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

Re: *Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f), STB Docket No. EP-726*

Dear Ms. Brown:

I am enclosing for filing in the above-captioned proceeding the reply comments of the Capitol Corridor Joint Powers Authority (CCJPA). We appreciate the opportunity to offer the CCJPA's views on the Surface Transportation Board's proposed statement of policy.

Thank you very much for your assistance in this matter.

Sincerely,

Allison I. Fultz

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 728

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

**REPLY COMMENTS OF THE
CAPITOL CORRIDOR JOINT POWERS AUTHORITY**

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Dated: April 13, 2016

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SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP 728

**IMPLEMENTING INTERCITY PASSENGER TRAIN ON-TIME PERFORMANCE
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The Capitol Corridor Joint Powers Authority (CCJPA) strongly disagrees with the position of the Association of American Railroads (AAR), several of its members, and the Surface Transportation Board (the Board) that the preference accorded by statute to intercity and commuter trains¹ operated by or for Amtrak is anything less than absolute. The plain language of 49 U.S.C. § 24308(c) requires each dispatching decision to prioritize the movement of intercity and commuter trains operated by or for Amtrak over the movement of freight trains. CCJPA offers the following reply comments to (a) urge the Board to withdraw the notice of its unauthorized revision of the clear language of the statute as proposed in this proceeding, (b) offer CCJPA's views on the role of negotiated performance agreements in the context of an investigation under 49 U.S.C. § 24308(f), and (c) refute some host carriers' suggestion that complainants under section 24308(f) must make a threshold showing that preference has been violated.

¹ The title of the instant proceeding, as well as several of the Board's comments, may be misconstrued to suggest that commuter trains operated by or for Amtrak are not entitled to preference coextensive with that accorded to intercity passenger trains operated by or for Amtrak. *See* Proposed Policy at 4 ("We therefore favor a systemic approach to preference – one that focuses on minimization of total delays affecting *intercity passenger train movements* while on the host carrier's network, consistent with the statute."). From the plain language of the statute, these statements are incomplete, inaccurate, and must be corrected by the Board. 49 U.S.C. § 24308(c) ("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.").

I. Background

The Capitol Corridor is a state-supported intercity passenger train system that provides a convenient alternative to traveling along the congested I-80, I-680, and I-880 freeways by operating fast, reliable, and affordable intercity rail service to sixteen stations in eight Northern California counties: Placer, Sacramento, Yolo, Solano, Contra Costa, Alameda, San Francisco, and Santa Clara. Since August 2012, the Capitol Corridor has run thirty daily trains (twenty-two on weekends and holidays), with an annual ridership of nearly 1.5 million passengers. Of these, fewer than thirty percent of passengers ride from end to end.

Capitol Corridor operates over a 170-mile segment of rail line owned and dispatched by the Union Pacific Railroad (UPRR), and over a segment of line owned by the Peninsula Corridor Joint Powers Board. The CCJPA has contracted with Amtrak to operate the Capitol Corridor trains. CCJPA, Amtrak, and UPRR have negotiated and are all parties to an Incentive Agreement for Operation of Capitol Corridor Trains (the Agreement), which defines on-time performance as completing a route within route-specific scheduled running times defined by the Agreement, plus allowances for certain negotiated delays.

II. Host Carriers May Not “Balance Interests” As Between Amtrak-Operated Passenger and Freight Operations

CCJPA strongly disagrees with the AAR’s, several of its members’, and the Board’s apparent disregard of the plain language of Section 24308(c) in concluding that the statutory right to preference is anything less than absolute. *See, e.g.*, Initial Comments of CSX at 1 (Filed Feb. 22, 2016) (“[P]reference should not be viewed as absolute priority, and should instead balance the interests of Amtrak passengers, commuter rail passengers, shippers, and host railroads.”); Initial Comments of AAR at 10 (“Preference does not mean that Amtrak trains never yield to freight traffic. Rather, preference merely means a *weighting* in favor of Amtrak.”)

(emphasis in original); Proposed Policy at 3 (“[A] host rail carrier need not resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train. Under this view of preference, the Board would take a systemic, global approach in determining whether a host carrier has granted the intercity passenger trains preference.”). The only support advanced for this proposition is a strained reading of the statute that completely ignores a critical clause, and an appeal to the general terms of the Rail Transportation Policy (RTP) adopted by Congress and codified at 49 U.S.C. § 10101. The Board should not permit either to override Congress’ clearly expressed, unqualified intent to provide preference to intercity and commuter trains provided by or for Amtrak.

