BEFORE THE

SURFACE TRANSPORTATION BOARD

DOCKET NO. EX PARTE 728

POLICY STATEMENT ON IMPLEMENTING INTERCITY PASSENGER TRAIN ON-TIME PERFORMANCE AND PREFERENCE PROVISIONS OF U.S.C. 49 24308(c) AND (f)

COMMENTS OF THE STATES FOR PASSENGER RAIL COALITION, INC.

FEBRUARY 22, 2016

The States for Passenger Rail Coalition, Inc. (SPRC) is a private non-profit organization comprised of 22 state departments of transportation and 2 passenger rail authorities. SPRC promotes the development, implementation, and expansion of intercity passenger rail services. In order to accomplish this purpose the SPRC:

- Promotes current and long-range plans for intercity passenger rail throughout the United States;
- Facilitates coordination and cooperation among state and agency officials and between the public and private sectors in order to promote and develop intercity passenger rail services;
- Advocates for, and assists in, the pursuit of state and federal funding to support further development and improvement of America's passenger rail system; and
- Supports current efforts and projects managed by state transportation departments and designated local authorities.

States and single-purpose authorities sponsor the following intercity passenger rail routes:

Pacific Surfliner	Chicago-St. Louis (Lincoln Service)	Piedmont
Capitol Corridor	Hiawatha	Keystone
San Joaquin	Wolverine	Pennsylvanian
Vermonter	Chicago-Carbondale (Illini/Saluki)	Ethan Allen
New Haven-Springfield	Chicago-Quincy (IL Zephyr/Carl Sandburg)	Albany-Niagara Falls-Toronto
Washington-Lynchburg	Blue Water	Empire (NYP-ALB)
Washington-Newport News	Hoosier State	Adirondack
Washington-Norfolk	Pere Marquette	Heartland Flyer
Washington-Richmond	Downeaster	Cascades
Carolinian	Kansas City-St. Louis (MO River Runner)	Maple Leaf

The SPRC does not support the proposed statement of Surface Transportation Board (STB or Board) policy on preference as it would effectively redefine preference that the host railroads are required to give to intercity passenger trains operated by Amtrak.

The proposed Board policy also would nullify the preference Congress directed the host railroads give to Amtrak trains, reversing a core obligation which the freight railroads agreed to during the creation of Amtrak, and transfer, from the public to private interests, the benefits of billions of dollars in federal, state and local infrastructure investments that have been made to reduce intercity passenger train travel times, and add capacity to the national railroad network.

BACKGROUND

Deregulation of the freight railroads and creation of the National Railroad Passenger Corporation (Amtrak) occurred within a decade. Amtrak was established by Congress in 1970 and freight railroads were deregulated in 1980.

The Rail Passenger Service Act (RSPA) signed October 30, 1970 by President Nixon authorized the National Railroad Passenger Corporation (Amtrak) to manage the basic national rail network and operate trains under contracts with the freight railroads. Amtrak assumed the common carrier obligations for passenger service of the private railroads in exchange for the right priority access of their tracks for incremental cost.

In establishing Amtrak, the RSPA states, in part,

> "…the Congress finds that modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country…."

Only three years after the creation of Amtrak, on-time performance (OTP) of intercity passenger trains had dropped so precipitously that Congress enacted legislation directing the freight railroads to extend preference to intercity passenger trains. {See 49 CFR 24308 (C)(3)(c)}.

> "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. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms…."

In the same legislation, Congress also provided for Amtrak to operate trains at accelerated speeds and to operate additional trains; and for the public to add sufficient infrastructure, and compensation, to support improved intercity passenger rail services. These provisions were enacted to better serve the public interest as expressed by Congress in establishing Amtrak.

