that granting preference to Amtrak trains would materially lessen the quality of freight transportation to shippers. There are no other exceptions, mitigating factors, balancing tests, or other qualifications in the statutory language itself or implied in the legislative history. The statute does *not* (a) afford the host railroad the right to grant itself preference relief unilaterally, (b) permit the host railroad to avoid the burden of proving that preference would materially lessen the quality of freight transportation, or (c) permit a host to escape responsibility for having failed to provide preference by demonstrating "mitigating factors" after the fact. Any policy which proposes these additional requirements and qualifications is not interpreting – but, rather, is impermissibly rewriting -- federal law.

The Board's proposed reinterpretation of the preference law is unsupported by any precedent, and indeed is contrary to the interpretations accorded to Amtrak's preference right by the Department of Justice when it brought suit to enforce Amtrak's rights against a host railroad; by the Interstate Commerce Commission in its Adequacy of Service regulations; and by the Department of Transportation in its regulations governing host railroad preference relief applications for which it was responsible until that authority was shifted to the Board. The

Proposed Policy Statement does not acknowledge any of these prior interpretations, attempt to distinguish them, or provide any reasoning for why they should be ignored.

Nor can the Board's proposed reinterpretation of the meaning of "preference" be justified by any change in conditions in the rail industry since the preference law was first passed in 1973. Even assuming that the Board were empowered to reinterpret federal law to account for changed conditions, Congress specifically reaffirmed its commitment to Amtrak's right to preference as late as 2008, when it *first*, significantly amended portions of 49 U.S.C. § 24308 without change to the definition of preference in subsection (c), and *second*, granted Amtrak the right to an investigation of, among other things, preference violations when the on-time performance of Amtrak trains falls below 80 percent, thus adding to the already-existing right of the Attorney General to enforce Amtrak's right of preference under 49 U.S.C. § 24103(a). Moreover, the preference law includes a "relief" procedure to allow host railroads to object if providing preference would materially lessen the quality of freight transportation to shippers. Had Congress also wanted to add a "balancing test" or "overall network efficiency" test or "changed circumstance" test to the preference statute or to PRIIA it could have; but notably, it gave the Board jurisdiction to award damages for violation of the preference statute *as written*.

Amtrak's statutory right to preference is the clear expression of Congress's intent to safeguard the viability of passenger service as part of the national transportation system and economy, by granting Amtrak a concrete and enforceable right to preference over freight traffic in using any rail line, crossing, or junction. As recently as 2008, Congress created a new avenue for preference enforcement through section 24308(f) investigations in order to enhance that right, not to weaken it. The Board, by redefining preference and creating exceptions to that right to "promote efficient passenger service" or "minimize total delays," is substituting its own

judgment for that of Congress, which concluded that preference was in fact the means by which host railroads must promote efficient passenger service and minimize total delays. If the Proposed Policy Statement were adopted as written, it could effectively render the statutory right to preference a nullity.

In Section II below, Amtrak explains that the Proposed Policy Statement is procedurally invalid because it makes pronouncements that are binding on the public and yet was not promulgated through notice and comment rulemaking. In Section III below, Amtrak shows that the Board erroneously interpreted the preference law and that the entire Proposed Policy Statement – including the discussion of the types of evidence relevant to preference violations in the context of a § 24308(f) investigation – is tainted by that error. For either or both of these reasons, the Proposed Policy Statement should be withdrawn.

II. The Proposed Policy Statement Is Procedurally Invalid Because It Is Binding On The Public And Was Not Promulgated Through Notice And Comment Rulemaking.

The Proposed Policy Statement makes pronouncements that are binding on the public and yet it was not promulgated through notice and comment rulemaking under 5 U.S.C. § 553.¹ Therefore, if issued in final as the Board contemplates, it would be invalid under the Administrative Procedure Act.

“[A] document will have a practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences.” *Gen. Elec. Co. v. Environmental Protection Agency*, 290 F.3d 377, 383 (D.C. Cir. 2002)(quoting Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances,

¹ Agency policy statements are excluded from the notice and comment rulemaking requirements, 5 U.S.C. § 553(b)(A)-(B), but only when they are not binding on the agency or the public. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). Although the Proposed Policy Statement does not bind the Board, it does bind the public.

Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1355 (1992).

The Proposed Policy Statement contains the Board's view of preference:

Currently, we do not view the preference requirement as absolute. In other words, 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.

Proposed Policy Statement at 3. The Board explains that “[u]nder this view of preference, parties to § 24308(f) proceedings should focus their evidence and arguments on whether or not a host carrier made identifiable, consistent efforts to minimize total delays for intercity passenger train movements...” Proposed Policy Statement at 4.²

The Proposed Policy Statement says parties in investigations are “still free to present any arguments or evidence they could have presented before the Board issued this policy statement,” *id.*, and the Board might change or refine its view of preference.³ However, unless the Board reverses its current “systemic, global approach” to preference, a party would be taking a significant risk if it did not focus on evidence and arguments consistent with the Board's stated view. The imperative to focus on systemic/global evidence and arguments is what makes the Proposed Policy Statement practically binding on private parties notwithstanding the option to include additional or different evidence.⁴ In other words, a party to an investigation is “reasonably led to believe that failure to conform” in its evidentiary submission and arguments to

² “Evidence regarding delay attribution should be directed toward comprehensively analyzing the delays affecting the service in question.” Proposed Policy Statement at 6.

³ The Board is providing “preliminary guidance merely as a potential starting point for parties to consider when developing evidence for section 24308(f) proceedings, recognizing that the fact-specific nature of section 24308(c) preference issues means that the Board's approach to such issues will likely be refined in individual section 24308(f) proceedings.” Proposed Policy Statement at 3.

⁴ Based on the Board's description of the evidence it contemplates, parties in a section 24308(f) investigation would be required to spend considerable time and money in preparation of systemic/global preference evidence. See Proposed Policy Statement at 4.

the systemic/global approach to preference espoused by the Board “will bring adverse consequences.” *See Gen. Elec. Co. v. Environmental Protection Agency*, 290 F.3d at 383.

The Board should withdraw the Proposed Policy Statement because issuing it in final would, among other things, be “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

III. The Proposed Policy Statement Is Substantively Invalid Because it is Entirely Based On, and Tainted By, a Fundamental Misinterpretation of the Preference Law.

The Board -- ignoring the plain language of the statute and clear expressions of Congressional intent -- has misread the preference statute. The mistaken definition that the Board adopts taints all of the evidentiary and other guidance that flows from that mistake. The Proposed Policy Statement therefore cannot be salvaged and should be withdrawn in its entirety.

First, the Board’s approach to preference is a direct contradiction of the plain and unambiguous language of the statute. It is beyond the Board’s authority to act as a legislative body. Except for (1) the emergency exception and (2) situations where a host railroad has filed a preference relief application and the Board has granted relief and established the rights of the host railroad and Amtrak, there are no factors or circumstances that the Board lawfully could find to be “an appropriate mitigating factor” (see Proposed Policy Statement at 7) for a host railroad failing to provide preference.

Second, the Proposed Policy Statement conflates the statutory definition of preference with the separate statutory preference relief procedure. The Board’s confused and erroneous interpretation of § 24308(c) conflicts with the plain and unambiguous language of the statute, as well as (1) Congressional intent expressed in the legislative history of the Amtrak Improvement Act of 1973, (2) ICC precedent regarding the statutory preference relief procedure, (3) the

Federal Railroad Administration's ("FRA") regulations implementing the statutory preference relief procedure, and (4) the interpretation of the DOJ in the preference enforcement action brought in 1979 against the Southern Pacific Transportation Company regarding Amtrak's *Sunset Limited* route. When properly construed, the preference relief procedure ensures that host railroads have an avenue to secure relief from preference if they can demonstrate that providing it would materially lessen the quality of freight service provided to shippers; no other mechanism exists in the law for "relief from" or "mitigation of" preference.

Third, the Board's fundamental misinterpretation of the preference law taints all of the evidentiary conclusions and other guidance in the Proposed Policy Statement.

A. The Preference Law – Its Purpose, History, and Plain Meaning.

The preference law provides, in its entirety:

Preference Over Freight Transportation. 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).

Although this statute was not enacted until 1973 – three years after Amtrak was brought into existence -- the concept of preference for passenger transportation existed long before Amtrak's inception, as a voluntary policy established by the freight railroads themselves for their own passenger service. From the inception of Amtrak passenger service, Congress expected that priority accorded to passenger trains should continue. Indeed, in a 1971 hearing to address

Amtrak performance, the presidents of four host railroads affirmed to Congress their commitment to *voluntarily* provide Amtrak passenger trains with “priority” or “preference” over freight trains.⁵

However, once relieved of the obligation to physically operate passenger trains, many railroads began to sidetrack Amtrak passenger trains to allow what they considered to be a more efficient flow of freight train traffic. As a result, the average performance of long distance trains plummeted from over 70% in 1972 to 35% in 1973. Hearings on H.R. 8351 before the Subcomm. on Transp. and Aeronautics of the House Comm. On Interstate and Foreign Commerce, 93rd Cong., 1st Sess., at 29-32. In response, Congress enacted into law an obligation for the freight railroads to grant Amtrak trains preference over freight traffic on any rail line, crossing or junction, 45 U.S.C. § 562(e), the predecessor to the preference language now codified at 49 U.S.C. § 24308(c).

The Interstate Commerce Commission (“ICC”) was also aware of the almost immediate failure of freight railroads to accord Amtrak passenger trains preference once they were no longer operating those trains themselves, and independently attempted to correct the poor on-time performance that resulted. In 1971 the ICC, under authority of the Rail Passenger Service Act of 1970,⁶ proposed a regulation providing:

Schedules shall be designed so as to provide expeditious service and the sidetracking of passenger trains for freight trains shall not be permitted except in [an] emergency.

⁵ For example, John S. Reed, the President of the Santa Fe Railway, told Congress in a statement, “this railroad company traditionally has given passenger train operations preference over freight service and would continue to afford Amtrak trains such priority.” *Review and Refunding of Rail Passenger Service Act: Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*. 92nd Cong. 1, H.R. Rep. 92-54, pt. 2 at 651, 677, 670, 676, 687, 692 (Dec. 7, 1971) (Statement of John S. Reed, President, Santa Fe Railway).

⁶ Rail Passenger Service Act of 1970, Pub. L. 91-518, 84 Stat. 1327, 1339-40 (1970).

Adequacy of Intercity Rail Passenger Service Notice of Proposed Rulemaking, 36 Fed. Reg. 23636, 23638 (to be codified at 49 C.F.R. § 1124.3)(proposed Dec. 3, 1971). In 1973 the ICC noted the reasoning behind its no-sidetracking rule:

A cause of slow schedules and poor on-time performance is the failure of carriers in recent years to give passenger trains priority over freight trains. “Side-tracking” is built into a schedule, yet it seems to be done more often than really necessary. Even where a passenger train is initially given priority, if it is at all late, it may lose this priority and be side-tacked time and again for freight trains. In this way, late passenger trains get later and disgruntled travelers arrive too late after scheduled arrival time, having had to “follow a freight in.”

Adequacy of Intercity Rail Passenger Service, Ex Parte No. 277(Sub-No. 1), 344 ICC 758, 779 (Decided Dec. 7, 1973).

The other agencies which have, or have had, authority to enforce the preference statute are the Department of Justice (“DOJ”), which can bring actions against freight operators to enjoin violations of the preference law;⁷ the Department of Transportation, which was charged in the preference statute with hearing freight railroad applications for relief from their preference obligations; and the Board, which, since the passage of Passenger Rail Investment and Improvement Act (“PRIIA”) in 2008, has taken over the role of the Department of Transportation in hearing freight railroad relief applications, and is charged with investigating poor on-time performance of Amtrak trains on host railroad lines, under PRIIA 213.⁸

⁷ See former 45 U.S.C. § 547(a) and 49 U.S.C. § 24103(a).

⁸ The Proposed Policy Statement incorrectly states that authority to enforce the preference “resided with the Secretary of Transportation” and that PRIIA “shifted enforcement of the preference requirement to the Board.” Proposed Policy Statement at 2. The Secretary of Transportation had authority over host railroad preference relief applications until enactment of PRIIA, but has never had preference enforcement power. PRIIA gave the Board authority to award damages against a host railroad if (among other things) it finds that delays investigated under section 24308(f) are attributable to a host railroad’s failure to provide preference to Amtrak. Authority to bring actions in federal court to enjoin violations of the statute remains with the DOJ. 49 U.S.C. § 24103(a).

B. The Proposed Policy Statement Impermissibly Construes The Definition Of Preference.

The Proposed Policy Statement impermissibly construes the definition of preference because it ignores the plain and unambiguous meaning of the phrase “in using a rail line, junction or crossing” and substitutes a “systemic, global” definition of preference.

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.” 49 U.S.C. § 24308(c).⁹ The quoted phrase includes a singular, indefinite article (“a”) followed by a list of three nouns (“rail line, junction, or crossing”). The Proposed Policy Statement says “[A] host rail carrier need not resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train.” Proposed Policy Statement at 3. If a host railroad does not resolve an individual dispatching decision at a rail line, junction or crossing in favor of Amtrak, then Amtrak does *not* have preference over the freight train in using that rail line, junction or crossing. The Board’s statement contradicts the plain and unambiguous meaning of the phrase “in using a rail line, junction, or crossing.” 49 U.S.C. § 24308(c).

Instead, the Board adopts a preference definition that aggregates the individual rail lines, crossings and junctions: “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.” Proposed Policy Statement at 3. This “view” of preference contradicts the plain and unambiguous meaning of the singular phrase “in using a rail line, junction, or crossing.” 49

⁹As a report commissioned by the Association of American Railroads said: “By law, Amtrak passenger trains operating over rail freight lines must be given priority; this means that when Amtrak trains meet or overtake freight trains, the freight trains are shunted to sidings or parallel lines until the passenger train has passed.” Cambridge Systematics, Inc., *National Rail Freight Infrastructure Capacity and Investment Study* at 4–6 (Sept. 2007).

U.S.C. § 24308(c). The Board's interpretation of preference is an impermissible construction of the statute.

The Board bases this reinterpretation of the preference law on the hypothesis that the preference law, as written, "might not, in the long run, promote efficient passenger service."

Proposed Policy Statement at 4. The Board explains (*id.*):

An individual dispatching decision involving two trains may have efficiency consequences for the network; therefore, a dispatching decision that may appear, in isolation, to favor freight over passenger efficiency may ultimately promote efficiency and on-time service for passenger trains on the network generally (including, for the long run, trains on the particular route at issue). 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.

In formulating the right to preference to refer to "minimization of total delays" on a host carrier's network, rather than on individual cases of Amtrak being sidetracked in favor of freight traffic, the Board is substituting its own judgment for what would "promote efficient passenger service" for the judgment of Congress which clearly believed that giving Amtrak preference in using individual rail lines, junctions and crossings *was* the means to promote efficient passenger service. While it is true that curing the impediments to efficient passenger service is the ultimate goal of a PRIIA 213 on-time performance investigation, such an investigation will not even be initiated – and the host railroad's compliance with the preference law will not even be at issue – unless the train's on-time performance falls to a substandard level (less than 80% on-time performance) for a substantial period of time (two consecutive quarters). 49 U.S.C. § 24308(f). An inquiry into whether the preference right was observed was included in PRIIA 213 so that the Board may determine if a preference violation or violations were a cause of that poor performance; and if so, to remedy that cause, along with other causes that might be uncovered.

But to redefine preference to mean no more than, essentially, overall on-time performance of Amtrak trains is to drain the preference right of all meaning and effect.

The Board also implies that the preference law should not be enforced as it was enacted because times have changed and “[d]ue to increased traffic density, the rail operating environment has become more complex since Congress first established a preference requirement in 1973.” Proposed Policy Statement at 4. But, although Congress *first* enacted the preference law in 1973 that is *not the last* time Congress has expressed its will on this subject. Congress is well aware of changes in the rail industry, including those on which the Board relies, and it did not see fit to change the basic definition of preference.¹⁰ Significantly, in 2008, when Congress gave the Board new authority to investigate preference violations as part of section 24308(f) and transferred preference relief application review authority from the Secretary of Transportation to the Board, it did not make any change in the definition of preference. Contemporaneously, Senator Murray explained “as a matter of Federal law," freight railroads "are required to give Amtrak trains preference over freight traffic when dispatching traffic over their rails. ***When you look at the on-time performance of many of these Amtrak trains you have to question whether the law is being ignored.***” *Amtrak Reform and FY 2008 Budget: Hearing Before the Senate Appropriations Subcomm. on Transp. and Hous. and Urb. Dev.*, 2007 WL 614849 (Feb. 28, 2007)(statement of Senator Murray) (emphasis added). It must be concluded from these actions and statements that, as recently as 2008, Congress reaffirmed its intent that the Board to enforce the law as written.

¹⁰ See footnote 11, *infra*.

C. The Board’s Construction Of Preference Further Contradicts The Plain And Unambiguous Meaning Of The Statutory Definition When It Conflates Preference With The Separate Preference Relief Application Procedure.

Congress defined preference and separately provided a preference relief procedure. The first sentence of section 24308(c) (set forth in full above) defines preference and refers to the relief procedure. The second sentence says that it is the host railroad that may apply for relief from preference through the prescribed procedure. The third sentence includes the hearing requirement, the standard and the potential remedy for host railroad preference relief applications.¹¹

Under the Board’s construction of preference, the Board could construe preference *with* consideration of the quality of service to freight shippers, *without* receiving and ruling on a host railroad relief application in accord with the procedure in the second and third sentences. The first sentence of section 24308(c) unambiguously refers to the application relief procedure set

¹¹ In the original enactment, the preference and the relief modification procedure were set forth in separate subsections and the Secretary of Transportation had authority to hear and decide relief applications:

(e) Preference for intercity passenger trains.

(1) Except in an emergency, intercity passenger trains operated by or on behalf of [Amtrak] shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary [of Transportation] has issued an order to the contrary in accordance with paragraph (2) of this subsection.

(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of Title 5 of the United States Code, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

Former 45 U.S.C. §562(e). Amtrak Improvement Act of 1973, Pub. L. 93-146, §10(e)(2) (1973). In 1981, the preference provision was amended to add Amtrak commuter trains. Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §1188(c) (1981). Under Pub. L. No. 103-272, 108 Stat. 745 enacted on July 5, 1994, the preference and relief provision was re-codified as 49 U.S.C. § 24308(c) without substantive change. In 2008, authority to determine preference relief applications was moved from the Secretary of Transportation to the Board. Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432, Div. B, Title II, § 213(d), 122 Stat. 4848, 4927(2008).

forth in the second and third sentences of the statute.¹² Absent an emergency, Amtrak gets preference “unless the Board orders otherwise under this subsection.” Because it ignores this “*unless*” clause, the Board’s construction conflicts with the plain and unambiguous language of the first sentence of section 24308(c).¹³

The Board’s interpretation of preference in the Proposed Policy Statement 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. If preference is construed as contemplated in the Proposed Policy Statement, rather than apply for relief from preference, the host railroad would favor its own trains over Amtrak trains and later argue, if the conduct is challenged in a section 24308(f) investigation, that its conduct was not a preference violation because it was necessary to avoid a material lessening of the quality of service to freight customers. Thus, the Board’s construction of preference makes the preference relief application procedure superfluous. Statutory interpretations that make statutory language superfluous are not favored. *United States v. McGoff*, 831 F. 2d 1071, 1083 (D.C. Cir. 1987)(“[T]he Government’s reading suffers from a significant problem; it runs afoul of the well-established principle of interpretation that condemning statutory language to the rubbish heap of surplusage is much to be avoided.”)

When properly construed as discussed above, the preference relief application procedure resolves a concern expressed by the Board regarding the potential effect of preference on freight

¹² The Board’s power to order preference relief can only mean the procedure provided in the second and third sentences. It cannot mean preference relief under the first sentence of section 24308(c). In the original preference codification (set out in the previous footnote) the preference and the relief modification procedure were set forth in separate subsections. Former 45 U.S.C. §562(e). Amtrak Improvement Act of 1973, Pub. L. 93-146, §10(e)(2) (1973). Absent emergency, Amtrak had preference “unless the Secretary [of Transportation] has issued an order to the contrary in accordance with paragraph (2) of this subsection.” In 1994, the preference and relief provision was re-codified as 49 U.S.C. § 24308(c) without substantive change. Pub. L. No. 103-272, 108 Stat. 745.

¹³ This is true despite the importance of preference relief applications as a mechanism host railroads can use if they believe that providing preference will materially lessen the quality of freight transportation provided to shippers.

traffic efficiency. The Board says “the rail transportation policy ... directs the Board to regulate so as to promote efficiency in freight service, 49 U.S.C. § 10101.” Policy Statement at 3. But the rail transportation policy set forth in 49 U.S.C. § 10101 makes no reference to preference; the rail transportation policy elements that mention “efficiency” do not suggest or make any linkage with preference; and nothing in the legislative history of the rail transportation policy now set forth in section 10101 suggests that Congress intended to alter preference or provide another preference relief mechanism besides the one found in what is now section 24308(c). Rather, it is the preference relief application procedure in section 24308(c) which Congress provided as the mechanism to ensure that preference does not materially lessen the quality of freight transportation to shippers. If a host railroad applies for preference relief and can demonstrate that preference will materially lessen the quality of freight service provided to shippers, then the Board has authority to establish the rights of the host railroad and Amtrak on reasonable terms.¹⁴

Although the statutory language on this issue is unambiguous,¹⁵ to the extent the Board considers other factors in construing the relief provision of the statute it will find that the construction discussed above is consistent with legislative history and the view of several other entities that have had occasion to construe preference and the preference relief application procedure.

First, the Board’s construction conflicts with the legislative history of the Amtrak Improvement Act of 1973, which clearly provides that preference and the preference relief application procedure are separate. The Conference Report to the Amtrak Improvement Act of

¹⁴ The Board should consider promulgating procedural rules to process host railroad relief applications modelled on those promulgated by the Department of Transportation. See 49 C.F.R. § 200.5.

¹⁵ If a statute is unambiguous, such is the case with section 24308(c), agencies and courts need not rely on legislative history for clarification. *ACLU v. Fed. Comm’n Comm’n*, 823 F.2d 1554, 1568 (D.C. Cir. 1987).

1973 explains that (absent emergency) preference applies *unless* the Secretary has a hearing, makes the requisite finding and sets alternative terms:

The House amendment added a new subsection (e) to section 402 of existing law providing that, except in an emergency, Amtrak passenger trains must be accorded preference over freight trains *unless* the Secretary of Transportation, after a *hearing* held under section 553 of title 5 of the United States Code, made a *finding* that such preference would materially lessen the quality of freight service provided to shippers. In case of any such finding, the Secretary was required to issue an order fixing rights of trains on such terms and conditions as he determined to be just and reasonable.

H.R. Rep. No. 93-587 (1973)(Conf. Rep.) reprinted in 1973 U.S.C.C.A.N. 2331, 2339 (emphasis added).

Second, the Board's construction conflicts with the ICC's view of preference. In 1971 under authority of the Rail Passenger Service Act of 1970, the ICC issued proposed regulations on intercity passenger service.¹⁶ The proposed regulations include a provision that "the sidetracking of passenger trains for freight trains shall not be permitted except in emergency."¹⁷ Before the regulations were final, Congress enacted the Amtrak Improvement Act of 1973, which codified the preference right into law, and gave the Secretary of Transportation authority to consider host railroad preference relief applications. Amtrak Improvement Act of 1973 §10(e)(2).¹⁸ In issuing its final regulations, the ICC said preference and the host railroad preference relief application procedure were separate:

[S]ection 10(e) of the Amtrak Improvement Act of 1973, P.L. 93-587 [45 U.S.C § 562(e)] and the underlying conference report, clearly accords intercity passenger trains operated by or on behalf of Amtrak preference over freight trains in the use of any given line of track, junction, or crossing except in emergency situations *or*

¹⁶ Adequacy of Intercity Rail Passenger Service Notice of Proposed Rulemaking, 36 Fed. Reg. 23636, 23638 (proposed Dec. 3, 1971).

¹⁷ *Id.*

¹⁸ In response, the ICC changed its sidetracking prohibition to cover only non-Amtrak intercity passenger trains (which were then still operating) and, in the discussion of this change, had to contemporaneously construe preference and the Secretary of Transportation's authority to consider host railroad preference relief applications. The Amtrak Improvement Act of 1973 was enacted on November 3, 1973 and the ICC's regulations were issued on December 7, 1973.

unless an exemption has been made by the Secretary of Transportation upon a finding that such preference would materially lessen the quality of freight service provided to shippers.

Adequacy of Intercity Rail Passenger Service, Ex Parte No. 277(Sub-No. 1), 344 ICC 758, 779 (Decided Dec. 7, 1973)(emphasis added).¹⁹ Thus, within days of enactment of the statutory preference, the ICC recognized the distinction between preference and the preference relief application procedure.

In 1987, the ICC again recognized the difference between preference and the preference relief application procedure when it set terms and compensation for Amtrak's use of tracks and facilities of the Soo Line Railroad. The ICC explained "intercity or commuter passenger trains are to be given preference over freight trains in the use of any given line of track, junction, or crossing. Any railroad whose rights are affected with regard to freight train operation may file an application with the Secretary of Transportation requesting appropriate relief." *Amtrak and Soo Line Railroad, Use of Tracks and Facilities and Establishing Just Compensation*, 1987 ICC Lexis 239, ICC Finance Docket No. 31062 at 7-8 n. 4 (Decided June 25, 1987).

