

William L. Crosbie
Chief Operating Officer



February 20, 2009

Chairman Charles D. Nottingham
Vice Chairman Francis P. Mulvey
Mr. W. Douglas Buttrey
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: Passenger Rail Investment and Improvement Act of 2008

Dear Chairman Nottingham, Vice Chairman Mulvey, and Mr. Buttrey:

This letter supplements my testimony at the Public Hearing held on February 11, 2009 on implementation of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), and responds to certain questions raised by the Board Members and statements made by other witnesses.

I. The Initiation of an Investigation of Substandard Performance

A. Discretionary Investigation Initiated By The Board

Under PRIIA, the Board "may initiate an investigation" when either of two conditions are met:

- (1) "If the on-time performance of any intercity passenger train averages less than 80 percent for any two consecutive calendar quarters," or
- (2) "[T]he service quality of intercity passenger train operations for which minimum standards are established under section 207 of [the PRIIA] fails to meet those standards for 2 consecutive calendar quarters."

The decision of whether to initiate an investigation under these provisions rests solely in the discretion of the Board. During the Hearing, the Board asked whether it was required to wait two consecutive quarters after standards are established before initiating an investigation, which would mean that the earliest that the Board could initiate an investigation would not be until possibly January of 2010. While an investigation triggered by failure to meet the second condition (*i.e.*, compliance with service quality standards) cannot begin until two consecutive quarters after adoption of the standards have passed, the Board may initiate an investigation where on-time performance is less than 80 percent for "*any*" two consecutive calendar quarters. The on-time performance of Amtrak's trains over the past year is a matter of public record, and

there are many trains that have averaged less than 80 percent for two consecutive calendar quarters. Thus, the Board, may, in its discretion, choose to initiate an investigation *today*.

B. Mandatory Investigation Initiated By Amtrak or Others

In addition to the Board's discretionary authority to initiate an investigation, PRIAA also requires the Board to initiate an investigation "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." The filing of a complaint is not conditioned upon either of the triggers for a discretionary investigation by the Board. Thus, Amtrak (or one of the other parties authorized to do so) may file a complaint at any time alleging substandard performance or a violation of Amtrak's preference right in 49 U.S.C. § 24308(c).

II. The Investigation of Substandard Performance

Once an investigation is initiated in any of the ways set forth above, the Board is charged with investigating "whether and to what extent delays or failure to achieve minimum standards are due to causes that could be reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators." The statute directs the Board to "obtain information from all parties involved" during its investigation and to "identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." In addition, if the Board determines that "delays or failure to achieve minimum standards" are attributable to a violation of Amtrak's preference right the Board may award damages and "such other relief to Amtrak as it determines to be reasonable and appropriate."

While the scope and nature of particular investigations will depend on the circumstances giving rise to the investigation, Amtrak anticipates that investigations will principally fall into one of two categories: (1) patterns and practices that result in consistently poor on-time performance of an intercity passenger train, including frequent failures by a host railroad to provide preference to Amtrak trains; and (2) locations on a rail line where there is consistent unreasonable delay of an intercity passenger train. The purpose of most investigations would therefore be to examine whether a host railroad or Amtrak could take steps to reasonably address consistent delays. Such an investigation, in most instances, will not require the Board to engage in an overly granular level of detail to determine, for instance, the specific cause for why any individual train arrived at a station late. Rather, the investigation will focus on patterns and practices that consistently delay trains, such as unlawful freight train interference or unreasonable slow order delays.

III. The Role of Performance Data and Conductor Delay Reports

Amtrak's train schedules are negotiated with our host railroad partners, and are published with the hosts' and Amtrak's joint concurrence. These schedules have had permanent adjustments made over the years, and temporary modifications are frequently made, typically at the request of host railroads, for situations such as major host railroad track maintenance projects. Amtrak has an employee at our National Operations Center dedicated to coordinating such temporary schedule modifications, in cooperation with host railroads.

