

February 21, 2025

BY E-FILING

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. Under 49 U.S.C.
§ 24308(f)—For Substandard Performance of Amtrak's Sunset Limited Trains 1
and 2 (Docket No. NOR 42175)*

Dear Ms. Brown:

Attached for filing in the above-referenced docket is the Rebuttal of Illinois Central Railroad Company to Non-Party Replies.

Sincerely,

/s/ David A. Hirsh

David A. Hirsh

Counsel for Illinois Central Railroad Company

Attachment

cc: All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42175

COMPLAINT AND PETITION OF THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. § 24308(f) – FOR SUBSTANDARD PERFORMANCE OF AMTRAK’S
SUNSET LIMITED TRAINS 1 AND 2

**REBUTTAL OF ILLINOIS CENTRAL RAILROAD COMPANY
TO NON-PARTY REPLIES**

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**REBUTTAL OF ILLINOIS CENTRAL RAILROAD COMPANY
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In accordance with the Board’s August 19, 2024 decision (“August 19 Decision”), Illinois Central Railroad Company (“CN”) hereby submits its rebuttal to the non-party replies to the Opening Statement of National Railroad Passenger Corporation (“Amtrak”) and the railroad parties’ reply statements thereto.¹ As discussed below, the non-party replies predominantly support CN’s positions. Only RPA argues in support of Amtrak, and its arguments are meritless.

I. MOST NON-PARTY REPLIES SUPPORT OR ARE CONSISTENT WITH CN’S POSITIONS.

Almost all of the non-party comments support or are consistent with CN’s key positions regarding: (1) the meaning of preference; (2) the Board’s authority to award damages in this proceeding; and (3) the extent and applicability of any recommendations the Board may issue.

¹ Reply comments were filed on or about January 22, 2025, by the following: Association of American Railroads (“AAR”); Association for Innovative Passenger Rail Operations (“AIPRO”); Commuter Rail Coalition (“CRC”); Massachusetts Bay Transportation Authority (“MBTA”); Northern Indiana Commuter Transportation District (“NICTD”); Rail Passengers Association (“RPA”); Reason Foundation; Southeastern Pennsylvania Transportation Authority (“SEPTA”); and Washington Legal Foundation (“WLF”).

A. The Meaning of Preference

In its reply comments, CN argued that preference under 49 U.S.C. § 24308(c) means only that dispatching must be weighted in Amtrak's favor and that Amtrak is wrong in asserting that preference is absolute.² CN also explained that adoption of Amtrak's interpretation of preference would hurt all users of the rail network, including Amtrak, both because it would impair network fluidity in ways that harm every network user and because Amtrak would be required to compensate hosts for the resulting excessive and disproportionate costs.³

The non-party commenters (except for RPA) who directly address the meaning of preference agree with CN's arguments by highlighting the statutory text, the historical context, the Rail Transportation Policy (49 U.S.C. § 10101), and the harm that would be done to all network users if the overbroad interpretation of preference proposed by Amtrak and implied by its proposed recommendations were implemented.⁴

In addition to rejecting Amtrak's absolute vision of preference,⁵ AIPRO makes a further point that undermines Amtrak's argument that it requires an extreme form of preference to operate successfully. AIPRO emphasizes that no preference of any kind, much less absolute

² Reply of Illinois Central Railroad Company to Opening Statement of National Railroad Passenger Corporation ("CN Reply"), at 24-31 (filed Dec. 23, 2024).

³ *Id.* at 32-36.

⁴ *See, e.g.*, Brief of AAR at 5-20 and Verified Statements of Paul B. Duncan (Ex. A), John H. Friedmann (Ex. B), and C. Tyler Dick, Ph.D., P.E. (Ex. C); Comments of Reason Foundation at 5-6.

In addition, several non-party passenger rail operators emphasize that Amtrak is entitled to "preference over freight transportation" only, 49 U.S.C. § 24308(c), not over commuter trains. *See* CRC Reply at 2-4; MBTA Reply at 1-3; NICTD Reply at 1-2; SEPTA Reply at 1-2. As discussed in Part I.C., below, they also address the potential harms from Amtrak's overbroad "recommendations."

