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SERVICE DATE- DECEMBER 28, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 728

POLICY STATEMENT ON IMPLEMENTING INTERCITY PASSENGER TRAIN ON-TIME PERFORMANCE AND PREFERENCE PROVISIONS OF 49 U.S.C. § 24308(c) AND (f)

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Statement of Board Policy.

SUMMARY: The Surface Transportation Board (Board) is issuing this proposed Policy Statement to provide guidance to the public regarding complaint proceedings under 49 U.S.C. § 24308(f) and related issues under 49 U.S.C. § 24308(c). The Board seeks public comment on this proposed Policy Statement, and may revise it, as appropriate, after consideration of the comments received.

DATES: Comments on this proposed Policy Statement are due February 22, 2016. Reply comments are due March 14, 2016.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman, (202) 245-0386.
[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: This proposed Policy Statement provides guidance regarding issues that may arise and the evidence to be presented in complaint proceedings under 49 U.S.C. § 24308(f). That provision allows the Board to initiate an investigation on its own, and requires the Board to initiate an investigation upon complaint by the National Railroad Passenger Corporation (Amtrak) or others, to determine whether the failure of intercity passenger trains to achieve 80 percent on-time performance is due to causes that could reasonably be addressed by a host carrier, Amtrak, or other intercity passenger rail operators. If the Board finds that service delays are attributable to the host carrier's failure to provide preference to Amtrak trains as required by 49 U.S.C. § 24308(c), the Board may award damages or other appropriate relief. The Board seeks public comment on this proposed Policy Statement, and may revise it, as appropriate, after consideration of the comments received.

Background

Amtrak was established by Congress in 1970 to preserve passenger services and routes on the Nation's railroads. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383–384 (1995); *Nat'l R.R. Passenger Corp. v. Atchison, Topeka, & Santa Fe R.R.*, 470 U. S. 451, 454 (1985); see also *Rail Passenger Serv. Act of 1970*, Pub. L. No. 91-518, 84 Stat. 1327. As a condition of relieving railroad companies of their common carrier obligation to provide passenger service, Congress required that they permit Amtrak to operate over their tracks and use their facilities. See 45 U.S.C. §§ 561, 562 (1970 ed.). With the exception of certain rail lines located mainly in the northeastern United States, most of Amtrak's passenger service is provided over rail lines that are owned by other host carriers, mainly Class I freight railroads. Those host carriers are responsible for dispatching both freight and passenger trains on their lines. On these lines, Amtrak trains share tracks and facilities with freight trains and, in a number of major metropolitan areas, a substantial volume of commuter rail service.

Since 1973, Congress has required host railroads to give Amtrak trains preference over freight trains when using rail lines and facilities. At the time, authority to enforce this preference requirement resided with the Secretary of Transportation. The law requires that “[e]xcept 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” 49 U.S.C. § 24308(c); see *Amtrak Improvement Act of 1973*, Pub. L. No. 93-146, § 10(2), 87 Stat. 552 (initial version). However, “preference” is not defined by statute.

In 2008, Congress enacted the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) to address, among other things, issues related to the performance of passenger rail service, including the concern that one cause of Amtrak's inability to achieve reliable on-time performance may be the failure of host freight railroads to honor Amtrak's right to preference. See Pub. L. No. 110-432, 122 Stat. 4907; S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007). PRIIA shifted enforcement of the preference requirement to the Board. See 122 Stat. 4927.

Under 49 U.S.C. § 24308(f), which was enacted as part of PRIIA, if the “on-time performance” of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the Board may initiate an investigation, or Amtrak and other eligible complainants may file a complaint with the Board requesting that the Board initiate an investigation.¹ The purpose of such an investigation is to determine whether and to what extent delays are due to causes that could reasonably be addressed by the host railroad or the passenger rail operator. Following the investigation, should the Board determine that Amtrak's deficient on-time performance is “attributable to” the host carrier's “failure to provide preference to Amtrak over freight transportation as required” by 49 U.S.C. § 24308(c), the Board may award damages or other appropriate relief. 49 U.S.C. § 24308(f)(2). If the Board finds it appropriate to award damages to Amtrak, such an award must be used “for capital or operating expenditures on

¹ The Board is concurrently addressing the definition of “on-time performance” in a Notice of Proposed Rulemaking under Docket No. EP 726.

the routes over which delays” were the result of the host railroad’s failure to grant the statutorily required preference to passenger transportation. 49 U.S.C. § 24308(f)(4).

