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February 22, 2016

VIA E- FILING

Ms. Cynthia T. Brown,
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423

Re: Ex Parte 728: Policy Statement on Implementing Passenger Rail OTP and Preference Provisions of 49 U.S.C. § 24308(C) and (F)

Dear Ms. Brown:

The National Association of Railroad Passengers, the nation's oldest and largest organization speaking for the nearly 40 million Americans who rely on passenger rail every year, appreciates the opportunity to comment on the STB's "Policy Statement" on implementing preference provisions.

NARP strongly urges the Board to withdraw this policy statement. Our staff and members believe that this action gets it wrong, both on substance and as a matter of process and law. STB is engaging in administrative overreach in this instance, issuing a "Policy Statement" on how it will view the need for a right to preference without any input from any outside parties – even though "preference" has already been thoroughly defined, and periodically reaffirmed, by elected legislators who make the law on behalf of the voting public. The Dept. of Justice and the Dept. of Transportation have also addressed preference on numerous occasions.

This "statement," which would have effects every bit as binding and far-reaching as an actual rule, was issued without hearing any evidence, without taking any public testimony, and without even undergoing any kind of formal rulemaking procedure. More seriously it amounts to the Board and its staff effectively trying to re-write legislation by regulatory fiat. Behind closed doors, regulators are trying to fundamentally change the rules of the game for how Amtrak can press host railroads to honor their legal obligations, going around the intent of Congress as expressed some 30 years ago and consistently reaffirmed in law and court rulings.

[Discussion on 49 U.S.C. § 24308\(C\)](#)

The law was originally written so that host railroads – rescued by taxpayers in 1970 when Amtrak was created to relieve the host railroads of having to run passenger trains – had to give passenger trains preference unless they could win an exemption by proving that preference for passenger trains would "materially lessen the quality of transportation provided to freight shippers."

It is useful here to quote the entire relevant section, 49 U.S. Code Section 24308c (emphasis added):

“Preference Over Freight Transportation - Except 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 unless the STB orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the STB for relief. If the STB, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the STB shall establish the rights of the carrier and Amtrak on reasonable terms.”

The effect of STB’s new policy statement as written would be to flip the burden of proof from host railroads, who must by statute seek relief from STB, to Amtrak, which would have to prove to STB that a host railroad’s failure to give preference did NOT “materially lessen the quality of freight transportation” – a largely impossible burden given the need for access to proprietary data and information.

Bluntly, NARP believes changing what laws say and how they’re applied should be done by elected lawmakers and not by regulators operating without the benefit of a public hearing or even a formal rulemaking process.

The Effects of Neutralizing Preference

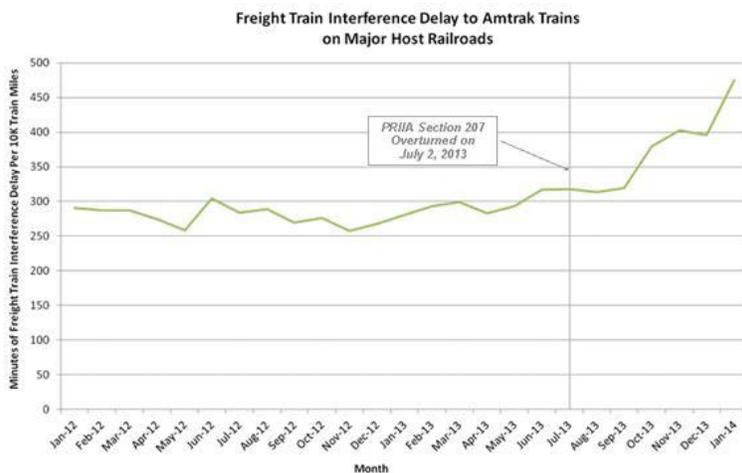
The period between the summer of 2013 and late 2014 offers the closest thing available to a laboratory experiment to demonstrate the practical effect of neutralizing legal preference on host railroad behavior. That intervening period began with the DC Court of Appeals reversing a lower court ruling and invalidating preference, and ended with the Supreme Court restoring it while sending the case back down for further review. Host railroad behavior then was unmistakable -- by the summer of 2014, Amtrak’s on-time performance (OTP) had dropped by half.

Under the metrics and standards implemented by the 2008 rail reauthorization law, Amtrak was able to achieve

a 2012 on-time performance rate of 83 percent nationwide, and 71 percent for long distance trains. This level of on-time performance played a key part in allowing Amtrak to sustain its explosive ridership growth, which has led to ridership records in 10 of the past 11 years.

Since the metrics were struck down by the court of appeals, reported freight interference incidents nearly tripled, and Amtrak’s on-time performance plummeted to 42 percent. The long distance trains were the most hard-hit; in a

Freight Train Interference Delays on the Major Freight Host Railroads



particularly extreme case, the on-time performance of the Capitol Limited plummeted to 1.6% in July of 2014. Amtrak reported in April 2014 that, in response to these skyrocketing delays, ridership and revenue had fallen by 15% year over year to date.

