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Comments of  
National Railroad Passenger Corporation  
(Amtrak)

ENTERED  
Office of Proceedings

Concerning  
Amtrak Emergency Routing Orders  
Docket No. EP 697

FEB 7 - 2011

Part of  
Public Record

The National Railroad Passenger Corporation ("Amtrak") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Surface Transportation Board ("Board"), which sets forth new proposed rules regarding Amtrak emergency routing orders (the "Proposed Rule"). See 76 Fed. Reg. 766 (January 6, 2011).

The purpose of the NPRM is to establish procedures for Amtrak to obtain emergency routing relief from the Board as authorized by 49 U.S.C. § 24308(b), which provides:

**Operating During Emergencies.** – To facilitate operation by Amtrak during an emergency, the Board, on application by Amtrak, shall require a rail carrier to provide facilities immediately during the emergency. The Board then shall promptly prescribe reasonable terms, including indemnification of the carrier by Amtrak against personal injury risk to which the carrier may be exposed. The rail carrier shall provide the facilities for the duration of the emergency.

For decades since the 1972 enactment of the provision now codified at 49 U.S.C. §24308(b), the STB (formerly the ICC) has followed a procedure whereby Amtrak applies for emergency access or other relief by contacting, in the most expeditious manner possible under the circumstances, a designated representative of the ICC/STB who is available 24 hours a day, 365 days a year, and who is empowered to issue an order, immediately upon such application, requiring a rail carrier to provide facilities to Amtrak during an emergency. See NPRM at footnote 1. As noted in the NPRM, in recent years instances where Amtrak and the rail carrier have failed to agree on emergency routing of Amtrak trains, and where Amtrak has had to apply to the STB for relief, have been rare. However, when such application has been necessary, the procedures that have been in place for decades have proved to be an efficient method of implementing § 24308(b), and Amtrak is unaware of any objections raised by any rail carrier, or to any other issue that has arisen, regarding the efficacy or fairness of these procedures.

While Amtrak does not object in principle to establishing written procedures implementing 49 U.S.C. § 24308(b) consistent with current procedures, it is Amtrak's view that the Proposed Rule does not adequately preserve the STB's longstanding

procedures that enable Amtrak to receive an emergency order on an immediate basis, to the detriment of Amtrak passenger service in emergency situations.

***It Is Critical That Any New Regulation Preserve Amtrak's Ability to Seek and Receive Immediate Relief in Emergency Circumstances***

49 U.S.C. § 24308(b) provides that “the Board, *on application* by Amtrak, *shall require* a rail carrier to provide facilities *immediately* during the emergency”, with reasonable terms and conditions to be prescribed “promptly” thereafter. (Emphasis added.) The statute thus envisions (1) that the only necessary condition to issuing an order is an application by Amtrak to the Board, and (2) that the order be issued immediately upon such application, whereas the decision regarding other terms and conditions may, if necessary, be prescribed at a later time. This statutory scheme is necessary and appropriate because of the exigent circumstances that exist when, for example, an emergency occurs that requires detouring an *en route* Amtrak train with passengers on board. In the case of these and other emergencies, delayed relief is equivalent to no relief at all.

Situations that may require immediate action by the Board are not hypothetical, but in fact occur frequently. Most recently, at 8:15 p.m. on Saturday, January 29, 2011, BNSF advised Amtrak of the closure of both tracks on the BNSF route used by Amtrak's *California Zephyr* due to structural damage to the Burlington Bridge on the BNSF Ottumwa Subdivision caused by an underwater explosive charge. As a result, Amtrak was required to detour trains operating between Omaha and Chicago on Union Pacific Railroad tracks. See excerpt from Amtrak's “A Report” of January 31, 2011, attached hereto.

