

BEFORE THE  
SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 726

ON-TIME PERFORMANCE UNDER SECTION 213 OF THE PASSENGER RAIL  
INVESTMENT AND IMPROVEMENT ACT OF 2008

OPENING COMMENTS OF THE ENVIRONMENTAL LAW AND POLICY CENTER,  
ALL ABOARD INDIANA,  
ALL ABOARD OHIO,  
ALL ABOARD WISCONSIN,  
MIDWEST HIGH SPEED RAIL ASSOCIATION, and  
VIRGINIANS FOR HIGH SPEED RAIL

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AND OTHERS

The Environmental Law and Policy Center (ELPC), All Aboard Indiana, All Aboard Ohio, All Aboard Wisconsin, Midwest High Speed Rail Association and Virginians for High Speed Rail (hereafter, ELPC, et al.) submit these comments in response to the Board's Notice of Proposed Rulemaking (NPRM) on the definition of "on-time performance" under Section 213 of the Passenger Rail Investment and Improvement Act of 2008. On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, (PRIIA) 80 Fed. Reg. 80737 (proposed Dec. 28, 2015).

ELPC et al. are not-for-profit organizations that share a common goal of advancing the development and operation of intercity passenger rail serve in the United States. All six organizations have members who regularly ride Amtrak trains and have directly experienced the on-time performance of those trains.

During the most recent reauthorization of the intercity passenger rail programs, Fixing America's Surface Transportation Act (FAST Act) this past December, Congress indicated that it supports Amtrak service in their respective states so long as it is not a burden on U.S. taxpayers. However, for Amtrak to maximize its revenue and lessen taxpayer burden, intercity passenger rail service must be on time: otherwise people will not ride the trains. Accordingly, the Board must use its oversight authority to ensure that intercity passenger rail in the U.S. runs on time to accomplish the goals of maximizing Amtrak revenues and lessening the burden on U.S. taxpayers.

The Board's proposed definition of "on-time performance" (OTP) considers "a train 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)." NPRM at 80739. ELPC et al. support the Board's efforts to ensure that trains run in a timely, predictive manner. We also support the Board's proposed standard for terminal station OTP. Almost 500 of our members from all over the country, have signed the attached petition evincing strong public support for intercity passenger rail, endorsing this standard for terminal stations and urging strong federal enforcement of on time performance. See Attachment 1, Petition.

However, we also contend that the Board has not gone far enough. The Board's proposed definition is overly restrictive because it only includes the final terminus or destination of the train and fails to capture potential delays at intermediate stations. Excluding intermediate stops from the definition of OTP is inconsistent with prior administrative precedent, PRIIA and Congressional intent supporting a national intercity network. Accordingly, ELPC et al. encourages the Board to consider a more expansive and appropriate definition of "on-time performance" that incorporates all stations, not just the end points.

## I. BACKGROUND

From approximately 1950 to 1970, the private railroads, which operated both passenger and freight services, faced mounting financial problems. At that time, intercity passenger rail service had to compete with explosive growth in the highway and airline industries, and freight rail suffered from high fixed operating costs, which were difficult to offset in the face of stiffer competition for the trucking industry. Although the rail industry sought to discontinue the cost-prohibitive passenger rail business on certain lines, as "common carriers" they were required to provide passenger service as well as freight service, and thus were prohibited from ceasing service until the Interstate Commerce Commission (ICC) and state regulatory commissions issued an order allowing the cessation of passenger service. *National R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry.*, 470 U.S. 451, 454(1985).

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

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

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

In 1973, in response to poor OTP, Congress investigated concerns that some of the railroads were continually impeding the movement of Amtrak trains and instituting slow orders. Senator Vance Hartke from Indiana, Chairman of the Surface Transportation Subcommittee

stated that: “[I]n Indiana, the James Whitcomb Riley is forced to run at speeds of 10 miles per hour because of slow orders on bad track between Indianapolis and Chicago. Running a passenger train over track like that is a public disservice.”<sup>1</sup> *Amtrak Oversight and Authorization: Hearing on S. 1763: Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 88 (1973)(statement of Senator Vance Hartke). Accordingly, Congress granted Amtrak a “general preference” over freight transportation in using rail facilities, specifying that Amtrak has “preference over freight transportation in using a rail line, junction or crossing, subject to the objection of a rail carrier, and the [STB] orders otherwise under this subsection after section 553 of Title 5 hearing.” 49 U.S.C. § 2308(c). See also Amtrak Improvement Act of 1973, Pub. L. No. 93,146, §10(2), 87 Stat. 552 (initial version). Even though “preference” is the subject of a separate rulemaking by the Board, Congress’s action in 1973 granting passenger rail the right of preference is premised in a large part on the importance of OTP.

In 2008, Congress enacted PRIIA, in part, because it recognized that on-time performance was critical to the success of achieving viable national intercity passenger rail service in the United States. Just prior to the passage of PRIIA, Amtrak’s on-time performance for long-distance trains was below 40%. Following the passage of PRIIA, Amtrak’s on-time performance increased dramatically. Section 207(a) of PRIIA required the development of metrics and standards. The metrics and standards that were finalized in May 2010 required that Amtrak achieve on-time performance of 80% to 95%. Just two years later, in 2012, Amtrak achieved its highest ever on-time performance level of 88.7% system-wide, and 81.2% for long distance.

