

**SURFACE TRANSPORTATION BOARD (STB) PROPOSED RULE ON  
ON-TIME PERFORMANCE (OTP) UNDER THE PASSENGER RAIL INVESTMENT AND  
IMPROVEMENT ACT (PRIIA) OF 2008 SECTION 213  
AND  
STB “POLICY STATEMENT” ON  
AMTRAK’S STATUTORY RIGHT OF PREFERENCE**

**BACKGROUND**

Amtrak filed petitions requesting that the STB initiate an investigation into on-time performance on two routes:

the Illini/Saluki (Canadian National is the host) - filed in January 2012 and amended August 2014

the Capitol Limited (CSXT and Norfolk Southern are the hosts on different segments) – filed in November 2014.

Amtrak’s petitions were filed under PRIIA Section 213, 49 USC sec. 24308(f) (“PRIIA 213”), which requires the STB to investigate the causes of delays to Amtrak trains on host railroad lines when the host railroad’s performance falls below certain thresholds, one of which is less than 80% “on-time performance” for the prior two consecutive quarters. In the course of the investigation, the STB may award damages if it finds that delays have been caused by a failure of the host to provide Amtrak with the preference over freight transportation required by law.

The “preference” rights to be decided in a PRIIA 213 action refers to 49 USC sec. 24308(c) -- which has remained unchanged federal law since 1973. Section 24308(c) provides that intercity rail passenger transportation provided by or for Amtrak “has preference over freight transportation in using a rail line, junction, or crossing,” except in specifically defined situations discussed more fully below.

In January 2015 the STB ordered the parties to submit briefs as to the meaning of “on-time performance” (“OTP”) as used in PRIIA 213.

In May 2015 the STB withdrew its order and stated that the Board would determine the definition of OTP through formal notice and comment rulemaking. The Board did not issue an order a Notice of Proposed Rulemaking (“NPRM”) until December 2015.

Along with the December 2015 NPRM on the definition of OTP, the STB issued a “Policy Statement” on how it intended to define and apply Amtrak’s statutory right of preference in the context of a PRIIA 213 investigation.

**This paper addresses why both the NPRM and the Policy Statement erroneously interpret and apply the law with respect to Amtrak’s rights under PRIIA 213 and under its statutory right to preference, and how Amtrak’s interpretation would result in better performance to the benefit of its passengers and state partners.**

## **OTP NPRM – SECTION 213**

### **THE TRIGGER FOR INITIATING A PRIIA 213 INVESTIGATION SHOULD BE ON-TIME PERFORMANCE AS MEASURED AT ALL STATIONS, NOT SIMPLY AT THE ONE STATION AT THE END OF THE ROUTE.**

#### PRIIA 213

- PRIIA 213 was enacted in 2008 in order to provide Amtrak, states, and other affected parties with some means of improving the dismal on-time performance of passenger trains on host railroads. It makes the STB the agency responsible for investigating and remedying poor performance by host railroads, and provides in relevant part:

*If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, ... the Surface Transportation Board ... may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, **the Board shall initiate such an investigation**, to determine whether and to what extent delays ... are due to causes that could reasonably be addressed by Amtrak or other intercity rail operators. ... In making its determination or carrying out such an investigation, the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train. (Emphasis added.)*

- A second “trigger” for initiating an investigation was the metrics and standards promulgated by the FRA under PRIIA 207, but those are currently being challenged in court.
- There is ample statutory and regulatory support for defining and applying the term “on-time performance” to mean performance at **all station stops on a route, not just the last station on the route**, and in the absence of a different definition in PRIIA 213 itself it should be presumed that Congress had these precedents in mind when it enacted PRIIA 213.
- But the STB ignored all of those precedents, and proposed a rule that would unreasonably limit the cases that Amtrak could bring to the STB to investigate (or that the STB could investigate on its own volition), and would potentially limit the STB’s investigation as well.