The on-time performance of Amtrak's trains is not derived from the Conductor Delay Reports (discussed below). Rather, the time that a train arrives at each station is generally reported by station agents or automatically recorded and compared to the scheduled arrival time. This information is maintained in a separate database, and serves as the basis for Amtrak's reporting on the performance of its trains against schedules.

Delays are reported by a different method. At the end of every trip Amtrak's conductors send a Conductor Delay Report to Amtrak's operations center in Wilmington, Delaware and to the host railroad over which the train operates. The Conductor Delay Reports set forth any delay that caused a train to deviate from its pure run time, such as a slow order requiring the train to reduce its speed, a signal directing the train to stop, a freight train impeding its progress, mechanical problems, police action, or anything else. The Conductor Delay Report identifies the cause of delay, the length of the delay, and the location on the route where the delay took place. Amtrak maintains uniform delay reporting practices across the country and across all host railroads. Amtrak's conductors undergo regular training on the manner in which Conductor Delay Reports are to be completed and on the importance of providing accurate information. Failure to properly complete a Conductor Delay Report is grounds for disciplinary action against a conductor by either Amtrak or the host railroad. Each host railroad is given an opportunity to comment and suggest changes to each Conductor Delay Report. The information on the Conductor Delay Reports is entered into a database and serves as the basis for Amtrak's reporting of delays to its trains. These data comprise a rich historical record of train operations going back nearly a decade, and are used by Amtrak, host railroads, and the Federal Railroad Administration ("FRA"), among others. Indeed, the Department of Transportation's Office of Inspector General relied on this data in its September 8, 2008 audit of the root causes of delays for Amtrak trains.

The on-time performance and delay data will be sent to the FRA and publicly reported. At the Hearing, some witnesses attempted to cast doubt on the reliability of the on-time performance and delay data. It is, however, beyond question that the data is a reliable and trustworthy source of information for the two distinct purposes for which it will be utilized by the Board.

(1) The initiation of a discretionary investigation by the Board. On-time performance and delay data will serve as the basis for determining whether conditions exist for the Board, in its discretion, to initiate an investigation of substandard performance or delays. Specifically, performance data will indicate whether "the on-time performance of any intercity passenger train averages less than 80 percent for any two consecutive calendar quarters." And, performance and delay data will indicate whether "the service quality intercity standards that are established under section 207 of [the PRIIA] fails to meet those standards for 2 consecutive calendar quarters." These data are certainly a reliable source to determine whether there is reasonable suspicion for the Board to exercise its discretion to initiate an investigation.

(2) One source of information in an investigation. As part of its investigation, the Board is required to "obtain information from all parties involved." Thus, the Board will review the train performance and delay data as part of its investigation. Amtrak also expects that the Board will consider affidavits or other evidence submitted by Amtrak personnel and conduct interviews of any Amtrak employees that possess information relevant to an investigation. In

addition, the Board will also review any train performance and delay data in the possession of a host railroad, consider any affidavits or evidence submitted by a host railroad, and conduct interviews of any host railroad employees or other third parties that possess information relevant to the Board's investigation. The Board, as part of its fact-finding function, will necessarily weigh the reliability and credibility of all of the information provided to it in reaching its findings.

IV. Amtrak's Statutory Right of Preference

PRIAA provides that "[i]f the Board determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under [49 U.S.C. §24308(c)], the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate"

A. The Meaning of Preference

The law states that "intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction." There are two exceptions to this right: (1) in the event of an emergency; and (2) if, upon application for relief by a rail carrier, the Board determines that "preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers." As set forth in detail in the attached letter from Amtrak's outside counsel, the meaning of preference has never been in any doubt: Subject to two exceptions, it is an absolute right; passenger trains must be provided the right of way and freight trains must yield.

