

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**

CPKC REPLY STATEMENT

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- Exhibit 2 *Financial Assistance to Amtrak: Hearings Before the Subcomm. on Transp. & Aeronautics of the H. Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. (June 12, 1973) (Testimony of Roger Lewis) (excerpts)*
- Exhibit 3 Finance Docket No. 34495, *Buckingham Branch Railroad Company – Lease – CSX Transportation, Inc.*, Oral Argument (Oct. 13, 2004) at 68 (Testimony of Paul Vilter) (excerpts)
- Exhibit 4 *Review and Refunding of Rail Passenger Service Act: Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce, 92d Cong., 1st Sess., pt. 2 (Dec. 7, 1971) (Testimony of John Reed) (excerpts)*
- Exhibit 5 *Examining the Surface Transportation Board’s Role in Ensuring a Robust Passenger Rail System: Remote Hearing Before the Subcommittee on Railroads, Pipelines, & Hazardous Materials Of the H. Committee on Transportation & Infrastructure, 116th Cong., 2d Sess. (Nov. 18, 2020) (Testimony of Stephen J. Gardner) (excerpts)*
- Exhibit 6 Jim Blair, Amtrak Director Host Railroads, “*Amtrak’s Rights and Relationships with Host Railroads*” (Sept. 21, 2017), available at https://www.fhwa.dot.gov/Planning/freight_planning/talking_freight/september_2017/21/talkingfreight9_21_2017bl.pdf (excerpts)

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Canadian Pacific Kansas City Limited, on behalf of its U.S. rail carrier subsidiaries,¹ hereby provides its Reply Statement as required by the Board’s Decision herein served August 19, 2024 (“August 19 Decision”).

I. INTRODUCTION

CPKC is a participant in this proceeding as a result of its role with respect to two very short segments of the *Sunset Limited*’s route – two miles of trackage across the Neches River Bridge, over which Union Pacific Railroad Company (“UP”) has trackage rights and serves as Amtrak’s host railroad for the *Sunset Limited*, and an at-grade crossing of trackage owned by Illinois Central Railroad Company (“CN”) at Southport Junction (near New Orleans) over which the *Sunset Limited* operates. Amtrak has not raised in this proceeding – either in its Complaint or

¹ Canadian Pacific Kansas City Limited’s U.S. rail carrier subsidiaries include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc. (collectively “CP” or “CP/Soo”); The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, “KCSR”). We use the acronym CPKC herein for convenience to refer collectively to Canadian Pacific Kansas City Limited’s U.S. carrier subsidiaries rather than to the parent entity.

its Opening Statement² – any issue about CPKC’s dispatching or other actions relating to those track segments.

CPKC, however, does have an interest in how the Board addresses the three sets of questions posed by the Board’s August 19 Decision. CPKC hosts Amtrak intercity passenger service on multiple segments across its network,³ and Amtrak is exploring the possibility of adding new services on other portions of the CPKC network.⁴ CPKC is proud of its record as an Amtrak host railroad. CPKC (like its predecessor CP)⁵ has consistently earned an A or A+ grade on Amtrak’s annual Host Railroad Report Card, reflecting a very low incidence of “minutes of host-responsible delay per 10,000 train-miles.”⁶ With its commitment to operational excellence, CPKC expects that it will continue to provide a superb level of performance for the Amtrak services it has agreed to host.

Nevertheless, CPKC believes it is important that the regulatory framework governing Amtrak’s interactions with the freight rail network not intrude unnecessarily into the manner in which Amtrak’s host railroads undertake their network operations. Although Amtrak has the tremendous statutory power to force its way onto rail lines owned by America’s freight railroads (and in the process to receive preferential dispatching relative to freight trains), Congress has

² NOR 42175, Amtrak’s Opening Statement (filed October 7, 2024) (“Am. Op. Statement”).

³ CPKC hosts two train pairs (four trains) per day between Milwaukee and St. Paul, MN (the *Empire Builder* and *Borealis*); eight train pairs (16 trains) per day between Milwaukee and Chicago (the *Hiawatha Service*, *Empire Builder*, and *Borealis*); one train pair between Schenectady, NY and the Canadian border at Rouses Point, NY (the *Adirondack*); and one train pair between Schenectady, NY and Whitehall, NY (the *Ethan Allen*).

⁴ As the Board is aware, CPKC has supported Amtrak’s exploration of new services using CPKC trackage between Baton Rouge, LA and New Orleans and between Meridian, MS and Shreveport, LA.

⁵ CPKC’s predecessor KCSR has not hosted Amtrak service.

⁶ See <https://www.amtrak.com/reports-documents>. CP and CPKC have received an A or A+ in every Host Railroad Report Card since at least 2017.

made clear that Amtrak must – at minimum – compensate those railroads for the incremental costs that its presence imposes. Congress has further authorized Amtrak to negotiate operating agreements with its hosts that provide additional “incentive” compensation in exchange for superior operating performance. This framework provides an appropriate set of bounds within which Amtrak and its hosts can negotiate over the full panoply of topics that can affect the performance of Amtrak’s trains, including such matters as the trains’ operating schedules – specifically, anticipated run-time and recovery time as well as the time slots during which the trains will operate – and the financial consequences for the hosts if Amtrak’s performance exceeds (or falls short of) a certain standard.

The operating agreements that result from these negotiations can tailor their terms to the specific operational contexts and varying geographic challenges of different host railroads and the different Amtrak services using portions of those railroads’ networks. As a result, such agreements are generally the best means of accommodating Amtrak’s desired passenger service on rail lines that continue to be operated and maintained by their owners to support vital freight transportation. In considering Amtrak’s claims to an “absolute” and sweeping preference entitlement, the Board should be cautious about disrupting this balance, lest it impose upon host railroads new burdens that would inevitably degrade service to freight rail customers while simultaneously compelling Amtrak to pay more to operate commensurate with Congress’s mandate that Amtrak cover the incremental costs associated with its trains.

II. THE BOARD’S QUESTIONS DO NOT ARISE IN CONNECTION WITH ANY COMPLAINTS ABOUT CPKC-RELATED DELAYS EXPERIENCED BY AMTRAK’S *SUNSET LIMITED*

At the outset, CPKC wishes to emphasize that the *Sunset Limited* did not incur avoidable delays as a result of CPKC’s dispatching or other conduct. Indeed, Amtrak has not made any

allegation in this proceeding suggesting that CPKC played any role in Amtrak's dissatisfaction with the on-time performance of the *Sunset Limited*.

During the course of this proceeding, the Board has inquired about two sets of issues involving CPKC. Neither reflects any cause for concern about CPKC's conduct with respect to the *Sunset Limited*'s operation.

First, in its decision herein served February 13, 2024, the Board inquired about speed limits on CN trackage adjacent to the diamond (at-grade) crossing of CPKC trackage at Southport Junction. This is an issue that Amtrak did not raise in its Complaint or its Opening Statement. As CPKC explained in its response to the Board's questions, the reduced speed limit that was in place during 2022 reflected track conditions that have since been improved.⁷

Second, in its decision herein served September 26, 2024 (the "September 26 Decision"), the Board inquired about three specific delays to the *Sunset Limited* in the vicinity of Beaumont, TX, for which UP's root cause explanations refer to CPKC freight trains. Again, nowhere in Amtrak's Complaint, its Opening Statement, or its Supplement addressing the delays called out in the September 26 Decision does Amtrak make any mention of CPKC.⁸ As CPKC explained in its root cause explanations for these three specific delays, none of them reflects any systematic problem arising from CPKC's train operations or dispatching, much less a failure by CPKC to provide dispatching consistent with statutory "preference" standards.⁹

⁷ See Response of CPKC to Questions Posed in Decision Served February 13, 2024 (filed Apr. 15, 2024).

⁸ See NOR 42175, Supplement to Amtrak Opening Statement Concerning Additional Delays Identified by the Board in Its September 25, 2024 Decision (filed Oct. 24, 2024).

⁹ Response of CPKC to Decision Served September 26, 2024 (filed Oct. 10, 2024).

III. THE PROPER INTERPRETATION OF THE STATUTORY TERM “PREFERENCE”

The Board has asked CPKC to address what “would constitute a ‘failure to provide preference to Amtrak’ under 49 U.S.C. § 24308(f),” and to explain how CPKC’s interpretation of this obligation “differ[s] from Amtrak’s.” August 19 Decision at 3. As explained below, CPKC’s view differs from Amtrak’s.

A. CPKC’s Understanding of Amtrak’s Position

Amtrak’s Opening Statement lays out a view of the “preference” obligation that applies to both dispatching and other railroad functions. First, in the arena of dispatching, Amtrak defines the word “preference” as “‘a giving of priority or advantage to one person, country, etc. over others.’” Op. Statement at 63. Amtrak then asserts that Amtrak has an “*absolute* right to preference.” Op. Statement at 74. In Amtrak’s view, that means that host railroads must resolve each and every “individual dispatching decision” involving an Amtrak train “in favor of Amtrak.” *Id.* at 64. As Amtrak explains, “if a host railroad does not resolve an individual dispatching decision at a rail line, junction, or crossing in favor of Amtrak, then the host has failed to provide preference over the freight train in using that rail line, junction, or crossing.” *Id.* at 69. In assessing whether preference has been provided, Amtrak says, there is no room whatsoever for consideration of any “practical concerns” that might inform a dispatcher’s decision-making. *Id.* at 61, 70.

Second, Amtrak asserts that the preference obligation applies not only to dispatching decisions but to other “systemic practices that subordinate Amtrak’s use of the carrier’s rail lines, junctions, or crossings to the carrier’s use.” *Id.* at 64. The precise boundaries of this position are unclear, but Amtrak appears to assert that the preference obligation implicates a host railroad’s decision-making regarding train length (*e.g.*, *id.* at 76-80 (attacking practice of operating “non-fitting trains”)); crew management (*e.g.*, *id.* at 84-86 (appearing to attack practices relating to

planning for the expiration of freight crews' hours of service); the routing of trains (*e.g., id.* at 86-88); and freight train scheduling (*e.g., id.* at 93-95).¹⁰ Broadly speaking, Amtrak contends that the statutory preference obligation demands that host railroads invest in “internal procedures, practices, and personnel that facilitate rather than frustrate Amtrak’s priority of access to the enumerated infrastructure.” *Id.* at 65.

B. Overview of CPKC’s Position

CPKC believes that the “preference” obligation is quite straightforward. Absent emergency conditions, Amtrak trains are entitled to a *higher dispatching priority* than CPKC or other freight movements. In this sense, CPKC agrees with Amtrak in at least two respects: “preference” means assigning a higher level of “priority” than freight trains, and Amtrak trains are always entitled to that higher dispatching priority (such that that the obligation might be thought of as “absolute,” but only in the narrow sense of whether there are times when that preference may be disregarded).

CPKC parts ways with Amtrak’s interpretation of what it means to provide “preference” in two other respects, however. The first problem with Amtrak’s interpretation is that it adopts a too-narrow view of the dispatching decision-making to which the preference obligation applies. The second problem is that Amtrak (inconsistently) applies its view of preference outside the dispatching arena to a host of business decisions to which the preference obligation has no proper application.

¹⁰ CPKC’s citations to these portions of Amtrak’s Opening Statement should not be misunderstood as expressing any view regarding the appropriateness of any of the specific practices about which Amtrak complains.

In the *dispatching context*, as the Board has already acknowledged and tentatively determined,¹¹ the concept of providing preference does not mean donning narrow blinders that dissect a dispatcher's performance into a disconnected series of red-light, green-light decisions. A hard-and-fast "every single signal must be green/every switch lined for Amtrak to keep the main" approach is nonsensical as a matter of sound railroad operations, would be counterproductive for Amtrak itself, and – most importantly – is not necessary in order to provide Amtrak trains with a higher priority than any others on the railroad. Amtrak's rigid approach would inappropriately find fault with a dispatcher's reasonable efforts to juggle multiple factors to expedite the movement of Amtrak's trains – along with all other trains having a lower priority – across the road. In other words, the preference obligation may *always* apply to the dispatching of trains, but the *nature* of that obligation is not *absolute*.

Beyond the dispatching context, the preference obligation has no application at all. As Amtrak itself points out, the preference statute addresses dispatching decisions that prioritize one train's access to a line over another's. Other business decisions about railroad operational design – train schedules, train length, crew management practices, capacity investments, and freight solicitation efforts – have nothing to do with giving Amtrak priority access to any particular "rail line, junction, or crossing." These sorts of decisions might well influence what level of

¹¹ In *Policy Statement on Implementing Intercity Passenger Train On-Time Performance & Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, Ex Parte No. 728 (decision served Dec. 28, 2015), the Board explained, for example, that: "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." *Id.* at 4. Although the Policy Statement was subsequently withdrawn so that the Board's "approach to preference issues can be developed and refined in the context of specific § 24308(f) cases" (see Ex Parte No. 728 (served July 28, 2016) at 3), the wisdom of the Board's reasoning remains sound.

performance Amtrak can reasonably expect (and, for example, what Amtrak schedules might be realistic); they might form the basis for Board recommendations under 49 U.S.C.

