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February 22, 2016

Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: Docket No. EP 728

Dear Surface Transportation Board members:

The Virginia Rail Policy Institute (VRPI) responds to the invitation of the Surface Transportation Board to comment on its Policy Statement On Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f). The following comments are submitted by the Executive Committee on behalf of the Board of Directors and Fellows of VRPI.

VRPI's Position

VRPI is dedicated to advancing public policies that support the interests of both freight and passenger rail in Virginia. Among VRPI's board and fellows are professionals with deep experience and expertise in the freight rail industry, and others with a professional interest in passenger rail. A roster of our members, including brief biographies, can be found at <http://www.varpi.org/node/27>.

We are keenly aware of the market dynamics driving today's freight rail industry and the effects these are having on the operational practices and policies of the freight carriers. Nevertheless, to the extent that the STB Policy Statement represents a shift away from protecting Amtrak's statutory right of preference and toward relieving the host railroads of their obligations to provide it, we are opposed to the policy changes it contains.

The STB's Policy Statement Fundamentally Alters Long-Standing Public Policy

Congress clearly stated in 1973 that, as a matter of public policy, Amtrak trains will be given preference over freight by the railroads hosting Amtrak trains. In 49 USC 24308(c), Congress mandated that:

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

The change in public policy to which we refer is introduced by the following language on Page 3 of the STB Policy Statement:

“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.”

By restructuring the wording of the statute in this way, the STB adds a new element to the preference requirement, omitting the requirement for an exemption and effectively licensing the host railroad to determine for themselves when they "should be" entitled to ignore Amtrak's right of preference.

The Policy Statement also introduces extraneous factors in determinations of whether Amtrak's statutory right of preference has been violated, including (1) the STB's mission to promote "efficiency in freight service," (2) whether individual dispatching decisions involving two trains have 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

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 specifically rejected the approach the STB proposes to take:

“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." (emphasis added)

The Attorney General goes on to say, "*Undue disruption of freight operations can be avoided by obtaining a waiver,*" yet despite clear evidence presented by the Inspector General that host-responsible delays are causing thousands of hours of delay for Amtrak trains every year, no application for such an exemption has ever been filed by a freight railroad.

The Proposed Policy Shifts the Burden of Proof to Amtrak

In place of requiring the host railroad to apply for an exemption, the Policy Statement places the burden of proof on Amtrak to challenge the railroad's compliance with its statutory right of preference. It is up to Amtrak to (1) bring a PRIIA 213 petition, (2) demonstrate that the policies and practices of the railroad have resulted in consistent, systematic and damaging delays to passenger trains, (3) prove that the delays occur differentially with passenger trains and not with the railroad's freight shipments, and (4) demonstrate that the failure to give preference did NOT materially lessen the quality of freight transportation.

Bias in Proposed Evidence of Preference Violations

The STB 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, others appear to be unfairly biased toward the freight railroads.

For example, the proposed evidence of the host carrier's internal policies and processes that support or hinder the minimization of total delays for intercity passenger trains, "*...may include evidence of management policies and procedures, personnel practices (such as training materials, bonus incentives, and performance evaluations), and internal controls of such management policies and personnel practices to ensure that they are functioning as intended. Such evidence could indicate incentives or disincentives for employees to implement practices that support or hinder preference for Amtrak trains.*" (Page 5)

While the host railroad may produce evidence of its internal policies and processes that support preference, Amtrak has no recourse to data that might prove otherwise. It is not a fair hearing if the evidence by its very nature is available to only one party.

Another example is evidence indicating whether a host carrier's policies and processes have, in practice, resulted in a pattern of minimized or exacerbated passenger train delays.

"Such evidence may ultimately consist largely of statistical analyses of available data, such as a comparison of the reliability of intercity passenger trains with other types of service operated by the host carrier on the same route — such as data showing that the on-time performance for passenger service was consistently higher or lower than that of the highest class of freight service operated by the host carrier over the same route."

(Page 5)

By conflating freight and passenger rail in terms of acceptable standards of reliability, the STB fails to acknowledge their significant differences in this respect. Whereas Amtrak holds itself to an OTP standard of 15 minutes or less, freight rail variability is measured in terms of days or weeks.

We quote Lawrence J. Gross, Partner and Senior Consultant at FTR Transportation Intelligence, a leading freight transportation research and forecasting firm, in a recent editorial on the competitiveness of rail compared to trucks in today's freight market:

"The problem is that the single-car network currently delivers a transportation product that is really not truck-competitive. The core issue is lack of consistency. Shippers will accept a slow service, provided it is properly priced. But what they won't accept in today's world is the tremendous variability in delivery time that is typical of today's carload network. Truck variance is measured in minutes and hours, rail carload variance is measured in terms of days and weeks.

For shippers to convert from truck to rail, they need to have a clear commitment from the railroads on how long it will take and assurance that the commitment will be met. It's not how fast the car gets there; it's whether it gets there when it's supposed to. The railroad can't just price around the problem, because for most truck shippers, a service in which delivery can occur any time within a two-week period is unsuitable at any price." (Lawrence J. Gross, "[It's time for Carload Version 2.0](http://www.railwayage.com)," www.railwayage.com, February 16, 2016) (emphasis added)

In such a freight environment, a proposed standard of evidence that puts the reliability of passenger trains on par with the "highest class of freight service" is simply inappropriate.