#### The STB’s Proposed Rule, measuring performance at only one station on a route, ignores statutory and regulatory precedent

- The STB’s Proposed Rule would define “on-time performance” as follows:

*[A] train is deemed to be “on time” if it arrives **at its final destination** within five minutes of its scheduled arrival time per one hundred miles of operation (capped at 30 minutes). (Emphasis added.)*

- The STB states that it based its proposed rule on the definition of on-time performance in regulations that were adopted by the predecessor to the STB, the Interstate Commerce Commission (“ICC”) in the early years of Amtrak’s existence when the ICC had jurisdiction over passenger rail performance issues. The NPRM cites to the **1973 version** of regulations promulgated by the ICC, which stated that an Amtrak train “shall arrive at its final terminus no later than 5 minutes after scheduled arrival time per 100 miles of operation, or 30 minutes after

scheduled arrival time, whichever is the less.” *Adequacy of Intercity Rail Passenger Serv.*, 344 I.C.C. 758, 776 (1973), formerly 49 C.F.R. sec. 1124.6 Rule 6(b).

- However, the STB completely ignored later modifications made to those regulations by the ICC. Those modifications recognized that measuring performance only at one station – the “final terminus” – was an inadequate and unhelpful measure of the true performance of a train throughout the route and for all of its passengers.
- In 1974 the ICC initiated a proceeding “to inquire into and determine the quality of intercity rail passenger service with a view toward determining whether the Commission should prescribe additional rules and regulations...,” and proceeded to hold public hearings and take testimony from over 300 public witnesses and railroad representatives.
- As a result of that intense inquiry, the ICC determined that a definition focusing only on endpoint OTP was unreasonable and should be modified. The ICC stated:

“As now worded, Rule 6(b) seems to indicate that on-time performance is required, and that passengers have a right to expect on-time service, only at end-point destinations of the trains. The [ICC] proposes changes ... to make clear that on-time service is required at intermediate stops, as well as at the end-point stations of any route. The changes are clearly justified to clarify passenger rights and the carrier’s obligations. ***The public should be able to rely upon train schedules at intermediate stops as well as the ‘final terminus’ of a route.*** (Emphasis added.)
- Rule 6(b) was therefore revised to read: “Where safe operation permits, the train shall arrive ***at its final terminus and at all intermediate stops*** no later than 5 minutes after scheduled arrival time per 100 miles of operation, or 30 minutes after scheduled arrival time, whichever is the less.” (Emphasis added.) 351 I.C.C. 883, 910, 997 (1976).
- Rule 6(b) remained in effect, measuring on-time performance at all stations, until the ICC’s jurisdiction over passenger rail was terminated in 1979.
- The ICC’s measurement of “on-time performance” was consistent with Congressional intent to measure Amtrak performance at all stations, as embodied in 49 USC sec. 24101(c)(4) – originally enacted in 1970 -- which provides:

(c) Goals.—Amtrak shall ... operate Amtrak trains, to the maximum extent feasible, ***to all station stops*** within 15 minutes of the time established in public timetables... (Emphasis added.)

All-Stations On-Time Performance should be the measure applied by the STB

- The existing measurement known as All-Stations OTP (“ASOTP”) measures the actual arrival time at each station along a train’s route, compared to the published scheduled arrival time (except for the origin station, where it is the departure time that is measured vs. the scheduled departure time). A train is considered “on time” at the station if it arrives 15 or fewer minutes late. For each train over a given time period, ASOTP is calculated by dividing the number of “on time” station arrivals by the total number of station arrivals (or departures at origin).
- On time performance should be measured at all stations along a train’s route. Measuring performance by when a train arrives at only one station at the end of the route, as proposed by the STB, ignores the actual travelling experience of the majority of Amtrak passengers.
  - Only about 35% of Amtrak passengers detrain at the end-point; about 65% detrain at an intermediate station.
  - Only 10% of all Amtrak stations are end-points; using the STB Proposed Rule, performance at 90% of Amtrak’s stations would never be measured.
  - Twenty-four states with Amtrak service (over half of the states served by Amtrak) have intermediate stations but no end-point stations in their state, and under the STB’s Proposed Rule would therefore not have performance within their state measured.
  - On-time performance at the endpoint is often not representative of performance at other stations on the route. Endpoints are usually among the highest-OTP stations on a train’s route, and OTP at intermediate stations is often substantially lower than at the endpoint. Therefore, if only endpoint OTP were used, many routes with performance substantially under 80% all along the route will still show over 80% endpoint OTP and could not be subject to a PRIIA 213 investigation.
  - Measuring performance only at the end-point of a route will likely cause poorer performance at intermediate stations, with host railroads focused only on arriving at the endpoint on time since that is the only point measured.
- On time performance should be measured at all stations based on a tolerance not exceeding 15 minutes from the scheduled arrival time. Using tolerances exceeding 15 minutes and based on the length of the route, as proposed by STB, ignores customer needs as well as Congressional intent.
  - Customers are not less sensitive to arriving on time just because their train happens to have a long route. As discussed above, most customers do not travel for the train’s entire route, and those customers are likely indifferent to how long the train’s entire route is.
  - 49 USC sec. 24101(c)(4) provides: “Amtrak shall ... operate Amtrak trains, to the maximum extent feasible, to all station stops **within 15 minutes of the time established in public timetables...** (Emphasis added.)