In the above case – as in the vast majority of cases occurring in the past – Amtrak was able to reach a voluntary agreement with the affected carrier to provide the emergency service for the required period of time. However, if no agreement had been reached, Amtrak would have needed to seek from the Board an *immediate* order requiring Union Pacific Railroad to accommodate the detour of an Amtrak train loaded with passengers upon its arrival in Omaha on Sunday morning. Under current practice, Amtrak would have been able to seek such relief, by telephone, from a designated Board representative empowered to issue emergency orders and available to do so at 8:15 on a Saturday evening.<sup>1</sup>

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<sup>1</sup> As noted in STB Ex Parte No. 633, *Y2K Readiness*, Decision served August 19, 1999 at 2: “The Board also may issue emergency orders to enable Amtrak to reroute passenger trains when its normal routes are temporarily unavailable. Through the Board's Agent, Melvin F. Clemens, Jr., Director, Office of Compliance and Enforcement, *such emergency orders may be issued at any time, day or night.*” (Emphasis added.)

In order to effectuate the plain language of § 24308(b) that emergency relief be available on an “immediate” basis, it is critical that any new regulation contain a delegation of authority to enter emergency routing orders to an STB representative:

- (1) who is available 24 hours a day, 7 days a week, 365 days a year,
- (2) who is empowered to receive and act on applications made and served by Amtrak by telephone, and
- (3) who is vested with authority to issue an emergency order immediately upon receipt of the application.

The Proposed Rule alters current practice – to the detriment of Amtrak and the travelling public, and contrary to § 24308(b) – with respect to all three of these essential elements.

*1. The Designated Board Agent(s) Should Be Available 24/7/365.*

The NPRM proposes to add a new § 1011.4(a)(10) to the Board’s regulations, delegating authority to issue decisions on Amtrak applications for emergency routing orders to individual Board members. This would replace the current delegation of authority to a Board staff member reachable at any hour of the day or night, 365 days a year. Notably, the Office of Public Assistance, Governmental Affairs, and Compliance is delegated the authority to issue orders in emergencies arising under 49 U.S.C. § 11123 (governing directed service orders for continuing freight and commuter rail operations) if no Board member is available. See 49 CFR Part 1011.7(b)(5). Amtrak proposes that a similar delegation of authority be made for issuing decisions on emergency routing orders under 49 U.S.C. § 24308(b), to ensure that an appropriate agent is available on a 24/7/365 basis to issue such decisions.<sup>2</sup>

*2. Amtrak Should Be Permitted to Continue To Make and Serve Its Application, and the Board’s Initial Order Should Be Communicated, By Telephone.*

Under current practice, Amtrak can make its application to the designated Board agent by telephone, either accompanied or followed by a written application stating the basis for relief. Under the Proposed Rule, Amtrak would be required to file a written application with the Board, in person or using the Board’s e-filing option, with a copy served on the affected rail carrier(s) by facsimile, e-mail, or in person. Proposed Rule

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<sup>2</sup> As noted in footnote 1 of the NPRM, the agent of the Board previously vested with authority to issue emergency routing orders on application by Amtrak has retired. However, as illustrated by the delegation of authority contained in 49 CFR Part 1011.7(b)(5) governing freight and commuter rail emergency situations, authority can be delegated to the holder of an STB office rather than to any specific individual, provided that Amtrak is provided with contact information that would enable it to reach the designated staff member at any time.

§1034.2(a), (c). The required contents of the application are set forth in Proposed Rule §1034.2(b).

In emergency situations where, for example, an Amtrak train filled with passengers is en route and a detour order is required immediately, time is of the essence and telephonic communication is simply the most efficient way of communicating the issue and relief requested, confirming that the facts are understood, providing information, and responding to any questions that may arise. Communication by facsimile or e-mail alone is a one-way flow of information that may delay relief past the point where it might be effective. Amtrak does not object to a requirement that it file and serve an application in the manner, and containing the information, set out in the §1034.2(a)-(c) (except as noted below), at the same time that it makes its application and provides notice to the affected carrier(s) by telephone.