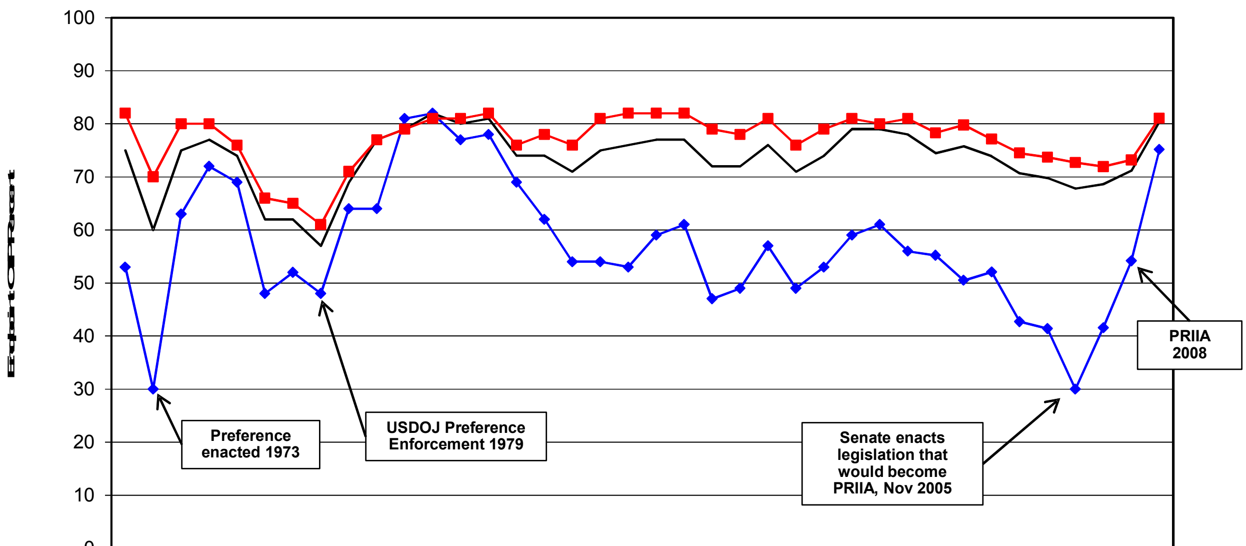
OTP deteriorated due to freight train interference and discretionary host railroad preference in the late 1970s as described in the report by Amtrak <u>PRIIA Section 210 FY10 Performance Improvement Plan for the *Sunset Limited* *Texas Eagle*</u>,

> "…Ridership on the *Sunset Limited* increased after Amtrak took over the train's operation. However, on-time performance deteriorated in the late 1970s due to freight train interference. In 1979, the U.S. Department of Justice (DOJ) filed a federal lawsuit against Southern Pacific, charging that on the *Sunset Limited* route, it had violated the provision of the Rail Passenger Service Act (RPSA) that requires that Amtrak trains be given pref-

erence over freight trains. (This lawsuit remains the only legal action brought by DOJ under that provision.) On-time performance improved markedly after Southern Pacific entered into a consent decree that required it to comply with the RPSA provision…"

As illustrated below, there are three events during the Amtrak era of America's intercity passenger rail history which caused the host railroads to systematically respond with preference and markedly improve the OTP operation of intercity passenger trains.

Amtrak Endpoint On Time Performance, 1972-2009



Fiscal Year	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90
System	75	60	75	77	74	62	62	57	69	77	79	82	80	81	74	74	71	75	76
Long Distance	53	30	63	72	69	48	52	48	64	64	81	82	77	78	69	62	54	54	53
Short Distance	82	70	80	80	76	66	65	61	71	77	79	81	81	82	76	78	76	81	82

Fiscal Year	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09
System	77	77	72	72	76	71	74	79	79	78	75	76	74	71	70	68	69	71	80
Long Distance	59	61	47	49	57	49	53	59	61	56	55	51	52	43	41	30	42	54	75
Short Distance	82	82	79	78	81	76	79	81	80	81	78	80	77	75	74	73	72	73	81

Sources: Through 2000, Amtrak Annual Reports; 2001+, Amtrak OTP Monitor Report System

The three events are: 1) Congressional action in 1973 requiring host railroads to give Amtrak trains preference over freight trains, 2) the 1979 action by the US Department of Justice on behalf of Amtrak to enforce the right of preference against the Southern Pacific Railroad for operation of the *Sunset Limited*, and 3) action by the US Senate in 2005 to progress legislation which later became the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). PRIIA included provisions to define performance metrics for operation of intercity passenger trains (Section 207) and a means for Amtrak, service sponsors and the Surface Transportation Board to enforce action against host railroads for poor OTP (Section 213).

Each of these events were taken in the public interest to require the host railroads to operate intercity passenger trains in a manner which delivered service quality and effective OTP.

In relieving the freight railroads of the responsibility, and costs, of operating passenger service under the RSPA, the Congress began a program of supporting the costs of intercity passenger service. This financial support in annual operating and capital investments totals more than $40 billion to date, and should be considered a subsidy to the freight railroad industry as that is the cost to taxpayers to relieve the host railroads of the passenger component of their original common carrier obligation.

