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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: Complaint and Petition of the National Railroad Passenger Corp., Docket No. NOR 42175

Dear Ms. Brown:

On behalf of Washington Legal Foundation (WLF), please consider this non-party reply to National Railroad Passenger Corporation's (Amtrak's) complaint for substandard performance of Amtrak's Sunset Limited Trains 1 and 2. WLF appreciates the Surface Transportation Board's invitation of non-party replies in the Board's August 19, 2024 Decision.

WLF is a national, non-profit, public-interest law firm and policy center that promotes free enterprise, limited government, and the rule of law. Given railroads' vital role in America's economy, WLF often participates in administrative proceedings affecting the rail transportation system.¹

The Decision asked parties and non-parties to answer several specific questions about the Board's authority. WLF's reply will focus on the Board's authority to impose damages on host rail carriers. First, WLF will explain that the Board can punish only those host rail carriers whose failure to provide preference causes Amtrak to fall below 80 percent on-time performance for any two consecutive calendar quarters. Second, WLF will show that the Board has not provided host rail carriers with fair notice of what constitutes an unlawful failure to provide Amtrak preference.

I. Statutory Authority

The Board directed Amtrak to address the Board's authority under § 24308(f)(2) of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) to impose damages on host rail carriers when the Board concludes that those rail carriers failed to provide preference to Amtrak's Sunset Limited 1 and 2 routes. Amtrak responded that § 24308(f)(2) grants the Board sweeping

¹ See, e.g., WLF Comment to Surface Transportation Board, *In re Growth in the Freight Rail Industry Hearings*, Aug. 13, 2024, <https://www.wlf.org/case/in-re-growth-in-the-freight-rail-industry-hearings/>; WLF Comment to Environmental Protection Agency, *In re In-Use Locomotive Regulation*, Apr. 19, 2024, <https://www.wlf.org/wp-content/uploads/2024/04/Bradbury-WLF-Comments-on-EPA-Authorization-Request-for-CARB-Locomotive-Rule-19-Apr-2024-Final.pdf>.

authority to impose damages on host rail carriers for “any and all delays that are attributable to the host rail carrier’s failure to provide preference.”²

But the statute says otherwise. Section 24308(f)(2) states that “If the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier’s failure to provide preference to Amtrak,” the Board may award damages. Amtrak isolates the term “delays” from that part of § 24308(f)(2) and accords to it a broad meaning. Under that interpretation, *any* individual delay having any impact on Amtrak can trigger the Board’s damages authority.

The word “delay” in that narrow slice of § 24308(f)(2) cannot do the amount of heavy lifting that Amtrak’s interpretation requires. Statutes should not be interpreted in a vacuum. Rather, “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”³ The relevant part of § 24308(f)(2) refers to § 24308(f)(1). In Section 24308(f)(1), Congress specified what type of “delay” would trigger a Board investigation: “If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters.” The statute proceeds to use the shorthand term “delay” twice more in paragraph (1): “...the Board shall initiate such an investigation, to determine whether and to what extent *delays*...” and “... the extent to which scheduling and congestion contribute to *delays*.” § 24308(f)(1) (emphasis added). Congress understood that delays are common for railways and can occur for varied reasons. Therefore, Congress set a specific threshold material enough to merit investigation: Amtrak’s falling below the standard of its trains being on time 80 percent of the time for six straight months.

The Board’s authority to investigate and impose damages on host rail carriers must also be interpreted in the broader context of Congress’ deregulation of the railroads. The Staggers Act of 1980 lists 15 policy purposes that the federal government should pursue “in regulating the railroad industry.”⁴ Those statements together establish that the Act’s primary purpose was to minimize regulation. Congress could not have meant to require the Board to ignore that primary purpose by mandating investigations into *every* instance of Amtrak line delay.

The best reading of the Board’s authority to impose damages under PRIIA § 24308(f)(2) is that the Board can fine a host rail carrier only if it concludes that the carrier’s failure to provide preference caused Amtrak to fall below 80 percent on-time performance for two consecutive calendar quarters on one of its lines.