- ASOTP is practical, straightforward, transparent, and easy to measure.
- Amtrak has been calculating and reporting ASOTP by route and train number in its quarterly reports required by PRIIA since 2010.
- Host railroads have access to the database with both the ASOTP statistics and the raw arrival/departure information on which they are based.

## **POLICY STATEMENT ON PREFERENCE**

**STB'S "POLICY STATEMENT," ISSUED WITHOUT OFFICIAL INPUT FROM ANY PARTY, MISCONSTRUES THE PLAIN MEANING OF THE TERM "PREFERENCE" AS IT HAS ALREADY BEEN DEFINED BY CONGRESS AND INTERPRETED BY THE U.S. DEPARTMENT OF JUSTICE AND THE U.S. DEPARTMENT OF TRANSPORTATION.**

### *The need for a right to "preference" as enacted by Congress*

- Historically, freight rail carriers had a legal obligation to provide passenger service over their tracks. They also honored dispatching practices that prioritized the movement of passenger trains that they operated on those tracks. But over time, providing passenger service proved to be unprofitable, and the freight railroads asked to be relieved of their obligation.
- In 1970, Congress enacted the Rail Passenger Service Act "to prevent the complete abandonment of passenger rail passenger service" by creating Amtrak to relieve the freight railroads from obligation of operating passenger trains at a loss. However, almost immediately after being relieved of that burden, the freight railroads began to prioritize freight over passengers. According to the legislative history, the average performance of long distance trains plummeted from over 70% in 1972 to 35% in 1973.
- To avoid the consequences of this practice for intercity rail passenger service, Congress granted Amtrak trains statutory preference over freight trains, now codified at 49 USC 24308(c):
 

"Preference Over Freight Transportation.- Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the STB orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the STB for relief. If the STB, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the STB shall establish the rights of the carrier and Amtrak on reasonable terms."
- Unfortunately, despite the federal law, host railroads have continued to prioritize their freight trains over Amtrak trains, causing poor performance for Amtrak's passengers and state partners.
- In 2012, the FRA's Inspector General found that host-responsible delay, including preference violations, was the largest cause of delays across all non-Northeast Corridor routes.

- During the 12-month period ending June 2015, Amtrak trains were delayed by freight trains on host railroads over 75,000 times, for delays totaling 800,000 minutes, or over 13,000 hours.
- According to a 2008 DOT Inspector General study, poor on-time performance costs Amtrak almost \$140 million per year, an amount more than 50% of Amtrak's FY2015 Federal operating subsidy.

*The language and intent of the "preference" statute is clear and unambiguous, and requires no additional interpretation*

- The first sentence of the preference provision establishes Amtrak's right to "preference over freight transportation." Congress identified **only two possible exceptions** to that rule: (1) when there is an emergency, and (2) when the host rail carrier applies to the STB and, after a hearing in which the host carries the burden of showing that granting preference will materially lessen the quality of transportation provided to freight shippers, the STB modifies the preference obligation and establishes the rights of the carrier and Amtrak.
- In U.S. v. Southern Pacific Transp. Co., the only case brought by the Attorney General of the United States to enforce Amtrak's statutory preference rights, the Department of Justice stated (emphasis added):
  - "Congress enacted a **mandatory prohibition** against freight interference – a prohibition that was to be **without exception** save the two expressly stated in the statute itself."
  - "In the absence of an order from the Secretary granting relief to a railroad, the statutory preference must be accorded, without regard to the effect of preference on freight operations, except in an emergency."
  - "[U]ndue disruption of freight operations can be avoided by obtaining a waiver; absurd or impossible applications of the provision are avoided by inclusion of the exception for emergencies."
- Similarly, the **Department of Transportation** – which, prior to 2008, had jurisdiction to hear a freight railroad's application for an exemption from preference which the STB now has – **issued regulations establishing a process for considering requests for exceptions** to preference, including the filing of formal application, a formal hearing, and the issuance of a final decision. **No application for such an exemption has ever been filed by a freight railroad.**

*The STB's Policy Statement should be withdrawn*


- **The STB should withdraw the Policy Statement**, which was issued without hearing evidence, taking testimony, or undergoing a formal rulemaking procedure, but which purports to resolve legal issues that will be binding on parties in a PRIIA 213 investigation.