§ 24308(f)(1),¹² and they certainly are appropriate topics for negotiation as part of a consensual operating agreement between Amtrak and its host railroad, but they are not addressed by the preference statute.

C. The Preference Obligation Must Be Applied with Sensitivity to How Real-World Railroad Dispatching Decisions Are Made

The preference obligation referenced in Section 24308(f) is that set forth in 49 U.S.C.

§ 24308(c). Section 24308(c) states:

“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 affected by this subsection may apply to the Board for relief.”

As noted above, CPKC agrees with Amtrak’s view that “preference” means a “priority or advantage to one ... over others.” To that end, CPKC dispatches Amtrak trains by affording them priority treatment (*i.e.*, “preference”) over freight trains using the same line of railroad.

1. Assessing Whether Amtrak Has Received “Priority” Dispatch Calls for Awareness of the Context in Which Dispatching Decisions Are Made

CPKC’s understanding of what priority treatment entails is informed by the nature of the dispatching decisions to which this obligation applies. Dispatchers with responsibility for any given territory on the railroad must develop strategies for using available track capacity to move across the railroad the trains that present themselves at an entrance point to the dispatcher’s

¹² In an investigation under Section 24308(f), the Board may make determinations of “to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier” and may “identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.”

assigned territory. Each of those trains will have a certain level of relative priority, and in this mix Amtrak trains are at the very top with the highest priority. That means that CPKC's dispatchers will *prioritize* the movement of an Amtrak train, a process that includes taking into consideration all of the constraints that might limit the dispatcher's feasible options in a given context.

Unfortunately, Amtrak's arguments about the preference obligation are not sensitive to how dispatching decisions are made in the real world. At times Amtrak's position appears to be that the host railroad must resolve every single "individual dispatching decision[] at any rail line, junction, or crossing" in favor of Amtrak. Am. Op. Statement at 64. For example, Amtrak suggests that an Amtrak train must *never* be "shunted onto a siding." *Id.* at 66. At other times, Amtrak appears to suggest that the statutory preference obligation means that Amtrak's trains must never be delayed by the presence of freight traffic. *See, e.g., id.* at 4-5, 10 (appearing to conflate "delays or failures to achieve minimum standards" with "failure to provide preference" and referencing "obligations to ensure the COTP Minimum Standard is achieved").¹³ In either frame, Amtrak appears to view dispatching as a series of isolated decisions whether to give Amtrak a green light or red light (or some other restricting indication), and it interprets the preference obligation as always demanding that Amtrak get a green light. Others have aptly analogized this position to the way the Secret Service moves the President's motorcade through

¹³ This was also the implication, for example, of one of Amtrak's Interrogatory responses to UP in this proceeding. Amtrak stated that "Pure Running Time for the *Sunset Limited* incorporates existing physical capacity assuming preference is afforded to Amtrak trains. To the extent capacity is consumed due to railroad operating decisions, or volume increases, such reductions in capacity will be treated as delays." *See* Amtrak's Response to the Board's Interrogatories & Document Requirements, Appendix A – Part III (filed Sept. 25, 2023) at 55.

crowded city streets,¹⁴ with the road essentially closed to traffic (and every car and truck moved out of the way) well in advance of the motorcade's arrival so that the President can proceed without facing the safety risks associated with potential stoppages or delays.

CPKC respects Amtrak's well-founded desire to receive top priority relative to other trains using a given line and to achieve good on-time performance. But Amtrak's position is inconsistent with how railroad dispatching works, and its perspective on what "giving preference" means is likewise out of touch with reality. Rather than a series of isolated red light/green light decisions, dispatching involves something more akin to a "strategy" for managing traffic flows across a rail line with less-than-infinite capacity. To illustrate, consider a higher priority expedited intermodal train on a single-track segment of CPKC's mainline. It will be afforded preference over every other freight train, but it will occasionally take sidings, slow at approach signals, and stop at red signals so trains moving the opposite direction can proceed. Is this consistent with the higher priority train being given preference? Yes, it absolutely is.

That is because expediting the movement of the priority intermodal train involves a more holistic approach to dispatching than just calling every ball or strike that arises in the train's favor. It involves a corridor approach, taking into account the capacity of the line and all of the trains – both freight and passenger – that must move across it. It means planning in advance for efficient meets or passes, when sometimes the best way to expedite the priority train to its next station is to have it wait for a fleet of oncoming, lower-priority trains to move out of the priority train's path.

¹⁴ See, e.g., *Policy Statement on Implementing Intercity Passenger Train On-Time Performance & Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, Ex Parte No. 728, Opening Comments of Norfolk Southern Ry. (filed Feb. 22, 2016) at 11.

The same is true of Amtrak's trains, which of course have priority even relative to expedited intermodal freights. But that level of priority does not mean that the Amtrak train will only see green signals or never be paused in a siding. CPKC and its dispatchers understand their obligation to treat Amtrak's trains as those *most* deserving of expedited handling, and *least* deserving of being delayed to accommodate conflicting traffic and other factors. But despite CPKC's best efforts, delays to Amtrak trains do happen, and sometimes those delays are appropriately classified as the result of "freight train interference" (or "FTI"). It is a fact of railroad life – and a good one, from the perspective of the economy and rail shippers – that there will be many freight trains running on the same territory as Amtrak's trains. Juggling those conflicting demands for limited capacity will inevitably result in FTI delays, but that fact alone would not mean that Amtrak's train was not given preference. Making such a judgment would require a much deeper analysis of the dispatcher's decision-making in light of all the circumstances.

Amtrak suggests that any approach to preference that examined the real-world factors bearing on dispatching decisions would involve some sort of "balancing test" or "extra-textual limitation[]" on the scope of Amtrak's preference right." Am. Op. Statement at 64. CPKC disagrees. To be sure, Amtrak is correct that freight railroad dispatchers are not generally allowed to subordinate Amtrak's needs to those of the freight network by applying some sort of "balancing test" or other "limitation" on *when* Amtrak is entitled to preference – deciding, for example, that "moving Amtrak is just too hard right now, so it will have to wait for a lull in our freight traffic." Again, except in emergencies, Amtrak is entitled to preference. But good dispatching – including giving Amtrak dispatching preference – *requires* that the dispatcher take account of real-world factors affecting the fluidity of a rail line in light of all of the traffic using

that line. Taking account of those factors does not override statutory preference to serve some other goal, it simply reflects an appropriate understanding of how preference – or priority – works in the real world.

2. Amtrak’s Arguments About the “Plain Text” of Section 24308(c) Do Not Support Its Position

Amtrak’s core argument in support of its “always-a-green light” view of the preference obligation appears to be its point that Congress chose to use a “singular, indefinite article (‘a’) followed by a list of three nouns separated by the disjunctive ‘or’” as a way of describing when and where Amtrak is to receive preference – *i.e.*, with respect to its use of “a rail line, junction, or crossing.” Am. Op. Statement at 64. Amtrak is correct that the preference provision addresses particular dispatching decisions about access to particular lines, junctions, or crossings. But Amtrak misreads the text when it slices and dices the management of conflicting train traffic on a busy rail line into signal-by-signal pieces. In CPKC’s experience, Amtrak trains operate over a host railroad’s rail line between the point where the Amtrak train enters that line (*e.g.*, at an origin station or a junction with another railroad’s line) and continue to a point where the train exits (*e.g.*, at a destination station or at a junction with another carrier’s line). Providing Amtrak with preference over freight “in using a rail line” simply means that Amtrak will have a higher dispatching priority than freight trains while using the host carrier’s line. This does not dictate that each and every signal across the entire line will necessarily show green for the Amtrak train.

Nor do the statutory references to “a junction” or “a crossing” support Amtrak’s absolutist view of preference. Giving Amtrak preference over freight trains at “a junction” with another railroad, or “a crossing” by another rail line, simply means that Amtrak’s priority applies when the host railroad’s dispatcher is making decisions about train movements at these locations. True, such priority generally means that Amtrak will be allowed to proceed ahead of a freight

train that arrives at the same junction or crossing at the same time as Amtrak. But even in that scenario, what constitutes priority dispatch can depend on context, such as where the dispatcher makes a reasonable judgment that moving the freight train through the junction ahead of Amtrak will actually clear the way for the Amtrak train to proceed thereafter in a more expeditious fashion.

3. Amtrak Misconstrues the Pre-Amtrak Historical Record

Amtrak makes a variety of arguments based on the “history” of the preference obligation, but none of them support its absolutist interpretation of what preference means when applied to dispatching decisions.

First, Amtrak refers to the “longstanding industry practice” before Amtrak came into existence of “prioritizing trains carrying passengers over slower freight trains.” Am. Op. Statement at 65. As noted above, CPKC does not dispute that Amtrak trains must be afforded priority treatment. However, the mere fact of “prioritization” does not lend support to Amtrak’s apparent position that the preference obligation demands that Amtrak trains never be delayed by a freight train. Amtrak provides no evidence that any railroad operated its network in a manner that required every passenger train to proceed without delay resulting from the presence of freight trains, regardless of the circumstances.

The one specific historical practice that Amtrak cites actually undermines its position. Amtrak points to the Southern Pacific Transportation Company’s policy of clearing tracks “five minutes” ahead of a passenger train, and avoiding “freight saw-by[.]s.” Am. Op. Statement at 65-66. As reported by Amtrak, Southern Pacific’s general policies may seem reasonable as a way of recognizing the priority of passenger operations. However, those policies do not equate to what Amtrak now contends the statutory preference obligation requires. The notion that freight

operations should generally be out of the path of a passenger train a mere five minutes ahead of time would not have come close to preventing all “FTI delays” when a passenger train encountered conflicting freight traffic.

Similarly, Southern Pacific’s apparent policy of avoiding freight “saw-bys” is not the same as Amtrak’s unrealistic desire that its trains never be put in a siding. A “saw-by” is a specific kind of move that involves stopping an opposing freight train that is too long for a given siding where it is first to arrive in a manner that leaves its rear end “hanging out” beyond the siding and thus blocking the passenger train’s movement. This requires the passenger train to stop and wait for the freight train to proceed beyond the siding.¹⁵ By contrast, putting a passenger train in a siding to allow a fleet of opposing freight trains to proceed without stopping (possibly including trains that were too long for that siding) would not involve a “saw by” movement.

The historical record that Amtrak does not cite contains more pertinent evidence of how Southern Pacific understood what it meant to provide “preference” to Amtrak over freight trains. Testifying before Congress in 1971, Southern Pacific’s System Vice President for Operations, R.D. Spence, explained that Southern Pacific’s policy “from the beginning of Amtrak [was] that we would run the train to the very best of our ability and that [Amtrak] would be given preference on our railroad.” He also explained, however, that providing “preference” did not mean that Amtrak “will be given absolute priority, in other words, that there will be absolutely no delays.”¹⁶

¹⁵ See Steven Otte, “How a saw-by works,” TRAINS MAGAZINE (Sept. 9, 2022), available at <https://www.trains.com/mrr/how-to/model-railroad-operations/how-a-saw-by-works/>.

¹⁶ *Review and Refunding of Rail Passenger Service Act: Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (Dec. 7, 1971), pt. 2 at 674-76 (excerpts are Exhibit 1 hereto).

Second, Amtrak cites the attention Congress paid to the practice of “side-tracking” in the early 1970s when it enacted the statutory preference obligation. Am. Op. Statement at 67. There is no doubt that a decision by a host railroad dispatcher to “side-track” an Amtrak train – *i.e.*, place the train into a siding – so freight trains can pass could well constitute a failure to provide that train with “preference” depending on the particular circumstances. But that is a far cry from saying that any and all “sidetracking” is automatically a preference violation. In fact, Roger Lewis, Amtrak’s President when the preference obligation was born, made this very clear during testimony before Congress about the issue of freight train interference. He explained that a legislative approach directing host railroads to “‘always give preference to the passenger train, or never let a freight train interfere,’ just is not a real-world approach.”¹⁷ Why? Because “side-tracking” of the Amtrak train sometimes is the right dispatching decision. Mr. Lewis gave an example:

“Well, this question of freight train interference is complicated. There are cases in railroad operations, a number of them, where freight train interference might be justified. For example, maybe in an operation in an area where you had a siding that would take five cars, which would be enough to accommodate that particular passenger train, but would not accommodate a 100-car freight train, it would be sensible to put the passenger train aside and get the freight train out of the way, not only for that segment but for all of the operations that that train might later interfere with.”¹⁸

The same (correct and sensible) viewpoint was repeated by Amtrak several decades later in testimony before the Board. In 2004, Paul Vilter, Amtrak’s Vice President of Freight Railroad Relations, testified in the Board’s proceeding addressing a proposed lease by CSX to the

¹⁷ *Financial Assistance to Amtrak: Hearings Before the Subcomm. on Transp. & Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. (June 12, 1973) (“Lewis 1973 Testimony”) at 32 (excerpts are Exhibit 2 hereto).

¹⁸ *Id.*

Buckingham Branch Railroad of trackage over which Amtrak operated. Mr. Vilter was asked about the “priority” to which Amtrak trains are entitled. His response reflects the reality that priority does not always mean that the Amtrak train moves first.