Note that this sum does not include the more than $9.8 billion in federal grants made to intercity passenger service sponsors by the Federal Railroad Administration under the Passenger Rail Improvement and Investment Act of 2008 (PRIIA) and the American Recovery and Reinvestment Act of 2009 (ARRA). In addition, state and local project sponsors have invested billions more in rail infrastructure investments. These capital grants were made to improve safety, add capacity and reduce travel times for intercity passenger routes.

Federal intercity passenger grant awards aligned well with areas identified with long-standing rail network congestion and capacity issues, see https://www.fra.dot.gov/eLib/details/L02836, FRA High-Speed Intercity Passenger Rail (HSIPR) Program Funding Selection Summary.

For ARRA construction projects USDOT required Definitive Service Outcome Agreements (DSOAs) to be negotiated and signed by the FRA, the project sponsor, the host railroad, and Amtrak. In effect the projects and the DSOAs created “islands of improvements” outside of the traditional Amtrak host railroad operating agreements. These islands enabled and required enhanced network performance for freight and passenger services.

As a condition of receiving the grants, the host railroads were required to attest that the projects provided capacity for passenger rail at a minimum of 80% OTP and did not negatively impact freight capacity.

49 USC 24405 (c) (1) outlines the conditions under which the USDOT Secretary may provide a capital assistance grant for intercity passenger rail service:

> (c) Grant Conditions.—The Secretary shall require as a condition of making any grant under this chapter for a project that uses rights-of-way owned by a railroad that—
> (1) a written agreement exist between the applicant and the railroad regarding such use and ownership, including—
>> (A) any compensation for such use;
>> (B) assurances regarding the adequacy of infrastructure capacity to accommodate both existing and future freight and passenger operations;

Clearly, the Congress sought to protect both private, (railroad and shipper) and public interests, by requiring the host railroad to attest that the public infrastructure investments were adequate to accommodate the operation of both existing and future freight and passenger trains.