⁵ AIPRO Reply at 3 ("Rail carriers should not be expected to resolve every individual dispatching decision in favor of Amtrak.")

preference as Amtrak advocates, is necessary for the successful operation of passenger service.⁶ It explains that passenger operators and their hosts can and should rely instead on their operating agreements to govern their relationships, without the need to resort to claims of preference.⁷

B. The Board's Authority to Award Damages

In its reply comments, CN argued that the Board should not interpret 49 U.S.C. § 24308(f)(2) as permitting an award of damages unless a rail carrier's failure to provide preference caused delays that would result in Customer OTP falling below 80% for two consecutive quarters.⁸ AAR and WLF agree.⁹ WLF, in particular, underscores the importance of the Board exercising its authority judiciously so as not to award damages against a host that lacked fair notice that an action would be deemed a denial of Amtrak preference.¹⁰

C. The Extent and Applicability of Any Recommendations

CN argued in its reply comments that any Board recommendations must be specific to the Sunset Limited trains and be tailored and balanced, taking many factors into account, including: Amtrak's own responsibility for delays; impacts to the freight network, freight customers, or other passenger train operators; and any issues with Amtrak's data, scheduling, or existing congestion. CN urged that the Board reject Amtrak's overbroad and unworkable set of recommendations that apply to the entire rail industry.¹¹

⁶ AIPRO Reply at 1-3.

⁷ *Id.* at 2.

⁸ CN Reply at 36-38.

⁹ Brief of AAR at 28-31; WLF Reply at 1-2.

¹⁰ WLF Reply at 3-4.

¹¹ CN Reply at 20-24.

CRC, NICTD, and SEPTA agree, with particular focus on the harm to other passenger operators that could be caused by Amtrak's overbroad recommendations.¹² Further, CRC (whose arguments are joined by NICTD) specifically urges the Board to apply whatever recommendations it may develop to the Sunset Limited trains alone.¹³ And it joins Amtrak's Class I hosts in arguing the Board should reject Amtrak's overbroad recommendations that could unduly "hamper their flexibility to dispatch trains safely and efficiently."¹⁴

II. RPA'S ARGUMENTS IN SUPPORT OF AMTRAK ARE MERITLESS.

A. No *Quid Pro Quo* Supports Amtrak's Extreme Interpretation of Preference.

A central premise of RPA's arguments is the unsupported and erroneous assertion that "[p]reference is a *quid pro quo* in exchange for the U.S. taxpayers' 1970 rescue of the private railroads through absorbing the liabilities of common-carrier passenger service."¹⁵

As a statutory matter, that argument is wrong on its face. Congress enacted the Rail Passenger Service Act of 1970 ("RPSA")¹⁶ to rescue passenger service by establishing Amtrak to assume passenger operation responsibilities in exchange for fixed payments from those railroads that still had passenger common-carrier responsibilities. Under section 401, railroads could request contracts from Amtrak under which they would pay Amtrak a fixed amount based on their passenger service losses, "[i]n consideration of being relieved of" all responsibility for

¹² CRC Reply at 6-8; NICTD Reply at 2; SEPTA Reply at 1-3. [MBTA shares the same concerns, but believes Amtrak's preference claims and recommendations may in context be read narrowly. MBTA Reply at 1-3.]

¹³ CRC Reply at 6.

¹⁴ *Id.* at 7-8.

¹⁵ RPA Reply at 4.

¹⁶ Pub. L. No. 91-518, 84 Stat. 1327.

intercity passenger rail service.¹⁷ As the ICC made clear early in Amtrak’s history, “the entry fee provided for in section 401 is the *entire consideration for being relieved of the common carrier responsibilities for providing intercity rail passenger service.*”¹⁸ Operating agreements, which railroads entered into with Amtrak under a different section of the RPSA (section 402, now 49 U.S.C. § 24308) were written on a clean slate, with no lingering obligations stemming from the termination of the railroads’ passenger rail service obligations.