“Well, there is a Federal statute, The Rail Passenger Service Act, which calls for Amtrak trains to have priority. There is also in the real world in terms of trying to get two trains across a single-track railroad, it is *sometimes more efficient for an Amtrak train to wait for a freight to come through.*”¹⁹

As Amtrak’s own officers have recognized across the decades of Amtrak’s existence, the notion that Amtrak trains should be afforded “preference” does not dictate an absolutist “every single signal must be green/every switch lined for Amtrak to keep the main” approach to dispatching.

Third, Amtrak cites the “public bargain that created Amtrak,” implying that the preference obligation should be interpreted in light of the benefits freight railroads received when they were allowed to shed money-losing passenger services. Am. Op. Statement at 65, *see also id.* at 4-5. This is a misread of history. Amtrak’s creation does not give Amtrak any sort of perpetual claim against the freight railroads over which it operates beyond the specific obligations set forth in the statute or agreed to in Amtrak’s operating agreements with host railroads.

To be sure, Amtrak’s creation in 1971 enabled many freight railroads to discontinue their passenger operations in one fell swoop, but those railroads would not have been compelled to continue those operations indefinitely.²⁰ Rather, freight railroads would have been able to terminate these money-losing operations through case-by-case abandonment proceedings, and

¹⁹ Finance Docket No. 34495, *Buckingham Branch Railroad Company – Lease – CSX Transportation, Inc.*, Oral Argument (Oct. 13, 2004) at 68 (emphasis added) (Testimony of Paul Vilter) (excerpts are Exhibit 3 hereto).

²⁰ Indeed, many of CPKC’s historical carrier subsidiaries, including Soo Line and KCSR, did not have any passenger trains to discontinue upon Amtrak’s formation.

they surely would have done so many decades ago even absent Amtrak's creation. *See, e.g., City of Chicago v. United States*, 396 U.S. 162 (1969) (discussing statutory discontinuance procedures). Indeed, the Supreme Court has observed on multiple occasions that Amtrak was created precisely to *avoid the extinction* of passenger service, not to relieve freight railroads of burdens they could not otherwise have shed using existing abandonment procedures.²¹

As a result, the “public bargain” Amtrak describes carries no current weight. In 1971 (or later in some cases), railroads opted to join Amtrak and thereby accelerate the end of their passenger service obligations by avoiding time-consuming and costly abandonment processes. However, there is no sense in which the freight railroads were thereby agreeing to become Amtrak's vassals in perpetuity. Indeed, the fact that Congress acted in part to relieve the struggling railroads of their passenger-related burdens, and expressly specified that railroads be compensated for the incremental costs associated with Amtrak's continuing use of track owned by the freight railroads, shows beyond doubt that those railroads “owe” Amtrak nothing more than what the plain words of their statutory and contractual obligations specify. Congress's supposed “public bargain” cannot be interpreted as imposing perpetual or uncompensated burdens on the freight railroads, and Amtrak gets no “thumb on the scales” favoring its position on this or any other issue just because 53 years ago Congress acted to prevent the extinction of all intercity passenger service.

²¹ *See, e.g., Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 383 (1995) (“Congress established Amtrak in order to avert the threatened extinction of passenger trains in the United States.”); *National Railroad Passenger Corp. v. Atchison, T. & S. F. Ry.*, 470 U.S. 451, 454 (1985) (“as common carriers these railroads were bound to continue providing service until the Interstate Commerce Commission (ICC) or state regulatory authorities relieved them of this responsibility. Given the tremendous operating losses, many of the remaining handful of railroads operating passenger coaches sought ICC permission to discontinue passenger train service. The Rail Passenger Service Act of 1970 ... was Congress' effort to ‘revive the failing intercity passenger train industry and retain a high-quality rail passenger service for the Nation.’”).

D. The Statutory Preference Obligation Does Not Extend Beyond Dispatching

CPKC strongly disagrees with Amtrak's contention that the statutory preference extends beyond the arena of dispatching and imposes some sort of obligation to avoid "systemic practices" that may lead to delays attributable to the presence of freight trains on the tracks Amtrak uses. *Am. Op. Statement at 64.*

The full scope of Amtrak's position is a bit unclear. Some of the "systemic practices" that Amtrak discusses appear to relate to the host railroad's dispatching practices, such as instructions provided to dispatchers about how to perform their duties (*id.* at 89-91) or the programming of computer-aided dispatching systems (*id.* at 91-93). Other aspects of Amtrak's position, however, plainly seek to apply the preference statute to decisions that do not involve the dispatching of trains at all, and thus have nothing to do with which trains are given priority in the use of particular "lines, junctions, or crossings." For example, Amtrak appears to contend that the preference obligation should forbid any operating practice that might lead to delays to Amtrak trains, such as decisions about train length (*e.g., id.* at 76-80 (attacking practice of operating "non-fitting trains"); crew management (*e.g., id.* at 84-86 (appearing to attack practices relating to planning for the expiration of freight crews' hours of service));²² the routing of trains (*e.g., id.* at 86-88); and freight train scheduling (*e.g., id.* at 93-95).

CPKC believes that the preference statute applies only to dispatching decisions and not beyond. CPKC understands well that supporting the on-time performance of Amtrak trains requires far more than good dispatching that recognizes the priority of Amtrak's passenger trains.

²² CPKC acknowledges that some practices relating to crews, such as a dispatcher's decision to direct a train to stop on the mainline in order to change crews, thereby blocking Amtrak's use of that track, could be seen as a preference issue if there were realistic and reasonable options available to the dispatcher.

But it would be a misguided contortion of the statutory language to lump everything that influences Amtrak's performance under the heading of "statutory preference." Matters beyond the realm of dispatching are properly dealt with through negotiations between Amtrak and its freight railroad hosts, which can establish appropriate schedules for Amtrak's service (including both their time slot and scheduled running time) and address incentives for the host railroad to do any number of things aimed at facilitating Amtrak's on-time performance. CPKC takes great pains to structure its freight operations in a manner that avoids delaying Amtrak, but outside of the dispatching arena CPKC does so not because of the preference obligation but because it values a positive relationship with Amtrak and is incentivized to deliver on its contractual undertakings.

1. Applying "Preference" Outside the Dispatching Context Would Be Inconsistent with the Statute Even Under Amtrak's Own Interpretation

Much of Amtrak's argument about what preference means makes clear that preference applies solely to the dispatching context. For example:

- Dispatching decisions are the only ones that directly determine which train goes first – *i.e.*, which has "priority" – in the use of a particular line, junction, or crossing, which is what Amtrak says the preference obligation requires. *See* Am. Op. Statement at 64 (discussing resolution of individual dispatching decisions in favor of Amtrak).
- Dispatching decisions are the ones that result in the kind of "side-tracking" that Amtrak asserts was front of mind when Congress enacted the preference obligation. *See* Am. Op. Statement at 5, 77 (discussing side tracking "by UP dispatchers").

That Amtrak's position exceeds the reach of the statute is perhaps seen most clearly in the way Amtrak tries to reword the statute in support of its arguments. For example, in seeking to extend the statute to various network design decisions made by host railroads, Amtrak tries to characterize those decisions as involving "policies, practices, and procedures that *dictate access* to a line, junction, or crossing." Am. Op. Statement at 65. But that is not what the statute says.

Read plainly, the statute does not apply to decisions that might have indirect effects on how free of freight traffic a line, junction, or crossing will be when Amtrak desires for its trains to operate. After all, a great many business decisions – ranging from the mere fact that a railroad's marketing department has done a good job attracting traffic to a line, to the decisions of the operating department about when to run those trains and how long they should be, and decisions about how much track capacity to invest in, and many more, surely could be thought of as "dictating access." The statute speaks instead of Amtrak's priority in "using" the capacity that already exists relative to whatever freight trains happen to be simultaneously vying for access to that capacity. The statute's focus on real-time dispatching decisions about trains' use of existing rail infrastructure, the statute does not require freight railroads to structure their entire business around a guarantee that Amtrak trains will never see a restricting signal. Indeed, the fact that the statute begins with the phrase "[e]xcept in an emergency" further reinforces that the "preference" Congress had in mind concerns real-time train-movement decisions (*i.e.*, dispatching) rather than more "systemic" business decision making.²³

²³ Amtrak's misreading of the statute is even more clear when considered in the context of proposed new or expanded services. The logic of Amtrak's expansive view of preference would imply that any time Amtrak wants to start up service on a new route, or expand service on an existing route, it would need only invoke the "preference" obligation to demand a complete restructuring of freight operations so as to accommodate Amtrak. As Amtrak and the Board knows, however, that is not how the statutory framework functions. In fact, "[i]n determining whether to order the carrier to provide or allow for the operation of additional trains, the Board shall consider 'whether an order would impair unreasonably

Likewise, Amtrak argues that “[t]he text of the statute imposes an obligation on host rail carriers to prioritize Amtrak passengers over freight transportation, without limitation,” as if delaying passengers is somehow forbidden no matter how or why it occurs. Am. Op. Statement at 64. But the statutory language says nothing about prioritizing Amtrak’s *passengers*. Rather, it speaks narrowly to how dispatchers shall give Amtrak *trains* (*i.e.*, “intercity and commuter rail passenger transportation”) preference over freight *trains* (*i.e.*, “freight transportation”) in using a particular “rail line, junction, or crossing.” That scope has no application outside the dispatching function.

Amtrak’s effort to re-write the statute is perhaps understandable. More factors than just dispatching can affect Amtrak’s ability to realize good on-time performance when it establishes aggressive schedules on lines also used by large numbers of freight trains. But Amtrak’s proposed re-interpretation of the preference obligation is incorrect and inappropriate. The excessive scope contemplated by Amtrak would reach far back into the host railroad’s network design and resourcing decisions and impose a broad-ranging obligation to serve “Amtrak passengers” before taking any steps to run a freight railroad. That is the plain import of Amtrak’s contentions that railroads violate preference whenever a business decision might end up causing freight trains to be on the line at the same time as Amtrak’s train, thereby creating potential conflicts that, perhaps inevitably, result in “delays” to the Amtrak train.

There is truly no limit to the reach of Amtrak’s expansive interpretation of the preference obligation. Implementing it would command that host railroads reduce freight train traffic (or

freight transportation’ and, ‘when establishing scheduled running times, the statutory goal of Amtrak to implement schedules that attain a system-wide average speed of at least 60 miles an hour that can be adhered to with a high degree of reliability and passenger comfort.’” *Application of the National Passenger Railroad Corp. Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc., & Norfolk Southern Ry.*, Finance Docket No. 36496 (served Aug. 6, 2021) at 4 (quoting 49 U.S.C. § 24308(e)(2)).

limit traffic growth so as to allow shorter trains); invest in more double track; never operate any train that exceeded the length of any siding, no matter how short; alter their crew management practices to eliminate the possibility of re crews; schedule freight traffic in whatever slivers of time would be completely free of Amtrak operations; etc, etc, etc. It is inconceivable that Congress intended such a sweeping set of obligations when it enacted the preference obligation especially given that Congress had – in Amtrak’s own telling – created Amtrak at least in part to relieve the struggling freight railroads from the burdens of operating passenger trains. Am. Op. Statement at 65. It is also inconceivable that Congress, having mandated that Amtrak compensate freight railroads for the full incremental costs of its presence on their tracks, would have chosen to magnify those costs many fold by imposing a preference entitlement as grandiose as Amtrak imagines. *See* Section III.F. below.

2. Amtrak’s Expansive View of the Reach of Preference Outside Dispatching Is Contradicted by Evidentiary Resources Upon Which Amtrak Relies

Amtrak’s effort to hammer the square peg of preference into the round hole of non-dispatching decision-making is contradicted by many of the very resources Amtrak relies upon to establish that the existence of “preference” in the first place.

Amtrak’s Opening Statement, for example, relies on statements by Santa Fe President John Reed in testimony before Congress in 1971 to the effect that Santa Fe had traditionally “given passenger train operations preference over freight service.” Am. Op. Statement at 5 n.6. But Amtrak truncates its quotation too quickly. In the sentence after the one quoted by Amtrak, Mr. Reed explained that what he was referring to was the handling of trains by Santa Fe’s dispatchers: “regularly scheduled passenger trains shall continue to be designated as first-class trains and shall continue, except in cases of emergencies or exigencies *beyond the reasonable*

control of the dispatcher, to be afforded *preferential dispatch and handling* over other classes of train operations.”²⁴

To the same effect is testimony by Amtrak itself over the years when it complained about the performance of some of its host railroads. Amtrak has consistently treated “preference” as an obligation bearing on the dispatching of trains, not on more “systemic” business decision-making that may affect (or even “dictate”) how well Amtrak trains perform relative to their schedules. For example, in 2020, Amtrak’s then-Senior Executive Vice President, Chief Operating and Commercial Officer (and its current CEO) Stephen J. Gardner, testified about Amtrak’s concern that “Amtrak’s right to preference over freight transportation under the law is clear but often ignored.” Mr. Gardner explained how the freight railroads were required to “provide Amtrak trains with *dispatching preference* over freight.”²⁵ He also spoke of how before Amtrak’s creation “preference” was similarly understood as a dispatching concept: “Pity the dispatcher that delayed the *20th Century Limited* or the *Super Chief* for a freight train.”²⁶ And he explained that the FTI resulting from “Amtrak’s right of preference” being “ignored” is “typically caused by a freight railroad requiring an Amtrak passenger train to wait so that its freight trains can operate on the tracks ahead.”²⁷ That situation in turn arises because, “[o]n the U.S. rail network, rail line owners *control the dispatching of trains* that operate on their lines, which means the

²⁴ *Review and Refunding of Rail Passenger Service Act: Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (Dec. 7, 1971), pt. 2 at 670 (emphasis added) (excerpts are Exhibit 4 hereto).