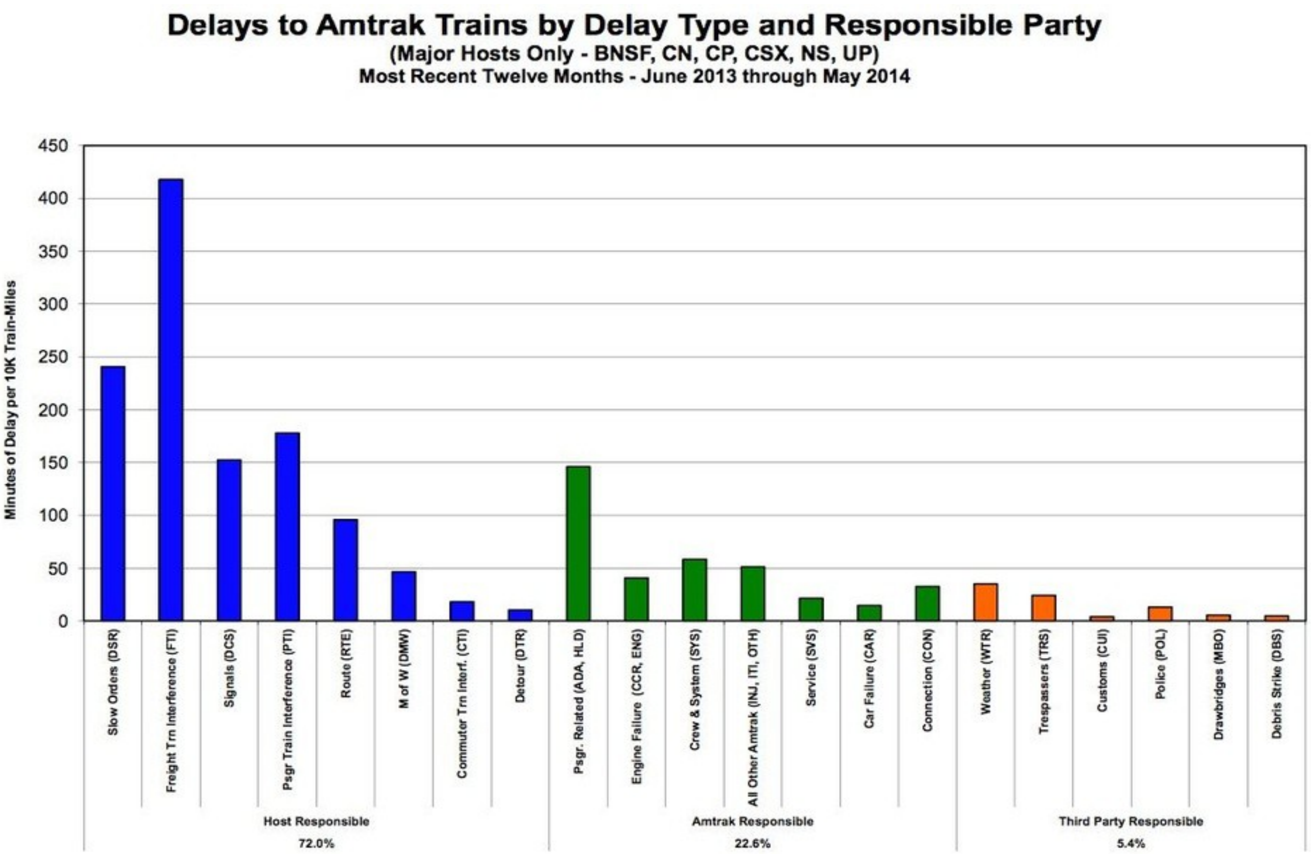
CAUSES OF DELAYS TO AMTRAK TRAINS

In 2012 the FRA completed an Analysis of the Causes of Amtrak Train Delays, Report Number: CR-2012-148. The report’s findings include:

> “…Amtrak train delays outside the Northeast Corridor (NEC) reduce the value of Amtrak service as an option for travelers and increase the railroad’s need for subsidies. Consequently, they have long been the subject of congressional concern and industry debate. Amtrak points to freight railroads’ dispatching practices as the cause with the

> greatest impact on Amtrak train delays, while the freight railroads contend that capacity limitations, or insufficient infrastructure for rail traffic levels, contribute more heavily.
>
> "…The impact of Amtrak delays took on a new significance with the passage of the Passenger Rail Investment and Improvement Act of 2008, and the American Recovery and Reinvestment Act of 2009…. *A substantial portion of the HSIPR program is geared towards improving the speed and reliability of existing Amtrak services…."*

As illustrated below freight train interference and slow orders are the two leading causes of poor OTP for the period June 2013 through May 2014.



Source: National Railroad Passenger Corporation Monthly Performance Report, May 2014

More recent Amtrak Monthly Performance Reports validate that host responsible delays account for about 72% of total delays to Amtrak trains, Amtrak is responsible for 22% of delays to passenger trains and 3rd parties account for about 6% of the delays. While the amount of delay varies among the host railroads, the pattern of freight train interference and slow orders continue as the top two reasons which negatively impact operation of intercity passenger trains.

Surely some component of these host railroad responsible delays must be attributed to a diminution of the preference which is less than the standard mandated by the Congress.

<u>POOR OTP INCREASES THE BURDEN ON THE THE PUBLIC TREASURY</u>

Poor OTP costs the public treasury more in subsidies for intercity passenger rail service. In 2008 the FRA completed Report Number: CR-2008-Effects of Amtrak's Poor On Time Performance. The report documented on time performance affects Amtrak finances

> "...poor OTP reduces ridership on Amtrak trains because potential passengers cannot predict when their train will arrive. It also increases costs, primarily by extending shifts, increasing staffing requirements, and utilizing more fuel. Improving OTP could significantly improve Amtrak's finances. It would generate funds Amtrak could use to increase the incentives to host railroads both to improve the performance of Amtrak trains operating on their tracks or reduce its reliance on Federal operating subsidies.
>
> Amtrak's poor OTP significantly undermines the viability of intercity passenger rail as an option for travelers and weakens Amtrak's financial position by reducing its revenues and increasing its operating costs. Between Fiscal Year (FY) 2003 and FY 2007, Amtrak's OTP off the Northeast Corridor (NEC) for long-distance routes fell from an average of only 51 percent to 42 percent, and OTP for non-NEC corridor routes fell from an average of 76 percent to 66 percent. The need to improve mobility, relieve congestion, and reduce oil consumption makes Amtrak's performance and financial health a national concern.
>
> Further, "…*The portion of the reductions in operating losses associated with state-supported routes would largely reduce state payments to Amtrak, and would not generally impact Amtrak's finances. (emphasis added*) Long-distance routes would generate the greatest gains from achieving reliable OTP because their current performance is so poor.
>
> Travelers who have the option to choose among transportation modes can readily choose to take the train if they become more confident that it will arrive on time. This makes revenues relatively responsive to changes in OTP…."

Finally, the FRA analysis of poor on-time performance found that it costs Amtrak almost $140 million per year, an amount equal to more than 50% of Amtrak's FY2015 Federal operating subsidy, and 12% of the total costs to States and local authorities to sponsor train operations during the same period.