- The Policy Statement goes beyond what is permitted in an interpretive rule under the Administrative Procedures Act.

*If it is not withdrawn, the Policy Statement must be revised to correct material errors*

- The Policy Statement ignores the plain statutory preference language quoted above, as well as the interpretation given by the Department of Justice and the Department of Transportation, when it erroneously states that “preference is not defined by statute” and that “there is no precedent for parties to look to in developing their cases...”
- The Policy Statement then proceeds to literally rewrite 49 USC sec. 24308(c), as follows:
 

“Although sec. 24308(c) does not define or directly qualify ‘preference,’ Congress expressed its view that ‘preference for ... passenger transportation ... [should not] materially lessen the quality of freight transportation provided to shippers.”
- These added, deleted, and rearranged words turn the statutory language on its head. Instead of requiring the freights to seek an exemption, sustain the burden of proof, and obtain a ruling setting forth new terms to guide the parties’ rights and obligations, the STB’s restructuring of the statute builds into the definition a new element that must be met in order for preference to be required.
- **The effect of this misreading is that freight railroads will be able to determine when they “should be” entitled to ignore Amtrak’s right of preference, and that determination will not be overturned unless (1) Amtrak brings a PRIIA 213 petition, and (2) Amtrak demonstrates that the failure to give preference did NOT materially lessen the quality of freight transportation.**
- The STB goes on to compound this fundamental error by providing that, in assessing whether Amtrak’s right to preference has been violated, it will also consider extraneous factors such as (1) the Board’s mission to regulate so as to promote “efficiency in freight service,” (2) whether an individual dispatching decision involving two trains has efficiency consequences for the network as a whole, and (3) whether the host carrier has made consistent efforts to minimize total delays affecting intercity trains. While laudable, the STB’s mission to promote efficiency in freight transportation was not the goal Congress sought to achieve when it enacted 24308(c).
- Indeed, the Department of Justice specifically rejected the approach the STB adopts in its Policy Statement: “In the absence of an order from the Secretary granting relief to a railroad, the statutory preference must be accorded, without regard to the effect of preference on freight operations, except in an emergency.”
- Situations where providing Amtrak preference actually does materially lessen the quality of freight transportation will likely be rare and related to specific circumstances limited in place and/or time. In such cases, the exemption process specifically provided for in the statute is available to the freight railroad to remedy any actual material lessening of freight transportation that the freight railroad could prove.

-  Policy Statement also contains a discussion of evidence it would consider probative in a proceeding to determine the existence of and remedies for a preference violation. While some of these types of evidence may be probative of a preference violation, some depend entirely on the STB's misreading of the preference statute.
  - For example, no reading of Amtrak's statutory right to preference over freight transportation makes relevant "a comparison of the reliability of intercity passenger trains with other types of service operated by the host carrier on the same route" – such as data showing that the on-time performance for passenger service was consistently higher or lower than that of the highest class of freight service operated by the host carrier on the same route."
  - The statute does NOT put Amtrak passenger service on a par with the "highest class of freight service" and it does NOT provide that preference need only be granted if Amtrak's scheduled passenger service is no worse than freight service.

**CONCLUSION**

Congress was clear in its meaning of preference, as has been confirmed by the US Department of Justice and the US Department of Transportation. Preference as defined in statute will support on-time Amtrak operations while containing built-in relief to allow hosts to seek exceptions so that the rail network should not suffer a material lessening of the quality of freight service to shippers. Use of All Stations OTP will ensure that performance at all stations in the network and in each state is included in measuring the performance of Amtrak trains.

Comments may be filed with the STB:

On-Time Performance NPRM	Docket No. EP 726	Comments due February 8, 2016
Preference "Policy Statement"	Docket No. EP 728	Comments due February 22, 2016