²⁵ *Examining the Surface Transportation Board’s Role in Ensuring a Robust Passenger Rail System: Remote Hearing Before the Subcommittee on Railroads, Pipelines, & Hazardous Materials Of the H. Committee on Transportation & Infrastructure*, 116th Cong., 2d Sess. (Nov. 18, 2020) at 22 (emphasis added) (excerpts are Exhibit 5 hereto).

²⁶ *Id.* at 27.

²⁷ *Id.*

freight railroads have substantial control over the on-time delivery of Amtrak customers traveling on freight-owned rail lines.”²⁸ In the context of preference, Mr. Gardner’s entire focus was on *dispatching*.

Similarly, Amtrak’s President in 1973, Roger Lewis, focused his concerns about freight train interference on the fact that “somebody must dispatch the trains that go on that track, both freight and passenger. These decisions are made in the field on a local basis.”²⁹

This prior testimony of Amtrak officials thus demonstrates that the expansive reading of the statutory preference obligation laid out in Amtrak’s Opening Statement deviates from its own historical and common sense interpretation of the provision’s reach.

E. The Operating Agreements Contemplated by Congress Are the Appropriate Source of Obligations Relating to the Actions of Both Parties – Over and Above Dispatching Preference – that Influence On-Time Performance

Congress contemplated that Amtrak would enter into operating agreements with its host railroads addressing the services the host would provide to Amtrak and the compensation terms the railroad would receive in exchange. In Section 24308(a)(1) Congress specifically authorized Amtrak to enter into “an agreement with a rail carrier ... to use facilities of, and have services provided by, the carrier or authority under terms on which the parties agree.” And that provision requires that operating agreements include “a penalty for untimely performance” so as to ensure that host railroads have incentives to avoid delays to Amtrak trains.³⁰ Amtrak recognizes that its

²⁸ *Id.* (emphasis added).

²⁹ Lewis 1973 Testimony (Exh. 1) at 32. Many other sources similarly reflect an understanding that “preference” involves choices made in the course of dispatching trains, not other business decisions. For example the FRA’s 2008 report on Amtrak delays discussed the “preference” issue entirely in terms “host railroad dispatching practices.” See “*Root Causes of Amtrak Train Delays*,” FRA Report Number CR-2008-076 (Sept. 8, 2008) at 3-8.

³⁰ This is in contrast with situations where the Board is asked to prescribe terms, in which case incremental cost is the floor and “the Board shall consider quality of service as a major factor when

operating agreements are the appropriate vehicle for establishing “host-specific terms and conditions,” including “service standards” and the “payment amounts and services provided by the host.”³¹

Amtrak’s sweeping views about the scope and force of the preference obligation ignore this context. All of the performance issues that Amtrak tries to shoehorn into the preference obligation – whether through its “no delays” view of what preference means or its “systemic business practice” view of the reach of that obligation – are (or could be) addressed in Amtrak’s operating agreements. The extensive debate between Amtrak and Canadian National over the performance incentive terms in Amtrak’s operating agreement with that host railroad provides a good illustration of how contract provisions rewarding or penalizing the host railroad based on such metrics as the on-time performance of Amtrak’s trains (for any reason) or the incidence of “host responsible delays” (many of which do not involve dispatching decision-making) is by far the superior way to address the vast array of elements that can affect a train’s on-time performance.³² Accordingly, if Amtrak wants to negotiate with its host railroads to provide financial incentives that encourage the railroad to adjust the design and execution of its freight operations in order to meet Amtrak’s often-aggressive passenger schedules, Amtrak is encouraged to do so. But Amtrak cannot fall back on the “preference” obligation to mandate that

determining whether, and the extent to which, the amount of compensation shall be *greater than* the incremental costs of using the facilities and providing the services.” 49 U.S.C. § 24308(a)(2)(B) (emphasis added).

³¹ Jim Blair, Amtrak Director Host Railroads, “Amtrak’s Rights and Relationships with Host Railroads” (Sept. 21, 2017) at 8, *available at* https://www.fhwa.dot.gov/Planning/freight_planning/talking_freight/september_2017/21/talkingfreight9_21_2017bl.pdf (excerpts are Exhibit 6 hereto).

³² See, e.g., *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(a) - Canadian National Ry.*, Finance Docket No. 35743, Opening Brief of National Railroad Passenger Corp. (May 27, 2022) at 8-11, 32-53; *id.*, Post-Interim Decision Reply Submission of Illinois Central R.R. & Grand Trunk Western R.R. (July 26, 2022) at 25-59.

freight railroads design and operate their networks in a manner that assures Amtrak a delay-free experience, much less undertake those measures at no charge to Amtrak despite the extraordinary additional costs they would entail.

F. Even if Amtrak Were Correct About the Reach of the Preference Obligation, It Could Not Avoid Compensating Railroads for the Associated Costs of What Amtrak Demands

Implicit in Amtrak's arguments about its entitlement to broad "preference" across both dispatching decisions and a wide array of a host freight railroad's business activities is the notion that the freight railroads would have to undertake all of the required efforts in exchange for whatever compensation the railroad might have agreed to in its most recent operating agreement with Amtrak. Such an understanding would be incorrect. In fact, were Amtrak to succeed in its quest to expand the scope of its host railroads' preference obligations, Amtrak would become obligated to pay increased compensation to those railroads.

That is because the statute compels that the compensation paid by Amtrak be no less than the incremental costs that the host railroad incurs as a result of Amtrak's services over its facilities. *See* 49 U.S.C. § 24308(a)(2)(B). There is no exception for costs incurred to provide whatever might be required by the statutory obligation to afford Amtrak trains "preference." Incremental costs are simply those occasioned by Amtrak's presence,³³ and such costs arise regardless of why they are incurred. If an Amtrak train has 20 cars instead of five, incremental

³³ *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(A) – Canadian National Ry.*, Finance Docket No. 35743 (served Aug. 9, 2019) at 22 ("incremental costs are those costs that CN has actually incurred, and that CN would not have incurred 'but for' the presence of Amtrak"); *see also, e.g., Amtrak & Washington Terminal Co., et al., Use of Tracks & Facilities & Establishing Just Compensation*, 348 I.C.C. 86, 103 n.15 (1975) (quoting H.R. Rep. No. 93-587, at 16 (1973)) ("[t]he Committee of Conference report on the Amtrak Improvement Act of 1973, which added 'incremental costs' to section 402(a) as a guideline for... fixing of compensation, stated they were intended 'to provide a basis for payment to the railroad of all costs which would not be incurred if passenger service were not performed for Amtrak.'").

costs would (typically) be higher. If an Amtrak train is heavier, incremental costs would (typically) be higher. Likewise, if an Amtrak train consumes more capacity, or a host railroad must work harder to perform the level of service Amtrak demands (perhaps because of Amtrak's success in imposing its view of preference obligations), incremental costs would also be higher.³⁴

As the Board made very clear when it addressed Amtrak's 1998 proposal to radically expand its "express" operations – an initiative Amtrak ended up abandoning – freight railroad hosts would be entitled to the full "incremental costs" imposed by Amtrak's expanded notions of preference. It would be premature to attempt to catalog all of the "new" incremental costs that host railroads might need to bear to implement Amtrak's expansive notions of how freight railroads must dispatch their railroads, schedule their trains, manage their crew assignments, or invest in infrastructure in order to comply. All such costs would end up being recoverable from Amtrak. The conclusion of the Board in the *Express* case is instructive:

"[T]he incremental cost standard entitles the rail carrier to recover the costs that it incurs as a result of Amtrak's services over its facilities. ... As we indicated earlier, UP/SP and other freight railroads, facing significant capacity constraints today for their freight operations, are investing heavily in added track and facilities to accommodate increased demand for rail freight services. Should Amtrak's increased express service cause capacity constraints requiring additional infrastructure investment, we see no reason why we would not include those directly attributable costs in a compensation order. *The same result should apply to any other cost the carrier incurs that is traceable to Amtrak's operations.*"

Application of the National R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Union Pacific R.R. & Southern Pacific Transportation Co., 3 S.T.B. 143, 155 (1998) (emphasis added).

³⁴ This is just the flip side of the principle that a railroad's application to DOT for *relief from the preference obligation* (under Section 24308(c)) might lead to a *reduction* in the compensation owed by Amtrak, as FRA regulations contemplate. See 49 C.F.R. § 200.5(c)(3) (applications shall "[i]nclude an analysis of whether and by how much Amtrak's compensation to the railroad should be reduced if the preference requirement is altered").

Amtrak may not wish to acknowledge the force of this point, but Congress' framework governing Amtrak's access to the freight railroad network demands that Amtrak compensate the railroads for the burdens Amtrak's operations impose. The Board need not decide any compensation-related question at this stage, but it should hesitate to conclude that Congress intended to magnify the incremental costs that Amtrak must reimburse based on the expansive interpretations of preference that Amtrak advances.

IV. THE PROPER INTERPRETATION OF THE STATUTORY TERM "HOST CARRIER"

The Board asked CPKC to address its proposed definition of the term "host rail carrier" for purposes of 49 U.S.C. § 24308(f), including a description of how, if at all, its interpretation of that term "differ[s] from Amtrak's." August 19 Decision at 3. The Board asked Amtrak to address two specific issues relating to this definition: (1) "the extent to which the Board should rely on the Federal Railroad Administration's definition of "host railroad." *See* 49 C.F.R. § 273.3 (defining "host railroad" as "a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment"); and (2) "under what circumstances, multiple rail carriers – each fulfilling one or more functions such as (but not limited to) ownership, dispatching, maintenance, and contractual accountability to Amtrak – could be considered 'host railroads' on a given portion of the *Sunset Limited's* route."

A. Host Railroads in General

Regarding the Board's first question, Amtrak contends that the Board should "employ for purposes of this investigation under Section 24308(f)" the FRA's definition of "[h]ost railroad" as 'a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment.' 49 C.F.R. § 273.3.45." Am. Op. Statement at 15. Applying that principle, Amtrak's position is that CPKC is not a host railroad for any portion of the *Sunset*

Limited's route. See Am. Op. Statement at 25-26 (maps 2 and 3). CPKC agrees with Amtrak's position.

Amtrak's interpretation of "host railroad" is correct as a matter of statutory interpretation. The statute's use of the phrase "host railroad" in Section 24308(f) must be read in conjunction with the broader context of Section 24308, the thrust of which is to establish a *relationship of direct accountability* between Amtrak and the railroads over which it operates. That section establishes two ways in which Amtrak can gain access to the rail lines of a freight railroad, both of which entail compensation paid directly by Amtrak to its host: first, by agreement with that railroad, as encouraged by Section 24308(a)(1), including with respect to incentive payments that Amtrak would pay over and above the minimum incremental cost compensation to which those freight railroads are entitled; and second, via an order of the Board granting access and imposing compensation terms. A railroad to which Amtrak has not gained access via one of these paths is not a host railroad, and the obligations imposed by the balance of Section 24308 do not apply.

B. The Potential for Multiple Hosts

Regarding the Board's second question – "whether, and under what circumstances, multiple rail carriers ... could be considered 'host railroads'" – Amtrak's position is that there can be "multiple hosts" in circumstances "where Amtrak has multiple agreements with carriers." CPKC has no disagreement with Amtrak's position as a conceptual matter, but some clarification may be warranted.

This issue arises in contexts where one railroad, as the host of an Amtrak service between two points (*e.g.*, UP's hosting of the *Sunset Limited* between Iowa Junction, LA and Los Angeles), itself operates over the lines of another railroad for certain portions of the route. CPKC agrees with Amtrak to the extent it is saying that in these situations both the trackage-rights landlord and the trackage rights tenant could in theory be "host railroads" with respect to

the trackage rights segment over which Amtrak operates, *but only if* Amtrak has an operating agreement with both of those railroads that applies to the operation of the train in question.