Amtrak has filed two complaints (both pending) requesting that the Board initiate an investigation pursuant to § 24308(f), claiming that host Class I carriers have not given Amtrak preference as required under § 24308(c).² But because “preference” is not defined by statute, we include guidance here regarding the Board’s interpretation of “preference.” In addition, because there is no precedent for parties to look to in developing their cases, we will also provide guidance regarding the evidence that may be most useful in § 24308(f) proceedings.

We note that through this policy statement, the Board is not making any binding determinations. Parties are still free to present any arguments or evidence they could have presented before the Board issued this policy statement. We provide this preliminary guidance merely as a potential starting point for parties to consider when developing evidence for § 24308(f) proceedings, recognizing that the fact-specific nature of § 24308(c) preference issues means that the Board’s approach to such issues will likely be refined in individual § 24308(f) proceedings. In addition, we are inviting public comment so that interested parties may suggest other interpretations and evidence that may be helpful in § 24308(f) proceedings.

“Preference” Under 49 U.S.C. § 24308(c): Interpretation and Evidence

Currently, we do not view the preference requirement as absolute. In other words, a host rail carrier need not resolve every individual dispatching decision between freight and passenger movements in favor of the passenger train. Under this view of preference, the Board would take a systemic, global approach in determining whether a host carrier has granted the intercity passenger trains preference. Although § 24308(c) does not define or directly qualify “preference,” Congress expressed its view that “preference for . . . passenger transportation . . . [should not] materially lessen the quality of freight transportation provided to shippers.” § 24308(c). Additionally, although Congress established that Amtrak’s mission is to provide “efficient and effective service,” 49 U.S.C. § 24101(b), the rail transportation policy also directs the Board to regulate so as to promote efficiency in freight service, 49 U.S.C. § 10101.

² In National Railroad Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway, Docket No. NOR 42134, Amtrak seeks an investigation pursuant to § 24308(f)(2) regarding alleged “substandard performance of Amtrak’s Illini/Saluki service between Chicago and Carbondale, IL” on rail lines owned by a subsidiary of Canadian National Railway Company. (Amtrak Amended Complaint 1, NOR 42134.) In National Railroad Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd., Docket No. NOR 42141, Amtrak seeks an investigation under § 24308(f)(2) regarding alleged “substandard performance of Amtrak’s Capitol Limited service between Chicago, IL and Washington, D.C.” on rail lines owned by CSX Transportation, Inc. and Norfolk Southern Railway Company. (Amtrak Complaint 2, NOR 42141.)

Moreover, a requirement of absolute preference might not, in the long run, promote efficient passenger service. Due to increased traffic density, the rail operating environment has become more complex since Congress first established a preference requirement in 1973. This environment requires complex decision-making by the host carriers' dispatchers. Past rail service crises, such as that during the late 1990s, have demonstrated that congestion at one location can adversely affect the rail network at large. See, e.g., Joint Petition for Service Order, 2 S.T.B. 725, 731 (1997). An individual dispatching decision involving two trains may have efficiency consequences for the network; therefore, a dispatching decision that may appear, in isolation, to favor freight over passenger efficiency may ultimately promote efficiency and on-time service for passenger trains on the network generally (including, for the long run, trains on the particular route at issue). We therefore favor a systemic approach to preference—one that focuses on minimization of total delays affecting intercity passenger train movements while on the host carrier's network, consistent with the statute.

Under this view of preference, parties to § 24308(f) proceedings should focus their evidence and arguments on whether or not a host carrier made identifiable, consistent efforts to minimize total delays for intercity passenger train movements while on the host carrier's network and on whether or not such efforts have in fact done so.³

The Board is particularly interested in receiving evidence from which it can determine the host carriers' policies and procedures used to satisfy their preference obligations to Amtrak trains, whether host carriers have systems in place for ensuring that Amtrak trains receive preference, and whether there is evidence of an identifiable and longstanding pattern of systemic failures to provide Amtrak trains with the statutory preference. Thus, the Board intends to look for the following types of evidence in the parties' presentations.