Third, the Board's construction of section 24308 (c) conflicts with the FRA's regulations implementing the statutory preference relief procedure. In 1980, the FRA (acting under authority delegated by the Secretary) promulgated regulations for the handling of preference relief applications. *National Railroad Passenger Corporation (Amtrak); Informal Rules of Practice for Passenger Service*, 45 Fed. Reg. 64191 (Sept. 29, 1980)(codified at 49 C.F.R. § 200.5). In the preamble to the regulations, FRA explained preference and the separate preference relief application procedure:

¹⁹ In fact, the ICC adopted a parallel preference and preference relief procedure for non-Amtrak intercity passenger trains. Under the regulations, railroads were required to give non-Amtrak intercity passenger trains priority unless the railroad petitioned "the Commission for an exemption to side-track intercity passenger trains..." *Id.* at 809. The ICC regulations stipulated that "[s]uch petitions may be granted upon a showing that non-exemption will materially lessen the quality of freight service provided to shippers, and subject to just and reasonable conditions." *Id.*

The first paragraph of [45 U.S.C § 562(e)] requires that rail passenger trains operated by or on behalf of Amtrak be accorded preference over freight trains in the use of any line of track, junction or crossing. However, the second paragraph allows railroads to apply to the Secretary for relief from that preference. After a hearing under section 553 of Title 5 of the United States Code, the Secretary may, if he finds that adherence to the preference requirement of subsection [45 U.S.C § 562(e)] will materially lessen the quality of freight service provided to shippers, issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

Id. In the regulations, FRA explained that “[a]ny railroad adversely affected by the preference requirement ... may apply to the Administrator for an order altering that requirement.” Id. at 64192. Pursuant to the regulations, applicants (host railroads) would list routes by endpoints, explain how the preference requirement materially lessened the quality of freight service (including supporting evidence) and “[i]nclude an analysis of whether and by how much Amtrak's compensation to the railroad should be reduced if the preference requirement is altered.” Id.²⁰

Fourth, the Board’s construction of section 24308 (c) conflicts with the interpretation of both parties in the preference enforcement action brought in 1979 against the Southern Pacific Transportation Company regarding the *Sunset Limited*.TM The DOJ understood preference and the preference relief procedure to be separate provisions in the statute:

The Statute ... directs railroads which assert that problems are created by the effect of the preference upon freight operations to seek relief from the Secretary of Transportation. In the absence of an order from the Secretary granting relief to a railroad, the statutory preference must be accorded, without regard to the effect of the preference on freight operations, except in an emergency.

Plaintiff’s Response to Defendant’s First Set of Interrogatories at 9, *United States v. S. Pac. Transp. Co.*, No. 79-3394 (D.D.C. 1980)(attached for convenience as Exhibit 1).

²⁰ Amtrak was provided an opportunity to object to the application. The rule provided for a prehearing conference, oral hearings, fact-finding proceedings, cross-examination, and public participation. Id.

D. The Board’s Misinterpretation of the Preference Statute Taints the Entire Proposed Policy Statement, Including the Discussion of Relevant Evidence

The Proposed Policy Statement should be withdrawn in its entirety, because there is not a single paragraph in it that is not tainted by the fundamental misinterpretation of the preference law demonstrated above. It is impossible to disentangle the Board’s definition of preference from conclusions about evidence relevant to (a) a preference violation, (b) delay attribution, or (c) on-time performance. Among the most important of these tainted evidentiary statements are the ones summarized below.

Evidence And Arguments Regarding Total Delays To Amtrak Trains Are Not Relevant to Preference Violations. The Proposed Policy Statement says parties to § 24308(f) proceedings should focus their evidence and arguments on whether host railroads made efforts to minimize “total delays for intercity passenger train movements.” Proposed Policy Statement at 4.²¹ This suggestion is based on the Board’s impermissible “systemic, global” definition of preference and thus should be deleted from the Proposed Policy Statement. The statutory definition of preference 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. Rather, 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.” 49 U.S.C. § 24308(c). A host railroad must resolve individual dispatching decisions between Amtrak movements and freight movements in favor of Amtrak and, on preference issues in section 24308(f) investigations, parties should submit evidence and arguments on whether the host railroad has done so.

²¹ See also Proposed Policy Statement at 5 (“[P]arties should provide evidence that shows whether a host carrier has implemented and executed policies that help minimize (or, conversely, exacerbate) total delays for intercity passenger train movements while on the carrier’s network.”)

Submission and review of evidence regarding compliance with the preference statute as written need not involve a burdensome exercise. That is, the parties would not necessarily need to submit evidence on every dispatching decision in the period covered by the investigation. Rather the Board has authority to direct parties to present evidence of individual dispatching decisions based on statistical sampling. See e.g., National Railroad Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company, STB Docket No. NOR 42134, slip op at 4 (STB Served Jan. 3, 2013)(where the Board ordered the parties to “collaborate to develop a sampling method across all of the relevant route data that would provide a representative subset of evidence to represent all movements subject to the petition.”).

Evidence And Arguments Regarding Materially Lessening Freight Transportation Is Not Relevant to Preference Violations. The Proposed Policy Statement says parties could submit evidence regarding “other factors that may have prevented the host carrier from providing preference” including “circumstances in which providing Amtrak preference would ‘materially . . . lessen the quality of freight transportation provided to shippers.’” Proposed Policy Statement at 7.²² This suggestion is based on the Board’s total misread of the plain meaning of the preference statute and its impermissibly conflated construction of preference and the preference relief application procedure, and thus should be deleted from the Proposed Policy Statement. The process Congress established for host railroads to apply for relief from preference means that evidence regarding circumstances where providing preference would materially lessen freight transportation would not be relevant in a section 24308(f) investigation. Rather, such

²² “The Board would then consider whether any of the claimed circumstances constitute an appropriate mitigating factor within individual section 24308(f) proceedings.” Id.

evidence would be relevant separately in the Board’s evaluation of a host railroad’s preference relief application.

Amtrak/Host Railroad Agreements Are Not Relevant to Preference Violations. The Proposed Policy Statement says that Amtrak/host railroad agreements are relevant to construction of preference. Proposed Policy Statement at 5 (“[P]arties should provide operating agreements and any other agreements between Amtrak, its host carriers, and other entities ... and evidence on how these agreements pertain to the meaning of preference as applied to the case.”) Preference 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.

Comparative Evidence On Passenger And Freight Train Performance Is Not Relevant to Preference Violations. The Board suggests that determinations of preference compliance could be measured by comparative evidence on passenger and freight train performance.²³ Preference is not comparative or relative to freight train performance and thus comparative evidence would be of no probative value.

Apart from the obvious disconnect with the statutory definition of preference, Amtrak is surprised that the Board would even suggest that passenger service being the “least-delayed class of transportation” could constitute evidence of preference compliance. A given Amtrak train typically will carry hundreds of people during its trip, and delays have direct and immediate effects on these people. Delays disrupt the schedules and activities of passengers. They can mean that connections are missed causing further delays; or meetings, gatherings and activities

²³ The Board refers hypothetically to “data showing that the on-time performance for passenger service was consistently higher or lower than that of the highest class of freight service operated by the host carrier over the same route” and later in the same paragraph to evidence showing Amtrak was the “least-delayed class of transportation on the host carrier.” In the latter case, the Board adds that “then the delays to Amtrak might not indicate a host carrier’s failure to provide preference.” Proposed Policy Statement at 5.

are missed. People waiting to pick up passengers can suffer the same ill effects and disruptions from delays as the people they wait to greet. Elderly and disabled passengers can be particularly hard-hit by delays. A late Amtrak passenger will take no comfort from knowing the host railroad's most important class of freight train was delayed even more. It is simply not appropriate to compare a freight train with a train carrying potentially hundreds of passengers. A more flagrant example of an "apples and oranges" comparison is difficult to imagine.

Host-to-Host Interchanges Are Not Relevant to Preference Violations. The Board suggests that determinations of preference compliance could be measured by timely interchange from one host railroad to a second host railroad. Proposed Policy Statement at 7. There is nothing in the statutory definition of preference to suggest that it is conditioned on an Amtrak train being received from a prior host railroad in a timely manner.

Certainly a host railroad delaying an Amtrak train causes disruption not only for Amtrak and its passengers but also for subsequent hosts in the route. Affected hosts routinely communicate with each other and have other avenues for self-help and adjusting their operations as appropriate. In any case, whether an Amtrak train is late or not has no relevance to a host's preference obligation.²⁴

Absent Emergency Or A Granted Relief Application, Other Factors Are Not Relevant to Preference Violations. The Proposed Policy Statement says parties could submit evidence in investigations regarding "other factors that may have prevented the host carrier from providing preference." Proposed Policy Statement at 7. "The Board would then consider whether any of the claimed circumstances constitute an appropriate mitigating factor within individual section

²⁴ Amtrak agrees that host railroad freight train scheduling policies are relevant to how hosts handle late handoffs of passenger trains, Proposed Policy Statement at 7, but the extent to which host railroads actually adhere to their schedules even in the absence of late handoffs is even more important. If there is significant variance between schedules and operations in the absence of late handoffs, the freight schedules are not useful in measuring the impact of late-arriving Amtrak trains.

24308(f) proceedings.” *Id.* Absent an emergency or a granted relief application (following the process required by section 24308(c), there are no “other factors” or “claimed circumstances” that the Board lawfully could find to be such “an appropriate mitigating factor.”

Emergencies Are Relevant, But Should Not Be Asserted For The First Time In An Investigation. In the discussion of factors that may have prevented the host railroad from providing preference, the Board refers to emergencies as an example. Proposed Policy Statement at 7. Apart from a granted preference relief application (which would be governed by its own terms), an emergency is the only lawfully valid circumstance or factor that could prevent the host from providing preference.²⁵

Host railroads typically notify Amtrak when emergency situations arise. Thus, an emergency exception to preference should not be asserted for the first time in § 24308(f) investigation and the language condoning such a practice should be removed from the Proposed Policy Statement. Otherwise, the Board is opening the door to the possibility that a host railroad would use the emergency exception as a *post hoc* rationalization for preference violations.

IV. Conclusion

As a binding document issued without notice and comment, the Proposed Policy Statement is procedurally defective under the Administrative Procedures Act. As a substantive matter, it misinterprets Amtrak’s statutory right to preference and draws erroneous conclusions

²⁵ Emergencies are certain unforeseeable, non-routine event of short duration. As the DOJ noted in the *Sunset Limited*TM enforcement action, “[T]he term ‘emergency’ presents no real interpretive difficulty. The FRA defines the term to include ‘derailments, collisions, storms, washouts, fires, obstruction of tracks, and other hazardous conditions which could result in injury, damage to property or serious disruption operations.’” Plaintiff’s Post-Hearing Memorandum in Support of Motion for Preliminary Injunction at 28, No. 79-3394 (D.D.C. Feb. 19, 1979)(attached for convenience as Exhibit 2.) The DOJ also noted “absurd or impossible applications of the [preference] provision are avoided by inclusion of the exception for emergencies.” *Id.* at 27. An emergency does not include freight congestion. In fact, if the emergency exception were construed to include freight congestion it would be redundant with the host railroad relief application procedure and that construction would suffer from the same flaw as the Board’s conflated construction of preference and the preference relief application discussed above. Plaintiff’s Reply to Defendant’s Post-Hearing Papers on Motion for Preliminary Injunction at 16, No. 79-3394 (D.D.C. Feb. 22, 1980)(attached for convenience as Exhibit 3.)

that fundamental misinterpretation. The Proposed Policy Statement should therefore be withdrawn.

Respectfully submitted,

NATIONAL RAILROAD PASSENGER CORPORATION



William H. Herrmann
Vice President and Managing Deputy General Counsel

Eleanor D. Acheson
Executive Vice President, General Counsel and Corporate Secretary

Christine E. Lanson
Senior Associate General Counsel

Dated: February 22, 2016

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
)
) Plaintiff,)
) Civil Action
) No. 79-3394
)
) vs.)
) SOUTHERN PACIFIC TRANSPORTATION)
) COMPANY)
) Defendant)

PLAINTIFF'S RESPONSE TO DEFENDANT'S
FIRST SET OF INTERROGATORIES

Preliminary Statement

Some of the information requested by Defendant's inter-rogatories was within the exclusive knowledge of Amtrak, which is not a party to this action. In order to facilitate discovery in anticipation of the hearing set for February 4, 1980 in this action, Amtrak voluntarily provided to Plaintiff the responsive information, upon which Plaintiff has in part relied in setting forth its answers.

1.

INTERROGATORY

1. (a) Please identify each employee of the United States or Amtrak who participated in or has had any responsibility for the initiation or conduct of the task force investigation of operations on the Sunset Limited between Houston and New Orleans referred to in the affidavit of Mr. James L. Larson which accompanied plaintiff's motion for a temporary restraining order.

(b) Please describe the role, activities and date of activity of each employee so identified in connection with the task force investigation.

PLAINTIFF'S RESPONSE

1. (a) Alan Boyd, President, National Railroad Passenger Corporation, 400 North Capitol Street, Washington, D. C. 20001;

Clark Tyler, Group Vice President, Passenger Services/Communication, National Railroad Passenger Corporation, 400 North Capitol Street N.W., Washington, D.C. 20001;

Paul F. Mickey, Jr., Vice President-General Counsel, National Railroad Passenger Corporation, 400 North Capitol Street N.W., Washington, D. C. 20001;

Robert A. Herman, Vice President-Operations, 400 North Capitol Street, N.W., Washington, D. C. 20001;

James L. Larson, Assistant Vice President-Contract Administration, National Railroad Passenger Corporation, 400 North Capitol Street N.W., Washington, D. C. 20001;

Carl M. Sloan, Industrial Engineer-Mechanical, National Railroad Passenger Corporation, 400 North Capitol Street, N.W., Washington, D. C. 20001;

Marvin Schaffer, General Supervisor Operations, National Railroad Passenger Corporation, 309 W. Jackson Blvd., Chicago, Illinois 60606;

Gordon W. DuBois, Engineer Track Construction and Maintenance, National Railroad Passenger Corporation, 400 North Capitol Street, N.W., Washington, D. C. 20001;

R. R. (Bob) Mitchell, District Manager, National Operations, St. Louis Division, National Railroad Passenger Corporation, 1820 S. Market Street, St. Louis, Missouri 63103.

(b) On September 6, 1979 Messrs. Boyd, Tyler, Mickey, Herman and Larson determined that a task force should be formed to investigate the excessive delays being encountered by the Sunset Limited. Mr. Larson supervised the formation and

operation of the task force, which included Messrs. Laison, Sloan, Schaffer, Dubois and Mitchell. During the period September 24 through October 16, 1979 the task force members rode in the cabs of the locomotives of the Sunset Limited in order to observe the operation of the train. In addition, Mr. Sloan and Mr. Schaffer inspected the physical properties along the route of the Sunset Limited, interviewed operational employees, reviewed dispatching documents, and studied delay reporting procedures. Following a review of applicable dispatching documents, the task force members reduced their observations and analysis to writing in the form of case studies completed on November 7, 1979.

2.

INTERROGATORY

2. (a) To the extent not covered in the reply to Interrogatory 1, please identify each employee of the United States or Amtrak who has participated in monitoring the performance of the Sunset Limited between Houston and New Orleans from September 1, 1979, to the date of your answer to this interrogatory.

(b) Please describe briefly the activity, and date of activity, of each employee so identified with respect to monitoring the Sunset Limited.

PLAINTIFF'S RESPONSE

2. (a) Many Amtrak employees do in the regular exercise of their duties note and act upon the performance of the Sunset Limited and all other Amtrak trains. Principal responsibility in this regard is vested in Mr. Robert C. VanderClute, Jr., Director of Train Operations, National Railroad Passenger Corporation, 400 North Capitol Street, N. W., Washington, D. C. 20001, and his staff. With specific regard to this action, Mr.

VanderClute rode in the cab of the locomotive of the Sunset Limited on January 18 and 20, 1980. Task force members identified in response to Interrogatory Number 1 also rode in the cabs of the Sunset Limited during the period December 28, 1979 through January 27, 1980.

Attorneys for the United States and for Amtrak also have ridden in the cabs of the Sunset Limited during the stated period, although their principal purpose was not "to monitor" the performance of the train. Those individuals are John H. Broadley, Andrew M. Wolfe, Thomas H. Peebles, Robert B. Patterson, Paul F. Mickey, Jr., and Roderick C. Dennehy, Jr.

3.

INTERROGATORY

3. (a) Please identify the employees of the United States or Amtrak who have substantial responsibility for ensuring that the statutory preference is complied with and enforced.

(b) Please describe briefly all actions taken by the employees so identified from the beginning of 1979 to the present against contracting railroads other than Southern Pacific Transportation Company or with respect to Amtrak's Northeast Corridor operations to bring about or force compliance with the statutory preference.

(c) Please explain briefly why this action was brought against defendant rather than other railroads (including Amtrak) whose overall on-time performance percentages are lower than those of defendant.

PLAINTIFF'S RESPONSE

3. (a) No employee of the United States or Amtrak has specific ongoing responsibility for ensuring that the statutory

preference is complied with and enforced. By statute the Attorney General of the United States is given the authority to take action to enforce compliance with the statutory preference. Paul F. Mickey, Jr., Vice President-General Counsel, National Railroad Passenger Corporation, has general responsibility for ensuring that Amtrak's rights, statutory or contractual, are complied with and enforced.

Mr. Robert C. VanderClute, Jr., Director of Train Operations, National Railroad Passenger Corporation, has substantial day-to-day responsibility for collecting and analyzing data relating to the on-time performance of all Amtrak trains, including identification of delays occasioned by apparent freight interference.

On or about November 2, 1979 Alan Boyd directed that a Train Performance Task Force be established, the function of which is to achieve Amtrak's overall goal of increasing system on-time performance to 70%. The members of the Task Force are Paul F. Mickey, Jr., Chairman, Edward E. Courtemanch, Brian Duff, Carol Foryst, William L. Gallagher, Lawrence D. Gilson, James Johnson, James L. Larson, John V. Lombardi, Herbert F. Longhelt, Robert Mitchell, Frederick C. Ohly, Carl M. Sloan, and Eric Von Schilgen.

(b) Amtrak reports monthly, internally with regard to the Northeast Corridor and externally to all of its contracting railroads, regarding the on-time performance of all Amtrak trains. By covering correspondence, Mr. VanderClute often encourages improved performance by controlling delays caused by several factors, including freight interference.

Mr. VanderClute's staff receives daily by telephone and by telex reports of delays incurred by all Amtrak trains. On those occasions in which a report is made of a delay which is

apparently due to avoidable freight interference, Mr. VanderClute often solicits by telephone, telex, or letter a more detailed explanation for the delay. When avoidable freight interference causes consistent or severe delay to Amtrak trains over a specific route or segment thereof, Mr. VanderClute (and, on occasion, members of Amtrak's executive staff) communicates to the operating railroad the need and obligation to eliminate those delays.

(c) Plaintiff objects to this interrogatory on the ground that it inquires into the Plaintiff's motives and other circumstances surrounding the instigation of litigation. Such an inquiry, except in circumstances which are unusual and which are not present in this action, is not within the scope of discovery authorized by Rule 26(b) of the Federal Rules of Civil Procedure. However, to expedite discovery procedures in anticipation of the hearing set in this action for February 4, 1980, Plaintiff deems this interrogatory modified accordingly and states that prior to commencing this action, plaintiff investigated the performance of the Sunset Limited between New Orleans and Houston and concluded that said performance was, for a period of time beginning in or about April, 1979 and continuing until this action was commenced, the worst of any route of an Amtrak train; that a relatively large proportion of the delay was attributable to avoidable freight interference; that significant efforts had been made to resolve these problems without the institution of litigation; and despite these efforts the performance of the Sunset Limited between New Orleans and Houston continued to deteriorate making recourse to litigation necessary to enforce the statutory preference.

4.

INTERROGATORY

4. Please describe the position of the United States and Amtrak on the scope and content of (a) the statutory preference and (b) the emergency exception; what is the statutory preference and what constitutes an emergency within the meaning of the section?

PLAINTIFF'S RESPONSE

Plaintiff objects to this interrogatory on the ground that it calls for a pure legal conclusion unrelated to any set of facts relevant to this litigation. However, to expedite discovery procedures in anticipation of the hearing set in this action for February 4, 1980, Plaintiff deems this interrogatory modified accordingly and states that its position on the scope and content of the statutory preference is the position previously stated in the complaint filed in this action and in the Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order. In sum, Plaintiff's position is that the commission by a railroad of acts including but not limited to those alleged in paragraph 16, subparagraphs (a) through (e), of the complaint constitute avoidable freight interference with the preferential movement of passenger trains mandated by 45 U.S.C. 562(e)(1). The term "emergency" appears not to be defined in the statute. The term would generally exclude all of the activity which with regularity occurs or should occur on a segment of track. It would generally include derailments and other unforeseen serious accidents, as well as force majeure situations, when their occurrence places well planned operations beyond the control of the operating railroad. As paragraph 17 of the complaint asserts, the actions on which the complaint is based "were taken in circumstances where no emergency existed."

5.

INTERROGATORY

5. (a) Is it the position of the United States and Amtrak that, absent an "emergency," the contracting railroad must keep its freight trains out of the way of the passenger trains, no matter how great the resultant interference with freight operations? Or do Amtrak and the United States concede that the statutory preference is relative rather than absolute?

(b) In a situation where a number of trains are off schedule and meets are occurring in unusual or unanticipated places, may a railroad delay a passenger train five minutes in order to avoid a one-hour delay to a freight train? What if the delay to the passenger train is 10 minutes? 20 minutes? What if the delay to the freight train would be three hours?

(c) Does the statute permit a railroad to delay a passenger train in order to advance a freight train where such delay is necessary to avoid a greater subsequent delay to the passenger train?

(d) In a situation where a passenger train meets a freight train, and where the only siding available for the pass is shorter than the length of the freight train, what action is required to comply with the statutory preference?

(e) Is it the position of the United States and Amtrak that the statutory preference requires a contracting railroad to operate a passenger train on main tracks only through all freight yards and siding locations, except in "emergencies"? What types of emergencies would justify an exception to the rule?

PLAINTIFF'S RESPONSE

5. (a) Plaintiff objects to this interrogatory on the ground that it calls for a pure legal conclusion unrelated to relevant facts. However, to expedite discovery procedures in

anticipation of the hearing set in this action for February 4, 1980, Plaintiff deems this interrogatory modified accordingly and states that it does not categorize the statutory preference as either relative or absolute, and sees no need to do so. The statute lends no special relevance to such characterizations, but directs railroads which assert that problems are created by the effect of the preference upon freight operations to seek relief from the Secretary of Transportation. In the absence of an order from the Secretary granting relief to a railroad, the statutory preference must be accorded, without regard to the effect of the preference on freight operations, except in an emergency.

(b)-(e) Plaintiff objects to these interrogatories for the following reasons. Being hypothetical in nature, these interrogatories call for opinions and legal conclusions. Rule 33(b) of the Federal Rules of Civil Procedure provides that interrogatories soliciting an opinion or contention are not objectionable only if the opinion or contention "relates to facts or the application of law to fact." But the facts to which Defendant's hypotheticals are stated to relate are not raised either in Plaintiff's complaint or in Defendant's answer filed in this action, and Defendant is legally precluded from raising any such facts in defense of the claims made by Plaintiff in this case. See Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order, pp. 9-10; response to Interrogatory 5(a) above. Accordingly, responses to these hypotheticals will not serve to narrow or sharpen the issues presented in this action and will not be admissible as evidence nor lead to the discovery of admissible evidence.

In addition, the hypothetical situations posed in these interrogatories are incomplete in that responses would involve circumstances the hypotheticals do not take into account. For

example, the hypotheticals seem to be based on an assumption that the ordering of traffic on a railroad consists of a series of fortuitous ("unusual or unanticipated") meets of trains with respect to which last minute impromptu decisions must be made. The claims presented in this case by Plaintiff involve situations which are quite otherwise. Given the nature and levels of traffic involved, the traditional rules governing dispatching, the physical railroad plant available, and the fixed, published, widely known and infrequent schedule of the Sunset Limited, most of the train meets which occur day in and day out on the relevant segment of track are within the control of competent and adequately instructed dispatchers and other operating personnel. The hypotheticals do not serve to illuminate the subject matter involved in the pending action, and responses thereto would be both irrelevant to any claim or defense herein, and would not lead to the discovery of admissible evidence.

(f) It is Plaintiff's position that the relief sought in a case should be tailored to the facts proved in that case. In this case the allegations of Plaintiff's complaint, with respect to which it will offer supporting proof at hearing, warrant the relief prayed for. Plaintiff's proof will relate principally to the segment of track between New Orleans and Houston, but the issues related to definition of the true causes of delay may well involve proof related to managerial competence and will--considerations which range wider than any narrow track segment. Depending on the proof actually made and its reception by the Court, application of an order to all of Defendant's lines on which Amtrak trains are operated might well be appropriate.

6.

INTERROGATORY

6. Please state the average number of passengers on an average trip of the Sunset Limited for the segment between Houston and New Orleans in April and October of each of the years 1975 through 1979.