² Complaint and Petition of the National Railroad Passenger Corp., Docket No. NOR 42175, Amtrak’s Opening Statement, Oct. 7, 2024, at 98.

³ *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

⁴ 49 U.S.C. § 10101.

II. Lack of Fair Notice

Due process requires that “parties receive fair notice before being deprived of property.”⁵ The Supreme Court has long held that “the dividing line between what is lawful and unlawful cannot be left to conjecture.”⁶ Fundamental fairness requires that citizens “be informed as to what the State commands or forbids.”⁷ The requirements of fair notice and warning apply with equal force in civil enforcement actions brought by administrative agencies.⁸ Enforcement actions that fail to inform their targets of what the law forbids before imposing damages cannot effectively achieve the goals of punishment and deterrence.⁹

Here the Board has not provided sufficient notice of the legal standard it will use to determine host rail carriers’ statutory compliance. Section 24308 of PRIIA does not define “preference” as it relates to actions that host rail carriers must take to accommodate Amtrak. In 2016, the Board withdrew a proposed Policy Statement that attempted to define “preference” for rail carriers and Amtrak.¹⁰ BNSF noted in its Reply to Amtrak’s Opening Statement that since Congress enacted PRIIA § 24308 in 1973, “no court has interpreted or applied the preference language.”¹¹ Indeed, in its August 19, 2024 Decision, the Board acknowledged that “the interpretation of these statutory terms is an issue of first impression,” and asked the parties as well as non-parties to address what satisfies “preference” under PRIIA.¹²

As it stands, the Board will have no choice but to determine whether host rail carriers failed to sufficiently preference Amtrak train traffic based on standards decided *after* the Board began its enforcement action. That alone constitutes a violation of fair-notice principles. Rail carriers will also be deprived of their due-process rights to be heard.¹³ Under the Board’s schedule, rail carriers have no opportunity to contest the Board’s standard for preference. If the Board determines any host rail carrier violated its preference duties and caused Amtrak delays, the next step of the bifurcated proceedings will determine damages.

⁵ *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

⁶ *Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926).

⁷ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

⁸ See, e.g., *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”).

⁹ See *Coinbase, Inc. v. SEC*, No. 23-3202 (Jan. 13, 2025 3d Cir.), slip op. at 20 (Bibas, J., concurring).

¹⁰ Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f), 81 Fed. Reg. 50,782 (Aug. 2, 2016).

¹¹ Complaint and Petition of the National Railroad Passenger Corp., BNSF Reply to Amtrak’s Opening Statement, Docket No. NOR 42175, Dec. 23, 2024, at 19.

¹² Complaint and Petition of the National Railroad Passenger Corp., Docket No. NOR 42175, Decision of Surface Transportation Board, Aug. 19, 2024, at 4.

¹³ See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”)

Finally, the Board's decision on the standard for "preference" here will not only affect companies the Board determines are "host rail carriers." The Board will, for the first time, define "preference" as it applies to rail carriers' duty to Amtrak under PRIAA. The Administrative Procedure Act permits agencies to set new standards through adjudication rather than rulemaking, but agencies must be mindful of the heightened due-process protections that attach to such a path.¹⁴

The Surface Transportation Board should reject Amtrak's absolutist interpretation of the Board's damages authority under PRIIA § 24308. An interpretation that allows the Board to punish rail carriers for *any* Amtrak delay is inconsistent with the plain language of § 24308(f) and contrary to the broader goal of deregulation Congress embedded into laws applying to rail carriers. The Board must also be cognizant of host rail carriers' right to fair notice of the law when deciding whether the enforcement targets here violated PRIIA preference requirements and afford those parties their due-process right to be heard.

Respectfully submitted,

Glenn G. Lammi
Vice President of Legal Studies

Cory A. Andrews
General Counsel and Vice President of Litigation

cc: Parties of Record (via email)

¹⁴ See *Coinbase, Inc.* *supra* note 9, slip op. at 19-20 ([W]hile the APA lets agencies choose enforcement, the Constitution's due-process protections still protect defendants. Laws that punish and deter must meet due process's heightened notice requirements.") (Bibas, J., concurring).