SINCE STAGGERS, AMERERICA'S FREIGHT RAILROADS HAVE BEEN REBORN

In taking a "global approach" to considering whether or not a host railroad is granting preference to Amtrak trains, the Board should take into account that, at the same time Amtrak trains have suffered poor OTP, the host railroads have not suffered, nor have shipper interests been harmed, through the operation of intercity passenger trains. Since deregulation, the productivity of the railway sector has increased substantially, outpacing other transportation and business productivity—and shipper rates measured in real dollars have dropped.

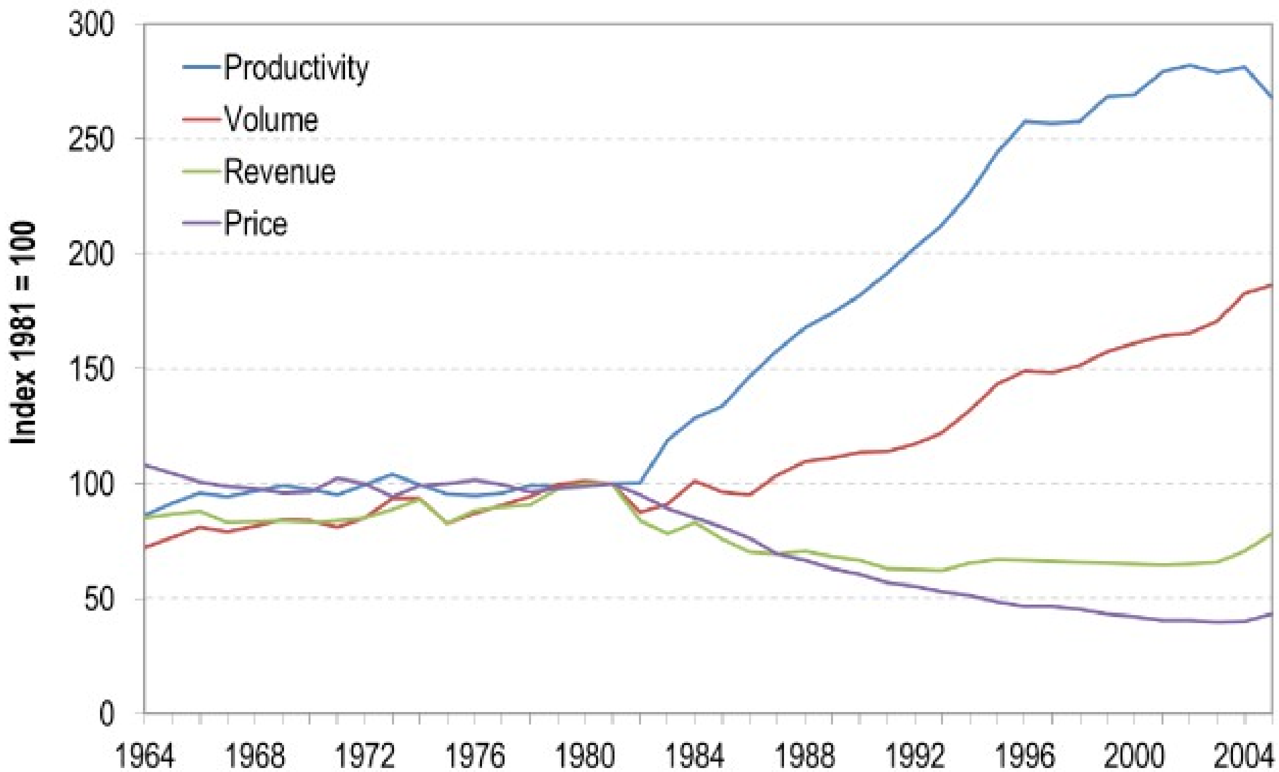
According to an article in the Winter 2010-2011 edition of the CATO Institute's publication, *Regulation*, Railroad Performance Under the Staggers Act,

> *"...Deregulation revived the rail freight industry, with most of the gains going to ship pers."*

The Association of American Railroads, in a on-line publication entitled Impact of the Staggers Rail Act of 1980, December 2015, states,

> *"...Since Staggers, railroads have increased their productivity far more quickly than most other industries. Overall rail industry **productivity** was flat for many years prior to Staggers, but is **up 139 percent** since then.*
>
> *"...Average inflation-adjusted rail rates (measured by revenue per ton-mile) are **down 43 percent**. This means the average rail shipper can move close to **twice as much freight for about the same price it paid more than 30 years ago** — saving rail customers, and ultimately U.S. consumers, hundreds of billions of dollars over this period...."*