PLAINTIFF'S RESPONSE

ABOARD RIDERSHIP STATISTICS
FOR TRAINS 1/2 FOR STATIONS
BETWEEN NORL AND HOU

MONTH:	<u>April</u>					
YEAR:	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>	
Average aboard between NORL-HOU for month ^{1/}		2,167	2,361	855	1,349	1,841
Average aboard/train ^{2/}		83	91	34	54	71
MONTH:	<u>October</u>					
YEAR:	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>	
Average aboard between NOEL-HOU for month ^{1/}		1,171	1,743	1,356	1,248	1,687
Average aboard/train ^{2/}		43	67	52	46	62

^{1/} This figure is the simple average of the number of passengers aboard the Sunset Limited for all instances of operation at all stations between New Orleans and Houston for each month listed.

^{2/} This figure is the same data as reported in Note 1, but divided by the number of trains operated in each direction during each month reported.

Respectfully submitted,

PLAINTIFF UNITED STATES OF AMERICA
By its attorneys

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VERIFICATION

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, Andrew M. Wolfe, who, after first being sworn, states that the foregoing answers to paragraphs 3(c), 4, and 5 of Defendant's First Set of Interrogatories are true and correct and within his personal knowledge, and to paragraphs 1, 2, 3(a-b), and 6 are true and correct according to his information and belief.

This 30th day of January, 1980.

Andrew M. Wolfe

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EXHIBIT G

FUTURE OF PASSENGER TRAINS

*Interview With B. F. Biaggini,
President, Southern Pacific Company*

Is rail travel in the U. S. going the way of the stagecoach—despite Government subsidies to attract more riders to trains? Should railroads push diversification into other businesses? Is

union "featherbedding" still a big problem? Mr. Biaggini came to the conference room of "U. S. News & World Report" to discuss these and other questions on transportation policies.

Q Mr. Biaggini, will the U. S. have any rail passenger service to amount to anything 10 years from now?

A I don't think so, other than in a place like the Northeast Corridor—the stretch from Boston to Washington.

Q What about Amtrak, the new Government-supported corporation that is supposed to preserve rail passenger traffic in key areas? Can it help keep some passenger lines operating?

A This has to tie in with national transportation policy, of course. But there are many problems related to maintaining passenger service. Not the least of them are geography and population patterns.

You have a large population center in Washington, and the fact that it is the headquarters of Government means that people from all over the country have business there.

Then you have Philadelphia, cities in New Jersey, and New York and Boston. This is the most densely populated part of the U. S., and there is a great deal of passenger traffic back and forth.

There is a possibility that something like the high-speed line the Japanese operate between Tokyo and Osaka might be worthwhile in our Northeast Corridor. But don't delude yourself. I don't think such service in this country ever could be a money-maker.

On the other hand, the social cost of providing this kind of service might be less expensive than to continue the expansion of highways and airfields.

Q Could a similar passenger line be practical in some other heavily populated areas—perhaps between Los Angeles and San Francisco?

A I don't think so. In the first place, the Western part of the country has superb highway systems. Cities and towns have developed along with the highways. You have an entirely different life style. The climate is different in the West, and it's fairly easy for people to get around by automobile.

When you get to the point of needing a transit system in such an area, then a flexible system, with reserved freeway lanes for buses and things like that, rather than a fixed system such as rails, is the sort that will be needed.

Also, the area from San Francisco Bay to Los Angeles is probably the greatest air-travel corridor in the world. There

are about 15,000 airplane seats a day in each direction.

The flight takes 50 minutes, and the fare is about \$10 less than from Washington to New York City, although the distance is 100 miles longer.

Q What about cross-country train travel in the U. S.? How do you see its future?

A There is no market for long-distance, inter-city passenger transportation by rail. People just won't ride it, and they won't pay what they should to support the service. I don't think the taxpayers of this country should put up 300 or 400 million dollars a year to support such a service if the demand is not there.

Q Still, advocates of Amtrak say that with enough new equipment, reduced fares, improved service and so on there will be a demand for passenger service. Do you agree?

A No. We lost the rail passenger business at a time when we were providing the finest service in the world. We had the most beautiful, best-riding, most streamlined trains. They were equipped with barber shops, valet service, maids, couriers, nurses, and dining cars where you could get the thickest steaks. And fares were substantially lower than they are now.

Q Were they substantially lower than air fares at that time?

A Yes, even though air fares have gone through a transition, but I'd say that the difference in fares was never a factor.

Q Was it simply that air travel is faster?

A Yes. The real bread and butter of passenger transportation is business travel, and the businessman simply cannot afford the time it takes to go by train.

Benjamin F. Biaggini, 55, is a career railroad man who joined the Southern Pacific lines in 1936 and became president of the company in 1964. An industrial and civic leader in the San Francisco area, he was appointed to the Pay Board by President Nixon earlier this year.

Q A new plan for bringing passengers' cars along on the same train is being tried between Alexandria, Va., and Florida. Might this work in the Western United States?

A I don't think so. It's been done with some success only in Europe, where there isn't the kind of highway system we have in this country. You go from one little village to the other on a relatively primitive road system.

Q Do you think it will be successful on the East Coast?

A I doubt it, but let them go ahead and experiment. In the Western part of the country that kind of service wouldn't be attractive to the businessman who is used to flying into an airport, getting a rented car and doing his business.

Q Might it prove attractive to vacationers?

A No, because the vacationer is trying to see the country. He is interested in the Grand Canyon, the Painted Desert, Yellowstone, Yosemite and places like that. He can't take his car off the combination train all the time to do it.



Q If the outlook is bleak for passenger trains, what service can Amtrak provide?

A I think Amtrak's function should be to preside over an orderly shrinkage of rail passenger service. The burden of maintaining passenger business by the railroads as private institutions had gotten to the point where it was just too great to stand.

Even today, Amtrak is trying to operate far too many miles of passenger-train service to fit the money it has and the demand it has for rail passenger service.

Q What about commuter service—is there a possibility that Amtrak will get involved in this?

A I don't think Amtrak wants to touch commuter service. It has been a losing proposition all over, with the possible exception of Chicago.

There isn't much rail commuter service left in the U. S., except in Boston, New York, Philadelphia and Chicago.

There is some in Cleveland. On the Southern Pacific, we have San Francisco to San Jose. I doubt if a million people in the U. S. ride commuter trains daily.

On our own lines, we handle only about 11,500 to town in the morning and out in the afternoon. In 1956, we were handling about 17,500. We've had this big decline in a period when the population of the territory south of San Francisco has probably doubled, or come very close to it.

Q Has the traffic gone to automobiles?

A Oh, sure.

Q Are you required to continue furnishing commuter service?

A That's right. Commuter service is under the jurisdiction of the State regulatory commissions rather than the Interstate Commerce Commission, which regulates our interstate business. A different attitude has prevailed toward the regulation and maintenance of commuter service than toward long-distance passenger service.

Q Would it be better to have Amtrak responsible for commuter service in the cities where it still exists?

A I think you have to consider providing local transportation as a local function. There's really no reason why a farmer out in the wheat fields of Nebraska should be taxed to get a Chicago commuter back and forth every morning, although we all get taxed for things we don't really participate in. But the area around a large city that needs commuter service should pay for it just as it pays for the street system and other local services.

Q Are you talking about public ownership of the commuter system?

A This is what is happening. The new Metro subway system in Washington will be financed and operated with public funds. The BART—the San Francisco Bay Area Rapid Transit system—will be owned by and operated with public money. New York subway systems operate that way. Just a handful of privately owned rail commuter services are still in business.

Q Do you get some State support for your Southern Pacific commuter service as the railroads do in the New York metropolitan area?

A We do not.

Q Suppose the Federal Government were to spend more tax money to help the railroads modernize and improve their service. Would that be a solution to today's difficulties?

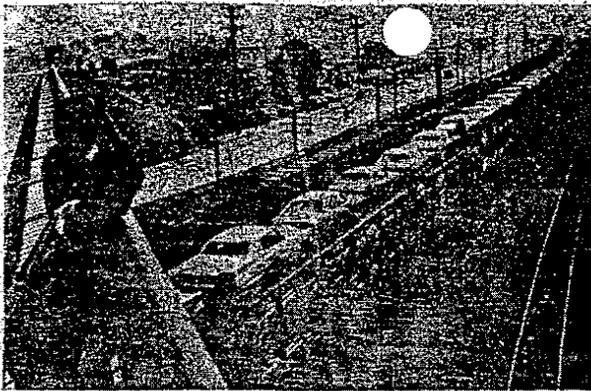
A The need really is not for more money from the Government, in the ordinary sense of that term. Certainly, the railroad industry needs large amounts of capital, because we have to look forward to a tremendous growth in demand for transportation over the next 10 to 15 years. And the railroads need much more equipment. You can't carry twice as much traffic without adding maybe 50 per cent more freight cars, making allowance for improvements in utilization that will come with advanced computer techniques and things of that sort.

There is a large pent-up demand for capital. But how to get it is the problem. I personally do not lean toward a large program of Government grants or subsidies. However, I very much support loan guarantees.

Q Why is that necessary? If the industry is expecting a growing market, why do lenders want the Government to guarantee their securities?

A The basic problem is that the strong railroads are irrevocably tied to the weaker ones. Practically all the freight traffic that moves on the country's rail system travels over two or more roads.

The furnishing of equipment for shippers who are located on a particular railroad's lines is usually the responsibility
(continued on next page)



Multilevel carrier for autos is typical of modernized freight equipment, which also includes the piggyback fleet.

FUTURE OF PASSENGER TRAINS

[continued from preceding page]

of that road. If you have a plant on the Southern Pacific, you naturally look to Southern Pacific to supply your freight cars. If you're on the Northwestern or the Milwaukee or the Santa Fe, or the Erie Lackawanna, you look to those roads for cars.

In recent years, we've seen a gradual decline in the ability of certain railroads to furnish their fair share of cars and locomotives. And the job is just too big for the relatively few prosperous roads to supply the bulk of the equipment. Government backing for loans to buy the needed equipment would go a long way toward strengthening our whole railroad system.

Q Mr. Biaggini, considering all the problems railroads face today, would the country be better off if all roads were nationalized into one big system?

A If you believe in nationalization, you can rationalize the nationalization of any industry. I think a privately owned transportation system is more efficient and cheaper than any other transportation system in the world.

Q How successful are nationalized railroads that now operate in many major nations?

A Every state-owned railway system in the world loses tremendous amounts of money. It ranges around 300 to 600 million dollars a year for the British, the Italians and the Japanese. I think the French win the prize—they are up around 900 million a year in losses. And you're talking about countries that aren't as big as the State of Pennsylvania.

It would be just a matter of time and the same thing would happen here. The Post Office is an excellent example of how a service operates under Government ownership. That problem has gotten to be one of such major proportions that we really don't quite know what to do about it.

Q Is every one of the state-owned railroad systems a money loser?

A I think maybe the Swiss get in the black once in a while.

Q How about the Canadian National?

A That's a big loser. And it operates right alongside the privately owned Canadian Pacific, which makes money.

Q Do nationalized roads tend to lose money because of the way they are managed or because they are obligated to carry passengers?

A I think it is the inevitable result of government ownership, which really means the elimination of the profit motive or the incentive to do well because there is a reward. Along with that there is management of the enterprise for social purposes, restrictions on what to do and how to do it.

Q Are nationalized railroads in other countries under

greater pressure than railroads in America to keep their rates down?

A Price regulation is not as severe in most countries where the railways are state-owned and operated as in the United States.

Q Do you think that nonmotivated bureaucracy is a major factor in their losing money?

A Again, it's the elimination of the profit motive. The incentive to do well for a reward, I think, is the basic argument of capitalism versus socialism.

Lack of motivation starts at the top and floats all the way down through the organization. I wouldn't blame it on the guy who has the clerical job or the other little jobs. It's just the spirit that pervades the whole organization.

Q Do you sense that unions are becoming more inclined to become advocates of nationalization?

A I think there is some union opinion to that effect, but nobody has a greater stake in the capitalistic system than the labor unions.

Q Then why have some unions begun to talk more this way?

A To put political pressure on railroad management.

Q Is it also because they think it might stop the large decrease in railroad employment?

A I'm sure that's one of the reasons.

Q If you got compulsory arbitration, would this make all the more reason for unions to push for nationalization?

A Compulsory arbitration and perhaps the elimination of work stoppages, which is really what we're trying to get at, would put more money in the individual union member's pocket if he didn't have to finance a strike now and then.

There is something to be said for the stability of employment that would go along with a program that would eliminate work stoppages in essential industries.

Q Although you oppose nationalization, do you think it's a good idea to reduce the number of railroad systems in the country?

A Over time, that has to happen unless some unforeseen demand should develop.

Q How can this consolidation be brought about?

A Generally, this means abandonment of some tracks. Let's say railroad A and railroad B go between two towns. They pick the best of the two lines between those two towns and agree to run all their trains over that one track, abandoning duplicate service on the other track.

RAILROADING IN THE 21st CENTURY—

Q Looking ahead, let's say to the 21st century, what do you envision railroading will be like by then?

A I see a strong, efficient rail system connecting the major centers of manufacturing and production and consumption, rather than just the major centers of population.

Very little will be needed in the way of major construction of new lines. The map is already pretty well developed. The expensive improvements to be made are intrinsic to the existing plants: heavier rails, new ties, new ballast—in other words, the business of rejuvenating the railroad system.

Q What about improving freight-handling facilities?

A A tremendous amount of work must be done in terminal improvements. The average terminals were developed 50 or 60 years ago.

In Chicago and St. Louis and Cincinnati and Kansas City, the terminal companies and separate railroad facilities are all out of date. They all need revamping to expedite the business of interchanging freight between one railroad and another, rather than having terminals develop into great big road blocks.

Q Ideally, would you have one terminal in each metropolitan area?

A That's a little bit of an oversimplification because there's a combination of originating and terminating business in any community, plus the freight that passes through in interchange service.

Goods are produced there and are shipped out. Other commodities come in and are delivered locally. And then there are commodities that are hauled in on one railroad, then interchanged to another road to go someplace else.

Q Is the day coming when it will be possible to avoid holding up freight in cities when its destination is farther down the line?

A We're doing more and more all the time to expedite freight. Instead of coming into a terminal and switching carloads of freight that go to another railroad on a sort of casual basis, you simply run right through like you used to do on passenger trains. This is going on in places like St. Louis and New Orleans. It's a fine way to expedite traffic through a terminal, but it will be necessary to get into the freeway or beltway type of approach for rail movements around terminals to improve that process.

Q Are improvements needed in the packaging and handling of freight?

A Freight equipment is pretty well up to date. Our freight cars today are substantially different from those of 15 or 20 years ago. In the packaging field, research is going along on the development of new cartons and new packages all the way up to the containerization and piggyback systems.

Freight cars today have all sorts of load-restraining devices inside them. We have cars with hydraulically cushioned underframes. Cars that handle bulk commodities are substantially larger than they ever were. The development of the piggyback fleet and the automobile multilevel fleet—these are developments of the last 10 to 15 years.

Q In looking ahead, you don't seem to expect anything startling in the way of innovations—no radically new locomotives and things of that sort. Is that a correct assumption?

A I think that's right. The introduction of the diesel locomotive and the changeover from steam were a very important part of the development of our modern railroad system.

Q What about electrification of locomotives?

A Electrification is fine, but it takes high-density traffic to justify the plant you have to put in for it, and you mate-



Southern Pacific's computer system helps control the road's operations, keeps track of freight cars and locomotives.

rially interfere with the flexibility of your system. As it is now, we at Southern Pacific can move diesel locomotives all the way from New Orleans to Portland, Oreg., and anywhere in between. If we had 1,000 miles in the middle of that stretch electrified, it would interfere with the flexibility of our diesel fleet.

Another thing we have to look at very carefully is the environment. The railroads move more freight longer distances with less intrusion on the environment than any other form of transportation.

Q Are diesels greater polluters than the old steam locomotives?

A I don't know. We didn't get into that in the old days. People were concerned with the romance and the beauty of watching that plume of black smoke and white steam against the blue sky. And we thought that was great stuff. We didn't look on that as polluting the environment. But the important point is that generation of power at a central power plant to run an electrified fleet would probably put more pollution into the atmosphere than the total diesel fleet doing the same job.

Q We've been hearing for a long time about how the use of computers and new communications systems would greatly increase efficiency of service. Yet these promises seem to be slow in coming. Why is that?

A In the first place, use of information systems is not nationwide. The Southern Pacific's TOPS system—that's Total Operations Processing System—is the most advanced information system in the industry today. With it, we control all our activities—freight-car location, train makeup.

Cars are classified by number, general dimensions, the kind of inspection they last had, the type of service they are fit for. We also have our locomotives under computer control. Some other railroads, such as the Union Pacific and the Burlington Northern, are installing similar systems.

Q Will these be interchangeable?

A It isn't quite necessary that they be interchangeable. But they will provide the same improved service as ours.

PEOPLE TO RUN COMPUTERIZED TRAINS—

Q How long would it take to install this type of computer system nationally, if we had a real program to do it?

A I would guess that if money were available we could do it in three to five years. We have the programs developed. Some tailoring would be needed in a nationwide system to protect confidentiality of certain kinds of information. Communications would probably have to be improved. But the big job would be training people.

Q Would this computer system go a long way toward alleviating the problem of freight-car shortages?

A It's one of the necessary steps we have to take in seeing that the total supply of freight cars is distributed efficiently around the country.

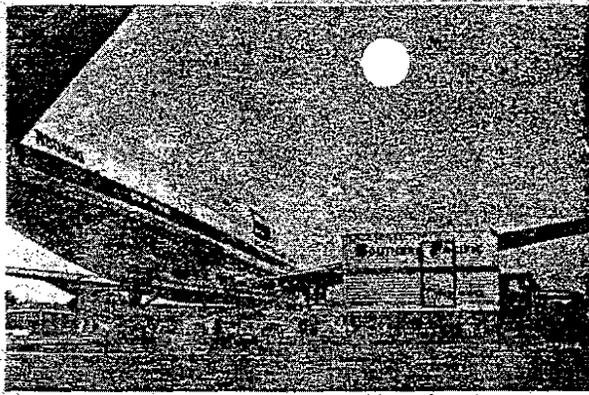
In the old days a freight car may have cost \$3,500 to \$6,000. Today, a refrigerator car costs \$35,000. The big Verta Pak cars that haul 30 little automobiles on their noses are a \$42,000-to-\$45,000 item. It has gotten to the point where the value of the cars means we simply have to have them under better control.

Q Does the country have enough freight cars to go around?

A There is a nationwide shortage of freight equipment. A lot of it is over age and should be replaced.

We need to tackle the problem two ways: One is to increase the numbers of freight cars and locomotives—that's to take care of growth. Then we need to work our equipment more efficiently by use of information systems.

(continued on next page)



"We are in the trucking business as well as the railroad business," says Mr. Biaggini, advocating diversified transport.

FUTURE OF PASSENGER TRAINS

[continued from preceding page]

Q What is the life span of a freight car?

A By the end of 20 years a car has had it, on the average.

Q With all the new equipment and new technology now available, are there good employment opportunities for young people on the railroads?

A Yes. In fact, Southern Pacific has concentrated on the development of young people—our young management team. We have graduate engineers, masters in business administration and bachelors in computer sciences and mathematics and all the regular sciences.

Q Does anybody want to be a railroad engineer any more?

A A fellow would be a lot better off if he went to work as a locomotive engineer than if he went to work in a law office or in some similar job.

Q What does a locomotive engineer make?

A About \$25,000 to \$30,000 a year.

Q How do you train a locomotive engineer?

A We have a locomotive simulator that we're operating in Los Angeles. It is a full-size mock-up of a locomotive cab. Through a computer we simulate all the sights and sounds that are associated with locomotive operation.

Q Even a cow on the track?

A We could put one on—it's no big job. Basically, if the student doesn't do the proper job of running the locomotive, he creates exactly the same condition that would happen out on the line if he made a mistake.

Q What sorts of people do you select for training as engineers?

A Generally, they are people who have been firemen. Others might be brakemen or conductors. I hope one day we'll be able to hire directly out of college as locomotive-engineer trainees.

Q Do you meet any resistance from the unions when you take an operating employe out of union jurisdiction and put him in management?

A No, it's a normal career path. We have people arriving at official positions through a wide variety of routes. One of them is through jobs that are bargained for by the unions.

Q Mr. Biaggini, most of what you have told us is directed toward the long-range future of railroads. What do you consider to be the most pressing problem for your industry at the present time?

A To bring the railroads into the twentieth century and get ready for the 21st. That requires a thorough revision of national transportation policy. We desperately need to have the rules under which we operate revised to reflect modern technology and know-how.

Q Would you be in favor of eliminating all regulation of railroad rates?

A That is a goal that we should be working toward. But I think that the impact on the economy—the dislocation of industry and so forth—would be too much to take all at once.

Q The Department of Transportation has recommended to Congress that all forms of transportation be allowed to raise and lower rates without regulatory approval. Would this fill the need for deregulation as you see it?

A I think it moves a little bit too far, too fast.

Q Why?

A I don't think that users of transportation are going to go for it because the sudden impact of these changes would be too much for them.

I heartily endorse competition and deregulation, but let's see where we are going, and not jump off the deep end until we know how relationships between shippers and customers will be affected.

Q Should railroads be permitted to own other forms of transportation such as bus and truck lines?

A This, of course, has been our theme song for many years. At Southern Pacific, we were one of the originators of diversified transportation. We are in the trucking business and the pipeline business, as well as the railroad business. We would like to be free to go into other forms of transportation.

Q Do you have special regulatory problems with your trucking business because you are a railroad?

A We would like to have our trucking lines freed of special restrictions that apply to them simply because they are owned by a railroad company. These restrictions stem from that old bugaboo, the Transportation Act of 1935. The legislators at that time thought it necessary to protect the growing trucking industry from the giant railroad industry that was viewed as monopolizing all of the land transportation of the country.

Q Does the Administration's transportation bill tackle this matter?

A The Administration bill proposes more freedom of entry into the trucking field and it makes no specific mention of the elimination of restrictions on railroad-owned truck lines.

Q Could the railroads take advantage of this greater freedom to enter the trucking field?

A I haven't read all the details of the bill, but it seems to me that anyone who can show financial responsibility could get into the trucking business.

GAINS IN REVISION OF WORK RULES—

Q The plans for the railroad industry you have outlined seem to require considerable co-operation from the unions. Are you making progress in modernizing work rules to meet more efficient operations?

A Yes. The most important parts of the agreements that we've negotiated with the operating unions this year are revisions of work rules. This is a breakthrough because we've done it over the bargaining table. Hopefully, the new agreements will give us the opportunity to improve service and hold our costs in line so we will be more competitive as the years go on.

Q Does this indicate a new attitude on the part of the unions toward this whole problem?

A I think so. I think this is a rational attitude.

Q Why have things worked out well in this case?

A Labor can't be expected to give up easily the things it has held dear all through history. But I do think the operating organizations this time realized that these were a necessary start on improvement in work rules and operating practices.

[END]

EXAMINER BUSINESS PAGES

Business editor: Jack Miller

S. F. Sunday Examiner & Chronicle, May 14, 1972

Section C Page

Amtrak Doomed Without Aid -- SP Chief

EXHIBIT H

By Jack Miller,
Business Editor

Amtrak, the government operated passenger railroad, doesn't stand "a chance of surviving as presently constituted."

Offering service "across the country and up and down the coast" dooms prospects of success, Donald J. Russell, retiring chairman of Southern Pacific Co., told The Examiner after admitting he has difficulty saying anything good about Amtrak.

The 72 year old railroad executive, who has been in the business more than half a century, said there is only one way Amtrak can be made to work: By the government pouring in several hundred million dollars a year.

The experiment, slightly over a year old, already has money troubles. It will get worse, Russell warns, since the railroads which turned over their passenger operations to the National Railroad Passenger Corp. (Amtrak) will stop making payments after 1974.

Russell proudly recalls that back in 1955 he predicted the end of long distance passenger service by about now. "The public just won't ride trains in sufficient numbers so a railroad can break even. Only one ten-

thousandth of 1 percent of the nation's population rides trains on any given day," he says.

Nothing will lure the businessman to long distance train travel, he adds. While sprucing up service and modernizing cars may attract vacationists, it would be mostly "one trip for the novelty, that's all."

Russell's comments were made as he prepared to give up all his "meddling privileges" in the railroad he joined 52 years ago on a summer job with a track gang as a Stanford student.

He's "happy and content" to make the break Wednesday when SP's board meets in Wilmington, Del. That will culminate two decades as top officer, including 12 years as president and four as chief executive officer.

Those were burgeoning growth years for the railroad. During Russell's regime, SP spent more than \$3 billion for new equipment and modernization. It pushed in many new areas -- trucking, pipelines, air and marine freight forwarding, leasing and land development for industrial and commercial uses.

But Russell is loath to claim the glory. "Where we were and where we are going is

a reflection of the company, not any one individual," he says.

If he had his way, his departure would be without public notice. He has granted interviews sparingly during his long railroading career "and reluctantly agreed to this because Blaggini (Benjamin F., president) asked me to."

His feeling about personal publicity: "Too often people begin to believe what is written about them."

Russell's measure of an executive's success is in the profit column of the financial statement and in the wealth of management talent.

SP has at least a half dozen top officials "equal to anyone and anything in the U.S. today. Many companies have to go outside to fill high positions -- that's a reflection of a shortcoming in management," Russell says, adding:

"If my successor doesn't do a better job than I did, then I didn't do a good job."

The railroad's reputation as the best money maker in the business indicates how Russell's hard-nosed cost-cutting techniques have paid off.

It explains why he has been an ardent foe of passenger service -- "In my opinion

it's impossible for long distance train travel to pay its way anyplace in the world."

