



ASSOCIATION OF
AMERICAN RAILROADS

Law Department

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March 13, 2009

Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
Attn: Ex Parte No. 683
395 E St., S.W.
Washington, DC 20423

Re: STB Ex Parte No. 683, Passenger Rail Investment and Improvement
Act of 2008

NOTICE OF INTENT TO PARTICIPATE

Dear Acting Secretary Quinlan:

Attached please find Supplemental Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX Parte No. 683

PASSENGER RAIL INVESTMENT AND IMPROVEMNT ACT OF 2008

**SUPPLEMENTAL COMMENTSOFTHE
ASSOCIATION OF AMERICAN RAILROADS**

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Dated: March 13, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX Parte No. 683

PASSENGER RAIL INVESTMENT AND IMPROVMENT ACT OF 2008

**SUPPLEMENTAL COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS**

This supplements the testimony of the Association of American Railroads (AAR) and the Freight Railroads at the February 11, 2009 public hearing on the Passenger Rail Investment and Improvement Act of 2008 (Act). Its purpose is to address some of the issues raised in Amtrak's supplemental filing to the Board dated February 20, 2009. Earlier this week, the Federal Railroad Administration (FRA) released for comment a Provisional Staff Exposure Draft on Proposed Metrics and Standards for Intercity Passenger Rail Service, which it is required to develop under the Act. The freight railroads intend to provide full comments on this document. Because the metrics and standards issued by FRA will undoubtedly impact how STB discharges its obligations under the Act, a copy of those comments will be provided to STB for review and consideration when they are filed with the FRA.

The freight railroads strive to provide safe and reliable facilities to Amtrak and its passengers and this is an obligation the industry takes seriously. The freight railroads also have an obligation to the nation's economy and their shippers to provide efficient transportation of the goods America and the world consume. Ultimately, Amtrak and its

host railroads must coexist in a way that allows for efficient and reliable passenger and freight service, both of which are critical to address the nation's increasingly critical transportation needs.

Amtrak's Contractual Relationship with its Host Railroads

The law provides Amtrak with the ability to negotiate contracts with its host railroads and there currently is an Operating Agreement in effect between each host freight railroad and Amtrak. These contracts govern the right and obligations of the parties with respect to the use of freight railroads' rights-of-way to provide Amtrak services, including provisions addressing the measurement and treatment of on-time-performance (OTP). Although the freight railroads do not share their contracts, statements by Amtrak officers make it clear that these agreements may be similar, but are not uniform, and may contain differing measurements.

The Act vests STB with the authority to investigate Amtrak performance that does not meet the standards to be established by FRA. While Amtrak has not expressly taken the position that its contracts with the freight railroads are rendered inoperative by this legislation, to the extent Amtrak's positions on how the Act should be interpreted may suggest that these contracts can be overridden, the freight railroads do not accept that position. In fact, since the Act calls for Amtrak and the freight railroads to incorporate the metrics and standards developed by FRA into their contracts, "to the extent practicable," it indicates that Congress recognized that the contracts would remain the governing documents between Amtrak and its host railroads. It is illustrative to note, as AAR has been advised, that one major railroad very recently reached a detailed settlement agreement in an arbitration with Amtrak that, by contract, measures that

railroad's future performance using measurements that are unrelated to the measurements recently advanced by FRA or in Amtrak's letter.

Amtrak takes the position that, strictly speaking, STB may initiate investigation immediately if OTP of any intercity passenger train has been less than 80 percent for two consecutive quarters. The freight railroads do not expect STB to do so; nor should it. Congress has recently enacted a process for the development of metrics and standards—currently being developed by FRA—which is intended to facilitate improvements in passenger rail service. Until that process is complete, and there is a minimal degree of experience with the new metrics and standards, it would be premature and inconsistent with the intent of the Act for STB to undertake investigations permitted by 49 U.S.C. §24308(f)(1). It also is not consistent with the statute for STB to undertake investigations for the purpose of assessing damages against host railroads for isolated delays. The Act's requirement that investigations may be triggered by failures stretching over two consecutive quarters indicates that Congress did not intend for STB to use its authority and utilize its resources to address isolated events like a single delay.

Scheduling Practices

Scheduling practices go to the heart of measuring performance. When investigating substandard performance by Amtrak, the Act confers on STB authority to determine “the extent to which scheduling and congestion contribute to delays.” Amtrak's supplemental filing to the Board stated that “Amtrak's train schedules are negotiated with our host railroad partners.” However, the picture Amtrak paints of the scheduling process does not always reflect reality. While some schedules have been adjusted over the years, many have remained relatively unchanged since 1971, even as

the current rail environment has rendered them infeasible to execute reliably. Indeed, during the hearing one Board member referred to the Carolinian as an example of an “aspirational” schedule.