It is important to note, however, that Amtrak *need not* have a host railroad relationship – embodied in an operating agreement – with every railroad that might own or dispatch every track segment used by a particular train. Instead, Amtrak can choose to piggyback on the host railroad’s (*i.e.*, the trackage rights tenant’s) operating rights across segments where that railroad’s contractual rights allow it to admit Amtrak. In those situations, Amtrak’s operating rights are derivative of the tenant’s rights, and Amtrak would not have any separate right to hold the trackage-rights landlord accountable for the performance of Amtrak trains across the segment.³⁵ As Amtrak’s Opening Statement contemplates, Amtrak could achieve such direct accountability by negotiating an operating agreement with the trackage-rights landlord, and in that circumstance there would be two separate “host railroads” for the segment in question.³⁶

CPKC believes that this approach is the only one consistent with the statutory framework, and it also makes sense as a matter of policy. As noted above, the statutory framework allows Amtrak to operate over the trackage of a freight railroad in only one of two ways: by entering a consensual operating agreement with that railroad or, absent agreement, obtaining an order of the Board granting compulsory access. By choosing in some cases to rely on the contractual operating rights of the host railroads with which Amtrak has an operating agreement, Amtrak is

³⁵ This is the situation with respect to the two miles of KCSR trackage in the vicinity of Beaumont, TX that the *Sunset Limited* traverses. Amtrak operates over that segment by piggybacking on UP’s trackage rights, not via any rights granted directly by KCSR.

³⁶ Of course, to the extent a trackage-rights landlord objects to Amtrak’s operation and that operation is outside the scope of the underlying trackage rights agreement, the railroad can assert its status as a host carrier under Section 24308 (including, for example, by objecting to additional Amtrak frequencies) and insist on compensation directly from Amtrak. In that event Amtrak would be required to negotiate access via an operating agreement or seek an access order under Section 24308(a). Absent such a step, however, the trackage-rights landlord would not become a host carrier.

able to avoid the burdens associated with seeking to enter into operating agreements covering every situation where a railroad other than Amtrak's host might have an ownership interest in particular trackage Amtrak uses (or might play some role in dispatching short track segments or interlockings), of which there likely are 100s or 1000s on Amtrak's route network.

As applied to the route of the *Sunset Limited*, this principle confirms that CPKC is not a host carrier at either of the points where the train's route touches CPKC trackage: the two miles of KCSR trackage east of Beaumont where UP operates via trackage rights and the diamond at Southport Junction, LA where the *Sunset Limited* operates using CN trackage that crosses KCSR trackage at grade. In these locations, Amtrak has chosen not to seek to enter an operating agreement with CPKC, and as a result Amtrak is correct that its host railroads are UP and CN, respectively, not CPKC.³⁷

V. THE BOARD'S LEGAL AUTHORITY TO AWARD DAMAGES

The Board asked CPKC to "address the Board's legal authority to award damages" and in particular whether that authority is "limited to damages for the failures to provide preference that would cause Amtrak to fall below 80 percent for any two consecutive calendar quarters" or instead extends to awarding "damages for any delays attributable to the host rail carrier's failure to provide preference, even if the host rail carrier's failures to provide preference would not, standing alone, cause Amtrak to fall below 80 percent for any two consecutive calendar quarters." August 19 Decision at 3.

Amtrak's Opening Statement appears to take the position that the Board has the authority to award damages for "any delays" caused by a failure to provide preference, whether or not

³⁷ As previously noted (at Section II above), Amtrak has not raised any issue with the *Sunset Limited's* operation at these locations, and as a practical matter CPKC's dispatchers afford the *Sunset Limited* the highest level of priority.

Amtrak's on-time performance fell short of the 80 percent on-time threshold. Am. Op. Statement at 98.

CPKC would disagree with such a position, which cannot be squared with the statutory text. The power to award damages (or grant any other relief) for a preference failure is limited to circumstances where the performance of a train has fallen short of the threshold for commencing an investigation under Section 24308(f). The "delays or failures to achieve minimum standards" referenced in Section 24308(f)(2) for which the Board "may award damages" are those "investigated under paragraph (1)," which is the subsection addressing investigations triggered by below-threshold on-time performance. Accordingly, without such a trigger there is no authority to investigate, and without an investigation there is no authority to award damages.

At certain points in its Opening Statement, Amtrak appears to agree with this limitation. For example, Amtrak appears to acknowledge that "[t]he 80% on-time performance threshold for an investigation is just that – a trigger for the Board's investigation." Am. Op. Statement at 99. If Amtrak does intend to limit its position regarding damages for "any delays" to situations where an investigation has been triggered, its arguments raise a separate question: can damages be awarded for delays that are not the cause of Amtrak performance falling short of the thresholds. CPKC is skeptical that this question would arise often – if ever – as a practical matter, for two interrelated reasons.

First, CPKC would expect that Amtrak's operating agreement with the host railroad in question would extensively address the financial consequences for impacts on train performance associated with isolated delays from potential "preference" violations. For example, if Amtrak's train continues to achieve performance levels that its operating agreement treats as acceptable – or even warranting incentive payments – then that contractual arrangement would seem to rule

out any claim that Amtrak was “damaged” by the isolated delays. Conversely, where Amtrak’s operating agreement provided that the host railroad accept greatly reduced compensation from Amtrak – or even make payments to Amtrak – when its performance was poor, the prescribed contractual consequences ought to foreclose any award of damages over and above what the contract specified.

Second, even if Amtrak’s position about the Board’s authority to award damages were correct as a conceptual matter, a preference violation would also need to be the proximate cause of Amtrak actually suffering measurable economic harm. Without opining in the abstract on the precise limits of the Board’s authority, it seems highly unlikely there would be many situations – if any at all – where an isolated set of preference failures could be proven to have caused actual damage to Amtrak. Instead, CPKC would expect that such an award would require, at minimum, evidence that (a) the preference-caused delays (not other factors) *caused Amtrak’s train to arrive late* for a meaningful number of passengers and (b) Amtrak suffered harm as a result of those delays and not other factors, including those within Amtrak’s control like the service amenities on its trains or limitations on its ability to carry additional passengers. It is difficult to imagine that the kind of evidence necessary to support a credible damages claim would not also mean that the preference failures at issue would have been sufficiently pervasive so as to also be the cause of Amtrak’s performance falling short of the thresholds that triggered an investigation in the first place.

CPKC suggests that, wherever the Board might conclude the outer limits of its damages authority may lie, it would be prudent for the Board to make clear that damages will be limited to situations where a systematic pattern of preference violations resulted in a serious and persistent failure by Amtrak to achieve acceptable on-time performance, and that poor on-time

performance was the proximate cause of actual financial harm suffered by Amtrak. Amtrak's Opening Statement has invited precisely this sort of prudential limitation on the award of damages, and the Board would do well to provide clarity up front. *See* Am. Op. Statement at 100 (acknowledging that "the Board might determine that damages or other relief are not appropriate in certain circumstances").

CONCLUSION

For the reasons set forth above, CPKC urges the Board to adopt the positions outlined above on the three questions posed by the Board's August 19 Decision.

Respectfully submitted,



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December 23, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of December, 2024, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

A handwritten signature in blue ink, appearing to read "Dan L Meyer", is written above a horizontal line.

David L. Meyer

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

EXHIBIT 1

EXCERPTS FROM TESTIMONY OF SOUTHERN PACIFIC VP OPERATIONS R.D. SPENCE

*REVIEW AND REFUNDING OF RAIL PASSENGER SERVICE ACT: BEFORE THE SUBCOMM. ON TRANSP. AND
AERONAUTICS OF THE H. COMM. ON INTERSTATE AND FOREIGN COMMERCE,
92ND CONG., 1ST SESS. (DEC. 7, 1971)*

Part 2
REVIEW AND REFUNDING OF RAIL
PASSENGER SERVICE ACT

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
TRANSPORTATION AND AERONAUTICS
OF THE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

FIRST SESSION

ON

H.R. 709, H.R. 913, H.R. 4570, H.R. 5715, H.R. 6707, H.R. 6734,
H.R. 6749, H.R. 7412, H.R. 7481, H.R. 7814, H.R. 7971, H.R. 9533,
(and identical bills)

TO AMEND THE RAIL PASSENGER SERVICE ACT OF 1970
TO IMPROVE, EXTEND, AND INSURE A MODERN AND
CONVENIENT INTERCITY RAIL PASSENGER NETWORK,
AND FOR OTHER PURPOSES

H.R. 11417 AND H.R. 9204

BILLS TO AMEND THE RAIL PASSENGER SERVICE ACT OF
1970 TO PROVIDE FINANCIAL ASSISTANCE TO THE NA-
TIONAL RAILROAD PASSENGER CORPORATION FOR THE
PURPOSE OF PURCHASING RAILROAD EQUIPMENT, AND
FOR OTHER PURPOSES

APRIL 21, 22, 28, 29; NOVEMBER 9, 10, 11, 16; DECEMBER 7, and 8, 1971

Serial No. 92-54

Printed for the use of the Committee on Interstate and Foreign Commerce

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63-281

WASHINGTON : 1972

Mr. HARVEY. Could I ask a question pertaining to Mr. Spence's statement? Getting back to the particular train order that you were just discussing, can you give me some information about the Amtrak contract. Does it contain any clause which gives Amtrak passenger trains priority over freight trains?

Mr. SPENCE. There is nothing that says they will be given absolute priority, in other words, that there will be absolutely no delays, but the contract does state a preference for the passenger train.

Mr. HARVEY. You say there is nothing specific in the contract that gives priority to Amtrak trains. Well, this statement bothers me, because the Interstate Commerce Commission said yesterday, and I quote, "The clause in the Amtrak contract requires all Amtrak trains to have priority over the participating carriers of freight."

The ICC pointed out this priority requirement was one of the reasons, for example, that the Denver & Rio Grande Western Railroad declined to join Amtrak. The Denver & Rio Grande said that its route to California through the Rockies was slower than the Union Pacific's route through the mountains. If they had to give preference to the Amtrak trains, they could not compete with the Union Pacific; therefore they preferred not to join Amtrak.

Now, I am at a loss to understand whether there is such a clause in the contract providing that priority status be given to Amtrak trains or whether there is not.

Mr. SPENCE. I am sure we can find it in the contract. As I recall, it says "preference." But may I refer to counsel for a moment.

Mr. HARVEY. I think it is a very basic point.

Mr. SPENCE. Yes. Here it is on my page 7.

Mr. HARVEY. Where are you reading from?

Mr. SPENCE. From the Amtrak contract.

Mr. HARVEY. What page?

Mr. SPENCE. Page 7. Section 3.3.

Mr. HARVEY. You were reading that?

Mr. SPENCE (reading):

The railroad shall provide service in an economic and efficient manner and shall give appropriate recognition to the important and long time passenger train operation and passenger comfort and convenience. The railroad shall make every reasonable effort to maintain the schedule established by NRCP for its inner city rail passenger service. From time to time NRCP will deliver to the railroad pursuant to section 3.2 requests regarding the manner and standard of operation designed to make precise the foregoing and bring about national economy and uniform standard of inner city railroad passenger operation.

Mr. HARVEY. There is nothing mandatory then about the railroad yielding to Amtrak trains?

In other words, the terms of the contract seem to encourage the railroads to yield to Amtrak trains, but I gather that "encourage" is the strongest word in the contract. There is nothing mandatory about it?

Mr. SPENCE. As far as I know that is the strongest language, but we interpret that to mean preference.

Mr. ADAMS. Would the gentleman yield.

You operate a group of trains known as the Blue Streak?

Mr. SPENCE. Yes, sir, we do.

Mr. ADAMS. I understand they are very fast freight trains and have rigid schedules.

Mr. SPENCE. Yes.

Mr. ADAMS. Do you give preference to Amtrak trains over the Blue Streak merchandise?

Mr. SPENCE. We give preference to the Amtrak trains, but we try to give the Blue Streak as good a break as we can.

Mr. ADAMS. It is my understanding that you treat the Amtrak trains as extras over your system?

Mr. SPENCE. Yes, that is correct for some areas.

Mr. ADAMS. Which means that the Amtrak sits behind the Blue Streak merchandise so far as your preference schedules are concerned in the day-to-day operation?

Mr. SPENCE. The Blue Streak is extra, too.

Mr. ADAMS. Can you give me a listing of where you run the Blue Streak merchandise so we can see whether the Amtrak system is worth running on the same tracks on the same schedules as the Blue Streak merchandise. Could you supply that to the committee?

Mr. SPENCE. I am not sure I understand the question.

Mr. ADAMS. I will back up. First, I want to know where the Blue Streak merchandise operates. In other words, the lines it operates on and the schedule it operates on and then your Amtrak schedule, so that the committee can see what is happening between the two operations.

If some of these things are wrong from an operating viewpoint, we are going to have to defend them one way or the other or get rid of them, as I mentioned over here, or we are going to have to determine whether or not they are being shunted aside.

Do you understand now what it is I am requesting on behalf of the committee?

(The following information was received for the record:)

BSM (BLUE STREAK MERCHANDISE) SCHEDULE AS COMPARED TO THE SCHEDULE OF THE "SUNSET LIMITED"

The BSM operates from East St. Louis, Illinois, to Los Angeles, California, via the Cotton Belt and SPT, a distance of 2,450 miles on a 50'30" schedule. No. 1, the westbound "Sunset Limited", operates from New Orleans, Louisiana, to Los Angeles, a distance of 2,030 miles on a schedule of 44'30". The two trains operate over primarily the same trackage from Flatonia, Texas, to Los Angeles; however, the "Sunset Limited" operates via Phoenix, while the BSM operates via Gila, Arizona, the most direct route between Tucson and Yuma. While the distance from Flatonia to Los Angeles via Gila is 1,507 miles, the distance via Phoenix is 1,548 miles, or 41 miles longer for the passenger train. Also, it must be recognized that the "Sunset Limited" schedule contains 2'15" of station time to entrain and detrain passengers at the 13 regular stops. The schedule of No. 1 from Flatonia to Los Angeles is 33'15", while the schedule of the BSM between these two points is 32'20", with only stops to change crews and operating over the shorter distance.