³ We anticipate that parties may seek to introduce movement-specific records pertaining to the causes of individual train delays, such as Amtrak's Conductor Delay Reports (CDRs) or similar individual train event data from host railroads. CDRs are used by Amtrak, the Federal Railroad Administration, and state departments of transportation for a variety of official purposes, including the reporting of passenger train performance by Amtrak and the calculation of monthly performance incentive payments to host carriers. See Dep't of Transp., Office of the Inspector Gen'l Report No. CR-2010-17, Amtrak Cascades and Coast Starlight Routes: Implementation of New Metrics and Standards is Key to Improving On-Time Performance 16-17 (Sept. 23, 2010). On the other hand, host railroads and some state agencies have questioned the reliability of CDRs because conductors are recording what they believe is a cause of delay based on the information available to them at the time and may be unaware of the delay's primary cause, which could have occurred miles away and cascaded across the host carrier's system. See, e.g., Federal Railroad Administration, Metrics and Standards for Intercity Passenger Rail Service 20 (May 12, 2010), <https://www.fra.dot.gov/eLib/Details/L02875> (click on "Download PDF Document") (last visited Dec. 14, 2015). Parties may address these issues and similar evidentiary issues in individual proceedings under § 24308(f).

Evidence of host carrier's internal processes and incentives. To the extent available, parties should provide evidence that shows whether a host carrier has implemented and executed policies that help minimize (or, conversely, exacerbate) total delays for intercity passenger train movements while on the carrier's network. Accordingly, the parties should provide operating agreements and any other agreements between Amtrak, its host carriers, and other entities (under seal if necessary), that bear on on-time performance, dispatching priorities, train delays, and related incentives, disincentives, and measurement protocols; and evidence on how these agreements pertain to the meaning of preference as applied to the case. The parties may also provide evidence of the host carrier's internal policies and processes that support or hinder the minimization of total delays for intercity passenger trains. This may include evidence of management policies and procedures, personnel practices (such as training materials, bonus incentives, and performance evaluations), and internal controls of such management policies and personnel practices to ensure that they are functioning as intended. Such evidence could indicate incentives or disincentives for employees to implement practices that support or hinder preference for Amtrak trains.

Evidence indicating how policies have impacted train delays. Parties should also provide, to the extent available, evidence indicating whether a host carrier's policies and processes have, in practice, resulted in a pattern of minimized or exacerbated passenger train delays. Such evidence may ultimately consist largely of statistical analyses of available data, such as a comparison of the reliability of intercity passenger trains with other types of service operated by the host carrier on the same route—such as data showing that the on-time performance for passenger service was consistently higher or lower than that of the highest class of freight service operated by the host carrier over the same route. Statistical analyses of the data could also be used to show patterns that illustrate host carrier and Amtrak behavior—such as whether the management policies and practices regarding preference have been implemented and whether those practices and policies are sufficient to minimize total delays for intercity passenger train movements while on the carrier's network. This type of analysis could involve development of one or more hypotheses—statement(s) that should be true given the circumstances—that are then supported by data.⁴ For example, a party could hypothesize that Amtrak trains should be the least-delayed class of train on the host's system. The hypothesis would then be tested using standard statistical and econometric tools. If Amtrak is, indeed, the least-delayed class of transportation on the host carrier, then the delays to Amtrak might not indicate a host carrier's failure to provide preference. By contrast, if Amtrak trains encounter greater delays than other types of movements, then the host carrier's actual instructions, incentives, or verbal signals provided to and implemented by dispatchers and their supervisors may diverge significantly from the carrier's officially-documented management policies. Another analysis might support a conclusion that Amtrak's own behavior—for example, failing to hand off trains originating on Amtrak-owned right-of-way to another host carrier on time—

⁴ Such methods are referred to in economic literature as forensic economics. An overview of these methods is provided by Eric Zitzewitz, Forensic Economics, 50(3) J. of Econ. Literature 731 (Sept. 2012).

contributes to deficient performance. These approaches to analysis would allow the Board to effectively assess claims regarding preference.