Realistic schedules provide the only meaningful benchmark against which metric and standards can be measured. Therefore, particularly with the heightened scrutiny to be given to Amtrak performance, it is imperative that schedules be determined scientifically within the context of the traffic and track that exists today and that is reasonably anticipated into the future. The scheduling process must recognize the unique challenges and characteristics of each rail line, including the need to perform necessary maintenance, and should provide Amtrak customers with an honest expectation of arrival times. There are numerous tools within the industry that can be deployed to help establish or validate the feasibility of train schedules. These include, but are not limited to, Six Sigma statistical tools, Rail Traffic Controller (RTC) and Intelligent Train Scheduler (ITS).

Allowing Time for Infrastructure Maintenance

Because “unreasonable” slow orders have been raised as a cause of delays, this topic bears discussion. The freight railroads invest billions of dollars in capital improvements in order to provide increased network capacity, operational flexibility and recoverability – all of which, correspondingly, enable Amtrak to provide more reliable passenger service. Slow orders are necessary to allow for safe operations where track may be damaged and to facilitate both routine and major maintenance of track and other infrastructure. Not only is this a reasonable practice, it is essential to the safety and sustainability of the rail network and will improve service reliability in the long term. It would be inappropriate to second-guess the decisions of freight railroads, who have made

massive investments in their infrastructure, with respect to slow orders and how and when they will be implemented. Unless time is devoted to maintenance activities, aimed at preserving and protecting rail investment, not only would it raise serious safety implications, all trains would suffer greater and greater delay.

Slow order or maintenance-related delays represent one of the single largest delay categories to Amtrak trains. However, as explained above, slow orders are both a reality and necessity in the rail environment. When STB investigates the relationship between schedules and delays, it must consider the impact of slow orders and maintenance needs. Charging freight railroads with slow-order delay minutes necessitated by both routine and major maintenance programs would be inappropriate. Instead, more flexible scheduling practices would allow for an allocation of reasonable track time for maintenance, incenting carriers to reduce total delay, while also providing more reliable transit and arrival time expectations to Amtrak customers during work periods. While recent declines in freight volumes, attributable to the severe economic downturn, may have lessened capacity constraints in the short term, projected growth in passenger and freight rail traffic surely will necessitate a more viable scheduling process and routine evaluations.

There may be circumstances where slow orders are not remedied for extended periods of time, justifying action under contract or, if there are no applicable contracts, under the statute. But slow orders associated with maintenance and regular replacement cycles should never be the basis for action against freight railroads. Amtrak schedules should contemplate that work.

Conductor Delay Reporting

Section 213 of the Act authorizes STB to “review the accuracy of the train performance data”. Freight railroads agree with Amtrak that the data utilized are the key to the measurement of performance. However, the reliability of Conductor Delay Reports, and the notion that they should be the primary source of data on which STB relies is open to question.

Conductor Delay Reports are neither the exclusive nor most reliable overall record of delay information. Amtrak conductors perform their responsibility to the best of their ability: however, for a number of reasons, Conductor Delay Reports do not reliably, consistently or accurately report the cause of every delay, identify properly the party causing the delay, nor precisely measure the amount of time of every delay:

- Amtrak conductor delay reporting is a manual, subjective process and conductors often estimate the cause and length of a delay.
- Amtrak conductors do not always have the tools or the relevant information to properly record delays (for example, Amtrak conductors would be unaware of a grade-crossing accident or a freight train with a locomotive failure 50 miles ahead and out of radio range). The conductor may not know the exact cause of every delay, but nonetheless must record some reason for every one of them.
- The perspective, incentives, and practices of individual conductors affect the CDRs. Some conductors are conservative and others liberal in their estimates.
- Conductors do not categorize delays consistently (for example, freight railroads routinely observe Amtrak conductor reports that differ sharply from one day to the next in estimating slow-order delay, even though there is no change in the slow orders in effect).
- CDRs often conflict with more accurate and precise computer generated data.
- These reports are often the proximate cause of delay, i.e. what can be seen from the windshield, not root cause of delay.
- The primary responsibility of an Amtrak conductor is to ensure the safe operation of the train and the safety of its passengers. Because of these principal duties, a conductor may not be able to give full attention to delays.

Before meaningful assessments of Amtrak and freight railroad performance can be made, better data needs to be assembled. As AAR emphasized in its initial testimony,

improved methods are needed for determining what caused a delay and who or what was responsible: without solid data on these questions, investigations will not be especially meaningful nor result in useful recommendations. The freight railroads recommend that electronic or system generated data be utilized where possible instead of, or at least in addition to, Amtrak's manual Conductor Delay Reports. Technological capabilities have advanced significantly and can provide more reliable information. There is no reason why systems should not be leveraged to improve the consistency and accuracy of the data. In the interim, freight railroads pledge to work with all stakeholders in improving available data. The host railroads have or are implementing these processes in their train dispatch centers, and are willing to work to improve Amtrak's data.