Mr. PODELL. Will you yield?

Mr. Spence, if I may interrupt, a moment ago a clause in the contract was read relating to what is deemed to be a reasonable acceptance of needs of Amtrak by way of a preference which I think that you and I can agree is meaningless, because it means no preference at all for Amtrak.

The clause certainly showed that there was absolutely nothing that would give Amtrak any advantage over your freight if you so desired not to give Amtrak such an advantage.

A moment later you made a statement which was very illuminating. You said you construe this paragraph to mean that Amtrak will get a preference.

Now, sir, I think this is a very important statement because this is a departure from what has been either the practice or the language of the original contract, which, I think, was poorly drawn from Amtrak's point of view.

Is that a matter of fact, sir, that from now on, that Amtrak will get a preference and can we accept that as a binding change in the contract?

Mr. THOMPSON. Would the gentleman make it a little stronger and ask if Mr. Spence is prepared to issue orders to his personnel.

Mr. PODELL. Let's see if he agrees. First, do you agree, sir?

Mr. SPENCE. Yes, sir; and I think I can deal with all the questions in turn, if I may.

Yes; I do, but may I qualify that. I do not consider it a change in policy. My instructions from the president of the Southern Pacific have been quite specific from the beginning of Amtrak that we would run the train to the very best of our ability and that they would be given preference on our railroad.

That has not changed. We have had to make some changes in the operation of our railroad and we have some changes yet to make. We have to split some dispatching districts, and put additional train order offices out in West Texas, which we are making arrangements to do.

Our intention has been and still is to give Amtrak preference regardless of what the contract says.

Mr. PODELL. And do you intend to issue a directive to that effect?

Mr. SPENCE. I have done that, sir. The arrangements we are making are to put on additional people will allow our people to do a better job.

Mr. PODELL. Will you supply us with a copy of that directive?

Mr. SPENCE. My directive so far has been the instructions that we have had from the beginning.

Mr. PODELL. I am talking about the instructions that Amtrak is to receive a preference, or if you wish to make a new directive, that will be acceptable as long as we get a copy.

Mr. SPENCE. My directive was a statement from the President from the very beginning that this is the way we will run the train. Will that suffice?

Mr. PODELL. Yes; if it encompasses the language set forth here.

(The following letter and attachment were received for the record:)

SOUTHERN PACIFIC TRANSPORTATION Co.,
San Francisco, Calif., December 13, 1971.

HON. JOHN JARMAN,
House of Representatives, Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN JARMAN: As requested during my appearance at hearing in Washington, D.C., December 7, herewith copy of instructions to Superintendents reaffirming past instructions to continue to see that passenger trains are given preferential treatment over freight trains to assure on time performance.

Yours very truly,

R. D. SPENCE,
Vice President, Operations.

Atch.

Reaffirming past instructions and as emphasized at staff meeting at San Francisco, November 29, 1971, please arrange to continue to see that passenger trains are given preferential treatment over freight trains to assure on time performance.

R. L. KING.
D. R. KIRK.

Mr. PODELL. I direct the same question to Mr. Moore.

Mr. Moore, I think you heard the testimony of Mr. Spence. Do you subscribe and support his statement as to the priority given Amtrak?

Mr. MOORE. Sir, on Penn Central ever since I have been at the throttle, which dates back to last September 1, we have done everything within our power to improve the on-time performance of our passenger trains. In fact, up until October 1, on a 15-minute tolerance basis, we were running our trains—inner city passenger trains—85 percent on time. That compares to the period prior to Amtrak of about a 75-percent performance.

So, I am saying we have improved. We intend to continue to improve. And the instructions that you mention are already out on our railroad and have been out for some time.

Mr. PODELL. Mr. Moore, just so I can establish a record, you do subscribe to the statement of Mr. Spence that Amtrak is to receive a preference over all freight operation on your line?

Mr. MOORE. I do, with the possible exception, there are cases in train operation when it is necessary for the train dispatcher to use some judgment in the meeting and passing of trains. Therefore, there might be an occasion based on his best judgment when it is more expeditious to accomplish a meet order for the freight train to hold the main line and the passenger train to take the side.

Mr. PODELL. That is understandable, sir. Certainly I know there is an exception to every rule. If you have supplied your line people with such directive, would you supply us with a copy, and if you have not, could you make such a directive and then supply us with a copy?

Mr. MOORE. I will supply you now with a copy of the directives we have issued over the past few months, with only an apology that some of the language used in the letters I do not approve of. [Laughter.]

(Testimony resumes on p. 685.)

(The following material was received for the record:)

DIRECTIVES AND MEMORANDUMS ISSUED BY PENN CENTRAL TRANSPORTATION CO.
OVER LAST SEVERAL MONTHS RE ON-TIME PASSENGER SERVICE

DECEMBER 7, 1971.

R. F. LAWSON, J. E. MARTIN, J. G. ROBINS, K. E. SMITH, D. A. SWANSON, B. L. STROHL, E. R. ADAMS, J. M. GILMORE:

Confirming telephone conversation with you today, this is to reiterate my ultimatum that all passenger trains will operate on time. I will no longer accept the excuse of passenger train interference as a result of roadway work, mechanical failures on cars and locomotives, slow orders or trains ahead.

Effective immediately, you will arrange to have a divisional or regional officer, including the General Manager, ride every single passenger train operated, every day, until you are advised by me personally that this is no longer necessary.

Also, arrange to furnish a daily report, by telephone, to my office giving the name and title of the officer who rode each train, between what points, performance exceptions and what *positive* corrective action taken to prevent a similar exception for the following day's operation, the name and title of the person or persons responsible for the delay and the handling given.

I have said all that I intend to about improving the completely unacceptable passenger performance we have experienced in the past, and you and your people might just as well understand that I will not accept anything less than a 100%

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

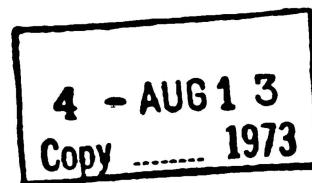
EXHIBIT 2

EXCERPTS FROM TESTIMONY OF AMTRAK PRESIDENT ROGER LEWIS

*FINANCIAL ASSISTANCE TO AMTRAK: HEARINGS BEFORE THE SUBCOMM. ON TRANSP.
AND AERONAUTICS OF THE H. COMM. ON INTERSTATE AND FOREIGN COMMERCE,
93D CONG., 1ST SESS. (JUNE 12, 1973)*

FINANCIAL ASSISTANCE TO AMTRAK

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
TRANSPORTATION AND AERONAUTICS
OF THE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS



FIRST SESSION

ON

H.R. 8351

**A BILL TO AMEND THE RAIL PASSENGER SERVICE ACT OF
1970, AS AMENDED, TO PROVIDE FINANCIAL ASSISTANCE TO
THE NATIONAL RAILROAD PASSENGER CORPORATION, AND
FOR OTHER PURPOSES**

JUNE 12 AND 13, 1973

Serial No. 93-22

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First, we welcome Mr. Lewis for his testimony. As is customary, we ask witnesses to submit the written text of their remarks for the hearing record and then summarize orally those remarks for the committee in the interest of conserving time. The subcommittee is very glad to have you back with us, Mr. Lewis, and we are all keenly interested in the challenging problems that you as head of Amtrak are handling.

We realize the shortness of the period of time which you had to produce results, and under the most difficult of circumstances. I can state personally I have ridden the Amtrak trains several times during the last year and a half. I watched your advertising campaign carefully on the national media.

I think in many respects Amtrak is doing an exceptionally good job in the short period of time you had in which to try to get organized, to try to produce results in this mode of transportation, where the railroads for so long have shown, very little interest in passenger travel in the country, concentrating instead on freight. As a result, with the development of other modes of transportation, particularly air travel, the public simply is not thinking in terms of rail passenger travel as yet.

So, as we welcome you to the subcommittee again to hear your testimony as to Amtrak's present and future plans, we are very cognizant of the very difficult problem that you are facing, and we will listen respectfully with interest to your testimony.

STATEMENT OF ROGER LEWIS, PRESIDENT, NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK); ACCOMPANIED BY ROBERT C. MOOT, VICE PRESIDENT-FINANCE; ROBERT MEDVECKY, VICE PRESIDENT AND GENERAL COUNSEL; AND J. RICHARD TOMLINSON, EXECUTIVE VICE PRESIDENT

Mr. LEWIS. Thank you very much. Mr. Chairman, Chairman Staggers and members of the subcommittee.

I have with me at the table this morning Mr. Richard Tomlinson, executive vice president of Amtrak, and Mr. Robert Medvecky, vice president and general counsel, and behind me, I am accompanied by Robert Moot, our vice president of finance.

We appreciate this opportunity to present Amtrak's financial plan for fiscal year 1974, and to discuss pending legislation for authorization of appropriations. H.R. 8351, introduced by Mr. Staggers and Mr. Devine on June 4, incorporates the amendments to the Rail Passenger Service Act proposed by the Department of Transportation. The Department's legislative proposals are in turn based on the recommendations made by the Department in its March report on Amtrak.

On July 1, at the start of fiscal year 1974, Amtrak will enter a new phase of its mission under our basic statute, the Rail Passenger Service Act of 1970. Amtrak has now completed its first 2 years of operation. In amendments to the act passed by Congress last year, the Department of Transportation was given the task of assessing the Amtrak operations thus far and providing recommendations as to the future shape of Amtrak. The DOT report provides what I regard as an objective and careful evaluation. Although the report details the problems we have faced and still face, the report's conclusion reaffirms my

the tracks shall be maintained at a level which will permit operation of trains at the same scheduled performance as was experienced on May 1, 1971, when we took over.

Now the difficulty there is, of course, that the requirements for passenger service in terms of right-of-way quality are more severe than they are for freight trains, and there has been an erosion in the quality of the track.

Mr. SHOUP. I understand that you are negotiating a new contract. Perhaps there should be more rigid requirements included.

I think you stated that the equipment is maintained, and operational maintenance is in the contract, and is performed by the railroads?

Mr. LEWIS. That is correct.

Mr. SHOUP. Then equipment malfunctioning would be a responsibility of the railroads?

Mr. LEWIS. If it was a failure to maintain it. In all fairness, I have to point out if we furnished them a bad car and it could not be maintained, the responsibility rests with us for furnishing the car rather than with them for faulty maintenance.

But much of it is due to inadequate maintenance.

Mr. SHOUP. Well, it is rather difficult from these charts to break it down.

Mr. LEWIS. Yes.

Mr. SHOUP. I notice there is much difference between rail lines.

Mr. LEWIS. There is a great difference, right.

Mr. SHOUP. Is this difference because you assign different equipment to these lines, or does this reflect on the operations of the lines themselves?

Mr. LEWIS. It reflects on the operations of the lines themselves, primarily. I must say that in defense of some of our railroads, our participating members, some always did a good job and are doing a good job now for us. The performance is quite uneven among the 13 separate railroads.

Mr. SHOUP. Then we have slow orders and this relates to the portion written into the contract on maintenance of the line?

Mr. LEWIS. A slow order could be put on for all kinds of reasons. Hurricane Agnes nearly tore up the whole railroad system in the Northeast.

Mr. SHOUP. Primarily?

Mr. LEWIS. It is primarily a matter of bringing the track back into condition by working on it and during the time between the damage and the repairs the speed is restricted.

Mr. SHOUP. Servicing in stations, is that the responsibility of the railroads?

Mr. LEWIS. Yes.

Mr. SHOUP. I notice there is quite a bit of divergence here between the lines.

Mr. LEWIS. This is the railroad's responsibility.

Mr. SHOUP. But there is no place you can tell them they are going to service within a certain time, criteria?

Mr. LEWIS. The criteria is the operation of the train in accordance with schedules, arriving and leaving at certain times, and to do the necessary work to make it possible.

Mr. SHOUP. The point is they have not done it.

Mr. LEWIS. In some cases they have not.

Mr. SHOUP. As I can look through the report, I see only one railroad that seems to be outstanding considering the number of on-time and non-on-time arrivals.

If I may go down to freight interference, again there is nothing in the contract. Are you planning to put anything in the contract specifically along these lines?

Mr. LEWIS. Well, this question of freight train interference is complicated. There are cases in railroad operations, a number of them, where freight train interference might be justified. For example, maybe in an operation in an area where you had a siding that would take five cars, which would be enough to accommodate that particular passenger train, but would not accommodate a 100-car freight train, it would be sensible to put the passenger train aside and get the freight train out of the way, not only for that segment, but for all of the operations that that train might later interfere with.

The difficulty on freight train interference, from our point of view, is that somebody must dispatch the trains that go on that track, both freight or passenger. These decisions are made in the field on a local basis.