At the Hearing, one witness suggested that dispatchers need to be afforded flexibility in the moments after a derailment. The law is clear that preference does not operate in such an emergency situation. Another witness suggested that there are certain unspecified locations where consistently affording preference to Amtrak trains would shut down the rail network because of congestion. Again, the statute anticipates that there may be locations and times where preference would "materially lessen the quality of freight transportation" and affords a process by which a host railroad can obtain relief. That process is codified in Department of Transportation regulations at 49 C.F.R. §200 *et seq.* To date, no host railroad has ever made such an application. PRIAA transferred the responsibility to consider applications for exceptions to preference from the Department of Transportation to the Board. Amtrak expects to work cooperatively with the host railroads in applications they may make to the Board with respect to whether relief from preference is appropriate at certain times and locations.

Some witnesses at the Hearing also seemed to suggest that the operating agreements between Amtrak and the host railroads were somehow inconsistent with preference. In fact, none of the operating agreements between Amtrak and the host railroads contain any agreements that allow for violation of preference – and they cannot do so, because parties cannot agree to do an illegal act.

B. Enforcement of Preference

Until passage of PRIAA, Amtrak did not have a private right of action to enforce preference. Rather, the United States Department of Justice was only entity capable of bringing an enforcement action and was limited to seeking injunctive relief. Since the creation of Amtrak, the Department of Justice has brought only one action enforcing preference. Congress concluded that an additional enforcement mechanism was needed. PRIAA provides that Amtrak may file a complaint with the Board. As discussed above, Amtrak may bring such a complaint at any time. Amtrak does not, however, anticipate filing complaints unless preference violations are either flagrant or systematic such that its trains are adversely affected in a material way.

PRIAA also authorizes the Board to award damages or other relief where it finds that a delay is attributable to a preference violation. It is not correct, as some witnesses at the Hearing seemed to suggest, that in order to award damages or other relief the Board must find that preference is the cause of on-time performance below 80 percent or failure to meet service quality standards. The Board's responsibilities are much more straightforward: any delay caused by a failure to provide preference is entitled to relief.

Such relief includes damages to redress the full financial effect of delays, and the Board is to consider "the extent to which Amtrak suffers financial loss"; this may include prospective lost passengers, rebates or other accommodations provided to passengers, salary paid to train crews, fuel costs, or other financial losses incurred by Amtrak as a result of unlawful delays. In addition to damages, PRIIA also allows the Board to prescribe "other relief to Amtrak as it determines to be reasonable and appropriate." This may include fines and/or injunctions that "would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved."

* * *

Amtrak appreciates the opportunity to appear before the Board and pledges to continue to work cooperatively with the Board and its staff as it exercises the important responsibilities entrusted to it by Congress in PRIAA. Amtrak would be happy to share with you in more detail how we and our host railroad partners schedule and operate our trains and monitor their performance. Please consider that you and your staffs have an open invitation to come to Amtrak to tour our facilities, ride our trains, and learn how we operate our nationwide passenger network.

Sincerely,



William L. Crosbie
Chief Operating Officer

October 17, 2007

David W. Ogden

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**Re: The Statutory Preference Afforded To Amtrak Passenger Trains Under Federal Law
 and Department of Transportation Regulations.**

Dear Ms. Acheson:

You have asked us for our opinion on the meaning of the statutory preference for Amtrak passenger trains mandated by 49 U.S.C. §24308(c). As we set forth herein, the statute establishes an absolute rule that dispatchers for host railroads must ensure that freight traffic does not obstruct or delay the use by Amtrak passenger trains of rail lines, junctions or crossings, subject only to limited exceptions specified in the statute itself. As a report commissioned by the Association of American Railroads ("AAR") recently expressed it: "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 p. 4-6 (Sept. 2007) (emphasis added) (available at http://www.aar.org/PubCommon/Documents/natl_freight_capacity_study.pdf). And as Senator Murray recently 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." *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 Sen. Murray).

A. The Plain Meaning of the Statute.

The plain meaning of a statute's words is the fundamental touchstone for statutory interpretation. Because "Congressmen typically vote on the language of a bill," *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004), there is a strong presumption that a "legislature says in a statute what it means and means in a statute what it says." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006). Section 24308(c) of Part 49 of the United States Code states:

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 Secretary of Transportation orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Secretary for relief. If the Secretary, after an opportunity for a hearing under section 553 of title 5, decides that

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preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Secretary shall establish the rights of the carrier and Amtrak on reasonable terms.