It was no coincidence that these delays followed hard on the heels of the DC appeals court ruling, and it was also no coincidence that the result unraveled a decade of record ridership. NARP found it ironic that these delays hurt Amtrak's bottom line and increased its dependence on public subsidies, given that those who publicly backed the appeals court ruling usually cite Amtrak's business performance as a reason to argue against intercity passenger rail service.

Equally telling was the rebound that on-time performance enjoyed within just days or weeks of the Supreme Court's ruling sending the case back to the lower court for review while reversing the Appeals court's action. We recognize that some delays are the result of inadequate infrastructure, but the dramatic change in OTP data during this period suggests that dispatching decisions play an outsize role in many of the delays we have seen.

A Personal Toll

Lost in the statistics, however, is the personal toll on our members who rely on – and pay for – timely and regular service on routes delayed by freight interference. Many irreplaceable personal moments have been disrupted by these delays, with crucial medical transports affected, weddings and funerals missed and rare home visits by deployed service-members cut short or even cancelled altogether. Each of these hundreds of stories – and we supplied more than 1,300 such stories to STB in October of 2014 – add up to more than mere temporary inconvenience and in many cases impose real dollar costs on vulnerable travelers.

Delays can cause real emotional pain to those who may already be travelling for somber reasons. Joanna Roe, a Washington state resident, boarded the Empire Builder at a small station about 45 minutes east of Vancouver, Wash., travelling to Boston to attend a funeral, “so I really had to be there,” Roe told us. After crossing into Montana and North Dakota, “We were pulled off the main line so many times I lost count. It kept getting longer and longer....We were delayed so often that we had to have two separate crew changes, which delayed us EVEN MORE as we waited for the new crews to arrive.” Joanna ultimately missed a connecting train in Chicago, was put up in a hotel in Chicago with only \$10 food money for the day, cancelled the next day's train leg and booked a new, expensive flight from Chicago O'Hare in order to attend the funeral.

Delays impose additional costs on fare-paying passengers. Kathleen Newell of Detroit, Mich., points out that freight delays in North Dakota make even the short trip from Minneapolis, Minn., to Ann Arbor, Mich., impossible to complete in one day as was once possible. “This delay causes a missed Chicago, Ill., to Ann Arbor, Mich., connection. In addition I have to stay overnight in Chicago, pay for a hotel and shorten my stay in Michigan as a result,” Newell writes.

Consider the anger of Walter Dunn, of North Port, Fla., an elderly man who had to travel unexpectedly from Florida to New York because his 91-year-old mother had been admitted to the hospital in critical condition. Dunn explains, “Several times we sat on a siding waiting for a freight train, whose schedule I am sure is not critical, to go by. When we starting getting later and later into stations the general comment amongst



passengers was 'that Amtrak never on time.' I think this is disgrace to our country. The trains in some third world countries keep a better schedule than those in this country." Older Americans often find air travel difficult and driving long distances impossible, so train travel is a true lifeline for these citizens, who deserve better.

Freight interference delays disrupt business being conducted by our members. Elliot Adams of Sharon Springs, N.Y., left Utica for a meeting in Detroit. Because the train schedule put Mr. Adams in Detroit early in the morning, he planned to arrive at the conference center early and scheduled a series of one-on-one meetings in preparation for the larger conference. "But my train was over nine hours late," Adams wrote. "I missed all those very important one-on-one meetings and the day time meetings, only arriving in time for an evening meeting."

Those with serious health conditions and the disabled are disproportionate users of the long-distance network, because of the difficulties they have managing air travel and driving. Delays cause inhumane problems for patients and impose additional suffering on people who are already ill. "In December of 2013 my wife and I rode the Empire Builder from Chicago to Winona, Minn., for an appointment at Mayo Clinic," explains Gary Lutes of Chicago, Ill. "Unfortunately the train was so late that we missed our shuttle to Rochester. We were fortunate that another shuttle service happened to arrive to take us to Rochester. We checked into our hotel at 3:00 a.m. with an 8:00 a.m. appointment at Mayo."

Coming at a time of record ridership, these delays on freight railroads nationwide may well permanently discourage new and first-time riders from exercising their choice to travel by rail, a choice more Americans each year say that they want. Chronic delays not only hurt our members and the rail-riding public but diminish Amtrak's ability to generate annual revenue improvements that reduce the amount of subsidy that is provided by taxpayers – both a statutory requirement and a policy goal at both ends of the political spectrum.

Given all of the above, NARP believes withdrawing this "Policy Statement" is in the best interest of the taxpaying and fare-paying public.

Sincerely,



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