BEFORE THE
SURFACE TRANSPORTATION BOARD

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)

OPENING COMMENTS OF THE ENVIRONMENTAL LAW AND POLICY CENTER, ALL ABOARD INDIANA, ALL ABOARD OHIO, ALL ABOARD WISCONSIN, FRIENDS OF THE CARDINAL-CHARLESTON, WVA, MIDWEST HIGH SPEED RAIL ASSOCIATION, NATIONAL ASSOCIATION OF RAILROAD PASSENGERS and VIRGINIANS FOR HIGH SPEED RAIL

Karen E. Torrent, Esq.
ENVIRONMENTAL LAW AND POLICY CENTER
500 New Jersey Ave, N.W.
Suite 400
Washington, DC 20001
(312) 505-3111

Dated: February 22, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

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)

OPENING COMMENTS OF THE ENVIRONMENTAL LAW AND POLICY CENTER AND OTHERS

The Environmental Law and Policy Center (ELPC), All Aboard Indiana, All Aboard Ohio, All Aboard Wisconsin, Friends of the Cardinal-Charleston, WVA, Midwest High Speed Rail Association, the National Association of Railroad Passengers and Virginians for High Speed Rail (hereafter, ELPC, et al.) submit these comments in response to the Board's proposed Policy Statement (PPS) issued 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). Notice of Proposed Statement of Board Policy, 80 Fed. Reg. 80878 (proposed Dec. 28, 2015).

ELPC et al. are not-for-profit organizations that share a common goal of advancing the development and operation of intercity passenger rail serve in the United States. All eight organizations have members who regularly ride Amtrak trains and have experienced the substantial delays in intercity passenger rail service.

ELPC et al. respectfully submit that the PPS contains an inapposite rendering of the plain and unambiguous language of Section 24308(c). Specifically, although Section 24308(c) clearly states that the passenger rail preference is absolute with two limited exceptions, the PPS purports to add an additional condition that must be met before freight railroads are obligated to provide preference. The foregoing effectively amounts to a legislative amendment of the statute, which is beyond the authority of the Board. For this reason, and those set forth below, ELPC et al. encourages the Board to withdraw the PPS.

I. BACKGROUND

From approximately 1950 to 1970, the private railroads, which operated both passenger and freight services, faced mounting financial problems. At that time, intercity passenger rail service had to compete with explosive growth in the highway and airline industries, and freight rail suffered from high fixed operating costs, which were difficult to offset in the face of stiffer competition from the trucking industry. Although the rail industry sought to discontinue the cost-prohibitive passenger rail business on certain lines, as "common carriers" they were

required to provide passenger service as well as freight service, and thus were prohibited from ceasing service until the Interstate Commerce Commission (ICC) and state regulatory commissions issued an order allowing the cessation of passenger service. National R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry., 470 U.S. 451, 454 (1985).

In 1968, the ICC issued a warning to Congress and the President that "[w]ithout immediate action on the part of the Federal Government, significant segments of the country will soon face the loss of their last remaining [passenger] rail service." Interstate Commerce Commission's Report to the President and the Congress Effectiveness of the Act, March 15, 1978, p.2, http://www.fra.dot.gov/eLib/Details/L04184.

In 1970, Congress created Amtrak "to avert the threatened extinction of passenger train in the United States." See Rail Passenger Service Act of 1970 (RPSA) Pub. L. No. 91-518, § 101, 84 Stat. 1328 (creating the National Railroad Passenger Corporation, now known as Amtrak). RPSA expressly states that Congress considers passenger rail service to be a "public convenience and necessity" and "that federal financial assistance as well as investment from the private sector of the economy" was needed to achieve the national goal of continuing and improving passenger-rail service rail in the United States. RPSA, Pub. L. No. 91-518, § 101, 84 Stat. 1328.

As a condition of relieving railroads of their intercity passenger rail service obligations, Congress required, among other things, that the private railroads allow Amtrak to operate passenger trains on their tracks and facilities, at rates either agreed to by Amtrak and the host railroads or prescribed by the ICC, and later the Surface Transportation Board (STB). See 49 U.S.C. 24308(a); National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 410 (1992); Atchinson, Topeka& Santa Fe Ry., 470 U.S. at 455. Apart from the Northeast Corridor, all of Amtrak's passenger trains operate on tracks owned and operated by the freight railroads.

Prior to Amtrak's creation it was the general policy of the railroads to accord passenger trains "preference" over freight trains in the use of their rail lines regardless of whether it resulted in delays and cost to the freight railroads. In 1973, during the reauthorization of the 1970 Act, Congress investigated concerns that some of the railroads were continually impeding the movement of Amtrak trains and instituting slow orders. In written testimony before the Senate Surface Transportation Committee, the President of the Association of American Railroads stated that: "It is the policy of the all participating roads to give preference to Amtrak passenger trains, even at the cost of delay to freight services." *Statement of Stephen Ailes, President, Amtrak Oversight and Authorization: Hearing on S. 1763:Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 88 (1973), p. 131.