He was willing "to pay a big price" to tackle SP's labor problems and says: "We still have a tremendous amount of man hours paid for that are not necessary... we could run a train without any people."

Russell is unruffled when asked about his reputation as a tough boss.

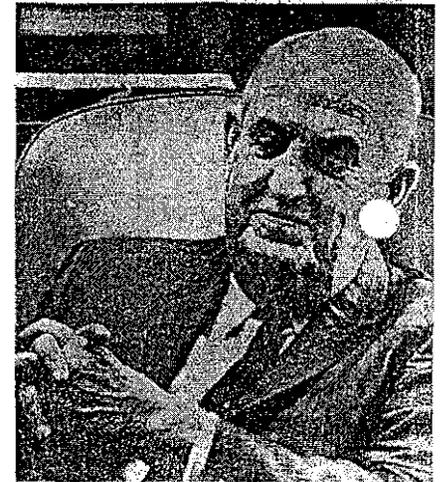
"I've always been fair in handling people. You can call it tough, but I never asked for anything I wouldn't do myself. SP always comes first -- there's a difference between being firm and vindictive."

What's his formula for grooming top talent?

"Pick people most likely for a job. Make it possible for them to get experience to qualify. I brought Blaggini out here from Texas in 1955 to gain experience."

It's common knowledge that Russell yielded the SP throttle slowly after he moved out of the presidency in 1964. "For a while, I retained a veto and meddling privileges. But I have been meddling less in recent years."

He's proud of the "transition" executed "without a ripple" so he doesn't "interfere in anyway with the operation of the railroad today."



Donald J. Russell -- happy to retire

EVEN AT 200 M.P.H.

467 9/25/72-582

People Don't Want Trains

Your editorial (July 6) suggesting a "200-m.p.h. train from Los Angeles to San Francisco would make train travel in California competitive in time with airplanes" misses two significant points:

1 First, the topography of California is unlike that between New York and Washington. The Santa Margarita Mountains along the coast and the Tehachapi Mountains inland make it impossible to operate high-speed trains at the present time on existing tracks.

Tunneling under these ranges would be comparable in cost to building a line under the English Channel — without any economic justification. While a project of that kind might be technologically feasible, there would be no incentive for private industry to invest the capital necessary to build it.

Second, citing the example of the "bullet trains" in Japan obscures the rest of the picture. The Tokaido Line is an engineering marvel but the rest of the nationalized railroad there is plagued with money-losing

lines, politically controlled rates and a system deficit of over \$1 million a day. It has 12,000 miles of railroad and employs 470,000 persons—more than any other single organization in Japan and almost as many as the total U.S. railroad industry employs to operate 20 times the trackage.

2 Rail passenger service in the United States might be justified in a few appropriate places such as the Boston-New York-Washington corridor. But it's time to wake up to the fact that the great majority of Americans have decisively opted for other modes of personal transportation. The record shows that Americans simply will not use long-distance railroad service in sufficient volume to justify the expense. No amount of promotion or government involvement to "improve" service will change that situation.

THOMAS C. BUCKLEY
Manager, Public
Relations Department
Southern Pacific
Los Angeles

Exhibit 2

5
MV. SP. file

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 vs.) Civil Action
) No. 79-3394
 SOUTHERN PACIFIC TRANSPORTATION)
 COMPANY)
)
 Defendant.)

PLAINTIFF'S POST-HEARING MEMORANDUM
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

PLAINTIFF UNITED STATES OF AMERICA

By its attorneys

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INTRODUCTION

The plaintiff regards this as an important case.

The Sunset Limited is a passenger train operated by defendant Southern Pacific Transportation Company ("Southern Pacific") between New Orleans and Los Angeles pursuant to contract with Amtrak. In 1979 the on-time performance of the Sunset Limited deteriorated drastically, from an already-low 50% in the first few months to 0% in July, at which level it remained four four months. According to reports made by Southern Pacific, an abnormally large portion of the underlying delays were due to freight interference, most of which occurred between New Orleans and Houston. (Facts 1.1, 2.1, 3.3, 3.5 ^{1/})

Amtrak repeatedly urged Southern Pacific management to resolve this acute problem, but received no satisfactory response. As the performance of the train continued to decline, Amtrak conducted an investigation in September and October 1979 in order to determine first-hand the causes of the delays. (Facts 3.7-3.9)

Amtrak observers rode in the cabs of Sunset Limited locomotives, reviewed Southern Pacific operating documents, and inspected the operating facilities in yards and along the main line. They concluded that a great deal of unnecessary and avoidable freight train interference was occurring. Despite the presence of Amtrak observers and accompanying Southern Pacific officers on the trains, on-time performance continued to decline. In the first two weeks of December 1979 the Sunset Limited never arrived less than 4 hours and 25 minutes late, and often as much as 7 to 9-1/2 hours overdue. At Amtrak's request, the Attorney General filed this action on December 20, 1979. (Facts 3.9-3.12)

^{1/} Citations denoted "Facts" refer to Plaintiff's Proposed Findings of Facts and Conclusions of Law filed herewith.

The next day this Court entered a Consent Order requiring Southern Pacific to accord the statutory preference to the Sunset Limited. Only then did performance begin to improve. Nevertheless, Amtrak observers riding the Sunset Limited after that date reported that numerous instances of avoidable freight interference continued to occur. (Facts 4.6, 4.7, 4.9, 4.11-4.13)

The evidence shows that Southern Pacific has tolerated remarkably inept dispatching on its rail lines between Houston and New Orleans, and that its dispatching practices have inflicted substantial avoidable delays on the Sunset Limited. The evidence also shows that by tolerating those delays Southern Pacific conveyed to its employees the clear impression that priority treatment of Amtrak trains was not required on its rail lines. If a railroad consistently engages in such flagrant practices over a substantial period of time, but can escape the imposition of sanctions by improving its poor performance following the institution of a lawsuit, then the statutory preference is meaningless.

Southern Pacific has attempted to rebut the Government's case on the facts, but with little evidentiary foundation and a notable lack of success. For its principal defense Southern Pacific has been forced to rely on the claim that it has merely engaged in deficient dispatching, and that the statute should be applied only where a conscious decision to prefer freights over passenger trains can be identified. This position is facially absurd. The statute does not require proof of scienter. The statute requires priority treatment for intercity passenger trains. Where a law requires two trains to be treated unequally, and they are instead handled with equal negligence, the law is violated.

Southern Pacific has also suggested that the dispatching moves described to this Court involve enormously complex decisions, and that it is unfair to second-guess those decisions. This position is an insult to the trade. As the plaintiff's evidence has shown, the function of yardmasters and dispatchers is to adapt to changing circumstances as they occur in order to avoid precisely the types of situations presented to the Court in this case. Appropriate planning and competent dispatching, both premised on the clear priority of Amtrak trains, would have avoided each of those situations. The fact that in each case several uncomplicated alternative moves existed that would have expedited the movement of the passenger train undercuts any argument that the task is simply too difficult.

The only other defense left to Southern Pacific is to assert that because its performance has improved since last December 21 no injunctive relief is necessary. There are three obvious flaws in this position. First is the familiar legal principle that when a defendant ceases illegal activity only in response to a court order, the likelihood of future violations can be presumed. Second is the fact that Southern Pacific still has not eliminated unlawful freight interference between Houston and New Orleans. Many of the incidents discussed at this hearing occurred during the month of January, during the pendency of this Court's order. Third, injunctive relief is required in light of Southern Pacific's attitude toward Amtrak passenger trains, which according to the plaintiff's evidence has ranged from indifference to outright hostility. While the plaintiff appreciates the candor of Southern Pacific's Vice President for Transportation in admitting that his railroad regards Amtrak as an encumbrance, this is yet another public statement which will

serve to confirm the understanding of its employees that Amtrak trains are not welcome on its tracks.

The relief the plaintiff seeks in this case is neither novel nor burdensome. It is the same priority that has customarily been accorded to important passenger trains throughout the recent history of railroading. It is the priority that existed in 1950, when Southern Pacific's chief operating witness was the Trainmaster of the Lafayette Division and the Sunset Limited was run on time. At that time freight trains were required to clear all main tracks, within yards and without, at least 5 minutes before the approach of important passenger trains; switch movements were not allowed on main tracks in yards for five minutes before those trains arrived; and Southern Pacific rules expressly forbade the delay of a passenger train by a freight saw-by. The legislative history of Section 402(e) demonstrates beyond doubt that Congress meant to give Amtrak trains at least the same priority formerly accorded to important passenger trains.

STATEMENT OF FACTS

Plaintiff's Proposed Findings of Fact filed herewith are incorporated as if fully set forth herein.

ARGUMENT

- I. The Testimony of Plaintiff's Witnesses, Unlike That of Southern Pacific's Witnesses, Was Properly Supported and Is Entitled to Great Weight.

There are substantial conflicts in the evidence before this Court concerning the causes of freight interference. In addressing these conflicts, the Court should consider not only

the conclusions stated by the witnesses, but also the extent to which those conclusions are supported by other evidence. The testimony of witnesses whose conclusions are supported by other evidence which is substantial and convincing is entitled to great weight. The testimony of a witness whose conclusions are supported only by his own judgment or by his own characterization of information from unidentified sources is entitled to little or no weight.

(a) Plaintiff's Case

The testimony of plaintiff's witnesses is fully supported by substantial and convincing evidence from other sources and is thus entitled to great weight.

The President of Amtrak, Alan Boyd, testified with respect to the decline in the on-time performance of the Sunset Limited in 1979. That testimony is based on the on-time performance data compiled and furnished by Southern Pacific itself. (PX 1; DX 17) ^{2/}

Mr. Boyd also testified that Amtrak, before requesting the Attorney General to bring suit against Southern Pacific, made efforts to persuade Southern Pacific to improve the performance of the Sunset Limited on a cooperative, non-judicial basis, but that Southern Pacific's response to these efforts was not satisfactory. That testimony is supported by documentary evidence (DX 6 and DX 7, correspondence between Mr. Boyd and the highest officers of Southern Pacific); by undisputed evidence that the performance of the Sunset Limited continued to decline in September and October 1979, while Amtrak observers and Southern Pacific officers rode on the train (PX 1, DX 17); by the

^{2/} References to "PX" and "DX" are to plaintiff and defendant's exhibits introduced at the hearing on plaintiff's Motion for a Preliminary Injunction.

admission of the Southern Pacific's witnesses that they are more concerned with freight service than passenger service; and by the tacit admission that they took no specific action to enforce the statutory preference during the several months before this action was filed. (Facts 5.1, 5.3, 5.4, 5.10)

James Larson testified with respect to specific incidents of freight interference encountered by the Sunset Limited. Mr. Larson clearly identified the sources of the information upon which he based his testimony. One source was the first-hand reports of the Amtrak observers who rode on the Sunset Limited. The qualifications of those observers and the events they observed have been placed before this Court in sworn affidavits executed by the observers themselves. (Affidavits of Larson, Sloan, Schaffer, Mitchell and DuBois filed on December 20, 1979 and February 1, 1980) A second source of Mr. Larson's testimony was the official documents maintained by Southern Pacific to schedule and record the movement of trains. These included timetables, delay reports, train sheets, train orders and yard records. These are the documents experienced railroad people use to analyze railroad operations, a fact acknowledged by Southern Pacific in its response to interrogatory No. 2 of Plaintiff's Second Set of Interrogatories. Response filed January 30, 1980; See also II at 48.25-50.3) ^{3/} Mr. Larson assembled the pertinent documents with respect to each of the incidents addressed in his testimony, analyzed them, brought them to court and referred to them extensively in the course of his

^{3/} The Roman numerals herein I-V, are used to designate the transcripts for the five days of hearings on Plaintiff's Motion for Preliminary Injunction, as follows: I-Monday, February 4, 1980; II-Tuesday, February 5, 1980; III-Wednesday, February 6, 1980; IV-Thursday, February 7, 1980; and V-Friday, February 8, 1980. The number before the decimal indicates the page of the transcript. The number after the decimal indicates the line of the page.

testimony. Plaintiff introduced representative samples of these documents into evidence. (PX 3, 4, 5, 7, 9, 21-28, 33, 35)

In summary, Mr. Larson's factual testimony was based upon clearly identified and authoritative sources of information which were presented to the Court in a manner which permitted the Court and opposing counsel to assess their validity.

Mr. Larson's opinions with respect to proper railroad practice were also supported by a breadth and depth of personal experience with an operating railroad and, after joining Amtrak, by years of experience in dealing with numerous operating railroads. (II at 5.21-6.16; II at 97.20-98.4; II at 122.6-122.18)

The testimony of Messrs. Guidry, Poole and Probst concerning the deterioration of passenger train service on the Lafayette Division was based on personal observation and was supported by their 109 years of railroad experience on both passenger and freight trains. (II at 32.10-33.6; II at 39.19-41.3; II at 47.19-49.4)

The testimony of Dennis Vorbau concerning the complaints received by Amtrak from passengers was supported by the sworn affidavit he submitted to this Court on December 20, 1979; by the analysis he performed and which he described on the witness stand (II at 59.16-62.14); and by the specimen letters of complaint which plaintiff introduced into evidence. (PX 20)

Lawrence Brophy's testimony principally concerned yard conditions. It was supported primarily by an analysis of the official yard turn-over sheets maintained by Southern Pacific to record the condition of its yards. (V at 141.17-141.25) These are the documents experienced railroad people use to analyze yard operations. (V at 141.19-141.25; V at 153.8-153.13) Mr. Brophy brought the pertinent yard turn-over sheets to court and referred to them extensively in his testimony. Plaintiff introduced

representative samples of these documents into evidence. (PX 22, 23, 25) Mr. Brophy also based his testimony on first-hand observations of the yards at issue. (V at 141.11-141.16) Mr. Brophy's statements of opinion were also supported by years of intensive and specialized experience in the operation of yards. Although Mr. Brophy discussed the condition of the yards with the people who worked there, he indicated that such discussions are not a reliable source of information and that his conclusions with respect to the condition of the yards were not based on such discussions. (V at 152.20-153.13)

In summary, the plaintiff's witnesses fully disclosed the information upon which their testimony was based, thereby inviting analysis by the Court and opposing counsel of the adequacy of that information to support the conclusions those witnesses reached. Such analysis indicates that the testimony of plaintiff's witnesses was well-founded and is thus entitled to great weight.

(b) Southern Pacific's Case

The testimony of Southern Pacific's witnesses cannot withstand the same analysis.

(i) Personal Knowledge

None of the witnesses whom Southern Pacific chose to present to this Court by affidavit or at the hearing had any personal knowledge concerning the incidents of freight interference alleged by plaintiff. This is a significant omission because every time an Amtrak observer rode on the Sunset Limited he was accompanied by a Southern Pacific officer. Whereas the Amtrak observers each submitted sworn affidavits to this Court, the Southern Pacific officers who accompanied them did not. One of the Amtrak observers, Mr. Larson, testified with respect to

Amtrak's observations and underwent cross-examination. None of Southern Pacific's observers were called to testify. It can be presumed that had they been called they would not have refuted the testimony of Amtrak's observers.

Southern Pacific sought to respond to the allegations of freight interference by offering the testimony of Mr. Ramsey. He did not ride on the Sunset Limited when the incidents of freight interference occurred. Nor is there any evidence concerning the extent to which Mr. Ramsey's version of the freight interference incidents is based on information he received from the Southern Pacific officers who were present to observe them.

From time to time Mr. Ramsey sought to convey the impression that his testimony was based on the personal knowledge of some other person. Mr. Ramsey rarely indicated the name of that person, the extent to which that person relied upon documents or memory, the date on which Mr. Ramsey received his information, or the form of the information (written or oral, general or specific). Instead Mr. Ramsey offered self-serving characterizations of what unidentified persons supposedly said to him or to others at some unspecified time. (IV at 97.24-98.2; 104.13-104.19) Much of Mr. Ramsey's information was, at best, third-hand. (See, e.g., IV at 110-12-110.15)

Another of Southern Pacific's witnesses, Mr. Jochner, the highest Southern Pacific officer dealing exclusively with Amtrak passenger train service, attempted to convey to the Court the false impression that he had extensive personal knowledge with respect to the problems recently encountered by the Sunset Limited. In response to a question by the Court, Mr. Jochner stated:

"I try to make it a practice in my position of riding these trains, all of our trains, at least once a month or as much as the schedule will permit."

(V at 134.22-134.24) The Court then asked Mr. Jochner if he had been on the Sunset Limited. Mr. Jochner answered that he had and that he understood the difficulties the crew on the Sunset Limited had encountered in the prior six months. (V at 134.2-135.11) In his prior deposition, however, Mr. Jochner stated that the last time he had visited the Lafayette Division was a single day in the summer of 1979. On that occasion, he rode in the passenger compartment of the Sunset Limited from Lafayette to Houston only. He was unable to recall when he had made any prior visits to the Lafayette Division. (PX 36 at 34.7-34.14 and 36.9-36.25)

(ii) Documentary Evidence

Southern Pacific offered into evidence only one document pertaining to the freight interference incidents. That document (DX 13) is a "string-chart" which purports to depict train movements on the Lafayette Division during a 28 hour period in October of 1979. It appears to have been prepared and offered to make the movement of the trains look very complicated and the dispatcher's job very difficult. (PX 17) indicates that the truth is otherwise. PX 17 sub-divides the entire string-chart into 12 individual parts, each of which represents the geographical area and period of time for which an individual dispatcher is responsible. PX 17 shows that each dispatcher is responsible for only a small fraction of the train movements portrayed on DX 13. Southern Pacific's single document concerning the freight interference incidents is thus misleading rather than helpful. Moreover, the lack of care with which this document was prepared is indicated by the fact that the graph had to be corrected at trial--specifically, Mr. Ramsey submitted a revised graph showing that several trains were parked on sidings for most or all of the 28-hour period covered by the graph.

Similarly, Mr. Jochner's tables which reflected augmented on-time performance of Southern Pacific's trains when compared with all trains in the Amtrak system (Jochner Affidavit, January 23, 1980, Exhibit B) were faulty: the augmented Southern Pacific's performance figures used a contract-based computation of on-time performance, allowing numerous types of delays to be excused, while the figures for other parts of Amtrak's system were based on ICC standards which do not excuse such delays.

From time to time in his testimony Mr. Ramsey sought to create the impression that his testimony was supported by Southern Pacific documents, some of which were described in general terms, and some of which were not identified at all. Upon cross-examination, Mr. Ramsey was asked whether he had brought with him to court any documents which supported certain of his assertions, and he admitted that he had brought with him no such documents. (V at 76.20-77.12)

It is not enough, however, to say that Southern Pacific's case was not substantiated by documentary evidence. Southern Pacific's case was repeatedly impeached by Southern Pacific's own documents.

In one situation where the condition of the Algiers Main on October 7, 1979 was at issue, Mr. Ramsey based his testimony on a telephone call to a Southern Pacific employee on February 6, 1980. He chose to rely upon the recollection conveyed in that conversation concerning an event which had occurred several months in the past rather than upon the Southern Pacific yardmaster's reports which are filled out contemporaneously with such events, are kept in the regular course of Southern Pacific's business, and flatly contradict the after-the-fact phone call. (Compare PX 9 with V at 66.25-67.12)

Southern Pacific's claims that its yard operations were disrupted by force majeure events on specified dates in July and

September of 1979 were refuted by Southern Pacific's own yard records. (PX 22, 23, 25)

Southern Pacific's claim that the delays to the Sunset Limited resulted from unanticipated ill fortune rather than from scheduled operations was refuted by Plaintiff's Exhibit 26, a Southern Pacific train schedule which proves that Southern Pacific actually plans to send daily freight trains out on the main track 26 and 33 minutes ahead of the Sunset Limited, a circumstance which virtually assures delay when the Sunset Limited overtakes those freights.

Southern Pacific's claim that the preference sought by plaintiff for the Sunset Limited is unrealistic and would bring the Lafayette Division to a halt was refuted by Plaintiff's Exhibits 27 and 28, which contain Southern Pacific's own timetables and show that previously Southern Pacific has successfully granted the contested preference to the Sunset Limited and that at the present time it grants comparable preferences to other passenger trains with equal success.

Southern Pacific's claim that the delays encountered by the Sunset Limited resulted from congestion was refuted by Plaintiff's Exhibits 29-33. Mr. Ramsey testified that freight volume was higher and congestion became worse in September and October of 1979. However, Plaintiff's Exhibit 29, a telegram written by Mr. Ramsey on September 14, 1979 states that the congestion situation had improved. Plaintiff's Exhibit 30 indicates that Mr. Ramsey wrote on October 11, 1979, with regard to specifically reported delays, in his own handwriting, that "Those delays could and should have been avoided to 1 & 2." Plaintiff's Exhibit 31, a Southern Pacific telegram dated October 15, 1979, states "WITH THE BUSINESS THAT IS ON THE LAFAYETTE DIVISION TODAY, THERE IS NO REASON WHY NO. 1 SHOULD NOT COME INTO HOUSTON ON TIME." In Plaintiff's Exhibit 32, Mr. Phipps, former superintendent of the

Lafayette Division, states that as of October 31, 1979, "line congestion has eased considerably".

Plaintiff's exhibits 33 and 34 demonstrate, from Southern Pacific's own freight data, that freight volume on the Lafayette Division did not increase in 1979 but instead decreased. Plaintiff requested that the data set forth in Plaintiff's Exhibit 33 be produced by Southern Pacific in discovery. Mr. Ramsey stated under oath that such assembled data did not exist, and could be collected only with difficulty. (Defendant's Response to Plaintiff's Interrogatory No. 3, dated January 30, 1980). When confronted with this data (which plaintiff subsequently obtained in other litigation) on cross-examination, Mr. Ramsey revealed that he was well aware that Southern Pacific compiled such data. It appears that Southern Pacific failed to produce highly relevant documents damaging to their principal defense in this case, documents containing information which plaintiff had requested and which Southern Pacific knew or should have known existed.

In summary, Southern Pacific presented no documentary evidence which supports its claims, but relied instead on the unsubstantiated oral testimony of its witnesses. That testimony was repeatedly refuted by Southern Pacific documents offered into evidence by plaintiff.

(c) Conclusion

Southern Pacific's denial that unlawful freight interference has occurred is based almost entirely upon the conclusory testimony of its witnesses, unsupported by personal knowledge or the regular business records of Southern Pacific. On such a slim basis, the testimony of Southern Pacific's witnesses would be entitled to little weight, even if it were uncontroverted by any other evidence. But the testimony of Southern Pacific's wit-

nesses is rife with self-contradiction and has been conclusively refuted by Southern Pacific's own documents. Accordingly, the testimony of Southern Pacific's witnesses is entitled to no weight whatsoever.

II The Evidence Shows That Southern Pacific Repeatedly Caused Avoidable Freight Interference to the Sunset Limited

The Southern Pacific rail line between New Orleans and Houston used by the Sunset Limited is basically a single track railroad equipped with automatic block signals, dispatched by timetable and train order (II at 24.18-24.22). It is comparable to many thousands of miles of railroad throughout the United States (II at 24.23-25.1). Traffic levels on the line show that it is not a high density operation (II at 95.8-95.13) and that the work load of the dispatchers is moderate (II at 99.11-99.20).

An Antrak task force conducted an investigation in September and October of 1979 to ascertain the causes of delays to the Sunset Limited. (II at 7.22-8.2). In addition to observing directly the operations of the train, the task force assembled train sheets, delay reports, yard records, conductors' reports and other documentation which recorded the history of actual train movements on the rail line (II at 9.3-9.14). Reports of their findings were compiled and presented to the Court in conjunction with the Motion for Temporary Restraining Order filed December 20, 1979. (Affidavits of Messrs. Larson,

^{4/} James Larson, 27 years experience in freight and passenger operations (II at 5.22-6.16); Carl Sloan, 22 years experience in mechanical and transportation (II at 8.10-8.12); Alden Clark, professional engineer, 25 years railroad operating experience (II at 8.13-8.15); Gordon Dubois, civil engineer, 33 years railroad experience (II at 8.16-8.18); Marvin Schaffer, 36 years experience in train movement (II at 8.19-8.20); Bob Mitchell, 40 years transportation experience (II at 8.21-8.23).

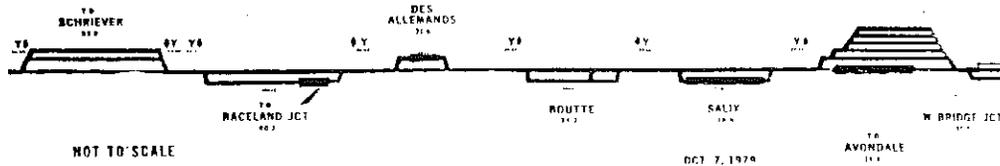
Sloan, DuBois, Schaffer, and Mitchell dated December 19, 1979; II at 11.5-11.10). A second investigation was conducted between December 28, 1979 and the last week in January 1980 (II at 11.11-12.1), and certain of the incidents observed during that period were described to the Court by Mr. Larson during the hearing on plaintiff's Motion for a Preliminary Injunction.