Both AAR and the Board suggest that “Congress expressed its view that ‘preference for . . . passenger transportation . . . [should not] materially lessen the quality of freight transportation provided to shippers.’” Proposed Policy, at 3; *see also* Initial Comments of AAR, at 8 (claiming that Section preference is not absolute “‘if the Board . . . decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers” (citing 49 U.S.C. § 24308(c)) (first alteration in original). That is *not* what the statute says.² The first clause of 49 U.S.C. § 24308(c) provides, “Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection.” The second clause provides, “A rail carrier affected by this subsection may apply to the Board for relief.” *Id.* And the third clause, in full, provides, “If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will

² To borrow a line from popular culture, the Board, AAR and several of its members have essentially “yada yada’d over the best part.” *See Seinfeld* (NBC television broadcast April 24, 1997).

lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.” *Id.*

Read together, these clauses clearly indicate that Congress intended the Board on a case-by-case basis to consider whether according Amtrak preference would materially lessen the quality of freight transportation provided to shippers, and only then on application by a rail carrier with an opportunity for hearing. The Board’s proposed policy and the position of AAR and several of its members eliminates this requirement, and tells each host railroad that it has the authority to stand in the shoes of the Board and decide for itself whether individual dispatching decisions would materially lessen the quality of freight transportation provided to shippers. *See, e.g.,* Initial Comments of CSX at 1 (suggesting that it should “balance the interests of Amtrak passengers, commuter rail passengers, shippers, and host railroads” in according preference). That approach, however, is unsupported by the clear language of section 24308(c). The Board’s proposed policy and the initial comments of AAR and several of its members “flout[] the rule that ‘a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.’” *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

The Board also must not countenance AAR’s and its members’ appeal to the RTP, directing the Board “to regulate so as to promote efficiency in freight service.” *See* Initial Comments of CSX at 2; Initial Comments of AAR at 9; Proposed Policy at 3. First, the *actual* language of the RTP directs the Board to “to promote a safe and efficient rail transportation system *by allowing rail carriers to earn adequate revenues*, as determined by the Board,” 49 U.S.C. § 10101(3) (emphasis added), not by resolving dispatching decisions in favor of some

amorphous concept of overall “network fluidity.”³ Second, even if the RTP could be construed to state a general obligation to act in favor of the overall efficiency of the system, it must not override a clearly expressed Congressional directive, even if they may stand in conflict from time to time. *See Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (“Where, as here, the language of a provision is sufficiently clear in its context and not at odds with the legislative history, there is no occasion to examine the additional considerations of policy that may have influenced the lawmakers in their formulation of the statute.”) (alterations and quotations omitted).

III. Negotiated Performance Agreements Are Irrelevant to Whether the Statutory Right to Preference is Accorded

CCJPA agrees with Amtrak that separately negotiated performance agreements between state passenger rail authorities, host carriers, and Amtrak, are irrelevant to whether preference was accorded. *See* Initial Comments of Amtrak at 21. As CCJPA explained in its reply comments to STB Docket No. EP-726, performance agreements between state passenger rail authorities, host carriers, and Amtrak tie penalties and/or incentives to compliance with *negotiated* standards that, by their nature, reflect only what the host carrier and Amtrak are willing to provide, but not necessarily what they are *able* to provide. Thus, a negotiated performance agreement may not impose performance penalties on a host carrier even if the host is not dispatching a passenger train with the preference it is entitled to by law. Deferring entirely to negotiated performance standards, which may or may not reflect the *statutorily* required performance level, would impede the Board’s ability to objectively “identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train” in a preference investigation. *See* 49 U.S.C. § 24308(1).

³ If “network fluidity” were the measure, slower-moving freight trains would *always* be required to yield to faster-moving, regularly scheduled passenger operations.

Accordingly, CCJPA strongly disagrees with the initial comments of AAR and several of its members that compliance with a negotiated performance agreement “should create a strong presumption that the host was according preference to Amtrak.” Initial Comments of AAR at 13; *see also* Initial Comments of CN at 6 (“If a host is meeting its responsibilities under its operating agreement, its doing so should be dispositive of whether it is violating preference.”). Such a position assumes that negotiated performance agreements necessarily reflect the performance levels that may be achieved if preference over freight transportation were always accorded, which may not always be the case.

IV. On-Time Performance Meeting the 49 U.S.C. § 24308(f)(1) Threshold is the Only Showing Necessary to File a Complaint

Finally, CCJPA rejects CN’s argument that an entity with the right to file a complaint under 49 U.S.C. § 24308(f)(1)⁴ should be required to make a prima facie showing that the host carrier has failed to accord preference. *See* Initial Comments of CN, at 7 (“[I]f Amtrak seeks a preference investigation, it must at a minimum outline the dispatching patterns or practices it claims constitute a violation.”). Section 24308(f) is clear that the *only* showing required to commence an investigation, whether on the Board’s own initiative or upon complaint, is that the average on-time performance of an intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters. The Board has no authority to require complainants to make an additional showing, or to decline investigation, once the substandard on-time performance of an intercity passenger train has been established. *See* 49 U.S.C. § 24308(f)(1) (“The Board *shall* initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier

⁴ An investigation under 49 U.S.C. § 24308(f) may be initiated by the Board, or “upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service.”

over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.”) (emphasis added).

V. Conclusion

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

Respectfully submitted,



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