In addition, the Proposed Rule does not contain any procedure for an emergency order issued by the Board or its designee to be communicated to the affected carrier(s) so that the order can be immediately carried out. Amtrak recommends that a provision be added to the Proposed Rule permitting the Board agent issuing the emergency order to contact the affected carrier(s) by telephone. In its application to the Board via telephone, Amtrak can also provide the Board with the contact name and telephone number of the representative of the affected rail carrier(s) with whom Amtrak has been dealing in any specific emergency situation.

3. *Applications for Emergency Orders Should Be Acted On Immediately.*

Nothing in the Proposed Rule requires that an emergency order be issued “immediately” upon application by Amtrak, as required by 49 U.S.C. § 24308(b). On the contrary, the Proposed Rule gives the affected carrier(s) one business day to file a reply to the application for relief, and permits the Board up to one business day to issue an “initial decision granting or denying Amtrak’s application.” Proposed Rule § 1034.2(d), (e). These procedures are appropriate for a determination as to the “reasonable terms” that 49 U.S.C. § 24308 requires be prescribed “promptly” following the issuance of an emergency routing order, but they do not provide for the immediate initial relief that may be needed by Amtrak and that is mandated by the statute.

The NRPM does recognize, in footnote 2, that “emergencies necessitating Board intervention under these proposed regulations may arise outside of normal business hours,” and that under those circumstances Amtrak may “alert the Board via e-mail” to a designated e-mail address “to an imminent filing by Amtrak *on the next business day.*” (Emphasis added.) However, no provision is made in the Proposed Rule itself for such a procedure outside of normal business hours or on weekends.

Even with the gloss provided in footnote 2, the Proposed Rule represents a departure from current practice whereby Amtrak may seek, and the Board may grant, *immediate* emergency relief at any time of the day or night, 365 days a year, in conformity with the statute and practice over many decades. The recent emergency

detour situation described above highlights the problem with this approach. Amtrak was notified of the emergency situation requiring a detour at 8:15 on a Saturday evening. Application of the Proposed Rule would have required Amtrak to e-mail notice to the Board that it would be filing an application of relief on the following Monday – representing an unacceptable gap between the time the emergency arose and any possibility of relief for a train filled with Amtrak passengers that would have been stranded in Omaha for over 24 hours.

### ***The Proposed Rule Does Not Provide Amtrak A Right to Appeal An Initial Board Decision***

The discussion in the NPRM regarding proposed new § 1115.2(h)(1) states that the proposed section “provides that *the parties* may appeal initial Amtrak emergency routing order decisions.” However, the text of the proposed rule provides: “(1) Any carrier potentially affected by an initial Amtrak emergency routing order decision may appeal such a decision.” The text should be revised to provide – as apparently was intended – that Amtrak also has the right to appeal an initial emergency routing order decision under the same procedures.

### ***Other Issues***

- ***Nature of emergencies covered by the proposed rule.*** Emergency routing orders may be sought and issued under § 24308(b) other than those regarding detours over the lines of a rail carrier. For example, in ICC Service Order No. 1179, *The Texas and Pacific Rwy. Co. Ordered to Operate Trains of National Railroad Passenger Corp. (Amtrak)*, Decision served March 21, 1974, the Commission found that an emergency existed when the Texas and Pacific Railway Company refused to continue passenger train service on a portion of its tracks pending completion of an operating agreement, and ordered that service be continued until such time as a voluntary agreement could be reached or determined by the Commission. And in ICC Finance Docket No. 31257, *Amtrak and Boston and Maine Corp. – Use of Tracks and Facilities and Establishing Just Compensation* Decision served April 8, 1988, the Commission ordered the Boston and Maine Corporation to provide Amtrak with access to a portion of its rail line in order for Amtrak to operate hi-rail inspection vehicles, granting relief on an emergency basis under the predecessor provision to § 24308(b).

Therefore, Amtrak proposes that any reference in the proposed rule which suggests that emergency routing orders may be limited to “detour” lines or agreements should be stricken and replaced with more generic references. For example, the language in the proposed rule at § 1034.2(b)(3) referring to “detour line(s)” should refer instead of “affected line(s)”, and the language in the proposed rule at § 1034.2(b)(5) referring to “terms of the detour agreement” should refer instead to the “proposed emergency routing agreement.”