The preponderant cause of delays to the Sunset Limited was interference by Southern Pacific freight operations (Affidavit of James L. Larson dated December 19, 1979, paragraph 14). The delays occurred when the Sunset Limited had to meet opposing freights (II at 62.13-62.18); when the Sunset Limited had to follow freights (II at 62.21-62.24, 68.4-68.6, 76.12-76.18); when the Sunset Limited had to run through sidings to meet or pass freights left standing or parked on the main line (II at 77.8-77.13, 83.19-84.4); when local yard operations blocked the main line in front of the Sunset Limited (II at 84.12-84.17, 100.7-.10); when the Sunset Limited had to "saw-by" freights that were too numerous or too long to clear the main track for the passenger train (II at 109.19-110.7); and when various other instances occurred which denied the Sunset Limited use of the main line because of freight operations (II at 110.8-111.6, 114.14-115.15).^{5/} These delays occurred because Southern Pacific employees either a) issued orders giving their freight operations priority over the passenger train in the use of the rail line (II at 30.9-30.20, 31.8-31.21, 34.9-34.15, 35.3-36.19, 41.6-41.22, 105.20-106.1, 119.25-121.7) or b) acted contrary to Southern Pacific's own operating rules (II at 114.22-115.20, 162.3-162.14). The specific examples of each type of delay which were presented in oral testimony are described below.

^{5/} Mr. Larson explained the train movements involved in meets, passes, and saw-bys. (II at 16.4-17.3; II at 19.7-20.8)

A. Delays Were Caused by Freights Being Given Preference at Meets.

(1) October 7, 1979 meet at Raceland Junction. (PX 9-1.)



The eastbound Sunset Limited, No. 2, was held on the siding at Raceland Junction for 1 hour and 1 minute waiting to meet a westward freight, Extra 4109 West, even though this was the only westward freight out of Avondale Yard that day. (II at 45.15-46.18) Plaintiff's witness, James Larson, testified that the delay to No. 2 could have been (a) avoided by holding Extra 4109 West at Avondale (II at 54.3-55.1, 56.1-56.15), or (b) minimized by establishing the meet at Boutte, a siding approximately halfway between Avondale and Raceland (II at 56.16-56.22). Southern Pacific's witness, John Ramsey, gave contradictory versions of why Extra 4109 West could not have been held at Avondale Yard on October 7, 1979. First he testified:

- (1) "There's no room on the main track and no room in the yard at that time" [6:00-7:00 p.m.] (IV at 95.25-96.7).
- (2) "Well, the 6679 was hanging out and there were no tracks clear at that particular time, at the time [2:25-6:25 p.m.] he showed up at the time they could bring him in is the information that I have been furnished" (IV at 97.24-98.2).
- (3) "Well, there were no clear tracks available as far as the planning the operation for this in the yard to accommodate the trains any different than the way they did, the way it was handled. My basis is -- my information is based on not only the turnover but also in talking to the officers who were on duty at that particular time -- not talking personally but had been talked to and I did some talking personally." (IV at 104.13-104.19).

- (4) "Well, Extra 8428 East was yarded at tracks 40 and 39, two of the tracks that Mr. Brophy indicates and the yardmaster's record at 3:30 p.m. indicated as clear." (V at 158.6-158.9).

But under cross-examination Mr. Ramsey admitted:

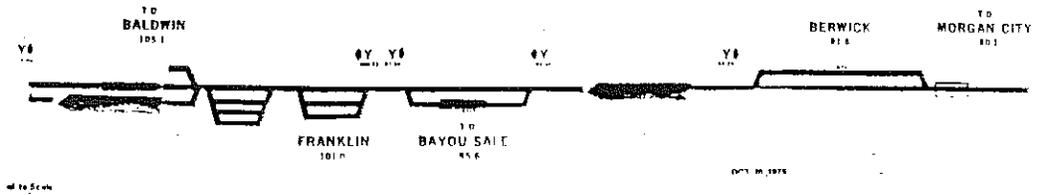
- (1) The yardmaster turnover for 3:30 p.m. showed tracks 37, 38, 39 and 40 to be clear (IV at 99.6-99.15, 100.12-100.13).
- (2) "They could have doubled him [Extra 6679 East] over in the yard . . ." (IV at 103.9).
- (3) It was physically possible to put Extra 6679 East into Avondale Yard at 3:30 p.m. (IV at 105.24-106.2, 117.12-117.15).

Plaintiff's witness, Lawrence Brophy, explained no proper concern for the Sunset Limited would have avoided delay (IV at 142.5-150.5). Even assuming the accuracy of Mr. Ramsey's assertions that tracks 40 and 39 were blocked, there is uncontroverted evidence that tracks 37 and 38 were still available to double Extra 6679 East into Avondale Yard, thus permitting the second eastward freight, Extra 6514 East, to be brought into Avondale on the main. This would have cleared the main for the westward freight, Extra 4109 West, to depart from Avondale Yard, thus freeing the yard track it was occupying for Extra 6514 East to use to clear for No. 2.^{6/}

Although Boutte siding was clear at the time No. 2 passed, it appears that a local switch engine had been given preference in the use of Boutte siding on October 7, 1979, thus denying No. 2 its use as a passing siding (III at 111.17-112.23, PX 7). It still was possible, however, to have established a meet at Boutte. (II at 28.13-28.21)

^{6/} There is a further factual issue as to whether or not the Algiers Main was occupied during this time, but considering the uncontested fact that there were clear tracks in Avondale Yard proper, there is no need to address this additional issue at this time.

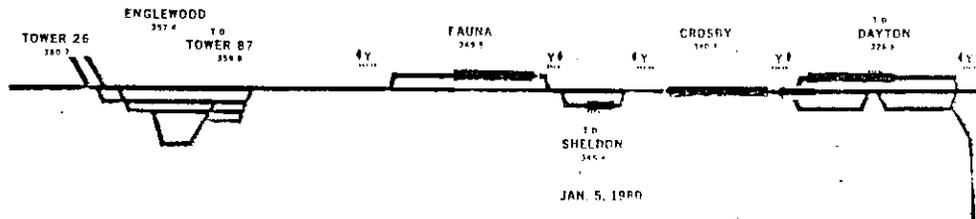
(2) October 16, 1979 meet at Baldwin (PX 8-13)



On October 16, 1979, the Sunset Limited was delayed at Baldwin, meeting two opposing freights. Southern Pacific concedes that this delay was avoidable since the second freight could have been held at Berwick to meet the passenger train (II at 58.13-62.9; III at 130.2-131.18)

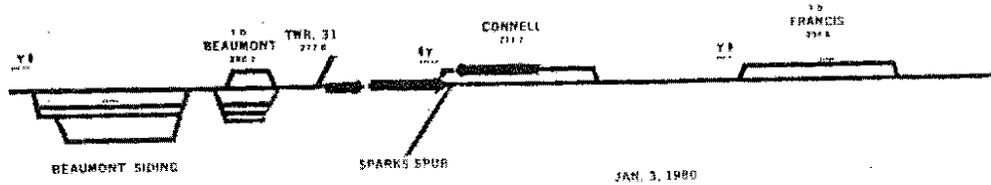
B. Delays Were Caused by Requiring the Sunset Limited to Follow Freights:

(1) January 5, 1980, Dayton (PX 8-C)



On January 5, 1980, No. 1 was delayed by being ordered to follow a freight, which departed nineteen minutes ahead of No. 1, from Dayton to Englewood (II at 63-68). Southern Pacific concedes that this was too close ahead of No. 1 (III at 140.2-140.7), explaining that once the freight has been permitted to use the main line in front of No. 1 to make up its train there was little practical choice but (a) to allow the freight to run ahead of No. 1 for 30 miles, since all available passing sidings were blocked with freights (III at 141.8-142.14), or (b) to back the freight down the Baytown Branch (III at 142.15-142.22).

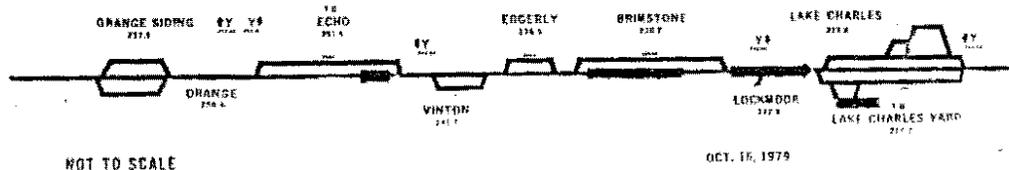
(2) January 3, 1980, Sparks Spur (PX 8-D)



On January 3, 1980, No. 2 was delayed by a local freight which picked up 20 empty cars at Sparks Spur (II at 69.1-72.21) and then ran ahead of No. 2 to Francis. Southern Pacific concedes that this delay was avoidable (III at 136.1-136.2, 138.12-138.20).

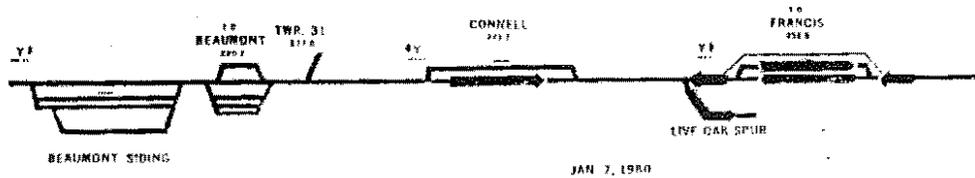
C. Delays Were Caused by Parking Freights on the Main:

(1) October 16, 1979, Brimstone (PX 8-E)



No. 2 was delayed 16 minutes going through the siding at Brimstone to get around a freight that had been parked on the main several hours earlier. Mr. Ramsey admitted that this delayed the Sunset Limited (III at 122.20-122.21) but asserted that he was "not sure that they would have had enough time to do it" [put the freight in the siding before the crew expired under the hours of service law, 45 U.S.C. § 61 et seq.] (III at 125.11-125.15) Southern Pacific documents reveal that the crew had more than two hours before it expired to perform this simple maneuver, which under ordinary circumstances takes only about 30 minutes. (IV at 26.1-26.7) Mr. Ramsey further asserted a corporate policy discouraging backing long freights (III at 129.14-130.1); he subsequently admitted that the railroad does back freights every day in connection with its normal freight operations (IV at 16.23-17.12).

(2) January 7, 1980. Connell (PX 8-F)

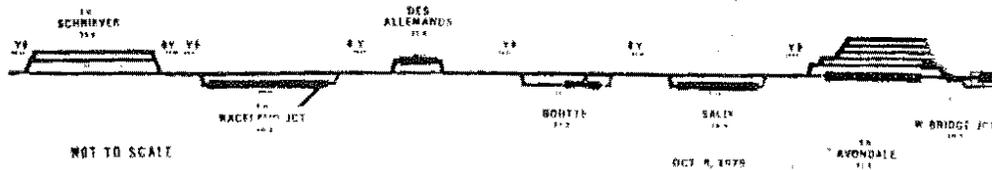


An eastbound freight was allowed to occupy the main at Connell forcing No. 1 to go through the siding and causing a sixteen-minute delay. This was permitted even though there was a crew on the freight which had more than an hour to clear for the passenger train (II at 82.14-83.17). In response to questions by the Court, Mr. Ramsey stated that the diagram was inaccurate because it did not show a westbound freight which was occupying the siding at Connell thus preventing Southern Pacific from using that siding to clear the eastbound freight for No. 1. (III at 149.18-150.9). Mr. Ramsey subsequently admitted that the diagram showing that Connell siding was free at the time No. 1 arrived was in fact accurate. (III at 153.13-153.20). In a further response to the Court's questions, Mr. Ramsey testified definitively that there was a third eastward freight occupying the Beaumont siding which prevented defendant from using that siding to clear for No. 1 (III at 150.10-151.17). On cross-examination Mr. Ramsey admitted that the Beaumont siding "could very well have been" clear (IV at 41.13-42.7)^{7/} Mr. Ramsey ultimately conceded that the freight blocking No. 1's path at Connell could have been put in the siding at Connell and that the crew on the freight had one hour and forty-three minutes to move the freight into the siding--a move he estimated to take approximately thirty minutes (IV at 21.3-21.16, 23.17-23.21, 26.1-28.6).

^{7/} The following day Mr. Ramsey again testified that the Beaumont siding was occupied, basing his testimony on a conversation which a Mr. Winterrowd had had with a trainmaster Arnold (V at 66.21-67.12). Mr. Ramsey had no documentation to support this assertion (V at 76.20-76.21)

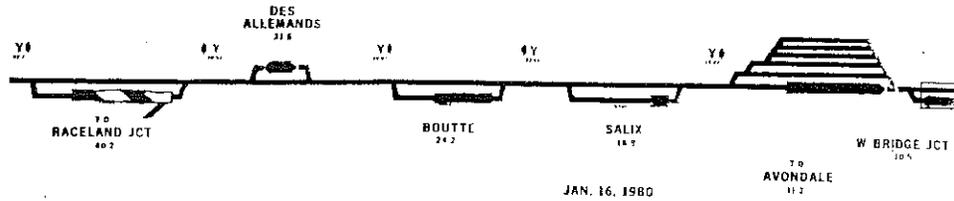
D. Delays Were Caused by Yard Operations Using the Main Track.

(1) October 8, 1979, Avondale Yard (PX 8-C)



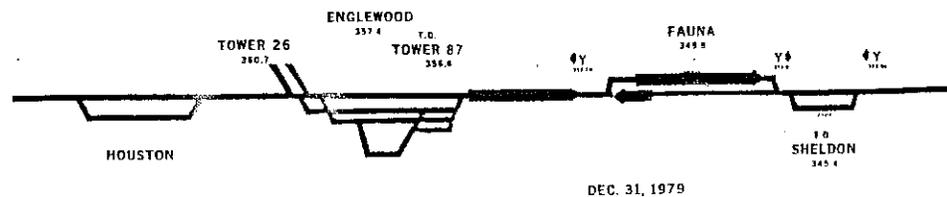
When the westbound Sunset Limited arrived at Avondale Yard on time on October 8, 1979 it was delayed for fifteen minutes because a yard engine was switching cars on the main line (II at 87.6-87.17). This violated Southern Pacific's own operating rule 93, which requires yard engines to clear the time of approaching first class trains. (II at 162.1-162.14). Additionally, when the yard engine cleared, No. 1 found the main track through the yard blocked by a freight which had been yarded on the main track and allowed to remain there despite the fact that No.1 was scheduled through Avondale at that time (II at 87.23-88.18). Both parties agree that track 38 was clear at the time No. 1 passed, (III at 116.18-117.9); it could have been used to make up the freight train, in which case No. 1 would not have been delayed. Moreover, the yard turnover shows nine (9) clear tracks in Avondale Yard at 3:30 p.m. on October 8, 1979 (III at 10.9-11.6). The records of movements into and out of Avondale yard for October 8, 1979 show that no trains or cars arrived into the yard between 1:30 p.m. (the time No. 1 was scheduled through) and 3:30 p.m., the time of the yard inventory (III at 11.7-11.20) According to these documents it is clear that the yard had ample space in addition to track 38 to clear the freight for No. 1. No. 1 subsequently was required to follow the same freight for 44 miles to Schriever, incurring a delay of more than an hour and a half (II at 88.14-89.24).

(2) January 16, 1980, Avondale Yard (PX 8-H)



On this date the main at Avondale was occupied by an opposing freight which had been given priority to use the main from Raceland Junction to West Bridge Junction (II at 100.18-102.5). This train could have been held at Raceland Junction to meet No. 1 or could have been cleared in Avondale Yard or on the Algiers Main (II at 102.6-102.21). Mr. Ramsey testified that in his opinion this was not done because of an unanticipated delay in getting clearance for a preceding freight to cross the Huey P. Long Bridge. The freight was subsequently cleared in the Algiers Main for No. 1 (III at 153.21-156.19).

(3) December 31, 1979, Fauna (PX 8-I)

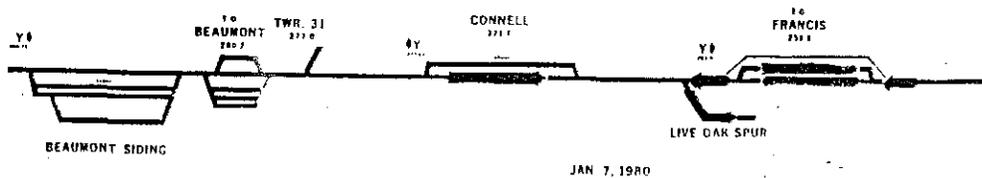


On December 31, 1979, two freights were dispatched eastward from Englewood Yard (Houston) in the face of the west-bound passenger train. The first freight cleared in the siding at Fauna but the second freight had no place to clear and had to occupy the main track in front of No. 1 until the first freight departed from the siding at Fauna (II at 104.11-105.11). Both the Southern Pacific yardmaster and the dispatcher had to authorize this move (II at 105.20-106.1) Mr. Ramsey testified that the second freight could not have been held at Englewood

Yard because the yard needed the room to clear the bowl tracks of the hump yard (III at 134.1-134.21), even though when asked about the specific volume of operations at Englewood Yard on December 31, 1979, he stated, "I didn't make any effort to find those figures." (IV at 151.6-151.17) Yard documents indicated that Englewood Yard was humping at about 70% of its normal activity on that day and Mr. Brophy testified that these figures show that there was no congestion in the bowl yard on December 31 (V at 151.2-152.19). Additionally, the main line through Englewood Yard has two tracks, and one of these tracks could have been used to hold the second freight. (IV at 152.19-152.21)

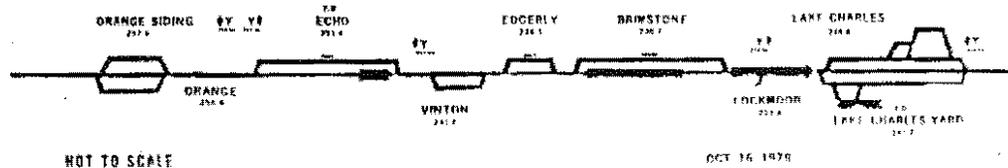
E. Freights Were Preferred Over the Sunset Limited in Other Instances:

(1) January 7, 1980, Live Oak Spur (PX 8-F)



The delay at Connell to take siding for the freight which is depicted in this exhibit was discussed above in Section C(2). No. 1 was also delayed at Francis to saw-by the freight trains. (II at 109.15-110.7) By allowing the eastbound freights to depart from Beaumont yard, the dispatcher created a situation where delay to No. 1 was inevitable: No. 1 would have to saw-by the freights at some location. (IV at 31.17) A third delay to the Sunset Limited occurred at Live Oak Spur when a local freight, Extra 7817 East, was made superior to the first class passenger train for purposes of using the main line and this restriction was not lifted when the local freight had cleared (II at 110.89-112.22) Mr. Ramsey conceded that this was an error on the part of the dispatcher (III at 143.1-144.18).

(2) October 16, 1979, Echo to Lake Charles (PX 8-D)



The delay at Brimstone depicted in this exhibit to take siding around a parked freight was discussed above in Section C(1). The other delay shown in this exhibit is the restriction which the Sunset Limited received at Echo which required it to wait at Echo, Vinton, Edgerly and Brimstone for a local freight (shown on the diagram at Lake Charles Yard)(II at 114.3-114.21, 116.18-117.18) Mr. Ramsey testified that, even though the Sunset Limited was running two hours and forty minutes late out of Houston, in his opinion the dispatcher acted properly in giving the local freight preference over No. 2 at Echo since it was unlikely No. 2 would be able to make up more than ten minutes between Houston and Echo (III at 119.3-120.1) He subsequently changed this testimony and admitted that "...the dispatcher issued an order that, what we call too heavy. In other words, it was too much time that delayed No. 2." (IV at 147.25-148.5)8/

The task force investigated and analyzed all factors which they considered to be relevant in evaluating the incidents presented to the Court. This included an analysis of all other traffic on the railroad at the time of the incidents as reflected

8/ There was considerable testimony concerning whether or not the delivery of the train order at Echo violated Southern Pacific's operating rules. Since the delay relevant here was due to the substance of the train order, not its manner of delivery, there is no reason to resolve that question here. However, it should be noted that the uncontroverted testimony is that the passenger train ran past the trailing switch at Echo--beyond its point of restriction (II at 115.5-115.9, IV at 140.2-140.10)

by defendant's operating records (II at 19.5-19.16). In no case were the delays to the Sunset Limited caused by strikes (II at 19.17-19.19), by floods (II at 19.20-19.21), or by any circumstances beyond the control of defendant (II at 19.22-19.24). In fact, in every case it was the actions of Southern Pacific employees which authorized defendant's freight traffic to delay the Sunset Limited. (II at 119.25-121.7)

III. SOUTHERN PACIFIC'S CONDUCT HAS CAUSED
SERIOUS IRREPARABLE INJURY TO THE PUBLIC INTEREST

The injury caused by Southern Pacific's failure to accord the statutory preference for passenger trains is obvious and far-reaching. Generally, failure to to accord the statutory preference inflicts injury to the public interest, as stated by Congress in fast and efficient intercity rail service. The injury to the public interest is inflicted in several ways.

First, it is inflicted upon the travelling public, whose primary criterion in choosing a mode of transportation is on-time reliability. (I at 12.23-13.5; III at 58.9) The inordinately high number of complaints received from Sunset Limited travelers attests to the extensive nature of the injury which its delays have caused them. (III at 59.23-60.4; 61.8-61.22; 62.9-62.14; PX 20) Equally affected are those who spend long and unnecessary hours awaiting late-arriving passengers.

Defendant's failure to accord the statutory preference also inflicts obvious injury upon Amtrak itself. Its ability to retain previous passengers and attract new ones on all lines in an era of energy shortages is severely undermined by the long delays to the Sunset Limited. (III at 59.8-59.15) Inasmuch as Amtrak is funded in substantial part by federal funds, this is an injury ultimately borne by the taxpaying public. The nature of the injury caused by Southern Pacific's failure to accord the statutory preference, then, is not only obvious and far-reaching but also irreparable.

IV. SOUTHERN PACIFIC'S CONDUCT IS A CLEAR VIOLATION OF SECTION 402(e)(1)

The plaintiff in this case seeks a determination that the action of Southern Pacific described in the Statement of Facts constitutes violation of section 402(e)(1) of the Rail Passenger Service Act (RPSA), 45 U.S.C. 562(e)(1). Because there are strong indications that these violations will continue absent a court order, plaintiff seeks the injunctive relief described in the attached proposed preliminary injunction.

The statutory provision which defines the violation is simple and clear.^{9/} As Southern Pacific has paraphrased it,^{10/} the provision "requires that '[e]xcept in an emergency,' Amtrak's passenger trains 'shall be accorded preference over freight trains in the use of track and other facilities, unless a waiver has been granted by the Secretary of Transportation.'" Southern Pacific would accord a protean meaning to the term "preference"; in its view, when "properly interpreted, in light of the historical background of the concept of passenger train preference, the statute requires only a reasonable and pragmatic effort to accord passenger trains 'top priority' in movement,"^{11/} rather than an ironclad precedence for passenger trains in all circumstances."^{12/}

^{9/} Section 402(e)(1) provides:

Except in an emergency, intercity passenger trains operated by or on behalf of the Corporation [i.e., Amtrak] shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary [of Transportation] has issued an order to the contrary in accordance with paragraph (2) of this subsection.

^{10/} Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction at 1.

^{11/} Id. at 2.

^{12/} Id. at 3.

The plaintiff cannot agree that the statute allows the flexible interpretation Southern Pacific advances. Its language clearly requires that passenger trains be given priority use of rail lines unless an emergency exists or a waiver has been granted. Undue disruption of freight operations can be avoided by obtaining a waiver; absurd or impossible applications of the provision are avoided by inclusion of the exception for emergencies. Except to the extent of these two qualifications, the preference is strict and mandatory. A railroad must make every effort, including efforts which may have the effect of delaying freight operations, in order to give priority access to Amtrak trains.

This interpretation is borne out by subsection (2) of section 402(e). If a railroad were allowed to curtail its efforts to expedite Amtrak trains at that point where its freight operations were slowed, subsection (2) would be superfluous. The whole purpose of the statute is to require freight railroads to make concessions to passenger traffic which they would otherwise not be disposed to make. Southern Pacific's forthright resistance to making those concessions underscores Amtrak's need for the legal protection of section 402(e).

At the hearing Southern Pacific expressed concern that the legality of individual dispatching decisions not be judged with the false clarity of hindsight. The plaintiff agrees that the statute should not be construed to require omniscience on the part of dispatchers and yardmasters. Those decision-makers should be held to a reasonable understanding of the situation which exists on their rail lines at any given time; the reasonableness of their understanding should be measured according to the information which is conveyed by well-maintained official records, such as train sheets and yard turnover reports, and

which is available through regular radio communications. But the degree of effort which the statute requires is not merely "reasonable." The statute requires a complete effort to give Amtrak trains priority, not just such effort as is convenient to normal freight operations. Any lesser requirement would render the statute meaningless.

The term "emergency" presents no real interpretive difficulty. The Federal Railroad Administration defines the term to include "derailments, collisions, storms, washouts, fires, obstructions to tracks, and other hazardous conditions which could result in death or injury, damage to property or serious disruption of railroad operations." 49 C.F.R. § 220.47. That this definition is accepted usage in railroading is demonstrated by the fact that virtually the same language is employed to define "emergencies" in Southern Pacific Operating Rule 955.^{13/} It is clearly appropriate to allow the Federal Railroad Administration, the agency likely to be empowered to grant waivers under subsection (2), to give content to this statutory term. Neither by the FRA definition nor by Southern Pacific's own rules can any of the incidents explored at the hearing be found to involve an "emergency." Southern Pacific's claim that the poor performance of the Sunset Limited was caused by

^{13/} According to that rule, the term includes "derailments, collisions, storms, washouts, fires, obstructions to the track or other matters which would cause serious delay to traffic, damage to property, injury to employees, or the travelling public."