Accordingly, Congress codified the policy of the freight railroads and created a passenger train preference as a statutory requirement subject to two exceptions. Section 24308(c) provides that "[e]xcept in an emergency, intercity passenger trains operated by or behalf of Amtrak has preference over freight transportation in using a rail lines, junction, or crossing unless the Board orders otherwise under this subsection. 49 U.S.C. § 24308(c). See also Amtrak Improvement Act of 1973, Pub. L. No. 93,146, §10(2), 87 Stat. 552 (initial version). Section 24308(c) provides

two exceptions to the passenger preference: (1) in the event of an emergency[1] and (2) when a railroad applies for and receives relief from the Board, or previously the Secretary of Transportation. "To win relief the freight railroad proves that giving preference to passenger rail "materially lessens" the quality of freight transportation provided to shippers. The Board would then work out a cooperative agreement between the parties for that specific exception." *Report on Root Causes of Amtrak Delays*, Dep't of Transportation, Office of Inspector General (September 8, 2008) p. 13. At no point in time since the passage of the 1973 Act, has any railroad petitioned either the Board or the Secretary of the Department of Transportation seeking relief from the statutory preference. Thus, absent an emergency, Amtrak trains today have an absolute right to preference.

Unfortunately the creation of a statutory right of passenger rail preference did not fix the problem of certain freight railroads impeding Amtrak service. Prior to 2008, Amtrak had no practical mechanism to enforce the passenger rail preference. Amtrak could not sue the host railroads in court or appeal to the Secretary of Transportation when it believed that its preference was violated. While the 1973 Act allowed freight railroads to appeal to the Secretary for a waiver of their preference obligations, according to the DOT Inspector General "they had little incentive to use it." Id at p. 5. Instead, some freight railroads chose to adjust their dispatching practices if they determined that giving Amtrak trains preference adversely affected their operations to an unacceptable degree. "The host railroads acknowledged that certain dispatching practices intentionally delay Amtrak trains, and we believe these practices violate preference. These include delaying Amtrak trains to maintain network fluidity; stopping freight trains on the mainline tracks to change out crews; and, in some cases, allowing intermodal trains to proceed before Amtrak trains." Id.

To address the lack of enforcement authority, in 2008, Congress passed the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907, giving Amtrak the tools to address this problem. Under PRIIA, Congress gave the Board enforcement authority to adjudicate[e] disputes between Amtrak and the freight railroads, including disputes about when Amtrak's "on-time performance problems" stem from the freight railroads' failure to "provide preference to Amtrak over freight trains." S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007). PRIIA also authorizes the Board to initiate an investigation if on-time performance averages less than 80 percent for two consecutive calendar quarters, 49 U.S.C. § 24308(f)(1) or "upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service." Id. The PPS issued by the Board, stems from the filing of two complaints by Amtrak against certain host railroads alleging violations of the preference and subsequent damages thereto under 49 U.S.C. § 24308(f)(1).

[1] Emergencies are defined in 49 C.F.R. § 220.13 (1973) as "derailments, collisions, storms, wash-outs, obstructions to tracks, and other hazardous conditions that could result in death or injury, damage to property, or serious disruption of railroad operations."

II. The Term "Preference" Has a Plain and Ordinary Meaning and Accordingly Is Not Subject to Interpretation By The Board

The Board should apply the plain meaning of the term "preference" in administering its authority to conduct investigations and resolve disputes under sections 24308(c) and 24308(f). The term "preference" has been incorporated into various federal statutes that have been reauthorized multiple times by Congress over the last 40 years without the need to include a specific definition. ELPC et al. contend that the term "preference" is unambiguous on its face and needs no definition.

For the sake of argument, applying the canons of construction to the statutory language renders the same conclusion. The starting point in construing statutory language is the statute itself. Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, frequently derived from the dictionary. In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994).

The term "preference" is not a term of art and is not statutory defined because it has a plain and ordinary meaning. Preference has been readily understood and applied within the rail sector for decades. As indicated supra, in written testimony before the Senate Surface Transportation Committee, the President of the Association of American Railroads clearly understood what preference meant when he stated that: "It is the policy of the all participating roads to give preference to Amtrak passenger trains, even at the cost of delay to freight services." *Statement of Stephen Ailes, President, Amtrak Oversight and Authorization: Hearing on S. 1763:Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 88 (1973), p. 131. Congress and host railroads acknowledge that preference means granting priority access to Amtrak.