- **Confirmation of receipt of application by affected carriers.** Section 1034.2(c) of the proposed rule would require Amtrak not only to serve its application upon representatives of the affected rail carriers by facsimile, e-mail, or in person, but also to “certify to the Board ... that its application *was received* by the affected rail carrier(s).” (Emphasis added.) In the case of service by facsimile or e-mail, it is not technically possible to certify receipt by the affected rail carrier or any particular individual at the affected rail carrier. There may be situations where facsimile machines are not functioning or are turned off; or where the intended recipient simply fails to open his or her incoming e-mail. Perhaps for these reasons, a requirement to certify receipt of service is not imposed with respect to the service of pleadings and papers generally. *See, e.g.,* 49 CFR § 1104.12(a) (documents filed with the Board must include a statement certifying service, but not requiring certification of receipt of service).

Amtrak proposes that the requirement that Amtrak certify receipt of service by the affected rail carriers be removed from the Proposed Rule.

- **Replies by affected carriers.** Section 1034.2(d) of the proposed rule provides that any potentially affected carrier “shall file a reply with the Board within 1 business day of the time Amtrak serves a copy of its application upon the carrier.” This language would appear to impose a requirement that all affected carriers *must* file a reply to an Amtrak application. Amtrak proposes that this language be amended to make the filing of a reply permissive, by changing the word “shall” to “may”.

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Amtrak appreciates this opportunity to submit its comments regarding the Proposed Rule.

Submitted:  
February 7, 2011

**Train 500(30) Delayed UP Brooklyn Subdivision, Freight Interference**

**RSS**

Train 500(30) was delayed on the UP Brooklyn Subdivision when it held at Oregon City, due to the disabled UP MCOHK ahead at Clackamas, MP 760.8, with air problems. Train 500(30) held at the station for open track.

**Delay: 500(30) 1'21"**

**BNSF Bridge Damaged, East of Burlington, IA**

**Desk**

BNSF advised at 815PM-CT on 1/29/11 of structural damage to the Burlington Bridge at MP 204.6 on the BNSF Ottumwa Subdivision, 1 mile east of Burlington. BN Contractors working on the demolition of old piers set an explosive charge after Train 5(29) cleared, with an underwater blast meant to go laterally and blowing masonry stones and fragments to the side, the blast went vertical and impacted the new bridge span with tremendous force. On site, BNSF had (12) Structures employees engaged in clearing and cleaning debris from the bridge deck, (13) contractor employees on site staging barges, scaffolds, light plants and materials to facilitate inspection and repairs from barge decks. Two barges with mounted on cranes and two tugs were on site with operators. Damage confirmed to steel floor beams and stringers and with both main line tracks shifted. Structural Engineers involved in the project were on site by 1130PM-CT. BNSF estimated main track 1 open by mid-afternoon on 1/31 and no estimated time open for main track 2.

As a result, trains operating between Omaha and Chicago required detouring via the UPRR Omaha, Boone, Clinton and Geneva Subdivisions. Passengers boarding or detraining at Creston, Osceola, Ottumwa, Mt. Pleasant, Burlington, Galesburg, Princeton or Naperville were provided alternate transportation. Passengers eastbound destined for Naperville offered to ride the bus from Omaha or stay on train to Chicago and provided alternate transportation back to Naperville.

BNSF advised main track #1 restored to service 7:15PM-CT; Main track #2 estimated to return to service approximately 3:15AM-CT Monday, January 31. Work Element #978837 issued.

**Delays: 6(28) 1'13" OMA - add frt loco UP-2002**  
49" Lost on detour  
(41) Pax Bussed  
5(30) 1'19" Lost on Detour  
55" OMA - s/o frt loco UP-4779  
55" E/LNK - 6(29) work ahead  
(132) Pax Bussed