"overwhelming physical problems" such as floods, strikes, washouts and hurricanes "^{14/} is simply refuted by the evidence.

One real interpretative difference remains. Southern Pacific takes the position in its Memorandum in Opposition that Congress enacted the statutory preference in "hortatory terms," and that since it established no fines or other penalties for violation, "it intended to do no more than adopt the historic general operating practice" of passenger train preference as it traditionally existed in the railroad industry. ^{15/} The legislative history of section 402(e)(1), reported in extensive detail in point II of Plaintiff's Memorandum in Response (pp. 6-12), shows that it was the specific purpose of Congress to enact an enforceable legal right for passenger trains and that it did so over the objections of the Association of American Railroads, spokesmen for the railroad industry, the Department of Transportation, and even Amtrak. For the purposes of this proceeding it is not necessary to determine whether Congress meant to create a preference for passenger trains beyond that which had traditionally existed, or whether it simply meant to reduce the historic preference to statutory terms. All plaintiff seeks is an order requiring Southern Pacific to accord to passenger trains on the Lafayette Division the same priority they once received prior to the creation of Amtrak.

^{14/} Memorandum in Opposition at 2. Although defendant has occasionally asserted that congestion caused by the strained capacity of its railroad is justification for failing to accord passenger trains a preference, plaintiff proved that freight tonnage at the time of the first riders' program was lower than for any other time in 1979; and that the tonnage for 1979 was lower than for 1974 or 1978--in short, that there was no congestion due to excessive tonnage on the rail line. Moreover, defendant's principal witness, Mr. Ramsey, testified that increased traffic levels were "not . . . per se" an emergency. (V at 18.15)

^{15/} Memorandum of Southern Pacific Transportation Company in Opposition to Motion for Preliminary Injunction, p. 4.

V. THE NATURE OF SOUTHERN PACIFIC'S PAST VIOLATIONS AND ITS ATTITUDE TOWARD PASSENGER TRAIN OPERATIONS SUGGEST THAT SUCH VIOLATIONS ARE LIKELY TO RECUR

In memoranda already submitted to this Court, plaintiff has maintained that in seeking equitable relief pursuant to explicit statutory authority to enforce public policy, the United States is entitled to equitable relief upon a showing of a reasonable likelihood of success on the merits and a reasonable likelihood that defendant's illegal conduct will recur absent preliminary injunctive relief. Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction at 4-7; Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order at 7-9.

Although plaintiff has already presented sufficient evidence to meet the traditional criteria for preliminary equitable relief, as defined in Virginia Petroleum Jubbers v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), such a showing is not required in governmental enforcement actions. In such instances harm to the public interest is presumed and judicial balancing of competing equities is not necessary. United States v. Ingersoll-Rand Co., 218 F.Supp. 530, 544-45 (W.D. Pa.), aff'd, 320 F.2d 509 (3d Cir. 1963)

The evidence presented to this Court and discussed above indicates that numerous and repeated statutory violations have already occurred, thus making success on the merits not just reasonably likely, but highly likely. In determining whether plaintiff is entitled to the relief sought here, then, this Court need only decide whether defendant's illegal conduct is likely to recur, absent an Order of this Court. As the subsequent discussion indicates, this Court would be fully warranted in inferring that defendant's illegal conduct is likely to recur. Indeed, on the record now before this Court, no other inference appears possible.

In assessing whether defendant's illegal conduct is likely to continue absent injunctive relief,

the necessary determination is that there exists some cognizable danger of recurrent violation, something more than a mere possibility which serves to keep the case alive.

United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). The evidence presented in this action makes abundantly clear that there is far more than some cognizable danger of recurrent violation and hence that injunctive relief is fully warranted here.

A. Past Violations Create an Inference of Future Violations

Plaintiff has established a clear pattern of trail dispatching practices which have inflicted substantial avoidable delays upon the Sunset Limited. That such a pattern has existed in the recent past gives rise to the strong inference that, absent a court order, the pattern will persist into the future. SEC v. Koracorp Industries, Inc., 575 F.2d 692, 698 (9th Cir. 1978); SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2nd Cir. 1975).

B. Violations Continue to Occur

Southern Pacific has urged this Court to conclude that the delays to the Sunset Limited were temporary in nature and that recent improvements in on-time performance make unnecessary the granting of injunctive relief. Improvement in performance does not, however, militate in favor of denial of this motion. Indeed, the fact that illegal conduct is terminated only when an investigation is commenced or a suit is filed may support the inference of future illegal conduct. SEC. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2nd Cir. 1972). Certainly, the cessation of violations after the filing of suit is no bar to the issuance of an injunction. United States v. Parke, Davis & Co., 362 U.S. 29, 48 (1960); Hecht Co. v. Bowles, 321 U.S. 321,

327 (1944). Recent improvement constitutes an admission that past delays were avoidable and that efforts to comply with the law will result in substantial on-time performance. The fact that improvement has been achieved only under judicial scrutiny does not lead to the conclusion that the improvement will be maintained voluntarily; the case law is clear that in fact, the inference is to the contrary.

Moreover, while performance has improved, it is clear from the evidence presented that obvious statutory violations continue to occur. The number and magnitude of such violations may have diminished, but the statute prohibits any instance of avoidable freight interference causing delay to passenger trains. It is necessary to the complete eradication of such violations that an injunction be issued and enforced.

C. Defendant Refuses to Recognize the Illegal Nature of its Actions

Defendant has persisted throughout this action in maintaining that its dispatching practices are not in violation of the statutory preference, and that given the identical circumstances in the future, it would again act in exactly the same manner. (V at 15.9-15.19) To convince defendant that the statute requires alteration of its practices, it is necessary that a finding of past violations be emphasized by the issuance of an injunction proscribing a continuation of those practices.

D. Defendant Has a Negative Attitude Toward the Statutory Preference and a Strong Motivation to Give Priority to its Freight Operations

Southern Pacific candidly admitted during the hearing that its primary interest is in its freight operations. (V at 136.10-136.12) More to the point, Southern Pacific forthrightly announced that it would be happy to be rid of its obligation to operate the Sunset Limited. (IV at 71.13; V at 100.16) Its view in this regard is one of long standing. As set forth at pages 12-14 in plaintiff's Response to Memorandum of Southern Pacific

in Opposition to Motion for Preliminary Injunction, Southern Pacific's highest officers have often publicly expressed their antagonism to the operation of intercity passenger trains in the United States. Southern Pacific did not attempt to refute this position during the hearing, but only attempted to explain what it perceives to be a basis for this hostility. Its persistent attitude underscores strongly the necessity for injunctive relief in order to assure that Southern Pacific will respect and enforce the statutory preference.

Southern Pacific's hostility to passenger train service has been communicated directly to Amtrak. In an April 1979 meeting with Amtrak officials, Mr. Babers, the Assistant General Manager of Southern Pacific stated, "Let's set the record straight. I don't give a good god damn for your passenger trains." (III at 27.25-28.1) The attitude of Southern Pacific toward passenger operations was perhaps best expressed at the hearing by Mr. Ramsey who, in response to the question of whether a freight could have been put in a siding to allow the Sunset Limited to pass on the main track, astonishingly responded "Why would they clear the main track?" (IV at 13.6-14.1)

Southern Pacific's current attitude was clearly demonstrated by two incidents which occurred during the course of this hearing. On February 5, 1980 the Sunset Limited was bucked off the main line onto a scale track to facilitate freight operations and as a result was derailed. (IV at 78.15-79.10) On February 6, 1980, Southern Pacific delayed a passenger train on another line for 23 minutes and refused to move the train out of a station until Southern Pacific received assurances that, if it became necessary to water the locomotive en route, the delay in doing so would not be charged against Southern Pacific in the calculation of incentive payments. (V at 129.10) Mr. Robert Jochner saw no impropriety in this method of resolving a contractual dispute with Amtrak, a method which involved holding

the train and all of its passengers hostage until Amtrak agreed to give the Southern Pacific the relief that it might become entitled to. (V at 130.8-130.12)

The company attitude is clearly reflected in the lack of positive action by Mr. Jochner, the highest Southern Pacific officer with exclusive responsibility for dealing with Amtrak. Despite the obviously deteriorating performance of the Sunset Limited in the latter half of 1979, Mr. Jochner visited the Lafayette Division only once, sometime during the summer. On that visit he rode the Sunset Limited only from Lafayette to Houston. He rode in the passenger accommodations. He is unable to recall the last time he visited the Lafayette Division prior to that occasion. (PX 36 at 34.7-34.14 and 36.9-36.25)^{16/}

Moreover, Mr. Jochner was unable to specify any action he had taken to instill a philosophy among Southern Pacific operating personnel that Amtrak trains are to run on time. (V at 136.17-137.23)

Clearly illustrative of Southern Pacific's view of the importance of the Sunset Limited's on-time performance is the fact that even after the December 21 Consent Order was entered in this action, Southern Pacific issued "blocking instructions," or schedules for its freight trains, establishing "optimum times" for freight departures from Lafayette Yard and from Avondale Yard only 26 and 33 minutes, respectively, ahead of the scheduled

^{16/} This testimony, given by Mr. Jochner in his deposition prior to the hearing, is in sharp contrast to the impression he tried to communicate at the hearing. In response to the Court's questioning Mr. Jochner stated at the hearing:

"I try to make it a practice in my position of riding these trains, all of our trains at least once a month or as much as the schedule will permit."

(V at 134.22-134.24) The court then asked Mr. Jochner if he had ridden on the Sunset Limited. Mr. Jochner answered that he had and was aware of the difficulties the crew on that train had encountered in the prior six months. (V at 134.2-135.11)

departure times from those stations of the Sunset Limited. (V at 24.6 and 28.19) On these schedules delay to the Sunset Limited is virtually assured. (V at 27.17)

Under these circumstances it is easy to understand why operating employees on the Lafayette division considered the Special Notice sent out by Southern Pacific pursuant to the Consent Order, proclaiming that its corporate policy was to accord preference to passenger train operations, to be a joke. (III at 37.2, 52.9-52.22)

Mr. Krebs, a Southern Pacific vice president, acknowledged that there is "a general understanding [within Southern Pacific] that the company does not favor the operation of passenger trains." (IV at 80.3) The employees realize that, contrary to former times when delays to passenger trains were thoroughly investigated (III at 34.1-34.5, 43.19-46.19, 49.8-50.5), disciplinary action is only rarely taken against those who interfere with the progress of the Sunset Limited. (III at 13.3-13.9; 16.15-16.25, 46.20-46.23)

Mr. Jochner admitted that because passenger operations constitute a smaller percentage of Southern Pacific's overall operation and because so many employees are inexperienced, many of the operating personnel are not familiar with the priority to be accorded passenger train operations. Yet by the end of 1979 neither Mr. Jochner nor any other Southern Pacific officer had instituted any program to communicate to those employees the nature and importance of the statutory preference for passenger train service. (IV at 86.4-86.21) Small wonder, then, that those employees consider the Sunset Limited to be just another train. As Mr. Guidry, a brakeman/conductor on the Sunset Limited for the past 15 years, testified, the current attitude among yardmasters is, "I don't give a damn about Amtrak." (III at 36.1) Mr. Provost, formerly a conductor on both passenger and freight trains, concurs, stating that the men he worked with in

freight operations "just didn't give a darn" about Amtrak. (III at 51.22-52.2)

Given Southern Pacific's strong motive to favor its freight operations and its unfettered opportunity to do so, given the attitude which has developed among the employees responsible for operating the train, and given the resulting, flagrant abuses in the past year, there exists every reason to conclude that violations will recur. Southern Pacific cannot be left to accord the statutory preference to the Sunset Limited voluntarily, but must be required to do so by this Court.

VI. THE RELIEF SOUGHT BY PLAINTIFF IS NEITHER NOVEL NOR UNDULY BURDENSOME

At the time this action was filed plaintiff sought enforcement of the statutory preference in the form of several specific operating requirements which were calculated to ensure that Amtrak trains received priority over Southern Pacific freight traffic. As the evidence in this case was presented it became apparent that it is not essential to that objective that the Court involve itself with such operational details.

The legislative history of Section 402(e) demonstrates beyond doubt that Congress meant to give Amtrak trains at least the priority historically accorded to important passenger trains formerly operated by the railroads for their own accounts. See Section IV above. By its evidence plaintiff demonstrated that such a priority (which was termed "absolute" during cross-examination only to distinguish it from lesser priorities now accorded) existed in recent times as a part of the operating practice of most railroads, including Southern Pacific, and that it exists today as a part of Southern Pacific's timetable instructions on another division of its railroad. (V at 30-44; PX 27-28) That priority was and is, in essence, that

all freight trains, transfer trains, and switch engines must clear the main track, within yards and on the road, a specified time before the approach of the passenger train, and that passenger trains must not be delayed to saw-by freight trains.

It is not necessary on this motion for interlocutory relief that the Court explore the outer boundaries of the statutory preference. By requiring the defendant to reestablish as part of its timetable instructions the priority which formerly existed and which, at the least, Congress intended to reinstitute, the Court would be granting substantially the same relief sought by plaintiff at the time this action was filed. Southern Pacific will not be unduly burdened by a requirement that it comply with the law in this manner. The obvious effect of the order would be to increase the on-time performance of the Sunset Limited, and by Southern Pacific's own admission, operation of its freight trains is facilitated when the Sunset Limited runs on time. (IV at 57.24-58.7; V at 79.23-80.3)

To best allow for implementation and monitoring of such an order, plaintiff also requests that the Court maintain in effect its requirement of December 21, 1979 that defendant report all delays over ten minutes to Amtrak and provide a detailed explanation of those delays resulting from freight interference. As the evidence demonstrated, the defendant has in the past provided Amtrak with reports, albeit superficial, of delays, so the incremental burden of this requirement is negligible. Finally, plaintiff requests that Southern Pacific be required to deliver a copy of the Court's Order to each of its employees responsible for the movement of trains within Lafayette Division, in order that its contents and requirements be immediately and precisely known by those persons.

CONCLUSION

Wherefore, plaintiff requests that this Court enter an order granting plaintiff's Motion for a Preliminary Injunction in the form annexed hereto.

Respectfully submitted,

PLAINTIFF UNITED STATES OF
AMERICA
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) Civil Action
) No. 79-3392
 SOUTHERN PACIFIC TRANSPORTATION)
 COMPANY,)
)
 Defendant,)

PRELIMINARY INJUNCTION

This matter came on to be heard on the 4th day of February, 1980, on the Verified Complaint of plaintiff United States of America and plaintiff's Motion for a Preliminary Injunction against defendant, its officers, agents, servants, and employees; and it appearing to the Court after five days of evidentiary hearings that defendant has given preference to freight trains on its rail lines between New Orleans and Houston, and that defendant has failed to accord a regular Amtrak passenger train, the Sunset Limited, in operations between New Orleans and Houston, the preference mandated by 45 U.S.C. §562(e)(1); and it further appearing to the Court that absent the relief ordered herein defendant is likely to continue to fail to accord the Sunset Limited the preference mandated by 45 U.S.C. §562(e)(1);

NOW THEREFORE, it is by this Court this _____ day of _____, 1980, ORDERED, pendente lite, that defendant herein, its officers, agents, servants, and employees take the following actions with respect to the operation of the Sunset Limited passenger train between New Orleans, Louisiana and Houston, Texas:

1. Amend its timetable special instructions to state:

Train No. 1 is superior to all trains except Train No. 2 and Train No. 2 is superior to all trains. Opposing inferior class and extra trains and yard engines must clear leaving time of Nos. 1 and 2 not less than five minutes. Inferior class and extra trains and yard engines in the same direction must clear time of Nos. 1 and 2 at the time such trains are due to leave the next station in the rear where time is designated but not less than five minutes. Nos. 1 and 2 must not be delayed saving freight trains.

2. Issue forthwith a Special Notice stating to its employees that they shall conduct their duties in accordance with the special instructions set forth in paragraph 1 above, except in **emergencies**, which term includes derailments, collisions, storms, washouts, fires, or other accidental obstructions to the track which place planned operations beyond defendant's control; and stating further that failure to so conduct their duties is punishable by defendant's disciplinary processes and by contempt of this Court.

3. Submit to Amtrak within twenty-four (24) hours of their occurrence reports of all delays in excess of ten (10) minutes, and submit within seven (7) days of their occurrence detailed explanations of such delays involving freight operations, including without limitation a statement of all trains involved in the delay, the duration of the delay, the causes of the delay, and any disciplinary action which has or will be taken as a result of the delay.

4. Deliver a copy of this Order to all of its officers, agents, and employees responsible for the movement of trains between New Orleans and Houston.

This Injunction shall remain in full force and effect
until further Order of this Court. Issued _____,
1980 _____ .m., Eastern Standard Time.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I have served the following documents filed herewith upon defendant by causing copies of same to be delivered in hand to defendant's attorney of record, Stephen Ailes, Esq., Steptoe & Johnson, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036:

1. Plaintiff's Post-Hearing Memorandum on Motion for Preliminary Injunction;
2. Proposed Preliminary Injunction;
3. Plaintiff's Proposed Findings of Fact and Conclusions of Law; and
4. Affidavit of James L. Larson.

Andrew M. Wolfe

February 19, 1980.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) Civil Action
) No. 79-3394
)
 SOUTHERN PACIFIC TRANSPORTATION)
 COMPANY.)
)
 Defendant,)

PLAINTIFF'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

I. PROPOSED FINDINGS OF FACT

1. Amtrak Passenger Train Service.

1.1 The National Railroad Passenger Corporation ("Amtrak") was established by enactment of the Rail Passenger Service Act of 1970, 45 U.S.C. §501 et seq., and came into being on May 1, 1971. (I at 10.4-10.6 ^{1/}) Prior to the establishment of Amtrak, the American railroad industry was losing approximately \$200 million annually on deteriorating rail passenger service. It was apparent that without some form of public support rail passenger service would be extinguished. Congress decided that rail passenger service should continue and that the necessary public funding should be provided. Rather than pay direct subsidies to private railroads, Congress established Amtrak as a new entity to provide the required rail passenger service. (I at

^{1/} The Roman numerals herein, I-V, are used to designate the transcripts for the five days of hearings on Plaintiff's Motion for Preliminary Injunction, as follows: I-Monday, February 4, 1980; II-Tuesday, February 5, 1980; III-Wednesday, February 6, 1980; IV-Thursday, February 7, 1980; and V-Friday, February 8, 1980. The number before the decimal indicates the page of the transcript. The number after the decimal indicates the line of the page.

10.11-11.1) In creating Amtrak, Congress declared that "modern, efficient intercity railroad passenger service is a necessary part of a balanced transportation system" and that "the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country". 45 U.S.C. §501.

1.2 Except in the Northeast Corridor between Washington, D.C. and Boston, Massachusetts, Amtrak provides rail passenger service to the travelling public under contracts with operating railroads. Pursuant to these contracts Amtrak provides the "rolling stock" (the locomotives and cars), sells tickets, provides station personnel, and furnishes on-board services (attendants for coach and pullman service, and waiters, cooks, and stewards for dining service). (I at 11.7-11.3; II at 7.--7.8). The contracting railroads operate the Amtrak passenger trains, providing the engineers, conductors, dispatchers and transportation supervision. (I at 11.14-11.16; II at 7.9-7.11). Amtrak has contracts with 21 private railroads, including defendant Southern Pacific Transportation Company ("Southern Pacific"). (I at 11.6-11.7; I at 12.2-12.4)

1.3 Under these contracts, the movement of the Amtrak passenger trains is controlled by the contracting railroad and not by Amtrak. (I at 11.14-11.16 and 12.9-12.2)

1.4 Amtrak has been directed by Congress to make a 50% improvement in the on-time performance of its passenger train service by September of 1982. (I at 13.9-13.11; 45 U.S.C. §501a, enacted on September 29, 1979, P.L. 96-73, Title I, §103(a), 93 Stat. 537)

1.5 Lacking control over the movement of the passenger trains, Amtrak seeks to improve the on-time performance of those

trains by offering financial incentives to the contracting railroads, by closely monitoring on-time performance, and by exhorting the contracting railroads to improve on-time performance. (I at 13.18-14.18; I at 33.15-38.19) Amtrak's contract with Southern Pacific provides financial incentives for better on-time performance. (I at 13.12-13.17)

1.6 Principally on the basis of the specific findings in this section 1, it is concluded that Congress mandated Amtrak to provide the travelling public with reliable intercity rail passenger transportation characterized by improved on-time performance.

2. The Sunset Limited

2.1 The Sunset Limited is an Amtrak passenger train which operates between New Orleans and Los Angeles, a distance of approximately two thousand miles. The Sunset Limited passes through Houston, Texas. The Sunset Limited departs westbound from New Orleans on Monday, Wednesday and Friday of each week and departs eastbound from Houston on Tuesday, Thursday and Saturday of each week. The westbound and eastbound operations are designated Amtrak Train Numbers 1 and 2 respectively. (Complaint and Answer at pars. 13-15 and 27; II at 40.1-40.5)

2.2 The segment of the Sunset Limited's route which lies between Houston and New Orleans, almost all of which is known as the Lafayette Division, is 364 miles long. All but 22 miles of this segment are controlled exclusively by Southern Pacific. (Complaint at par. 15. Answer suggests figure is 31 miles).

2.3 At the time Amtrak was created, the Sunset Limited already had a long and famous history. It had begun operation in the 1890's. (V at 85.25-86.5)

2.4 The Sunset Limited had long enjoyed an operational priority over freight trains. The 1950 Lafayette Division Time-

table set forth that priority in the following special instructions:

No. 1 is superior to All Trains Except
No. 2. No. 2 is Superior to All Trains.

Opposing first and inferior classes and extra trains and engines must clear leaving time of Nos. 1 and 2 not less than 5 minutes. First and inferior classes and extra trains and engines in the same direction must clear time of Nos 1 and 2 at the time such trains are due to leave the next station in the rear where time is designated but not less than 5 minutes. Nos. 1 and 2 must not be delayed sawing freight trains.

(PX 28,^{2/} pp. 21-24, emphasis supplied; V at 43.11-44.7) No such special instruction is included in the Lafayette Division timetable today. (V at 44.6-44.13)

2.5 In the years following World War II, the preference for passenger trains was strictly enforced on the Lafayette Division. Employees of Southern Pacific were frequently summoned to the office of the superintendent of the Lafayette Division and called upon to account for actions which delayed passenger trains, even when such actions had been accidental and had caused only minor delays. As a result, the employees of the Southern Pacific were careful to accord preference to passenger trains. (III at 33.24 - 34.12; III at 43.19-46.19; III at 49.11-50.5)

2.6 At that time, Southern Pacific operated four passenger trains in each direction between New Orleans and Houston each day of the week. Thus a total of 56 passenger trains per week were operated then, as compared with the current total of 6 passenger trains per week. The on-time performance of those earlier passenger trains was very good. (III at 41.12-41.24)

2.7 In 1950 the scheduled time for operations of the Sunset Limited between Lafayette, Louisiana and Houston was 3

^{2/} The designation "PX" will be used herein to refer to plaintiff's exhibits. "DX" refers to defendant's exhibits.

hours, 55 minutes. The present schedule is 5 hours, 25 minutes, even though the Sunset Limited makes one less stop. (III at 42.22-43.15) Similarly, the schedule between Lafayette and New Orleans was 2 hours, 55 minutes in 1950 and is now 3 hours, 26 minutes. (PX 5 and PX 28)

2.8 Southern Pacific's freight operations would be benefitted if the Sunset Limited regularly ran on time. (II at 138.8-138.25; IV at 57.24-58.7; V at 79.23-80.3))

2.9 Principally on the basis of the specific findings in this section 2, it is concluded that the rail line of defendant between New Orleans and Houston has the demonstrated capability to permit consistent on-time performance of the Sunset Limited when adequate training, discipline and managerial attention is devoted to that end.