The preference obligation was not enacted until three years after the RPSA, in 1973.¹⁹ That obligation, moreover, applies wherever an Amtrak train is dispatched by a host railroad on a mixed-use line – not just to those trains that were the subject of the 1970 bargain. The RPSA was a one-time, fixed-compensation deal for assumption of specific passenger operation responsibilities. Preference is an entirely separate statutory obligation, imposed later as part of an integrated statutory scheme under 49 U.S.C. § 24308 that is premised on compensation being provided to the host on an ongoing basis as provided for in § 24308(a).

In any event, regardless of one’s view of RPA’s *quid pro quo* argument, its effort to support Amtrak ultimately fails. As RPA acknowledges, the preference obligation was understood to entail no more than “the same preference that private railroads’ own passenger trains had expected previously.”²⁰ RPA, like Amtrak, assumes that prior to 1970 passenger trains had been accorded “absolute preference,” in the style of a presidential motorcade. But that is not the case. Three years before enactment of RPSA, in response to “complaints that

¹⁷ *Id.* § 401(a)(1)-(2), 84 Stat. at 1334. This payment could be paid in cash or in the form of rail equipment or services. *Id.* § 401(a)(2).

¹⁸ *Baker et al., Trustees—Compensation for Passenger Serv.*, 342 I.C.C. 765, 768 (1973) (emphasis added).

¹⁹ Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10(2), 87 Stat. 548, 552.

²⁰ RPA Reply at 3.

passenger trains are sometimes sidetracked for a meet with a freight train,” the Interstate Commerce Commission stated that “[o]perating conditions may dictate that passenger trains be sidetracked for long freight trains which will not fit the length of sidetracks, or for trains which are fleet operated, as where two to four trains, often including a passenger train, are operated in tandem.”²¹ And in a decision issued the month preceding enactment of that statute, the Commission responded to complaints that a rail carrier was delaying passenger trains “to permit prompt movement of freight trains” by observing that, “[i]n the day-to-day operation of any railroad discretion must b[e] given to the dispatcher to assure safe movement of all trains[,] and there are bound to be meets and passes requiring such actions.”²² Further, the nearly contemporaneous testimony of its presidents makes clear that even Amtrak understood that it was not owed “absolute” preference.²³

B. The Prerequisite of Two Consecutive Quarters of Substandard OTP for Initiating an Investigation Under 49 U.S.C. § 24308(f)(1) Cannot Excuse an Overbroad Interpretation of Preference.

RPA wrongly suggests that the strained “absolute” notion of preference championed by Amtrak will do no harm, and may therefore be adopted, because of the investigation threshold set by 49 U.S.C. § 24308(f)(1). RPA claims that failure of an Amtrak service to achieve the 80% Customer OTP (“COTP”) standard over two consecutive quarters (as required to trigger an

²¹ *S. Pac. Co. Discontinuance of Trains Nos. 39 & 40 Between Tucumcari, N.M., & Los Angeles, Calif.*, 330 I.C.C. 685, 692-93 (1967).

²² *Penn Cent. Transp. Co. Discontinuance of 34 Passenger Trains*, 338 I.C.C. 380, 464 (1970).

²³ See, for example, testimony by Amtrak Presidents Roger Lewis and Paul Reistrup cited by CN in its Reply to Amtrak’s Opening Statement (at 33-34) (including statement by President Lewis that absolute preference “just is not a real-world approach” and by President Reistrup that “prudent operation” will sometimes call for “putting a passenger train, which is short, into [a] siding and getting [a] freight past it on the main line, particularly when the freight train won’t fit in the siding”).

investigation) necessarily entails a “sustained failure [by the host(s)] to prioritize passenger traffic over a six-month period,” such that the investigation threshold ensures that even with an “absolute” notion of preference, only sustained unreasonable host conduct will be penalized.²⁴ These suggestions are contrary to the statute, facts, and logic.