I feel, and I have felt, that to try to legislate that and say, "You will always give preference to the passenger train, or never let a freight train interfere," just is not a real-world approach.

Mr. SHOUP. Didn't you earlier, speaking to Mr. Podell, state you think there should be top priority for passenger trains, and that is the only way to successfully run them?

Mr. LEWIS. It is a matter of priority, and I think priority is a good thing, yes; but I would like to just say that I think the important thing is to tell the railroad to run the train on time.

Now there is sufficient slack in most schedules to take care of some freight train interference. The interference we are talking about is the extraordinary or unusual type. We don't think there is any excuse for that. We think that the schedules are sufficient to take care of the normal train operations.

I think it would be better to have some system that is enforced by penalties or premiums for on-time performance, rather than to deal with the question of what the reason for the difficulty might be and legislate at that particular point.

Mr. SHOUP. I think the only thing you would have to look at, Mr. Lewis, is whose responsibility is it for the non-on-time performance.

Mr. LEWIS. Yes; but all of the things we have on these charts, of which you have a copy, are things within the control of the railroad. Some of the other difficulties are ours, and we keep them separate.

Mr. SHOUP. Mr. Chairman, I have referred to several charts in my questioning of Mr. Lewis. I would ask unanimous consent that they be printed in the record.

Mr. JARMAN. Without objection, it is so ordered.

[Testimony resumes on p. 60.]

[The charts referred to follow:]

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

EXHIBIT 3

EXCERPTS FROM TESTIMONY OF PAUL VILTER, AMTRAK VICE PRESIDENT
FOR FREIGHT RAILROAD RELATIONS

FINANCE DOCKET NO. 34495, *BUCKINGHAM BRANCH RAILROAD COMPANY – LEASE – CSX
TRANSPORTATION, INC.*, ORAL ARGUMENT (OCT. 13, 2004)

14 MR. VILTER: Good morning, Chairman Nober,
15 Vice Chairman Mulvey and Commissioner Buttrey. My
16 name is Paul Vilter. I am Amtrak's Vice President for
17 Freight Railroad relation. Accompanying me is Fred
18 Ohly, Amtrak's Senior Associate General Counsel.
19 Thanks for the opportunity to recap Amtrak's written
20 comments and answer any questions you may have.
21 As described in our written comments, this
22 proceeding is important to Amtrak for two primary

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1 I mean where is the incentive there if that's the only
2 guarantee that you have. So I don't know.

3 I want to emphasize that beyond this, the
4 safety element for them is this is a complicated, this
5 operation, as I said, is involving CSXT running
6 156,000 empties. BB is going to be running local
7 service. CSX is going to be providing local service
8 and Amtrak is going to be running the Cardinal back
9 and forth.

10 VICE CHAIRMAN MULVEY: A question to
11 Amtrak. Are you satisfied with the level of operation
12 over this track today from CSX?

13 MR. VILTER: This track specifically, I
14 guess I would say that, you mean just to Clifton Forge
15 or CSX all the way to Chicago?

16 VICE CHAIRMAN MULVEY: Well, overall
17 level. I guess the overall portion that the Cardinal
18 travels.

19 MR. VILTER: I would say that it is better
20 than many of the other trains that we operate over
21 CSXT. We are not fully satisfied with any of the
22 operations on CSXT. I guess I would call it

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1 frustrated.

2 VICE CHAIRMAN MULVEY: Thank you.

3 CHAIRMAN NOBER: Do you have anything?

4 COMMISSIONER BUTTREY: I'm just curious.

5 Do Amtrak trains have priority on the track when they
6 come through on a scheduled basis? All the Amtrak
7 trains are scheduled trains presumably and when they
8 want to come through the line, do they have priority?

9 Do the other trains have to get off the track and let
10 you through or do they just stay on the track and you
11 take a siding and get through whenever you can?

12 MR. VILTER: Well, there is a Federal
13 statute, The Rail Passenger Service Act, which calls
14 for Amtrak trains to have priority. There is also in
15 the real world in terms of trying to get two trains
16 across a single -track railroad, it is sometimes more
17 efficient for an Amtrak train to wait for a freight to
18 come through. We are not always given priority either
19 on this line or on any line in the country. Not
20 always.

21 COMMISSIONER BUTTREY: Thank you.

22 CHAIRMAN NOBER: I have no further

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1 questions.

2 VICE CHAIRMAN MULVEY: Nor do I. Thank

3 you.

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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

EXHIBIT 4

EXCERPTS FROM TESTIMONY OF SANTA FE PRESIDENT JOHN REED

*REVIEW AND REFUNDING OF RAIL PASSENGER SERVICE ACT: BEFORE THE SUBCOMM. ON TRANSP. AND
AERONAUTICS OF THE H. COMM. ON INTERSTATE AND FOREIGN COMMERCE,
92ND CONG., 1ST SESS. (DEC. 7, 1971)*

Part 2
REVIEW AND REFUNDING OF RAIL
PASSENGER SERVICE ACT

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
TRANSPORTATION AND AERONAUTICS
OF THE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

FIRST SESSION

ON

H.R. 709, H.R. 913, H.R. 4570, H.R. 5715, H.R. 6707, H.R. 6734,
H.R. 6749, H.R. 7412, H.R. 7481, H.R. 7814, H.R. 7971, H.R. 9533,
(and identical bills)

TO AMEND THE RAIL PASSENGER SERVICE ACT OF 1970
TO IMPROVE, EXTEND, AND INSURE A MODERN AND
CONVENIENT INTERCITY RAIL PASSENGER NETWORK,
AND FOR OTHER PURPOSES

H.R. 11417 AND H.R. 9204

BILLS TO AMEND THE RAIL PASSENGER SERVICE ACT OF
1970 TO PROVIDE FINANCIAL ASSISTANCE TO THE NA-
TIONAL RAILROAD PASSENGER CORPORATION FOR THE
PURPOSE OF PURCHASING RAILROAD EQUIPMENT, AND
FOR OTHER PURPOSES

APRIL 21, 22, 28, 29; NOVEMBER 9, 10, 11, 16; DECEMBER 7, and 8, 1971

Serial No. 92-54

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REVIEW AND REFUNDING OF RAIL PASSENGER SERVICE ACT

TUESDAY, DECEMBER 7, 1971

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2318, Rayburn House Office Building, Hon. John Jarman (chairman) presiding.

Mr. JARMAN. The subcommittee will please be in order.

This is a continuation of the hearings which we commenced on November 9 of this year to consider the proposed amendment to the Rail Passenger Service Act of 1970, which created the National Railroad Passenger Corporation, now generally known as Amtrak.

H.R. 11417 would add \$170 million to the original \$40 million to further support and improve national rail passenger service. We have asked the presidents or chairmen of the Seaboard Coast Line, Southern Pacific Transportation Co., Penn Central Transportation Co., Santa Fe Railway Co., and Burlington Northern Railroad to come in and testify before the committee as to their experiences in providing service for Amtrak pursuant to contracts with the Corporation.

Our record thus far demonstrates that on-time performance is far below a percentage which would attract passengers. Our record also contains charges that the Western railroads are out to sabotage Amtrak. We need to know from the top railroad management officials what they are doing and what they are willing to do to make Amtrak more successful in the immediate future and over the long term.

We also want to know what the several leaders of railroad management believe as to long-haul passenger service, and what it will take to make such service successful.

I understand that Mr. W. T. Rice, chairman and chief executive officer of Seaboard; Mr. William H. Moore, president of Penn Central; Mr. John S. Reed, president and chief executive officer of Santa Fe, and Mr. R. D. Spence, system vice president for operations for Southern Pacific Transportation Co., are with us this morning. And I believe that it will be more efficient if we ask these gentlemen to sit with us as a group, and then members of the subcommittee can ask questions of any or all of them.

We are pleased to have Mr. Roger Lewis, president of Amtrak, sitting in with us.

Gentlemen, we would like to keep this discussion as informal as possible with as much informative give and take, not only to us, but in terms of yourselves in terms of comments, questions, and contribu-

(647)

Mr. REED. Mr. Chairman, I am John Reed, president of Santa Fe. I do not have a prepared statement except that I appreciate the invitation to join this group, not having been one of those who was originally included. I think I can say that my reason for my being so grateful to be here is that I represent a railroad which I think probably tries harder than any other to make passenger service a viable operation, and I was frankly very much concerned with many of the statements, the public newspaper accounts of some of the previous hearings which I think were extremely unfair, both to Mr. Lewis, to Amtrak and to railroad management. I simply wanted to participate a little bit and help give some clarification to what is going on on our railroads today.

(Testimony resumes on p. 670.)

(The following supplemental statement and exhibits were subsequently received for the record:)

SUPPLEMENTAL STATEMENT OF JOHN S. REED, ON BEHALF OF THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COMPANY

As President and Chief Executive Officer of The Atchison, Topeka and Santa Fe Railway Company, I appreciated the opportunity of appearing before the Sub-Committee on December 7, 1971, to describe the role this railway has undertaken and will continue to follow in furnishing premium passenger service pursuant to its contract with the National Railroad Passenger Corporation. I wish to emphasize again that Santa Fe will exert every reasonable effort to promote the success of Amtrak.

At the time of my execution of our participation agreement with Amtrak on April 20, 1971, I pledged on behalf of Santa Fe to work closely with the new organization to carry on this railroad's traditional high standards of passenger service which have become implicit with our Super Chief, El Capitan and other Chief trains. That pledge was disseminated to all Santa Fe personnel through our company magazine, as shown on pages 6 and 7 of the May, 1971, issue which I have labelled Exhibit 1 and attached hereto. Since that time, Santa Fe employees and management have translated that promise into affirmative action, as exemplified by a copy of a letter sent me by the Editor of Trains Magazine, which he has permitted me to attach as Exhibit 2.

The laudatory comments expressed therein by a recent passenger on our Amtrak transcontinental trains are representative of those of the many other rail travelers who still enjoy Santa Fe's fine service performance for Amtrak. They confirm that Santa Fe promotes passenger service, as urged by Congressman Kuykendall at the December 7th hearing, through a spirit of cooperation which transcends the obligation of its Amtrak contract.

Of course, as the members of the Sub-Committee know, neither Santa Fe nor Amtrak can guarantee absolute perfection of passenger train service at all times. As a railroad spanning two-thirds of the nation between the midwest on the one hand and the Pacific Ocean and the Gulf of Mexico on the other, Santa Fe is often beset with the operating problems inherent in the vigorous terrain and climatic extremes which we encounter daily. Amtrak, too, has been plagued with difficulties during this "start-up" period of its initial operations in areas such as passenger reservations and maintenance of newly-acquired equipment. Its lack of railroad experience necessarily adds to the troublesome nature of these difficulties, which can be overcome with time and continued dedication.

As I advised the Sub-Committee on December 7th, Santa Fe traditionally has given passenger trains preference over its freight service. However, as requested by Congressman Podell, I have insured the continuation of this policy for Amtrak service through the directive which was given our Vice President-Operations on December 15, 1971, a copy of which I have attached as Exhibit 3, which he has issued to all operating personnel engaged in supervising and dispatching passenger train operations on Santa Fe lines. Both Mr. Cena and I will continue to devote our efforts to effect compliance with these instructions.

"We just came back from a most glorious vacation trip via Amtrak from Gallup, New Mexico, using the Santa Fe *Super Chief* (Pullman), where we spent 5 days using the Navajo Scenic Tour Group visiting the Navajo and Hopi Indian nations. What a beautiful train trip from Chicago to Gallup and return. We left on time and arrived on time both ways. The R.R. tracks were smooth, the train superb, service in the Pullman delightful and courteous. The dining cars both ways on Train No. 17 and No. 18 mastered by Stewards Willie Varnando and Zino Zarlendo was exceptional and service without equal. Having traveled approximately 50,000 miles via R.R., only the Union Pacific *City of Los Angeles* came close to such excellence. Even the waiters were most gracious in their service. A quote by one substantiates the quality of service. 'Pleased to serve you folks, come back and join our R.R. again.' What thoughtfulness."

Cordially,

DAVID B. MORGAN, *Editor*.

EXHIBIT 3

DECEMBER 15, 1971.

Mr. Cena: On December 7, 1971, I advised the Subcommittee on Transportation and Aeronautics of the House of Representatives Committee on Interstate and Foreign Commerce that this railroad company traditionally has given passenger train operations preference over freight service and would continue to afford Amtrak trains such priority.

Would you please reemphasize to all operating department supervisory personnel, including train dispatchers, that this long-standing Santa Fe policy is to be continued with respect to Amtrak operations on our lines. As specified in the operating timetables, regularly scheduled passenger trains shall continue to be designated as first-class trains and shall continue, except in cases of emergencies or exigencies beyond the reasonable control of the dispatcher, to be afforded preferential dispatch and handling over other classes of train operations.

JOHN S. REED.

Mr. JARMAN. Mr. Lewis, do you have any comment at this time?

Mr. LEWIS. No; except Mr. Chairman to say that I welcome, as these gentlemen do, an opportunity to discuss openly and with complete candor the problems that are confronted in what has been a major step in taking the passenger service out of this old and established railroad structure of this country, which before Amtrak involved 24 railroads operating passenger trains.