3. The On-Time Performance of the Sunset Limited in 1979 and Amtrak's Efforts to Improve It

3.1 Amtrak regularly monitors the on-time performance data submitted to it by the contracting railroads. (I at 14.2-14.15; Affidavit of Robert Vanderclute filed December 23, 1979, hereinafter "Vanderclute Affidavit", par. 3)

3.2 A certain allowance for delay is built into the schedule of every passenger train as "recovery time" and is therefore not reflected in on-time performance statistics. For the Sunset Limited between New Orleans and Houston, there is approximately two hours and twenty minutes of recovery time eastbound and approximately one hour of recovery time westbound. Therefore, if the Sunset Limited lost four hours on the schedule between Houston and New Orleans, it would have actually incurred approximately six hours and twenty minutes of delay. (II at 39.6-39.25)

3.3 The on-time performance data submitted by Southern Pacific to Amtrak indicated that in 1979 the on-time performance of the Sunset Limited declined as indicated by the following table:

ON- TIME PERFORMANCE OF SUNSET LIMITED IN 1979

<u>Month (1979)</u>	<u>Percentage On-Time</u>
January	55.6
February	50.0
March	53.8
April	46.3
May	7.1
June	7.1
July	0.0
August	0.0
September	0.0
October	0.0
November	0.0
December	7.1

(PX 1)

3.4 The on-time performance data submitted by Southern Pacific to Amtrak indicates that in July of 1979 the Sunset Limited had the worst on-time performance of any intercity passenger train in the United States. In the following months the Sunset Limited not only remained the worst performer, but did so by an increasing margin. (PX 2; DX 17)

3.5 The on-time performance data also indicates that, although the rail mileage between New Orleans and Houston is only 18% of the total rail mileage of the Sunset Limited, most of the delays to the Sunset Limited were occurring between New Orleans and Houston. (Complaint and Answer at par. 27)

3.6 The on-time performance data submitted by Southern Pacific to Amtrak further indicates that in 1979 the Sunset Limited had an abnormally large amount of freight interference. Whereas the Sunset Limited constitutes only 2% of Amtrak's adjusted train miles, in June of 1979 the Sunset Limited accounted for 14% of Amtrak's delays due to freight interference. In

November of 1979 the Sunset Limited accounted for 34% of Amtrak's delays due to freight interference. (Vanderclute Affidavit, par. 5)

3.7 As the on-time performance of the Sunset Limited deteriorated, Amtrak intensified its efforts to persuade Southern Pacific to improve the situation. The President of Amtrak testified, "We exhorted everybody we could find at the Southern Pacific to try to get us a little better service". (I at 17.11-12)

3.8 In addition, the President of Amtrak ordered a team of Amtrak employees (each of whom had extensive experience in railroad operations) to ride on the Sunset Limited to observe the problem and to make recommendations with respect to it. (I at 20.7-20.14; II at 7.17-8.2)

3.9 The Amtrak team rode on the Sunset Limited in September and October of 1979. They observed "a great deal of unnecessary and avoidable freight train interference" [That freight interference is discussed in detail in the following section.] Officers of Southern Pacific accompanied the Amtrak observers on these operations. (I at 20.17-20.22; Affidavits of Larson, Sloan, Mitchell, DuBois, and Schaffer filed on December 20, 1979)

3.10 The presence of the Amtrak observers and the Southern Pacific officers on the Sunset Limited did nothing to halt the continually declining performance of the Sunset Limited. On the contrary, the performance of the Sunset Limited became worse. Amtrak then requested the Attorney General to initiate litigation to resolve the problem. (PX 2; DX 17; I at 20.17-20.25)

3.11 In the first two weeks of December 1979 every operation of the Sunset Limited arrived at least 4 hours, 25 minutes late. Three operations arrived more than nine hours late. (Complaint and Answer, par. 26)

3.12 On December 20, 1979 this action was filed.

3.13 Principally on the basis of the specific findings in this section 3, it is concluded that the on-time performance of the Sunset Limited beginning about May of 1979 and continuing through most of December of 1979 deteriorated so badly, and Southern Pacific's responses to Amtrak's pleas for assistance were so unavailing, as to warrant Amtrak's seeking, and the Attorney General's furnishing his assistance under Section 307 of the Rail Passenger Service Act.

4. Avoidable Freight Interference To the Sunset Limited

4.1 The Southern Pacific rail line between New Orleans and Houston used by the Sunset Limited is basically a single track railroad equipped with automatic block signals, dispatched by timetable and train order. (II at 24.18-24.22). It is comparable to thousands of miles of railroad throughout the United States. (II at 24.23-25.1)

4.2 Over this segment of track the movement of trains over the main line is controlled by dispatchers except within certain yard limits where, in recent times, control of the main track has been exercised by yardmasters. (II at 12.20-13.10; III at 37.5-37.17; III at 52.24-53.12)

4.3 During the periods of time in which Amtrak observers were observing the operations of the Sunset Limited there occurred numerous instances of avoidable freight interference which are attributable to decisions made by dispatchers and yardmasters. (II at 43.12-121.7)

4.4 On October 7, 1979 train No. 2 was delayed meeting a westward freight train, Extra 4109 West. (II at 45.15-46.15) This delay could have been avoided by holding Extra 4109 West in Avondale Yard (II at 54.3-55.1, 56.1-56.15) or could have been minimized by establishing the meet at Boutte. (II at 56.16-56.22)

4.5 On October 16, 1979 train No. 2 was delayed at Baldwin meeting two opposing freight trains. This delay could have been avoided by holding the second freight train at Berwick. (II at 58.13-62.9; III at 130.2-131.18)

4.6 On January 5, 1980 train No. 1 was delayed following a freight train from Dayton to Englewood Yard. (II at 63.7-67.21) This delay could have been avoided by postponing the making up of a freight train on the main line until No. 1 had passed (III at 141.8-142.14) or by keeping the freight clear on the Baytown Branch until No. 1 had passed. (III at 142.15-142.22)

4.7 On January 3, 1980 train No. 2 was delayed following from Sparks Spur to Francis a freight train which had stopped at Sparks Spur to pick up additional cars. (II at 69.2-75.11) This delay would have been avoided if the freight had not stopped at Sparks Spur. (III at 136.1-136.2, 138.12-138.20)

4.8 On October 15, 1979 train No. 2 was delayed going through a siding at Brimstone to get around a freight train which was parked on the main track. This delay could have been avoided by placing the freight in the siding by using a backing move prior to the arrival of No. 2. (III at 77.15-79.24) Such a backing movement is routinely employed by Southern Pacific in the normal course of its freight operations. (IV at 16.23-17.12) The crew of the freight train had ample time to complete this movement before it expired under the hours of service law. (III at 77.15-79.24)

4.9 On January 7, 1980 train No. 1 was delayed going through a siding at Connell because a freight train was parked in the main track. This delay could have been avoided by placing the freight in the siding prior to the arrival of No. 1, which the crew had ample time to do before it expired under the hours of service law (II at 82.14-83.17), or by holding the freight train at Beaumont siding to meet No. 1. (IV at 37.9-37.18,

41.13-42.7, 44.7-45.10)

4.10 On October 8, 1979 train No. 1 was delayed at Avondale Yard because a yard engine was switching cars on the main line (II at 87.6-87.17) and because a freight train was yarded on the main line. (II at 87.23-88.18) No. 1 subsequently had to follow the freight train to Schriever. (II at 88.14-89.24) This delay could have been avoided by keeping the yard engine off the main line in accordance with Southern Pacific operating rules and by putting the freight train in the yard in anticipation of No. 1's approach. There was ample room in the yard to accommodate the freight train. (III at 10.9-11.5)

4.11 On January 15, 1980 train No. 1 was delayed at Avondale Yard because an opposing freight train occupied the main line by the yard. (II at 100.13-102.5) This delay could have been avoided by holding the freight train at Raceland Junction to meet No. 1 or by clearing the freight off the main line into Avondale Yard or onto the Algiers main in anticipation of No. 1's approach. (II at 102.6-102.21)

4.12 On December 31, 1979 train No. 1 was delayed because two opposing freight trains were allowed to leave Englewood Yard to meet No. 1 at Fauna. (II at 104.11-105.11) This delay could have been avoided by holding the second freight in Englewood Yard on yard tracks or on one of the main lines until No. 1 had passed. (IV at 152.19-152.21; V at 151.2-152.19)

4.13 On January 7, 1980 train No. 1 was delayed because No. 1 was not advised of the arrival of an opposing local freight which was given priority over No. 1 from Connell to Live Oak Spur. (II at 110.89-112.22; III at 143.1-144.18)

4.14 On October 15, 1979, train No. 2 was delayed when it was required to wait for a local freight at Echo, Vinton, Edgerly and Brimstone, rather than being permitted to make up some of the two hours and forty minutes it had already lost. (II at 114.3-114.21, 116.18-117.18)

4.15 Similar examples of avoidable freight interfer-

ence are described in the affidavits of Messrs. Larson, Sloan, Schaffer, DuBois, and Mitchell filed on December 20, 1979 and on February 1, 1980.

4.16. In all of the examples of freight interference described at the hearing and in the affidavits, alternatives existed which the dispatcher or yardmaster could have employed which would have avoided or minimized the delays to the Sunset Limited. The available alternatives were not complicated or sophisticated, but were standard railroad moves which dispatchers and yardmasters know or should know. (II at 119.22-121.7; V at 153.20-153.22).

4.17 Traffic levels on the Lafayette Division were not excessive during the observation periods. (II at 95.8-95.16; PX 33; PX 34) The workload of dispatchers on the Lafayette Division is moderate. (II at 99.11-99.2.)

4.18 Principally on the basis of the specific findings in this section 4, it is concluded that Southern Pacific regularly, frequently, in the normal course of its operations, in the absence of emergency, and without due regard for the preference to be accorded passenger trains, favored freight trains over passenger trains in meets and passes, needlessly obstructed the main line at sidings and in yards thereby creating the occasion for saw-bys, carelessly permitted freight crews to "die on their hours" thus permitting their trains to become an obstruction to passenger trains, casually issued train orders giving freight trains priority over passenger trains, failed to pay adequate attention to the need to clear the main track in advance of the predictable and infrequent passage of the Sunset Limited, and generally treated the matter of passenger train pre-

ference as though it were of little or no importance. Specific and numerous examples of this same activity continued to occur after issuance of this court's order of December 21, 1979.

5. Southern Pacific's Attitude Concerning the Preference for Passenger Trains and the Bearing of this Attitude on the Likelihood of Recurrence of Avoidable Freight Interference

5.1 Southern Pacific is primarily interested in the operation of freight trains. (V at 136.12) There is a general understanding within the Southern Pacific that the company does not favor the operation of passenger trains. (IV at 80.3. Southern Pacific would be pleased if the Sunset Limited were permanently terminated. (IV at 71.13; V at 100.16). Southern Pacific's Assistant General Manager told Amtrak officials, "Let's set the record straight. I don't give a good goddamn for your passenger trains." (III at 27.25-28.1)

5.2 Many of Southern Pacific's operating employees are not familiar with passenger train operations. (V at 135.25 - 136.2)

5.3 At the time of the hearings, Southern Pacific was unable to demonstrate specific steps it had taken to communicate to its employees the nature and importance of the statutory preference for passenger trains. (IV at 86.19; V at 135.25-136.3)

5.4 Southern Pacific's highest corporate officer dealing exclusively with Amtrak problems, Robert Joehner, has himself taken no specific action to instill the attitude that Amtrak trains are to run on time. (V at 136.17-137.23)

5.5 Mr. Joehner does not have first-hand knowledge of the recent problems on the Lafayette Division. The last time he visited the Lafayette Division was a single day in the summer of 1979. On that occasion he rode on the Sunset Limited only from Lafayette to Houston. He could not remember the last time prior

to that occasion that he visited the Lafayette Division. (PX 36 at 34.7-34.14 and 36.9-36.25)

5.6 Beginning in or about April of 1979, Southern Pacific's operating personnel perceived an attitude of indifference toward passenger trains among their fellow workers and immediate superiors. (III at 36.1; III at 51.22-52.2)

5.7 Disciplinary action is not regularly taken against Southern Pacific operating employees who fail to accord the Sunset Limited its statutory preference. (III at 13.3-13.9; III at 16.15-16.25; III at 46.20-46.23)

5.8 Southern Pacific's operating personnel did not take seriously the Special Notice required by this Court's Order of December 21, 1979, which stated that it is Southern Pacific's policy to give preference to passenger trains. (III at 37.3) They did not regard the notice as a matter which defendant was likely to enforce with discipline and sanctions. (III at 52.16)

5.9 Southern Pacific's principal operating witness testified that the judgments exercised by its employees in the instances described in section 4 of these Finding of Fact were appropriate (V at 7-a.2) and that, save for those instances as to which he conceded error, if those same circumstances were to recur in the future, Southern Pacific would deal with them in the same way it had done before. (V at 15.9-15.19)

5.10 Southern Pacific has planned certain capital improvements for the Lafayette Division. These capital improvements are not designed to insure that Southern Pacific will accord the statutory preference to passenger trains and will not necessarily have that effect. Southern Pacific's officers believe that surging business will continue to be a problem for Southern Pacific in operating the Sunset Limited on time (IV at 75.8; IV at 77.4-77.10) and that substantial and increasing pressure on the capacity of the Lafayette Division rail line will

make it more difficult for Southern Pacific dispatchers to accord preference to the Sunset Limited. (IV at 84.17-85.1)

5.11 After institution of this Court's Order of December 21, 1979, Southern Pacific promulgated blocking instructions and train schedules for its freight trains which established departure times regarded as optimum for its freights. These instructions and schedules provided that one freight train would leave Lafayette Yard only 26 minutes ahead of the Sunset Limited and another freight train would leave Avondale Yard only 33 minutes ahead of the Sunset Limited. (V at 24.6-28.20) If these freight trains and No. 1 were to depart at the scheduled times, delay to No. 1 would be virtually assured.

5.12 On February 6, 1980, Southern Pacific delayed an Amtrak passenger train on another line for 23 minutes and refused to move the train out of a station until Southern Pacific received assurances that, if it became necessary to water the locomotive en route, the delay in doing so would not be charged against Southern Pacific in the calculation of incentive payments Amtrak makes to Southern Pacific. (V at 129.10)

5.13 Principally on the basis of the specific findings in this section 5, it is concluded that Southern Pacific resents and would prefer to disregard the presence on its rail line of the Sunset Limited and other Amtrak passenger trains; that its attitude is known to its employees, who are aware that failure to accord the passenger train preference will not result in disciplinary proceedings; that its attitude of hostility to Amtrak is most recently exhibited in the February 6, 1980 incident referred to in the preceding paragraph; and that in view of Southern Pacific's unwillingness to acknowledge that the incidents described in section 4 of these Findings of Fact constitute avoidable freight interference, future episodes of the same kind are likely to recur.

6. Injury

6.1 Amtrak's ability to offer to the travelling public the alternative mode of quality transportation mandated by Congress depends upon the on-time performance of Amtrak's passenger trains. In deciding whether or not to travel by train, the travelling public is primarily concerned with the reliability of Amtrak's performance. (I at 12.21-13.5)

6.2 In 1979 the operation of the Sunset Limited resulted in an abnormally large volume of complaints from passengers. For the period May to August of 1979 Amtrak received passenger complaints at a system-wide rate of 7.9 complaints per 10,000 passengers. In that same period, complaints concerning the Sunset Limited were received at a rate of 37.4 per 10,000 passengers. During the remainder of the year this disparity increased. The rate at which Amtrak received complaints throughout its system declined to 3.7 per 10,000 passengers, but the rate at which Amtrak received complaints about the Sunset Limited increased to 45.9 per 10,000 passengers. A disproportionate number of these complaints concerned on-time performance. Many made specific mention of what the passengers perceived as freight interference. (III at 60.8-62.14, PX 20)

6.3 Southern Pacific admits that delays to the Sunset Limited discourage some of the travelling public from using rail passenger service. (Complaint and Answer, par. 32)

6.4 Principally on the basis of the specific findings in this section 6, it is concluded that Southern Pacific's activities which caused the Sunset Limited to run very late very often have caused serious injury to members of the travelling public, to those who attend travellers, to Amtrak and to the public in-

terest in intercity transportation.

II. PROPOSED CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to his controversy and of the subject matter of the controversy by virtue of the provisions of 45 U.S.C 547, 49 U.S.C. 10101 et seq., and 28 U.S.C. 1331(a), 1337, and 1345.

2. This Court has jurisdiction in this case to grant declaratory relief and further relief based on such a declaration under 28 U.S.C. 2201 and 2202.

3. Venue for this case in this Court is appropriate under 28 U.S.C. 1391(c).

4. Plaintiff's proof by clear, convincing and well documented evidence that defendant's agents have regularly ignored or denied to plaintiff, in the absence of any **emergency**, the preference to be accorded passenger trains pursuant to Section 402(e)(1) of the Rail Passenger Service Act ("the Act") -- which defendant sought to rebut with little more than the unsubstantiated opinions of its witnesses -- constitutes a showing of not only reasonable probability, but a very high probability, that plaintiff will succeed on the merits of the controversy.

5. The term **"emergency"** in Section 402(e)(1) includes derailments, collisions, storms, washouts, fires, or other accidental obstructions to track which place planned operations beyond the control of the operating railroad. The incidents described in Section 4 of the Findings of Fact were unaffected by any **emergency**.

6. Defendant has admitted through the testimony of its officers that it would achieve benefit to its general freight

operations if the Sunset Limited ran on time; and in light of the nature and levels of traffic involved, traditional rules governing dispatching, the physical railroad plant available, and the fixed, widely known and infrequent schedule of the Sunset Limited, according the statutory preference is within the competence of defendant's agents and will cause it no injury.

7. Defendant's failure to accord to passenger trains the preference mandated by 45 U.S.C. 562(E)(1) has caused injury to the travelling public, those who attend travellers, Amtrak, and the public interest in intercity transportation.

8. Southern Pacific's failure to accord the statutory preference to the Sunset Limited under the circumstances described in the Court's findings of Fact constitutes an action, practice and policy inconsistent with the policies and purposes of the Act; obstructs and interferes with Amtrak's discharge of its responsibilities under that Act; and threatens continued activity of the kinds described in Section 307 of the Act, 45 U.S.C. 547.

9. Southern Pacific's failure to accord the statutory preference to the Sunset Limited under the circumstances described in the Court's Findings of Fact constitute violations of the terms of Section 402(e)(1) of the R.P.S.A., 45 U.S.C. 562(e)(1); and the threat of continued violation demonstrated by Southern Pacific's primary concern for its freight traffic and its failure to devote adequate managerial attention to the needs of passenger service, despite issuance of this Court's temporary

restraining order dated December 21, 1979, warrant issuance of a preliminary injunction to compel adequate performance.

10. Southern Pacific's concern for the impact on its freight operations of according the statutory preference to passenger trains is an issue not before this Court, but one for the Secretary of Transportation to consider if relief from him is sought by application under Section (e)(2) of the Act, 45 U.S.C. 562(e)(2).

Respectfully submitted,

PLAINTIFF UNITED STATES OF AMERICA
By its attorneys

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(202) 633-4652

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	
)	
Plaintiff.)	
)	
vs.)	Civil Action
)	No. 79-3394
SOUTHERN PACIFIC TRANSPORTA-)	
TION COMPANY)	
)	
Defendant.)	

AFFIDAVIT OF JAMES L. LARSON

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, James L. Larson who, after first being sworn, states that the following facts are true and correct and within his personal knowledge.

1.

I, James L. Larson, gave testimony before the court on February 5, and 6, 1980 at the hearing on plaintiff's Motion for a Preliminary Injunction. During that testimony, I described my current occupation and employment history in the railroad industry.

2.

This affidavit is given in response to the Supplementary Affidavit of John D. Ramsey dated February 1, 1980, discussing instances of delay to the Sunset Limited on the Lafayette Division occurring in September and October 1979, which were not the subject of live testimony at the hearing.

3.

I have subsequently reviewed and analyzed various reports and documents relating to the specific instances cited.

4.

I have also reviewed the affidavit of Lawrence A. Brophy dated February 15, 1980, which also responds to Mr. Ramsey's supplementary affidavit.

5.

My investigation confirms the statements in Mr. Brophy's affidavit. In addition, I would add the following testimony:

6.

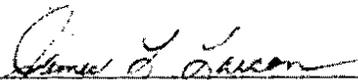
Larson Affidavit, Paragraph 10: Train No. 1 at Knippa, Texas, October 2, 1979

While Mr. Ramsey alleged that the switching took longer than anticipated and that the local freight encountered problems "in pumping air and charging his train," the Train Dispatcher did authorize the local freight to use the main track until 11:55 a.m. which was too late to avoid No. 1 receiving restrictive signal indications, indeed, I personally observed the local freight continue to switch the industry after No. 1 stopped at Knippa at 11:58 a.m. and then proceed to get the train into the clear. I observed no indication that there was any delay in releasing the air brakes on that train, and in fact the 8 minutes used by the local freight engine to proceed on the main track, couple to the train and pull into the clear, would indicate that they had no trouble with their air brakes. There is simply no evidence to support Mr. Ramsey's testimony that the local freight encountered any delay in releasing the air brakes.

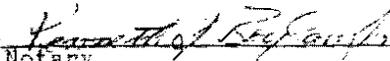
Larson Affidavit, Paragraph No. 3: Train No. 1 at Berwick and Bayou Sale, Louisiana, October 15, 1979

Mr. Ramsey's testimony refers to dispatching judgments and attempts to separate such judgments from preferential treatment of a freight train. However, the Train Dispatcher's role is to control and expedite the movement of trains. In this case the Train Dispatcher issued a train order restricting No. 1 in order to advance a local freight train. No. 1 was only 1 hour 11 minutes late when passing the last station before the train order was issued. The dispatcher restricted No. 1 at Bayou Sale until they would be 1 hour 21 minutes late to wait for the local freight. This is clearly a case of preferencing a freight train over a passenger train.

This 19th Day of February, 1980.


James L. Larson

Sworn to and subscribed before me this 19th day of February 1980.


Notary

My Commission expires 1-1-82

Exhibit 3

7M4
file
2-22-80

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	Civil Action
vs.)	No. 79-3394
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SOUTHERN PACIFIC TRANSPORTA-)	
TION COMPANY)	
)	
Defendant)	

PLAINTIFF'S REPLY TO DEFENDANT'S POST-HEARING
PAPERS ON MOTION FOR PRELIMINARY INJUNCTION

This memorandum replies to points raised in the Post-Hearing Memorandum of Southern Pacific Transportation Company in Opposition to Plaintiff's Motion for Preliminary Injunction (hereinafter "Defendant's Memorandum") and to Defendant's Proposed Findings of Fact and Conclusions of Law, both dated February 19, 1980. For convenience, this memorandum addresses those points in the same order in which defendant has raised them.

1. Motive For Bringing This Action
(Defendant's Memorandum, p. 1)

Southern Pacific begins its memorandum with the accusation that this case, although brought "in the name of" the Attorney General, is in reality an effort by Amtrak to attract the attention of the railroad industry, to make the railroad industry fearful, and to impress Congress. Defendant's charge is categorically denied. This action was brought not only in name but also in fact by the United States. 1/ Defendant's self-

1/ Defendant was advised in response to one of its interrogatories that this litigation was brought pursuant to an investigation by the United States. (Plaintiff's Responses to Defendant's First Set of Interrogatories, dated January 30, 1980, Interrogatory 3(c)).

serving charge is not supported by any evidence -- not even by the unsubstantiated opinions of its witnesses.^{2/}

2. Financial Considerations (Defendant's Memorandum, pp. 4-13)

Southern Pacific spent a great deal of time at the hearing developing evidence concerning the financial aspects of passenger train service, and devotes a great deal of attention to this subject in its Memorandum. Although Southern Pacific's counsel described these aspects as "the heart of the matter," (V at 90.15), they are clearly irrelevant to this litigation. As the Court suggested, this line of argument seems intended to challenge the validity of the Amtrak legislation. (V at 90.22) It also appears to be an attempt to justify (rather than deny) the fact that Southern Pacific would like to rid itself of the obligation to operate Amtrak trains. (Plaintiff's Memorandum at pp. 32-36 and Plaintiff's Proposed Findings of Fact 5.1-5.13) ^{3/}

3. Defendant's "Policy" Concerning Amtrak (Defendant's Memorandum, pp. 9-13)

Southern Pacific attempts to rebut plaintiff's evidence concerning Southern Pacific's attitude with evidence concerning

^{2/} Plaintiff seems to suggest that there is something untoward about Amtrak taking affirmative action to carry out the Congressional mandate to improve on-time performance. Given that mandate, it is altogether logical that Amtrak would first investigate the performance of the worst train in its system. Given the results of that investigation, it was incumbent upon Amtrak to notify the Attorney General. To the extent that this action influences other railroads to eliminate avoidable freight interference on their lines, such a result is desirable and in the public interest.

^{3/} In any event, Southern Pacific's discussion of finances ignores what its own witness admitted: if Southern Pacific thinks it is not being adequately compensated by Amtrak, Southern Pacific may seek further compensation from the Interstate Commerce Commission. (V at 116.13-116.19; 45 U.S.C. §562(a))

Southern Pacific's policy.^{4/} The short answer is that they are not the same thing. It may well be, as Southern Pacific contends, that the official policy of Southern Pacific is to accord the statutory preference. How could it be otherwise? It would be surprising in the extreme if Southern Pacific, a large, publicly held and extensively regulated corporation, had an official policy of violating the law.

Southern Pacific's problem is that it has not only a publicly expressed policy but also a publicly expressed attitude. While the former may be positive, the latter is negative and has an undermining effect. The result is that Southern Pacific has made only token efforts either to educate its employees concerning the importance of the preference or to discipline employees for violating the preference. (Plaintiff's Proposed Findings of Fact 5.1-5.13; Plaintiff's Memorandum, pp. 32-36) Employees working on the Lafayette Division understand that the attitude is stronger than the policy and this has engendered a feeling of indifference and cynicism among them. Thus, when Southern Pacific reiterated its "policy" in the court-ordered Special Notice of December 21, 1979, these employees considered it "a joke." (IV at 36.10-37.4; III at 52.9-52.22)

^{4/} Southern Pacific's repeated references to its allegedly benevolent policy toward Amtrak are utterly irrelevant to this proceeding. Neither Southern Pacific's "policy" nor its "attitude" have any bearing on the fundamental question whether violations of the statutory preference have occurred on the Lafayette Division. They are clearly not part of the plaintiff's cause of action. See Section 10 *infra*. Plaintiff has addressed Southern Pacific's attitude because it is relevant to the likelihood that future violations will occur. (Plaintiff's Memorandum, pp. 32-36) Southern Pacific's laborious explanation of its hostility to passenger trains tends to confirm plaintiff's inference that violations will recur without a court order.