First, RPA fails to substantiate its central argument that adoption or existence of the investigation mechanism in 49 U.S.C. § 24308(f)(1) supports its strained interpretation of the substantive obligation set by § 24308(c). Congress enacted the preference obligation in § 24308(c) in 1973. It has never amended that obligation, either when it enacted § 24308(f)(1) in 2008, or elsewhere. RPA boldly asserts that “the rule-writers” (presumably meaning Congress) adopted the requirement of two quarters of substandard performance as a prerequisite to investigation specifically as a response “to host railroads’ concerns about a maximalist, absolutist interpretation of ‘preference.’”²⁵ Its assertion is entirely speculative; it cites nothing in support. Further, it is axiomatic that in order to illuminate the meaning of an ambiguous statutory term legislative context and history must exist before or at the time of the statute’s enactment, because statutory interpretation involves determining “what legislators understood an ambiguous statutory text to mean when they voted to enact it into law.”²⁶ Relying on a provision enacted in 2008 to interpret a provision enacted in 1973 is simply wrong.

Second, the notion that the prerequisite for investigation under § 24308(f)(1) somehow reduces the impact of the demands of providing preference under § 24308(c) makes no sense. CN and other freight railroads have to meet their preference obligations regardless of whether a

²⁴ RPA Reply at 6.

²⁵ *Id.*

²⁶ *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 n.71 (2011).

§ 24308(f)(1) investigation is in the offing. If preference were authoritatively defined as requiring presidential motorcade treatment, CN and other freight railroads would be under an express statutory obligation to provide presidential motorcade treatment to Amtrak every day, resulting in a gridlocked freight rail system and national economic disaster. And even if freight railroads could somehow ignore their substantive obligations and consider only the potential for enforcement, they would still be subject to the separate authority of the Attorney General to enforce preference under 49 U.S.C. § 24103(a), which has no six-month threshold.²⁷

Third, it is plainly untrue that failure to meet the OTP standard for two quarters is indicative of “six straight months of dispatching that favors freight trains over passenger trains.”²⁸ Many factors affect Amtrak performance, as recognized by the statutory requirement that the Board investigate all relevant factors, many or most of which have nothing to do with preference, including many of the factors cited by RPA itself (such as weather and maintenance). If a railroad is forced to respond to an investigation triggered by such non-preference-related factors, it is essential that when the Board reviews whether and to what extent Amtrak’s underperformance is attributable to a preference violation, it applies the correct meaning of “preference.”

Finally, the statutory scheme itself makes clear that the period of underperformance that is a prerequisite for investigation is independent from the question of whether there may be a preference violation. The very purpose of the investigation is to ascertain the facts related to underperformance and to determine, among other things, whether that underperformance is

²⁷ In fact, such an action is currently pending in the District of Columbia district court against Norfolk Southern Railway Company and its holding company. *United States v. Norfolk S. Corp.*, No. 1:24-cv-02226-ABJ (D.D.C. filed July 30, 2024).

²⁸ See RPA Reply at 6.

attributable to a preference violation. The simple satisfaction of a prerequisite for investigation creates no presumption as to what that investigation will find.

RPA's arguments shed no light on the appropriate interpretation of preference.

CONCLUSION

The comments filed by the non-parties largely support one or more of CN's key positions: preference is not "absolute"; any damages for preference violations should be premised on a finding that preference violations, properly understood, caused the performance failures that triggered investigation; and any recommendations should be balanced and tailored and limited to the facts found in this investigation. RPA's arguments in support of Amtrak's strained "absolute" notion of preference are entirely without merit.

Respectfully submitted,

/s/ David A. Hirsh

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February 21, 2025

CERTIFICATE OF SERVICE

I, James M. Guinivan, hereby certify that I have, this 21st day of February, 2025, caused the foregoing Rebuttal of Illinois Central Railroad Company to Non-Party Replies to be served by email upon all parties of record and have provided courtesy copies by email to all non-parties that filed replies to Amtrak's Opening Statement or to replies of railroad parties.

/s/ *James M. Guinivan*

James M. Guinivan