49 U.S.C. § 24308(c).¹

The “common, ordinary meaning” of the term “preference” is “the selecting of someone or something over another or others.” *Drake v. Pierce*, 698 F. Supp. 1523, 1527-1528 (W.D. Wash. 1988) (quoting *The American Heritage Dictionary* (New College Ed. 1978)).² See *Gikas v. Washington Sch. Dist.*, 328 F.3d 731, 737 (3rd Cir. 2003) (noting that the “plain meaning” of the term “preference” in Pennsylvania Veterans Preference Act grants, “in unequivocal terms,” a preference to veterans in promotion); *Freeman v. Morton*, 499 F.2d 494, 502 (D.C. Cir. 1974) (rejecting argument that statute granting Native Americans “preference” in BIA hiring permitted any element of choice, noting that “[t]he statute makes the choice,” and recognizing that “clear meaning of the Act” granted unequivocal preference). Whenever a freight train and a passenger train have conflicting needs to use a rail line, junction, or crossing, therefore, § 24308(c) requires that a train dispatcher “select” passenger trains over freight trains, and allows only two exceptions to this rule: (1) in “an emergency,” or (2) pursuant to an order by the Secretary of Transportation premised on an express finding that preference in a particular context “materially will lessen the quality of freight transportation provided to shippers.” 49 U.S.C. § 24308(c). Where Congress expressly provides for exceptions to a general rule, no additional exceptions may be implied. See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001); *Natural Res. Def. Council v. E.P.A.*, 489 F.3d 1250, 1259-1260 (D.C. Cir. 2007).

Thus, with only those two narrow exceptions, the statute mandates that passenger trains must enjoy the right of way and freight trains must yield. This firm rule is meant to ensure that Amtrak’s passenger trains are given the priority necessary to provide effective service to its passengers and succeed commercially while operating over tracks owned and controlled by freight railroads whose own commercial interests in many instances would favor subordinating passenger trains to slower-moving freight traffic.

B. Department of Transportation (“DOT”) Regulations.

As noted, in establishing this right of way, Congress did not ignore the interests of freight traffic. The statute bars the freight railroads from acting unilaterally, but it also provides a mechanism by which they may obtain from DOT specific exceptions to the general rule where they can demonstrate the need to avoid a material adverse impact on freight service.

¹ The preference statute was extended to commuter trains in 1981 (see Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §1188(c), 95 Stat. 699 (1981)) and recodified in 1994 (see Revision of Title 49, Transportation, United States Code, Pub. L. No. 103-272, 108 Stat. 745 (1994)), but the pertinent language has not changed in any material respect since its original enactment. Compare 49 U.S.C. § 24308(c) with Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10, 87 Stat. 548, 552 (1973).

² The cited authority defines the word the same way in its most recent edition. See *The American Heritage Dictionary of the English Language* (4th Ed. 2000).

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Pursuant to § 24308(c), DOT has adopted regulations at 49 C.F.R. § 200 *et seq.*, establishing the process for considering requests for such exceptions. Freight railroads must file applications with the Docket Clerk of the Office of the Chief Counsel of the Federal Railroad Administration. *See* 49 C.F.R. § 200.5(a). Applications must contain the following information: (1) a list by endpoints of the routes that the railroad asserts are adversely affected by allowing priority to passenger trains, (2) an explanation and supporting documentation as to how “preference” materially lessens the quality of freight service afforded by the applicant to its shippers on every route listed, and (3) an analysis of whether and by what amount Amtrak’s compensation to the railroad should be reduced if an exception to preference is permitted. 49 C.F.R. § 200.5(c). Amtrak must be provided with a copy of the application, 49 C.F.R. § 200.5(f), and has 30 days to respond, 49 C.F.R. § 200.7(a). If Amtrak objects, a hearing will be held by a panel designated by the Federal Railroad Administration Administrator, 49 C.F.R. § 200.9, and a final decision will be promptly rendered. 49 C.F.R. § 200.11. No application for such an exemption has ever been filed or granted.