US Freight Railroad Performance Since Staggers
1981 = 100



Source: Association of American Railroads. Performance of Class I Railroads, 1964-2005

THE PROPOSED STATEMENT OF BOARD POLICY IS NOT IN THE PUBLIC INTEREST

The Board's proposed interpretation of 49 USC 24308 (c) effectively reverses the plain meaning of the statute. The relevant statute reads, in full:

> (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 Board orders otherwise under this subsection. *A rail carrier affected by this subsection may apply to the Board for relief.* If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter

> rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.

The Board presents the preference requirement as less than absolute, and preference is less than absolute to the extent that the absence of preference is due to an emergency or unless, after affording an opportunity for a hearing, wherein the Board determines the quality of freight transportation provided to shippers has been materially lessened, the Board orders otherwise.

The exception to absolute preference is not a free-standing, independent statute however as the proposed policy states. The statute is conditioned and dependent in that the Board may respond to a petition from a rail carrier for relief, provide opportunity for a hearing and determine that preference for intercity and commuter rail passenger transportation has, in fact, materially will lessen the quality of freight transportation provided to shippers.

Such an interpretation by the Board, 43 years after enactment of the statute, during which period no host railroad has petitioned for relief due to the operation of Amtrak trains lessening the quality of freight transportation provided to shippers, contravenes the public interest intent of the Congress in granting preference to Amtrak. Such an interpretation would place the burden of proving harm to a shipper on Amtrak, and not the rail carrier who serves the shipper.

AMTRAK—HOST RAILROAD OPERATING AGREEMENTS ARE NOT TRANSPARENT

Based upon its statutory rights, Amtrak has entered into negotiated agreements with host railroads that specify the terms of Amtrak's operations over host tracks. These agreements also incorporate performance payments and penalties. Performance payments are made by Amtrak to the host railroads when certain OTP outcomes are achieved. Host railroads must pay performance penalties to Amtrak when OTP fails to meet certain thresholds.

Amtrak host railroad operating agreements are proprietary, states and other intercity service sponsors are not a part of the negotiated agreements and cannot inspect nor directly know the terms and conditions of these agreements—but the intercity service sponsors are responsible to pay the direct and indirect costs of these agreements.

Thus intercity service sponsors are privy neither to Amtrak conductor delay reports (which have been rejected by the host railroads as inaccurate for recording the causes of delays to passenger trains) nor are service sponsors empowered to investigate host railroad preference policies, operations nor dispatch records.

THE BOARD SHOULD INVESTIGATE AND ENFORCE OTP

Consistent with the OTP provisions of PRIIA, Congress authorized the Board to independently investigate whether the host railroad or Amtrak should improve performance service, quality and on-time performance. The Board has requested funding to support new staff positions to support PRIIA activities, and the Board's Budget Request for FY 2014 includes the following statement:

> "Our request is motivated in part by the increase in workload associated with the recently enacted Passenger Rail Investment and Improvement Act of 2008 (PRIIA).

> PRIIA authorized the STB to hire 15 people to handle the Board's PRIIA responsibilities."

Further, 49 USC 24308 states, in relevant part,

> "…the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators. As part of its investigation, the Board has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays. In making its determination or carrying out such an investigation, <u>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</u>…."
>
> If the Board determines that delays or failures to achieve minimum standards… the Board may award damages…."

<u>CONCLUDING REMARKS</u>

America's transportation system is at a critical juncture with a compelling need for safe, efficient, secure, and reliable transport throughout. There is broad agreement on the need for additional infrastructure investment with measurable, productive, and sustainable results.

Both private and public entities involved in rail transportation have made significant investments in the national railroad network. Yet, after 46 years of trying, and many billions of dollars of investment, the national rail freight carriers continue to succeed, and the intercity passenger rail system continues to fall short of the public interest,Yet after 46 years of trying, and many billions of dollars of investment, our national rail freight carriers continue their success (which we applaude) and the intercity passenger rail system continues to fall short (which we lament) of the public interest and service quality goals envisioned by the Congress and our customers.

Thus intercity passenger service sponsors are like Erwin Schrödinger and his cat, we cannot discern the truth of preference. Only the STB is so empowered and has the resources to look inside the box to "...identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train…."

Accordingly, we call upon the STB to act in the public interest and enforce the existing laws.