4. Lafayette Division Traffic (Defendant's Memorandum, pp. 13-21)

Southern Pacific continues to rely upon freight congestion as its main excuse for delaying the Sunset Limited. In order to do so, Southern Pacific simply ignores the Southern Pacific correspondence introduced at the hearing in which the highest Southern Pacific officers on the Lafayette Division stated in the clearest possible terms that traffic on the Lafayette Division was not so congested as to require the delays which the Sunset Limited encountered. (PX 29-33)

Southern Pacific's position is also refuted by Southern Pacific's own freight tonnage data. (PX 33) Southern Pacific attempts to explain away its data by confusing the level of ton-miles with the question of speed, stating:

It should be obvious, however, that an operation which is slowed down will not produce the ton miles that it would produce if it were operating at its normal pace."

(Defendant's Memorandum, p. 17)

Defendant's conclusion is neither obvious nor correct. Southern Pacific's footnoted example suffers from an elementary flaw, in that no time reference is considered. An example will illustrate this flaw. A train crossing the Lafayette Division from New Orleans to Houston goes 364 miles. The speed at which the train travels does not change the ultimate number of miles it crosses, nor of course does it change the tons of freight the train carries. The ton-miles of the trip are the same regardless of how fast the train goes. The only effect of speed is to fix how much of the trip can be completed in a given length of time. According to Mr. Ramsey's figures (Exhibit 7 to Affidavit dated January 23, 1980) it took a freight train one day to cross the division in October 1978 but two days in October 1979. Therefore, if one were to measure the ton-miles for one train for one day, only half the ton-miles would be accumulated

on a given day for a given train in October 1979 as compared to October 1978. But the October 1979 train keeps going through the next day, and after two days each train has completed its trip, and the same ton-miles are achieved.

The significance of this analysis becomes evident when one compares ton-miles for one month or one year, which are the periods for which the data on freight volume presented by plaintiff were compared. Assume for simplicity that in both 1978 and 1979 Southern Pacific started one train across the division each day bearing the same tonnage of freight. Thirty-one October 1978 trains would complete the journey in October, and thirty of the half-as-fast October 1979 trains would do so; only the October 31, 1979 train would fail to complete its journey in October. The difference in October ton-miles caused by the difference in train speeds is only $1/31$ or about 3%.

When the time frame is expanded to a year the true impact on freight volume of train speeds becomes infinitesimal. In the example, 365 trains would complete the journey in 1978 and 364 in 1979. The difference in ton-miles is .0027. In fact, the monthly figures become identical, because the September 30, 1979 train adds the October ton-miles which the October 31, 1979 train loses.

Defendant's position with respect to the amount of freight tonnage on the division depends solely upon a fallacious view of the ton-mile data presented by plaintiff. Mr. Ramsey contended that other, more accurate, data existed. (V at 58.5-58.11) Defendant could have produced this other data and would certainly have done so if it supported its case, but failed to do so. Upon this record the Court must conclude that no increase in freight volume has been demonstrated.

Even if one were to assume that the Lafayette Division were too congested, Southern Pacific could have announced an

embargo, which would have exempted Southern Pacific from its obligation to accept additional freight business on the Lafayette Division. It appears that Southern Pacific made a conscious decision not to announce an embargo, with a view toward running as much freight over the Lafayette Division as physically possible.

5. The Statutory Preference, 45 U.S.C. § 562(e)
(Defendant's Memorandum, pp. 21-29)

A. Background (pp. 21-24)

Defendant belatedly relies upon new evidence concerning a contract negotiation between Amtrak and Southern Pacific which occurred sometime before the enactment of the statutory preference. (Defendant's Memorandum, pp. 22-24) This new evidence was not introduced at the hearing, is not subject to judicial notice, and is not a proper part of the record of this case. More importantly, it is plainly irrelevant. What Amtrak and Southern Pacific once did in the negotiation of a contract does not shed any light on what Congress subsequently intended to do in enacting the statutory preference.

B. The Enactment of the Statutory Preference
(pp. 24-29)

Defendant's account of the enactment of the statutory preference simply ignores the most significant fact of the legislative history: the statutory preference was passed over the combined opposition of the railroads, the Department of Transportation and Amtrak itself. (Response To Memorandum of Southern Pacific In Response To Motion For Preliminary Injunction, dated February 1, 1980, at pp. 6-12.) Surely Congress intended to do something more than ratify the status quo. Even defendant concedes that the statutory preference was enacted "in the face of continuing concern about Amtrak's on-time performance." (Defendant's Memorandum, p. 27) Defendant also concedes that the

debate over the ICC rule under consideration at the time Congress enacted the statutory preference focused upon the "sufficiency of enforcement mechanisms then in existence" -- a euphemism for the fact that enforcement of the traditional preference had broken down once the operating railroads were required to operate intercity passenger trains on Amtrak's account rather than their own. (Defendant's Memorandum, p. 26)

Congress evidently intended to ensure that Amtrak's passenger trains would have at least the same priority over freight trains which many railroads had historically accorded to their best passenger trains (and which Southern Pacific had accorded to the Sunset Limited in 1950). Congress wanted this preference to have the force of law and not to be subject to the changing business plans of the operating railroads. The preference it enacted is not any more rigid, ironclad, or impractical than the very rule in effect on rail lines throughout the country prior to the creation of Amtrak. Moreover, the preference is subject in the statute, as it was subject in railroad history, to an **emergency** exception.

Southern Pacific's prediction that the adoption of this preference would bring its operations to a complete halt is not credible. Mr. Larson gave several examples of railroads which operated successfully while giving strict preference over freight trains to their best passenger trains. (II at 36.24-139.6) And, of course, as plaintiff has mentioned repeatedly, Southern Pacific once granted full preference to the Sunset Limited itself. (PX 28, pp. 21-24; V at 43.1-44.7; see Plaintiff's Proposed Finding of Fact 2.4)

Although the legislative history clearly supports the construction of the statutory preference which plaintiff advocates, it should be kept in mind that legislative history is a secondary interpretive device that need not be consulted when

the language of the statute is clear on its face. In the statutory preference Congress so plainly mandated that Amtrak passenger trains are to have the right of way over freight trains that resort to legislative history is not necessary.

Defendant's Memorandum includes another flaw of statutory interpretation. Defendant suggests that the existence of two exceptions to the general statutory rule creates an inference that the statute should be construed in a loose and flexible fashion. (Defendant's Memorandum, p. 28) The proper inference is precisely to the contrary. Where Congress undertakes to create two and only two exceptions to an otherwise precise rule, no other exceptions should be recognized. National Association of Railroad Passengers v. National Railroad Passengers Corp., 414 U.S. 453, 458 (1974).

6. Southern Pacific's "Policy" In The Lafayette Division (Defendant's Memorandum, pp. 29-30)

Defendant is incorrect in stating that plaintiff's position is that Southern Pacific follows one "policy" concerning the statutory preference in the Lafayette Division and another "policy" elsewhere. See Section 3, supra. Plaintiff's position is that Southern Pacific has permitted numerous acts of avoidable freight interference to delay the Sunset Limited. Why such acts occur frequently in one place but not as frequently in another is a question which need not be decided.^{5/}

^{5/} Southern Pacific states that Mr. Boyd conceded that it would strain credulity to maintain that Southern Pacific had a different policy toward Amtrak on the Lafayette Division than exists on the rest of its system. (Defendant's Memorandum, p. 29) In truth, Mr. Boyd said he would have found such a situation surprising until he sent out his riding team. (I at 47.1-47.2)

7. Plaintiff's Evidence on Freight Interference (Defendant's Memorandum, pp. 30-31)

Southern Pacific appears to contend that plaintiff's evidence is insufficient because it pertains to only 63 examples of freight interference. First, defendant's contention is factually inaccurate. The affidavits submitted by the Amtrak observers indicate that the incidents specifically mentioned were not an exhaustive list but rather were representative samples of various kinds of repeated acts. See, e.g., Affidavit of James Larson, filed December 20, 1979, at page 9. Defendant's table at page 31 suggests that this case involves only 6 hours and 26 minutes of delay occasioned in 11 incidents. The table fails to take into account the multitude of similar delays to which the Sunset Limited has been subjected. The fact is that the Sunset Limited suffered an average of more than 6 hours 26 minutes delay on its operations during the period from December 1-14, 1979.

Second, defendant's contention is wholly at odds with an understanding reached in a pre-hearing conference with this Court on February 1, 1980. At that proceeding plaintiff's counsel expressed the concern that if plaintiff limited its evidence at the hearing to a small number of designated incidents, defendant would then contend that only isolated incidents had occurred. Defendant's counsel responded by emphatically denying that defendant would make such a contention:

MR. AILES: Your Honor, it seems to me we are back where we started. Our position is not at all that these are isolated violations. Our position is when you look into these situations they weren't violations at all and on each -- for each one they rely we have to look into it and say the real circumstances were as follows: If this move hadn't been made the passenger train would have been delayed more than it was by this move and therefore this was the proper way to handle it. Now, the statement that we just say these are just, "boys will be boys; these are occasional violations," is totally in error.

THE COURT: Then I understand that the defendants in this case are not going to make that argument.

MR. AILES: I'll say we are not.

(February 1, 1980 transcript at 24.16-25.5) Defendant should be estopped from contending after the hearing that the violations plaintiff has proved are isolated ones. (Defendant's Memorandum, p. 3; p.18, fn. 57, p. 46; see also Defendant's Proposed Findings of Fact and Conclusions of Law, p. 7, paras. 6, 6a)

Third, and most important, defendant's contention is irrelevant as a matter of law. In order to prevail plaintiff need only show that the statutory preference has been violated and, unless defendant is enjoined, may be violated again. (Plaintiff's Memorandum at p. 30) Although plaintiff need not show more, it has in fact done so. The evidence indicates that avoidable freight interference to the Sunset Limited occurred so blatantly and so frequently, and was so rarely punished by management, that it constituted a standard operating procedure.

8. The Incidents Of Freight Interference
(Defendant's Memorandum pp. 31-41)

In support of its version of the freight interference incidents, defendant cites one source of evidence: the testimony of Mr. Ramsey. Plaintiff contended in its memorandum that Mr. Ramsey's testimony was unsupported because he did not adequately identify the documents and people from whom his information was supposedly gleaned. That contention is well illustrated by the evidence defendant cites in its memorandum.

In the transcript cited by defendant in footnote 97, Mr. Ramsey refers to "computer records" which were prepared at some unspecified time and about which one is told only that they support Mr. Ramsey's conclusion. (V at 158.16-159.12) Mr. Ramsey did not bring those records to Court. (V at 161.17-161.20)

In the transcript cited by defendant in footnote 98, Mr Ramsey states:

Well, I would base it on actual check of the condition of the yard by the officers who were in charge of the operation on that particular day. And our routine records that we maintained, that could tell us that.
(III at 111.6-111.9)

Again Mr. Ramsey does not state who the "officers" were, what they found, what they told him, what the "routine documents" were, or what those documents contained. A pattern emerges: Mr. Ramsey's identification of sources is vague, contains no hard facts, and is freely laced with self-serving conclusions. Rather than stating the facts about the documents in question, Mr. Ramsey simply gives his personal assurance that these documents are "routine" and "could tell us that."

Mr. Ramsey's testimony is also self-contradictory. On various occasions, Mr. Ramsey offered different and conflicting explanations for the same incident. Defendant's Memorandum at various places refers to one of Mr. Ramsey's explanations while ignoring the conflicting explanations he offered elsewhere in his testimony. For example, Defendant's Memorandum states that in its first example (the October 7, 1979 meet at Raceland Junction) the western end of Avondale Yard was blocked by two trains, one of which was Extra 6679 east, which defendant says "unexpectedly had to wait" from 2:25 PM until almost 6:30 PM for authority to cross the Huey P. Long Bridge. This contention is based solely on Mr Ramsey's testimony on Wednesday, February 6, 1980 (III at 108-109). Defendant's citation to Mr. Ramsey's testimony ignores the fact that on the following day Mr. Ramsey first denied that this freight train could have been put into the yard tracks at Avondale and then admitted that it could have been put into those yard tracks. (Compare IV at 97.24-98.2 with IV at 103.9, IV at 105.24-106.2 and IV at 117.12-117.15; see also Plaintiff's

Memorandum at pp. 16-17.) Another example concerning the Beaumont siding is discussed in Plaintiff's Memorandum at p. 20.

There are numerous other indications that Mr. Ramsey is a fundamentally unreliable witness. He stated in his responses to plaintiff's interrogatories and at the hearing that no compilation of tonnage data for the Lafayette Division was available. Yet plaintiff secured that very compilation in another proceeding and presented it as Plaintiff's Exhibit 33. (V at 58.4) When asked questions which called for answers detrimental to Southern Pacific's defense, Mr. Ramsey became so rambling and unresponsive as to become incoherent. (III at 106.9-107.19; IV at 54.19-55.22; V at 26.7-27.10; V at 32.10-32.16; V at 38.1-38.8; V at 40.5-40.16; V at 78.19-79.11) And his characterization of his own handwriting in response to a question by the Court was highly suspect.^{6/}

Plaintiff will not belabor the record of this case with further examples but simply wishes to point out that Southern Pacific has now committed itself to a position of complete reliance upon Mr. Ramsey's testimony. If the Court determines that Mr. Ramsey is not a credible witness, Southern Pacific's defenses must fail.

9. Southern Pacific's Admissions of
Avoidable Freight Interference
(Defendant's Memorandum, pp. 40-41)

Defendant admits that in at least three of the eleven incidents discussed at the hearing, the freight interference to the Sunset Limited Limited was avoidable: "All three of these situations, we concede, involve errors." (Defendant's

^{6/} When asked by the Court whether a "t" in a note written in his own hand was capitalized, Mr. Ramsey stated that it was not, that he made his lower-case "t's" as if they were capitals. The very sentence under discussion contains three other "t's" which are lower-case and which are clearly dissimilar to the letter that prompted the Court's question. (V at 52.7-17; Plaintiff's Exhibit 30)

Memorandum, p. 41) 7/. Defendant attempts to soften the impact of these damaging admissions concerning a substantial portion of the incidents by suggesting that these errors became apparent only with the benefit of hindsight:

The remaining three of the eleven cases all involve situations where the Southern Pacific witness [Mr. Ramsey] testified that if the facts had been as now known by him, he would have made a different dispatching decision.

(Defendant's Memorandum, p. 40, emphasis supplied) Defendant's characterization of the record in this action is false. At the conclusion of Mr. Ramsey's testimony, the Court asked Mr. Ramsey a series of questions seeking to clarify this very point. After giving two answers which were typically unresponsive and self-serving, Mr. Ramsey made the following statement:

Q. [By the Court]: But in those cases where you would have acted differently it's not based upon hindsight as I understand it but based upon your judgment?

A. That's correct.

(V at 79.12-79.15)

10. The Defense of Good Faith and Lack of Intent (Defendant's Memorandum, pp 42-43)

Defendant takes the position that the statutory preference is not violated unless freight interference is shown to be intentional and that the statutory preference has been accorded if Southern Pacific makes "a good faith effort to give priority to the passenger trains." (Defendant's Memorandum, p. 42) The

7/ Similarly, in his supplemental affidavit, Mr. Ramsey admits that in many of the incidents discussed in plaintiff's affidavits (but not at the hearing) the freight interference to the Sunset was also avoidable. (Supplemental Affidavit of John D. Ramsey, §§III, V, XVIII, XIX, and XXVI) In his first affidavit Mr. Ramsey made no response whatsoever to most of the incidents of freight interference described in plaintiff's affidavits dated December 19, 1979.

statute does not provide exceptions for good faith or lack of intent. If Congress had intended to prohibit only intentional interference with passenger trains, Congress could have easily said so. Moreover, as indicated supra at page 8, the fact that Congress created two express exceptions to compliance with the statutory preference indicates that, save for those two exceptions, Congress intended the statutory preference to be strictly applied.

Southern Pacific is also incorrect in stating that there is no evidence of intent to interfere with the Sunset Limited. While plaintiff is not required to prove intent, it has done so. As indicated by the testimony of Mr. Larson, in many of the incidents the dispatcher was confronted with two or more known alternatives, one of which impeded the Sunset Limited and one of which did not, and chose the former rather than the latter. (II at 120.15-121.7) In such instances, the dispatchers intentionally took actions which violated the statutory preference. Certainly, this Court would be on firmer ground if it inferred Southern Pacific's intent from what Southern Pacific did than if it accepted at face value the self-serving professions of intent offered by Southern Pacific's witnesses.

11. Emergency (Defendant's Memorandum, pp. 43-45)

Defendant's view of the concept of emergency is vague and implausible:

the emergency provision was designed to encompass short term disruptions of normal operations"

* * *

An 'emergency' in railroad parlance can encompass continuing as well as episodic problems"

* * *

. . . The term emergency must be broad enough to cope with [a congested situation where all operations are bogged down and all trains, passenger and freight, are severely delayed].

(Defendant's Memorandum, pp. 40-41, emphasis supplied, footnote omitted). Plaintiff hesitates to comment on the meaning of these opaque sentences, but it would appear that defendant's position is that an **emergency** exists whenever congestion occurs. Mr. Ramsey admitted, however, that in his view congestion does not constitute an **emergency per se**. (V at 18.14-18.15) ^{8/} In any event, Southern Pacific's memorandum makes no attempt to distinguish congestion which occurs as a result of force majeure events from congestion which occurs as the result of inadequate dispatching or decisions to put additional freight traffic on the Lafayette Division. Surely the **emergency** exception does not apply to every incident created by defendant's desire to maximize freight revenue.

Defendant's Memorandum is equally vague with respect to the facts pertaining to the **emergency** issue. Defendant states that "an **'emergency'** did in fact exist on the Lafayette Division during much of the relevant time period." (Id. at p. 44, emphasis supplied) Defendant then refers to an event (a strike) which occurred on October 1, 1979 and states that there was serious congestion "[d]uring the month of October." Defendant declines to state when any **emergency** began or ended. Defendant declines to explain why any particular incident at issue in this case constitutes an **emergency** situation.

Plaintiff again hesitates to comment on the meaning of such vague statements, but it appears to be defendant's position that an emergency existed continuously from October of 1979 until January of 1980. That proposition is contradicted by the testimony of Mr. Ramsey. (IV at 157.23-158.1, V at 15.25-16.6; 18.4-18.20)

^{8/} Southern Pacific flatly contradicts Mr. Ramsey by stating in its Proposed Conclusions of Law that there was a "**continuing emergency**" on the Lafayette Division. (Defendant's Proposed Findings of Fact and Conclusion of Law, para. 6(b).

A specific example discussed at the hearing demonstrates defendant's conception of "emergency." Plaintiff's Exhibit 8-I depicted an instance in which a freight train was allowed to depart Englewood Yard in the face of No. 1, knowing that a delay to No. 1 would result. Defendant's only explanation for this action was that it was absolutely necessary to move the freight out of the yard in order for its humping activities in the yard to continue uninterrupted. (III at 134.1-134.21) Defendant classified this situation as an emergency. (IV at 157.16-157.22)

Mr. Brophy's testimony demonstrated that congestion in the yard was not heavy on that date. (V at 151.2-152.19) But even if the yard were heavily congested on that date the possibility that humping activities might have to be interrupted temporarily in order to allow the Sunset Limited to pass unimpeded is not an emergency. When such a situation develops the statute requires that the humping activity be interrupted.

Defendant states that the term emergency encompasses "short term disruptions of normal operations." Plaintiff vehemently disagrees. The preference must be accorded in such situations. If short-term disruptions occur with frequency, defendant's sole remedy is to plead to the Secretary of Transportation that complying with the preference is adversely affecting its freight operations. If defendant's view prevailed, the waiver provision in subsection 2 would be superfluous. The Sunset Limited could be delayed with impunity any time defendant's freight operations would be impeded.

Plaintiff offered a substantial amount of evidence with respect to the concept of emergency and has discussed it extensively. In the papers filed on February 19, 1980, plaintiff indicated its view that "the term includes derailments, collisions, storms, washouts, fires or other accidental obstructions to the track which place planned operations beyond

defendant's control." (Plaintiff's proposed Preliminary Injunction, par. 2). This view of the concept of **emergency**, unlike defendant's, is consistent with Congress' clear intention to give Amtrak's trains preference over freight trains.

In any event, plaintiff's evidence has demonstrated that the incidents of freight interference presented here were not caused by any **emergency**, no matter how that term is defined. Even if one were to assume that any form of congestion automatically constitutes an **emergency**, plaintiff has demonstrated that during the incidents discussed at the hearing the Lafayette Division was not so congested as to make it impossible to clear the main track for the Sunset Limited. On the contrary, plaintiff proved by clear and convincing evidence that, no matter what the general level of congestion might have been, in each incident Southern Pacific had enough extra room to get the freight traffic out of the way of the Sunset Limited.

In this regard it is interesting to note that defendant's post-hearing papers do not attempt to contend that the 11 incidents discussed at the hearing which caused delay to the Sunset Limited were caused by any force majeure event (e.g., floods, strikes, hurricanes, derailments). (See Defendant's Memorandum, pp. 32-41.)^{9/}

Defendant has proposed findings of fact with respect to "serious congestion," "severe weather conditions", "unanticipated labor stoppages" and "work taken to improve track and other facilities." (Defendant's Proposed Findings 8, 8d, 8e and 8f) However, defendant has not proposed any findings that these events caused any of the freight interference incidents cited by plaintiff. In fact, defendant has proposed no findings of fact

^{9/} On cross-examination Mr. Ramsey admitted that the incidents cited by plaintiff could not all be excused by the occurrence of **emergencies**. (IV at 157.23-158.1; V at 71.10-71.13)

concerning these incidents.

Thus, defendant's case with respect to the **emergency** issue is deficient with respect to causation: even if one concedes that **emergencies** existed, defendant has not proved that those **emergencies** caused the delays to the Sunset Limited at issue in this case.

12. Relief (Defendant's Memorandum pp. 46-54)

Southern Pacific states that plaintiff is seeking a "mandatory" injunction. This, of course, is technically true because plaintiff's proposed Preliminary Injunction is not in the form of a general order instructing defendant to refrain from violating the statutory preference. Plaintiff seeks an order compelling defendant to amend the timetable for the Lafayette Division to include language which implements the statutory preference in specific terms. (Plaintiff's proposed Preliminary Injunction, par. 1) Similarly, plaintiff seeks an order compelling defendant to issue a special notice which implements the statutory **emergency** exceptions in specific terms. (Plaintiff's proposed Preliminary Injunction, par. 2) The particular instructions proposed by plaintiff are especially appropriate because they are based upon the instructions Southern Pacific itself used voluntarily in 1950 when Southern Pacific wanted to accord full preference to the Sunset Limited.

The main purpose of these two items of relief is to specify what the statute requires. Thus, in practical terms what plaintiff seeks is not so much a mandatory injunction as a specific one. Plaintiff could just as easily have sought the

same relief in the form of a prohibitory injunction.^{10/} Whether this Court's order is mandatory or prohibitory in form, this case presents appropriate circumstances for granting the relief plaintiff requests. This Court has already ordered defendant to accord the statutory preference. The evidence shows that defendant continues to violate the preference. Defendant continues to insist that its prior actions comply with the statute. Defendant is primarily concerned with the movement of its freight trains. On the basis of this record, it must be concluded that defendant will not accord the statutory preference unless it is given specific instructions to do so.

Southern Pacific argues that the Court's discretion to enter the order plaintiff seeks is narrowly circumscribed. The case law does not support this proposition. "A court is not limited to simply prohibiting action in violation of a statute, but may also require affirmative acts to be taken to assure compliance." United States v. City of Chicago, 549 F.2d 415, 440-41 (7th Cir.), on remand, 437 F.Supp. 256, cert. denied, 434 U.S. 875 (1977). And where a plaintiff seeks to compel compliance with statutory requirements, the traditional balancing exercise will be abandoned. Atchison, Topeka & Santa Fe Railway Co. v. Callaway, 382 F. Supp. 610, 623 (D.D.C. 1974). ("When . . . federal statutes have been violated, it has been the long standing rule that a court should not inquire into the traditional requirements for equitable relief.") National Wildlife Federation v. Andrus, 440 F. Supp. 1245, 1256 (D.D.C. 1977); Sierra Club v. Coleman, 405 F. Supp. 53, 54 (D.D.C. 1975). The reason for abandoning the traditional equitable test

^{10/} For example, plaintiff's proposed preliminary injunction orders defendant to issue an instruction that other trains and engines "clear the leaving times of Nos. 1 and 2 not less than five minutes." (par. 2) The result would be the same if the Court enjoined defendant from failing to have its other trains and engines clear the leaving time of Nos. 1 and 2 by five minutes. Plaintiff would have no objection to the use of the prohibitory form of injunction.

is obvious: a defendant cannot be heard to argue that the burden it will suffer in complying with the law is too great. Cf. Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966), where the Second Circuit recognized a lesser showing of need for injunctive relief by plaintiff where "the only consequence of an injunction is that the defendant must effect a compliance with the statute which he ought to have done before."

Defendant's past violations of the statutory preference were numerous and have occurred over a substantial period of time. They continue to occur up to the present day. There will be countless daily unsupervised opportunities for Southern Pacific to violate the statute in the future and Southern Pacific has a demonstrated financial motive to do so. Therefore, plaintiff respectfully requests that the Court enter a preliminary injunction in the form attached to Plaintiff's Memorandum.

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CERTIFICATE OF SERVICE

I certify that I have served the foregoing Plaintiff's Reply to Defendant's Post-Hearing Papers on Motion for Preliminary Injunction by causing a copy of same to be delivered in hand to defendant's attorney of record, Stephen Ailes, Esq., Steptoe & Johnson, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036.


Andrew M. Wolfe

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