Potential Impacts of adopting the Policy Statement: Further Host-Caused Declines in Amtrak Performance

In the absence of a call from Congress or the FRA to clarify the preference provisions that have been in place for over 40 years, it is difficult to understand why the STB would release

a Policy Statement that fundamentally weakens Amtrak's preference protections in the face of the unprecedented declines in on-time performance experienced by Amtrak trains in recent years.

- 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.

We cannot allow Amtrak's OTP to erode further as the freight industry adjusts to market changes, yet that is the probable outcome of the STB's proposed policy. Rather than adopting a policy that elevates "promoting efficiency" in freight networks above Amtrak's statutory right of preference, the STB should address the freight-driven problems that are at the very root of such unacceptable levels of Amtrak delays.

Overarching Issues of Public Policy

The STB should maintain and uphold a strong commitment to established public policy which provides that (1) passenger trains should run reliably on time, (2) host railroads must give passenger trains preference over freight, and (3) the host carriers have an obligation to provide the facilities and operating practices to minimize delays of passenger trains. Congress has not altered this policy and indeed has strengthened it by giving Amtrak and the STB the means to challenge patterns of non-compliance by the host railroads. The policy has been upheld and confirmed in decisions by the U.S. Attorney General and the U.S. Department of Transportation.

That the STB proposes to get deeply involved in what a host carrier does, has failed to do, or has tried to do regarding preference for passenger trains ventures well beyond the boundaries of established policy. The question should simply revolve around whether the passenger trains are reliably on-time or not. If not, then to the extent the host railroad is responsible for the delays, the railroad should do whatever is necessary to run the passenger trains on time.

As a matter of policy, the host railroad should not be excused for a failure to manage train movements effectively and reliably or provide adequate facilities to run all of the traffic —

passenger and freight — reliably and expeditiously. It should do what needs to be done to accomplish this goal. Lack of investment and ineffective control should not be excuses for poor passenger train performance.

The Problems of On-Time Performance are Symptomatic of a Larger Problem

It is a matter of concern to VRPI that the STB's Policy Statement represents a step backward from Congressional intent in the creation of Amtrak in 1970. We disagree with the perception that Congress created Amtrak for no other purpose than "...relieving the freight railroads of their common carrier obligation to provide passenger service," as the STB document says. Had this been the only consideration, Congress would have permitted the investor-owned railroads to simply discontinue all intercity passenger trains and be done with it. While the railroads were more than glad to be relieved, we submit that it was the intent of Congress to preserve, improve and restore intercity passenger rail service to a level that existed prior to Amtrak's May 1, 1971 takeover.

In subsequent actions, Congress has sought to balance Amtrak's position with respect to the host railroads by mandating preference for Amtrak trains in 1973 and building OTP protections into PRIIA in 2008. *Yet at no time in its history has that relationship been so out of balance.* With the exception of the Northeast Corridor, Amtrak passenger trains represent a small fraction of all train activity. The freight railroads have dramatically reduced their network capacity for both volume and velocity, with the result that the quality of Class I railroad freight service has deteriorated dramatically since 1970. The problems Amtrak is experiencing with OTP are merely symptomatic, not the cause, of a larger problem — the proverbial "Canary in the coal mine."

Current Class I freight operations reflect a loss of freight traffic volume. When freight traffic is depressed due to business cycles, changing markets and highway competition, Amtrak should see improved performance of its trains on host railroads. But just the opposite is happening. Host railroads, in their response to the corporate raider threat, are making matters worse for both freight customers and Amtrak passengers by downsizing rail assets, running fewer and longer trains, cutting employment and other measures.

The STB is correct in stating that network performance drives many local dispatching decisions. If network freight ran better, there would be fewer Amtrak delays. Inordinate delays are fundamentally a result of operations-driven problems of the host railroads — while the public suffers the consequences in the form of late arrivals, missed connections, business disruptions and spoiled travel plans.

That freight operational problems all too often adversely affect Amtrak service is obvious to many of us who experience the impacts. In Richmond, VA in December, 2015, on two occasions CSX freight operational problems delayed a number of Amtrak trains for as much as five and six hours each. It comes as no surprise that ridership at Richmond's Main Street Station suffered a 12% decline in December.

Summary

If the STB adopts the changes proposed in its Policy Statement, VRPI believes Amtrak will suffer further declines in OTP due to freight operations-driven problems, with accompanying large declines in ridership and revenue on its routes. Ultimately, it is the federal taxpayers who will pay for Amtrak's losses, in effect subsidizing those operational practices by the host railroads that result in frequent and long delays for passenger trains. The Commonwealth of Virginia has made extensive financial investments in rail to facilitate passenger service; that these investments may not be realized, or will be rendered ineffective, as an unintended consequence of such changes, is of grave concern to VRPI.

The STB should withdraw its Policy Statement, which weakens Amtrak's right of preference, and instead do everything in its power to restore and enhance OTP for Amtrak trains.

Thank you for the opportunity to comment on Docket No. EP 728.

Yours truly,

A handwritten signature in blue ink that reads "Meredith Richards". The signature is written in a cursive style with a small dash above the letter 'i' in Richards.

Meredith Richards, VRPI President