Now there are only ourselves and the three railroads who chose not to join. It is a big problem and it needs this kind of discussion.

Mr. JARMAN. Gentlemen, we will do our best to keep this as informal as possible with as much participation as possible by the five of you and by the subcommittee.

As you know from the hearings that we have already had that there is real concern on our part here in the committee and in the Congress as to what the future holds for Amtrak. We are concerned about the expense aspect of it. We realize, of course, that it has been a comparatively short period of time in which to get a tremendous job under way, but we need real enlightenment as to what we can expect in the near future and in the distant future.

So, we are reaching out to you for as candid and frank comments as possible and as much information as we can get. We are aware of the criticism that has been leveled by Mr. Haswell, which makes reference to the attitude of railroad management.

Let me just lead off by asking for any comments that you would make on charges that have been made. There were hard-hitting charges made in an earlier hearing of this subcommittee, as you know.

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

EXHIBIT 5

EXCERPTS FROM TESTIMONY OF AMTRAK THEN-EXECUTIVE VICE PRESIDENT
STEPHEN J. GARDNER

*EXAMINING THE SURFACE TRANSPORTATION BOARD'S ROLE IN ENSURING A ROBUST PASSENGER RAIL
SYSTEM: REMOTE HEARING BEFORE THE SUBCOMMITTEE ON RAILROADS, PIPELINES, AND
HAZARDOUS MATERIALS OF THE H. COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE, 116TH
CONG., 2D SESS. (NOV. 18, 2020)*

EXAMINING THE SURFACE TRANSPORTATION BOARD'S ROLE IN ENSURING A ROBUST PAS- SENGER RAIL SYSTEM

(116-66)

REMOTE HEARING

BEFORE THE
SUBCOMMITTEE ON RAILROADS, PIPELINES,
AND HAZARDOUS MATERIALS
OF THE
COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

NOVEMBER 18, 2020

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U.S. GOVERNMENT PUBLISHING OFFICE

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WASHINGTON : 2021

rail counterparts. We believe the Congress in its reauthorization of the STB should consider mechanisms that level the playing field between Amtrak and publicly-funded commuter rail agencies.

In addition to the passenger rail congestion in our region, freight trains from six Class I railroads also interact and share tracks with passenger trains from both Amtrak and our commuter trains. Because of this, Metra has developed strong working relationships with freight railroads as we work together to effectively move passengers and freight across Chicagoland.

Our partnerships are further enhanced by the landmark Chicago Region Environmental & Transportation Efficiency (CREATE) program led by Chairman Lipinski and others in our congressional delegation. This program continues to be a positive example of the federal government, rail operators, and local and state governments coming together to tackle a major challenge. Expanding capacity in Chicago, removing bottlenecks, and bringing the network to a state-of-good-repair will enhance passenger train speeds and ensure our freight partners can continue to effectively serve their customers. We continue to appreciate the Chairman's leadership on CREATE and would strongly support Congress and this Subcommittee as it considers other changes to ensure we have a modern passenger rail system that provides for a level playing field amongst all passenger rail operators.

However, even great partnerships can be challenged. Yet, unlike Amtrak, we lack the same ability to resolve disputes over right of way, on-time performance, and track access at the STB. Despite the tremendous growth of commuter rail services nationally, federal law still only provides preference to the federally subsidized passenger rail services while state and local taxpayer subsidized passenger operations are excluded from full standing at the STB. Worse, Amtrak continues this malpractice with its access rates.

Metra looks forward to working with Congress as its debates authorizing new surface transportation programs, the Surface Transportation Board, and further emergency COVID-19 relief. Our current financial outlook is bleak, as we struggle to provide the same levels of pre-pandemic service while experiencing new and increased costs. In the long-term, while we appreciate the Committee's efforts in the INVEST Act, we continue to call on Congress to create long-term, predictable funding streams exclusively for commuter rail agencies. Lastly, we would support federal efforts to modernize the passenger rail system and create a more level playing field between all passenger rail operators.

Metra thanks Congress for its continued support of public transportation and systems like ours and appreciates the opportunity to update this committee on our operations and challenges. Thank you for inviting me to testify and I look forward to answering any questions you may have.

Mr. LIPINSKI. Thank you, Chairwoman Brown.

I now recognize Mr. Gardner.

You may proceed.

Mr. GARDNER. Good morning, Chairman Lipinski, Chairman DeFazio, and Ranking Member Crawford, members of the subcommittee, and my fellow witnesses. Thank you for the opportunity to testify today about the Surface Transportation Board's key role enabling Amtrak to effectively serve the Nation.

We strongly support the STB and believe the Board needs updated authority and additional resources for passenger rail so we can achieve the service levels and on-time performance your constituents deserve.

Congress created Amtrak in 1970 to take on a job that today's freight railroads no longer wanted. In exchange for Amtrak's assumption of these private railroads' common carrier obligation for passengers and the associated operating losses for passenger service, the freights agreed to allow Amtrak to operate wherever and whenever it wanted over their lines, to provide Amtrak trains with dispatching preference over freight, and to empower what is now the STB to ensure Amtrak's access to the rail network.

erence rights, which could make a huge difference in train performance.

As our CEO, Bill Flynn, recently testified, we are hopeful that with COVID relief funding and your support, we can quickly restore service and recover from this pandemic, setting in motion a new era of growth and a chance for Amtrak to play a significant role in helping reduce carbon emissions across the country.

A rarely heralded fact is that the U.S. has the largest rail network in the world, and yet we use so little of it for intercity passenger rail service. The fundamental reason for this is our inability to gain quick, reasonable access to the network and receive reliable service that we are owed under law.

This has effectively blocked our growth and left much of our Nation underserved. City pairs like Los Angeles and Phoenix or Atlanta to Nashville could clearly benefit from Amtrak service. Existing rail lines already connect them. Shouldn't Amtrak trains be serving these and many other similar corridors nationwide?

With your help, we can answer this question with a yes, by gaining strengthened rights and proper STB enforcement, coupled with a long-term dedicated source of funding for both Amtrak and intercity passenger rail expansion. With these, we can provide the type of modern and reliable intercity passenger rail service that nearly every other developed nation now takes for granted.

I want to thank you particularly, Chairman Lipinski, for your longstanding support of Amtrak, for your leadership role throughout many issues affecting Amtrak and for your time with the committee. We have always appreciated your support. Thank you very much for it.

And I look forward to answering any of the questions from the committee.

Thanks very much.

[Mr. Gardner's prepared statement follows:]

Prepared Statement of Stephen J. Gardner, Senior Executive Vice President, Chief Operating and Commercial Officer, National Railroad Passenger Corporation (Amtrak)

INTRODUCTION

Good morning Chairman Lipinski, Ranking Member Crawford, and all the members of this subcommittee. My name is Stephen Gardner and I serve as Senior Executive Vice President and Chief Operating and Commercial Officer for Amtrak. It is my pleasure to testify here today on behalf of Amtrak's many dedicated employees. Despite the challenges faced by our nation this year, thousands of our employees continue to further Amtrak's mission and provide a valuable service to the American public. I would like to thank them for their dedication and recognize the support Amtrak has also received from our state partners, labor unions, host railroads, and commuter colleagues as we navigate these difficult times.

I would like to thank this subcommittee for convening today's hearing to discuss a topic of great importance to Amtrak. A well-functioning Surface Transportation Board (STB) is essential to Amtrak's mission and core to the future of our company. With the strong backstop of an empowered STB, we can better connect communities across this nation with efficient, sustainable, modern service, and create thousands of new, good-paying jobs in the process as part of a vital effort to help this nation recover from the pandemic.

The STB has a central role to play in many issues critical to Amtrak including our ability to run trains in a timely fashion and efficiently expand and improve our network and the enforcement of Amtrak's statutory right to preference over freight

ON TIME PERFORMANCE AND PREFERENCE OVER FREIGHT TRANSPORTATION

The public bargain with the freight railroads that relieved them of the obligation to operate unprofitable intercity passenger rail service and created Amtrak included an important condition: freight railroads would provide Amtrak passengers traveling over their rail lines with “preference” over freight transportation. This was not a new concept at the time. When freight railroads operated their own passenger trains before Amtrak, they recognized that prioritizing trains carrying passengers over slower freight trains carrying cargo was critical to providing a viable passenger service. Pity the dispatcher that delayed the *20th Century Limited* or the *Super Chief* for a freight train. As the AAR has stated, when Amtrak was established freight railroads’ assurances that they would “grant Amtrak trains preference over their own freight trains” comprised an important part of the deal.⁸ The commitment was short-lived. Some railroads quickly backtracked on their promise and customers suffered: on time performance (OTP) of Amtrak’s long distance trains plummeted from 70% in 1972 to 35% in 1973. This led Congress to enact a 1973 amendment to the Rail Passenger Service Act specifically providing that “[e]xcept in an emergency . . . Amtrak has preference over freight transportation . . .” which remains the law today.

Amtrak’s right to preference over freight transportation under the law is clear but often ignored, most likely because of a lack of enforcement, as I will cover later. The largest cause of delay to our customers is “freight train interference,” typically caused by a freight railroad requiring an Amtrak passenger train to wait so that its freight trains can operate on the tracks ahead. On the U.S. rail network, rail line owners control the dispatching of trains that operate on their lines, which means the freight railroads have substantial control over the on-time delivery of Amtrak customers traveling on freight-owned rail lines. An analogy to air travel puts this reality in perspective. What if air cargo carriers were responsible for air traffic control? I would posit that planeloads of travelers would be left circling above airports while cargo jets landed first unless an effective regulatory regime existed to ensure the opposite.

When freight railroads ignore the law, our customers and your constituents suffer. Amtrak rigorously tracks all delays on every train to the minute and categorizes them according to the cause of delay. Freight train interference delays amounted to one million minutes in FY 2019—equivalent to nearly two years of passengers waiting for freight trains to operate first. As a result of these delays, the on time performance of nearly all long distance services, and many state-supported trains, is unacceptably low. In FY 2019, only 42% of long distance customers and 75% of state-supported customers arrived at their destination on time, and a complete listing of the on time performance for each Amtrak route is included in the Appendix. The disregard of Amtrak’s right to preference set forth in law is a fundamental challenge to Amtrak’s survival and our ability to provide reliable service to the nation, including to many of your home districts. This is not fair to your constituents and they deserve better service than they are receiving from many host railroads.

Moreover, while the law allows the STB to grant relief to a freight railroad from the obligation to provide preference in the event that doing so would materially lessen the quality of freight transportation provided to shippers, no railroad has ever sought such relief. Why? We believe this is because the presence of a few daily passenger trains on freight railroad mainlines is no threat to the quality and growth of freight transportation. For comparison, Amtrak’s mostly two-track Northeast Corridor mainline between Newark and New York Penn Station hosts up to 48 trains an hour. On most host railroad mileage, Amtrak operates two trains *a day*.

The experience of VIA Rail Canada, Canada’s intercity passenger rail operator, clearly demonstrates the dire consequences when there is not even the pretense of the right to preference over freight transportation. As noted in a 2016 Special Examination Report of VIA Rail by Canada’s auditor general, “in Canada, passenger trains do not have the right of way. Therefore, VIA’s trains are frequently required to yield to freight traffic, which sometimes results in significant delays.”⁹ These delays due to lack of preference have decimated the performance of VIA’s principal long distance train, the Toronto-Vancouver *Canadian*. In 2009, VIA added an extra night to the *Canadian*’s schedule with the expectation that this would improve its poor on time performance. Instead, on time performance plummeted to just 8% in

⁸ Statement of Edward R. Hamberger, President & CEO of the AAR, at Hearing on Passenger Rail Financing, Subcommittee on Surface Transportation and Merchant Marine of the U.S. Senate Committee on Science, Commerce, and Transportation, June 5, 2003, p. 5.

⁹ VIA Rail Canada, *Special Examination Report—2016*, March 16, 2016, p. 12 (https://www.viarail.ca/sites/all/files/media/pdfs/About_VIA/2016_OAG_Special_Exam_VIA_Rail_Canada_ENG.pdf).

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. NOR 42175

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UNDER 49 U.S.C. § 24308(f) FOR SUBSTANDARD PERFORMANCE OF AMTRAK'S
SUNSET LIMITED TRAINS 1 AND 2

EXHIBIT 6

EXCERPTS FROM PRESENTATION BY JIM BLAIR, AMTRAK DIRECTOR HOST RAILROADS

“AMTRAK’S RIGHTS AND RELATIONSHIPS WITH HOST RAILROADS” (SEPT. 21, 2017)



Amtrak's Rights and Relationships with Host Railroads

September 21, 2017

Jim Blair – Director Host Railroads

Backdrop: Amtrak's Statutory Rights

- The Rail Passenger Service Act of 1970 and subsequent amendments, now codified at 49 U.S.C. §§ 24101 *et seq.*, provides Amtrak with rights on host railroads, including:
 - Access to any rail line in the US.
 - Use of host railroad facilities.
 - Payments based on host's incremental cost.
 - Amtrak preference over freight transportation.
 - Additional trains.
 - Accelerated speeds.
 - Condemnation authority.