Contrary to the Board's assertion in the PPS, the term "preference" is an absolute statutory right to the extent it requires the freight railroads to provide priority of operation to passenger rail trains. From a legal standpoint, Amtrak's right to preference is absolute, (i.e., it applies in every instance not specifically excluded by the statute) and that the statute grants Amtrak the right to run trains unimpeded by other trains on host railroads' tracks except where there is an emergency or a freight railroad obtains a waiver from the Board. The executive branch of the United States as well as Congress supports this view.

In addition to the Board, Congress has also vested authority to enforce the right of statutory preference under the federal rail statutes to the Attorney General.[2] In 1979, the United States Department of Justice bought an enforcement action against the Southern Pacific Transportation Company for failing to accord the statutory preference for passenger trains. Complaint for Declaratory and Injunctive Relief, U.S. v. Southern Pacific Transportation Company, Civil Action No. 79-3394 (U.S. Dist. Columbia) December 20, 1979.

[2] The Attorney General has authority to seek equitable relief against defendants whose actions, practices and policies are inconsistent with the terms of the Rail Passenger Service Act, 49 USC § 24103.

Although the case settled prior to final judgment, it is instructive in that the Department of Justice asserted that passenger rail's right of preference is absolute and also provides clear examples of activities that the United States contends violates the statutory right of preference. The case involved Amtrak's Sunset Limited train that operated on Southern Pacific's lines from New Orleans to Houston. The Department of Justice alleged that "in the absence of an order from the Secretary granting relief to a railroad, the statutory preference must be accorded, without regard to the effect of the preference on freight operations, except in an emergency." Id.

The Department set out specific actions by the freight railroad that constituted violations of the statutory preference that included: Southern Pacific's failure to clear the main track of local freight operations to give priority to passenger trains; situations where both a passenger train and a slower freight train were set to depart from a yard, the freight train was dispatched first; situations where passenger and freight trains were travelling toward one another on a single track line of railroad a decision was made to hold the passenger train; where the passenger train overtook and was forced to run behind the slower freight train, dispatchers declined to permit the passenger train to pass the slower freight train; and, dispatchers repeatedly allowed freight trains to remain parked on Southern Pacific main track in front of Amtrak passenger while the freight train serviced or refueled the freight train, added or removed freight cars or provided a new crew.

These actions by Southern Pacific that constituted alleged violations of the passenger rail preference were precisely the same activities that were identified by Congress and formed the basis for passing the Amtrak Improvement Act that included a statutory right of preference for passenger rail. [3]

The PPS's interpretation and application of preference not only ignores the plain and ordinary meaning of the term "preference" and it also disregards Congress' intent to grant passenger rail priority access over the freight railroads lines that has been in effect for over 40 years.

III. The Board's Proposed Policy Statement Contravenes the Unambiguous Language of 42 U.S.C. § 24308 and Effectively Amends the Statute

Section 243089(c) of PRIIA includes three clear and unambiguous sentences regarding preference:

> *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 Board orders otherwise under this subsection. A rail carrier *may*

[3] "These amendments are made necessary by the continuing efforts of the Southern Pacific, Missouri Pacific, and others to impede the expeditious and dependable movement of Amtrak trains." *Hearing on S. 1763:Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 88 (1973), p. 105.

> *apply to the Board for relief*. If the Board, 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 Board shall establish the rights of the carrier and Amtrak on reasonable terms. 49 U.S.C. § 24308(c).

Under the plain language of section 24308(c), there are only two circumstances under which the statutory preference would not apply: (1) an emergency, or (2) when a freight carrier applies for relief. It is indisputable that neither factual scenario exists in the instant proceedings. The Board cannot inquire, as the PPS suggests, into whether there was a "material lessoning" in the quality of freight services unless a freight carrier first applies for relief. No railroad carrier has ever sought relief from the preference under Section 243089(c) and no railroad has sought a waiver in the cases presently before the Board. Accordingly, the Board's authority under PRIIA is limited to ascertaining whether there were violations of the statutory passenger rail preference, the extent of those violations and the determination of damages where appropriate. Congress left little room for interpretation in this regard.

Additionally, the PPS appears to add a *third circumstance* under which preference might not apply – a balancing of the equities under which the Board should consider, among other things: "whether 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." The PPS states:

> 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. PPS at 4.

This interpretation is not warranted on the plain face of the statute, and should not be considered probative in determining whether there has been a violation of the statutory preference. The modification of Section 24308(c) in the PPS adding an additional circumstance under which the preference may not apply through a balancing of the equities of freight and passenger rail—may also be construed as an amendment of the statute. Such an action clearly falls within the jurisdiction of the Congress and outside the administrative authority of the Board.

Moreover, if a balancing of the equities standard were adopted by the Board in a section 24308(f) action, it is difficult to imagine how, as a practical matter, "equities" would be proved. For example, Amtrak has no practical way of refuting a freight railroad's assertion that "Amtrak train A was delayed for freight train B so that Amtrak train C to arrive on time." In short, there is no way to conduct a network-wide analysis to determine if the equities of freight rail service and passenger rail service are in balance.