“Attributable to” Under 49 U.S.C. § 24308(f)(2): Interpretation and Evidence

Under 49 U.S.C. § 24308(f)(2), the Board can choose to award damages or other appropriate relief if the Board determines that Amtrak’s deficient on-time performance is “attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required” by 49 U.S.C. § 24308(c). In determining whether delays are “attributable to” the host freight carrier, we will need to take into account the reality that delays may be caused by host carriers, but also by the intercity passenger rail operator⁵ or other factors such as weather. We believe that such an approach is consistent with 49 U.S.C. § 24308(f)(1), which contemplates a comprehensive and impartial on-time performance investigation, in which the Board considers Amtrak’s role in delays as well as the host carrier’s role. See § 24308(f)(1) (“[T]he Board shall . . . determine whether and to what extent delays . . . are due to causes that could reasonably be addressed by a [host carrier] or . . . by Amtrak . . .”).

Evidence regarding delay attribution should be directed toward comprehensively analyzing the delays affecting the service in question. Parties should submit evidence that shows the types of delays that occurred and the entities associated with those delays. This type of data would allow the Board to assess the relative importance of alleged failures to provide preference versus other types of delays. Such evidence could include analysis of the timetables of the service in question, showing all major components of scheduled running time. This would enhance understanding of the impacts of delays on the recorded on-time performance of the service. In addition, parties could submit analyses of delays by source (host(s), operator, and third party) and type of delay. Such analyses should be designed to show patterns in causation and responsibility.⁶ Parties might also submit comparisons of the various types of delays, and the sources associated with each type of delay, with the timetable analysis. Such analyses could potentially show the relative importance of each delay type and source to the deficient on-time performance of the service. Finally, parties might also submit analyses of whether certain types of delays could be reasonably addressed by the party or parties responsible and what effect any potential measures to address delay might have on the on-time performance of the service in the future.

⁵ Currently, Amtrak is the only operator of regularly scheduled intercity passenger rail transportation, but that may change in the future. Also, Amtrak on a number of routes functions both as “host” and as “operator,” as described below.

⁶ On some routes, such as those for which Amtrak is an owner of part of the route and therefore acts as its own host for that portion of the route, Amtrak may be a source of both host and operator delays. In these instances, parties’ analyses should add together total delays for which Amtrak was the source, and also break out Amtrak delays into host and operator categories. Similarly, if § 24308(f) proceedings involve routes with multiple operators, analyses of such routes should break out operator delays by operator and type.

Potential Factors to Mitigate Preference Failures

Most Amtrak routes have more than one host carrier,⁷ and, as discussed above, the statute calls for comprehensive consideration of the factors affecting performance in a § 24308(f) proceeding. The ability of passenger trains to interchange in a timely manner from one host carrier to a second host carrier may affect the second carrier's service to passenger trains, including that carrier's ability to provide preference. Parties could submit evidence and argument regarding this issue in § 24308(f) proceedings. For example, parties could submit analyses of scheduled versus actual transfer times of trains from one host carrier to another. Parties could also describe the host carrier's freight train scheduling policy and could analyze how late handoffs of passenger trains affect the efficiency and reliability of scheduled freight services. Analyses showing consistent and longstanding patterns would be particularly informative.

Parties could also submit evidence regarding other factors that may have prevented the host carrier from providing preference in certain circumstances. Such factors could include "emergencies" or circumstances in which providing Amtrak preference would "materially . . . lessen the quality of freight transportation provided to shippers." See 49 U.S.C. § 24308(c). The Board would then consider whether any of the claimed circumstances constitute an appropriate mitigating factor within individual § 24308(f) proceedings.

Opportunity for comment. We encourage public comments on all aspects of this proposed Policy Statement, as well as suggestions for additional types of evidence that may be useful in consideration of preference issues and adjudication of § 24308(f) complaint proceedings. Comments on this proposed Policy Statement are due February 22, 2016. Reply comments are due March 14, 2016.

Decided: December 16, 2015.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

⁷ See Amtrak Monthly Performance Report for June 2015, E-16, <http://www.amtrak.com/ccurl/494/528/Amtrak-Monthly-Performance-Report-June-2015.pdf>, (showing multiple hosts for most routes).