Thus, absent an “emergency,” the freight railroads may not unilaterally make exceptions to the statutory default rule mandating preference. To the contrary, if a freight railroad believes relief is warranted at a particular time or location, it may seek a specific exception from DOT. Unless and until it persuades DOT to grant an exception, however, the freight railroad must grant Amtrak passenger trains the right of way over its rail lines, junctions and crossings.

C. The Legislative History.

This straightforward understanding of the statutory language and implementing regulations is corroborated by the statute’s legislative history. Almost immediately after Amtrak was created in 1971, both houses of Congress turned their attention to legislation directed at eliminating delays to Amtrak trains occasioned by freight train interference. Between October and December of 1971, the House Subcommittee on Transportation and Aeronautics and the Senate Subcommittee on Surface Transportation held a series of public hearings to consider enacting a statutory preference.³ After securing the personal pledge of the leaders of the major freight railroads to improve on-time performance and to grant Amtrak’s passenger trains a preference over freight traffic,⁴ Congress deferred action on preference legislation pending an Interstate Commerce Commission (“ICC”) rulemaking

³ Anthony Haswell, the Chairman of the National Association of Railroad Passengers, testified about the “incredibly poor” on-time performance record of Amtrak’s passenger trains, and opined that deliberate interference from freight trains was the primary cause. *See* Administration’s Request for Additional Funding for Amtrak: Hearing Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, 92nd Cong., 1st Sess. at 83-94 (Oct. 26, 1971) (statement of Anthony Haswell) (hereinafter “1971 Senate Hearings”); Review and Refunding of Rail Passenger Service Act: Hearings on H.R. 11417 Before the Subcomm. On Transp. and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92nd Cong., 1st Sess., at 567-96 (Nov. 11, 1971) (statement of Anthony Haswell) (hereinafter “1971 House Hearings”).

⁴ *See* 1971 House Hearings at 676-688 (Dec. 7, 1971) (statement and testimony of William H. Moore, President of Penn Central Transportation Co; John S. Reed, President and CEO of Santa Fe Railway Co.; W.T. Rice, Chairman and CEO Seaboard Coast Line Railroad Co; and R.D. Spence, System Vice President of Operations Southern Pacific Transportation Co.).

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proceeding,⁵ but warned the freight railroads that it would closely monitor the situation.⁶ When Amtrak's on-time performance further deteriorated as the direct result of increased freight train interference while the ICC deliberative process continued the following year,⁷ Congress enacted the statutory preference as Section 10(2) of the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548 (Nov. 3, 1973). Witnesses, including supporters and opponents of instituting an absolute preference, described the proposed right of way as "mandatory,"⁸ "unconditional,"⁹ and "rigid."¹⁰ After fully considering that testimony, Congress rejected more discretionary language in favor of the unequivocal preference, which remains in effect today.¹¹

⁵ On March 20, 1972, the Department of Transportation recommended that the ICC issue a regulation stating that "[r]ailroads shall give priority to passenger trains over freight trains, except in emergencies," with a formal waiver process set up if a freight railroad believe that compliance with the regulation would place an undue burden on a railroad's operations." See S. Rep. No. 92-756 at 6 (1972), as reprinted in 1972 U.S.C.C.A.N. 2393, 2394-95. The Senate Commerce Committee subsequently endorsed the DOT's recommendation. See *id.*

⁶ The House Report noted that it had "considered imposing a specific statutory requirement that passenger trains must be preferred over freight trains," but determined not to do so "at this time" because of concerns being raised. See Review and Refunding of Rail Passenger Service Act, H.R. Rep. No. 92-905 at 4, 9, 14 (1972). Notwithstanding this fact, the Committee stated that "it should be clear to all railroads, and it is expected by the committee, that passenger trains are to be accorded priority over freight trains, except when safety or operational ability requires otherwise." *Id.* "Such exceptions," the Committee warned, "should be rare." *Id.*