Amtrak Preference

No subject seems to generate more debate than Amtrak's statutory preference under 49 USC §24308(c), which provides that Amtrak will have priority over freight transportation except in an emergency or when such preference would "materially lessen the quality of freight transportation provided to shippers." The freight railroads have worked cooperatively with Amtrak over the years to meet their obligations in hosting passenger rail service while maintaining the fluidity of the rail network as a whole. They intend to continue in that regard.

However, to the extent Amtrak's position is that its trains must be given absolute priority in each and every instance, without any regard to the impact such a practice would have on the network as a whole, it is a counterproductive and untenable position. The statute speaks in terms of preference to rail passenger transportation, not to every Amtrak train under every circumstance; and, it does not use the term "absolute"

preference. Freight railroads do not dispute the basic right of preference that must be afforded to Amtrak. However, it must be recognized that extreme concepts of priority have impacts that must be considered and, ultimately, are unacceptable as public policy.

Dispatch preference cannot and should not be viewed one dispatch decision at a time or in an arena of absolutes. Rather, it is appropriately evaluated in the context of maintaining overall network fluidity, as opposed to on a train-by-train, event-by-event basis, and must take into account numerous operating parameters, including (i) the capacity of the infrastructure where Amtrak trains operate, (ii) the maintenance needs of that infrastructure, (iii) the network implications of dispatch preference (geography), (iv) the future implications of dispatch preference (impact on trains in the path of current trains including other Amtrak trains), and (v) unexpected events that happen virtually every day on a busy railroad. The physical and operational context of dispatch preference is integral to any determination as to whether or not the spacing and placing of any train into network flows creates the best available dispatch preference of an Amtrak train or of Amtrak operations as a whole. Under certain circumstances, slowing an Amtrak train or allowing an Amtrak train to follow a freight train temporarily may provide better dispatch preference for Amtrak than the absolute priority of that train above all other considerations. At the February 11 hearing before STB, Ross Capon, President of the National Association of Railroad Passengers, acknowledged that Amtrak's preference is not absolute as it would be reasonable to cause an Amtrak train to experience a brief delay in order to avoid a long delay to a freight train.

Computer modeling demonstrates that providing absolute priority to every individual Amtrak train is not operationally feasible on some key corridors, impeding the

performance of both passenger and freight trains. In essence, both passenger and freight operations would come to a halt, disrupting both travel and the widespread industrial and commercial activity that depends on rail. Public policy makers have recognized the tension between an absolute view of preference and the overall needs of the rail network. For example, FRA reports that Amtrak acknowledges that absolute priority would literally bring some railroad segments to a halt during periods of heavy traffic, although Amtrak disputes the extent of the risk. See Report of the U.S. Department of Transportation Inspector General to FRA on the Root Cause of Amtrak Train Delays, at iv (Sept. 8, 2008).

As AAR explained in its earlier testimony, the excess capacity of 1971 is gone. Thus, as the available computer modeling suggests, under traffic volumes that existed prior to last fall (and which are expected to return once the current recession is over) , the absolutist version of preference could only be achieved through the investment of billions of dollars to create additional capacity. Requiring such an investment by the freight railroads should be considered an incremental cost for which the freight railroads would be entitled to be compensated. It could also raise taking issues under the Tucker Act.

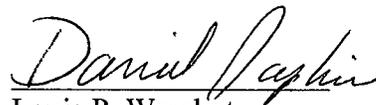
Any STB investigation of whether Amtrak has been denied its statutory priority, must evaluate specific dispatching decisions in full detail. The investigator must see what the dispatcher saw and how the dispatcher made decisions to route an Amtrak train around slower trains and in the face of oncoming trains, including other Amtrak trains, for a several-hour period. Modern dispatching systems permit this reconstruction, although it is a time-consuming undertaking involving not only track alignments but voice communications. This would be an educational process for all stakeholders.

The ultimate question in this debate is rail line capacity. It is in the public interest that both passenger and freight trains move in an efficient manner. If passenger schedules are adjusted to reflect the operating conditions and capacity of a rail line—as Amtrak has been willing to do in some circumstances—dispatching disputes are much less likely to arise. Amtrak will be able to sell what the railroad network can provide reliably.

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The goal of the host railroads is to foster a collaborative industry effort to advance passenger and freight rail transportation in America. They appreciate the opportunity to provide further input to the Board as it seeks to address the challenging tasks ahead. They have offered assistance to Amtrak and the FRA in the establishment of the performance metrics and standards and are available to meet with the Board.

Respectfully submitted



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