Finally, the balancing of the equities between passenger rail and freight rail that the PPS contemplates is not supported by any of the passenger rail statutes or legislative history. The

fundamental and primary purpose of the Rail Passenger Service Act of 1970, the Amtrak Improvement Act of 1973 and PRIIA was to provide a national network of intercity passenger service in the United States. There is no mention that the equities of freight rail service must somehow be balanced against providing intercity passenger rail service.

What Congress stated in 1970 is no less true today. The purpose of intercity passenger rail is "[t]o provide fast and comfortable transportation between crowded urban areas and in other areas of the country…to end the congestion on our highway and the over-crowding of airways and airports; [so] that the traveler in America should to the maxim extend feasible have freedom to choose the mode of travel most convenient to his needs…" 45 U.S.C. §501. There is no statutory or legislative history that supports the notion that that intercity passenger rail was to be on par with the highest class of freight service.

Congress did recognize that there might be circumstances in which the quality of freight service to shippers may be impacted which is why Congress included an exception under section 23408(c) that allows freight railroads to seek relief from their preference obligations. But that option is procedurally limited to an instance where the freight railroad seeks a waiver or relief and cannot be inserted as the PPS proposes, to determine if a preference violation was in essence excusable under a 49 U.S.C. § 23409(f).

The PPS cites 49 U.S.C. § 10101 as a justification for the inclusion of its balancing of the equities of freight and passenger rail standard asserting that "rail transportation policy directs the Board to regulate so as to promote efficiency in freight service." PPS at 3. 49 U.S.C. § 10101, entitled "Rail Transportation Policy" lists 15 policy the United States applies in regulating the "railroad industry." They include "encourage fair wages", "promote energy conservation", and a host of other broad and laudable goals. In the draft policy, the Board suggests that a single one of these – "promote efficiency" somehow trumps the plain language of "preference." By this same logic, the Board should balance any Amtrak claim of violated preference against the goal of energy conservation achieved by the freight railroad dispatcher forcing the Amtrak locomotive to save energy by going slower. Clearly the general provisions of 49 U.S.C. § 10101 do not override the specific statutory mandate of preference for intercity passenger rail set forth in the Passenger Transportation Section of the Code.

Again and again over the last 40 years, Congress has emphasized that passenger rail is a critical component to maintaining a balanced transportation system in United States.[4] Congress has consistently emphasized that "[i]ntercity passenger rail is an increasingly necessary

[4] See, e.g., Amtrak Improvement Act of 1973, Pub. L. No. 93-146,87 Stat. 548; Amtrak Improvement Act of 1974, Pub. L. No. 93-496,88 Stat. 1526; Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90; Amtrak Improvement Act of 1976, Pub. L. No. 94-555,Tit. I, 90 Stat. 2613; Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923; Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, Tit. I, 93 Stat. 537; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, Tit. XI, Subtit. F, 95 Stat. 687; Amtrak Reauthorization Act of 1985, Pub. L. No. 99-272, Tit. IV, Subtit. A, 100 Stat. 106; Amtrak Reauthorization and Improvement Act of 1990, Pub. L. No 101-322, 104 Stat. 295; Amtrak Authorization and Development Act, Pub. L. No. 102-533, 106 Stat. 3515 (1992);Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570 (1997).

transportation alternative to highway and air travel, particularly in congested parts of the country…Further it is critical to decrease our dependence on foreign oil and alleviate the impacts of global climate change." H.R. Rep. No. 690, 110th Cong., 2d Sess. 32 (2008). In order to effectuate the goal of reliable intercity passenger rail service, Congress mandated the right of preference for passenger rail subject to only two exceptions: emergency and where a freight railroad moves for relief and then the Board finds a material lessoning of the freight service. Congress has not authorized the Board to override this dictate. Therefore, the PPS interpretation of preference in section 24308(c) and the proposal to include a equities test in a proceeding under 49 U.S.C. § 23409(f), shifts the burden of persuasion to Amtrak to demonstrate that a freight railroads failure to give preference did not materially lesson the quality freight transportation, totally contradicts the express language of section 24308(c) and Congress' intent.

In conclusion, the Board's PPS contains an inapposite rendering of the plain and unambiguous language of Section 24308(c) and specifically the definition of "preference." Furthermore, despite the fact that section 24308(c) clearly states that the passenger rail preference is absolute with two limited exceptions, the PPS purports to add an additional exception - -Amtrak service should not materially lesson freight service - - that must be met before freight railroads are obligated to provide preference. The addition of this exception effectively serves to amend the statute, which exceeds the authority of the Board. For all of these reasons, ELPC et al. respectfully requests that the Board withdraw the PPS.