⁷ The House Subcommittee noted with concern that Amtrak's average on-time performance of long-distance trains went from better than 70% in March 1972 to 35% in March 1973. See Financial Assistance to Amtrak: 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 (June 12, 1973) (hereinafter, "1973 House Hearings"). Anthony Haswell testified on behalf of the National Association of Railroad Passengers that Amtrak's on-time performance was even worse than it appeared at first blush "in view of its heavily 'padded' schedules." See 1973 House Hearings at 253 (June 13, 1973) (statement of Anthony Haswell). Moreover, he noted that "[r]ailroad non-cooperation and obstructionism" remained a big problem. *Id.* at 264. Amtrak's operations data revealed that freight train interference had caused 15% of Amtrak's delay in March 1973, as compared with 8% for 1972, and "[t]he record on some individual railroads was even worse." *Id.* at 265. In total, according to Haswell, freight train interference was "the second most frequent cause of delay" after slow orders. *Id.*

⁸ See Letter from Secretary of Transportation John A. Volpe to Rep. Harley O. Staggers (Feb. 8, 1972) (observing that the statutory preference right "would create a mandatory preference").

⁹ See Letter from Amtrak President Roger Lewis to Sen. Vance Hartke, Chairman of the Surface Transportation Subcommittee of the Senate Commerce Committee (Dec. 16, 1971) (characterizing statutory right under consideration as "an unconditional preference of passenger trains over freight trains").

¹⁰ See Letter from the American Association of Railroads to Rep. Brock Adams (Feb. 7, 1972) (characterizing statutory preference right under consideration as a "rigid statutory constraint").

¹¹ As a result of the worsening situation, the National Association of Railroad Passengers had renewed its previous suggestion in 1971 to enact an unequivocal statutory preference. Its Chairman, Mr. Haswell, testified that the statutory right was "made necessary by the continuing efforts of the Southern Pacific, Missouri Pacific, and others to impede the expeditious and dependable movement of Amtrak trains." 1973 House Hearings at 288. Because the statutory preference he proposed was an "absolute right of preference," he recognized that it could conceivably interfere with freight operations in certain situations. *Id.* at 335. But, given the extent of the problem, he concluded that Congress needed to "establish a presumption of preference for passenger trains and let the railroads come in then and make a case for adjustments." *Id.* Under this statutory scheme, "railroads would be allowed to obtain relief from the Secretary [of Transportation] in cases where they could prove that service to shippers would be materially downgraded if Amtrak's preference was enforced." *Id.* at 288.

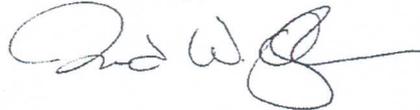
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D. Contemporaneous Rulemaking By The Interstate Commerce Commission ("ICC").

The mandatory nature of the statutory preference for Amtrak's passenger trains is further confirmed by the ICC's articulated understanding of the statute at the time it was enacted. On December 27, 1973, the ICC promulgated a rule for *non*-Amtrak intercity passenger trains that granted rights virtually identical to the preference that Congress had just granted by statute to Amtrak's trains. See *Adequacy of Intercity Rail Passenger Service*, Ex Parte No. 277, 344 I.C.C. 758 (1973) (available at 1973 ICC Lexis 3). The freight railroads had argued for a standing exception allowing dispatchers to place non-Amtrak passenger trains on side tracks whenever doing so would not impede their ability to arrive on schedule. *Id.* at *47. The ICC rejected that request, and determined to make *no* exceptions to the regulatory right of way, other than those that Congress had expressly permitted in § 24308(c). *Id.* at *46-48. Thus, in language important here, the ICC observed that § 24308(c) "clearly accords intercity passenger trains operating 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 unless an exception has been made by the Secretary of Transportation." *Id.* at *47. Adopting the same rule for non-Amtrak trains, the ICC explained that under that language "all intercity passenger trains *without the benefit of an exception* are to be accorded priority over freight trains except in emergencies or unless the Commission has issued an order to the contrary[.]" *Id.* at *112-13 (emphasis added).

Please let me know if you have any questions or if I can be of any further assistance.

Sincerely,



David W. Ogden