By the time Amtrak celebrated its 40th anniversary in 2011, Americans were riding Amtrak passenger trains in record numbers. Intercity passenger ridership increased from 16 million in 1972 to 31 million passengers in 2012. For most of the past decade, ridership records have been shattered year over year despite obstacles such as the fact that Amtrak service largely operates on tracks owned by the freight railroads and service is extremely limited. Amtrak operates long distance trains that typically run only once daily in each direction on a route. The vast majority of U.S. freight railroads lines do not have any passenger rail operating on them. Notwithstanding these factors, Amtrak posted a cumulative on-time performance rate of 83% in 2012, and for long distance trains, 71 percent. This record exhibits the strong correlation between increased ridership and on-time performance.

The Court of Appeals decision in 2013 invalidating Amtrak’s on time performance metrics and standards under Section 213 of PRIIA, *Ass’n of Am. R.Rs. v. Dep’t Transp.*, 721 F.3d 666 (D.C. Cir. 2013), which was later unanimously overturned by the U.S. Supreme Court, *USDOT v. Ass’n of Amer. Railroads*, 2015 U.S. Lexis 1713 (U.S. March 9, 2015) had an almost immediate negative impact on Amtrak’s on-time performance and resulted in delays that often were several hours in length.

The delays of 2014 were protracted and chronic. In its 2014 performance report, Amtrak found host (freight) railroad delays accounted for roughly two-thirds of all of its delays.

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<sup>1</sup> Note that Senator Hartke’s complaint refers to poor OTP at an intermediate point on this train’s journey. The James Whitcomb Riley ran from Cincinnati to Chicago with intermediate stops that included Indianapolis.

“[Amtrak] saw an immediate drop in on-time performance across the board that was directly attributable to train handling by the host carriers. . . . Freight train interference rates have nearly tripled, and this indicates not only that there are more delays, but also that those delays are of longer duration. In response, ridership and ticket revenues have fallen by 15% year over year to date.” D.J. Stadler, Vice President of Operations, Amtrak, Testimony Before the Surface Transportation Board (April 10, 2014), [www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadler-STBApr-09-2014.pdf](http://www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadler-STBApr-09-2014.pdf) .

As of May 2014, only seven of Amtrak's 48 routes had a better on-time rate than they had in the prior year, before the ruling by the Court of Appeals. Eight of the 33 routes, including most of the long-distance cross-country lines, experienced on-time arrivals less than 50 percent of the time over the past 12 months. The Empire Builder, running from Chicago to Seattle ran on time only 21 percent of the time in the past year. Only one in three California Zephyr trains made their trips between Chicago and San Francisco on time.

By June 2014, the system-wide OTP rate had fallen to 69.7%, and the rate for long-distance routes was only 41.2%, half of what it had been 29 months earlier. See Amtrak, Monthly Performance Report for June 2014, at E-7 (July 31, 2014), [www.amtrak.com/ccurl/621/650/Amtrak-Monthly-Performance-Report-June2014.pdf](http://www.amtrak.com/ccurl/621/650/Amtrak-Monthly-Performance-Report-June2014.pdf).

The steep decline in OTP had numerous adverse impacts on the public and taxpayers. American business, passengers and workers have borne the negative consequences of these delays in terms of costs, time and threats to passenger safety. The passenger stories reflecting the effects of the chronic delays in 2014 include the following:

On the Empire Builder, oil men who travel on the Empire Builder on a biweekly basis from their homes in Ohio to their jobs in the oil fields in North Dakota were routinely delayed. On the Capitol Limited, which had 236,000 passengers in 2014, Amish passengers, who have limited transportation options, were left waiting for several hours in Toledo eventually boarding the east bound train to return them to Harpers Ferry, West Virginia. On the Lake Shore Limited, that had a ridership of 373,000 passengers in 2014, a couple traveling across county was forced to sit in a cornfield outside Ravenna, Ohio for 12 hours waiting on freight to clear. Because the delay was so extensive, the amount of food on board the train, as well as the restroom operations became major concerns for the passengers and crew. Thankfully no medical emergencies arose on that train because it would have been hard for first responders to access the train in a timely fashion.

[http://impact.cleveland.com/metro/print.html?entry=/2014/10/solutions\\_sought\\_to\\_chronic\\_am.html](http://impact.cleveland.com/metro/print.html?entry=/2014/10/solutions_sought_to_chronic_am.html).

In 2015, the losses of Amtrak revenues amounted to \$13 million as ridership declined from 30.93 million to 30.88 million due in large part to chronic delays and that lack of OTP. Of the 15 major lines on the Amtrak national network, Amtrak's Empire Builder passenger rail suffered the biggest drop in ticket revenue - - \$4 million. The Empire Builder passenger service has suffered from the freight trains serving the oil boom in North Dakota that often are 100 oil tank cars in length. While Minot and Williston, North Dakota were second only to Chicago as origins and destinations for Minnesota riders, Minnesota and Twin Cities ridership fell from

200,000 to 136,000 and 138,000 to 90,000 respectfully. “Amtrak Sees Big Drop in Riders Through Twin Cities,” David Peterson, Star Tribune, December, 27, 2015. Under the Board’s proposed OTP definition, even if the Empire Builder reaches its final terminus of Chicago or Seattle/Portland on-time, the current poor state of OTP for passenger service in Minnesota generally, and major cities of St. Paul and Minneapolis specifically, would go unreported, unmonitored and possibly unimproved, because St. Paul-Minneapolis is an intermediate stop and not included in the proposed definition.

## II. THE DEFINITION OF ON-TIME PERFORMANCE SHOULD MEASURE ALL STATION STOPS, NOT JUST THE END POINT DESTINATION

The definition of OTP should be expanded to include all intermediate stations on intercity passenger routes. The Board’s proposed definition, which limits the measurement of OTP to only the end point, will negatively impact intercity passenger rail service along all of the routes. The proposed OTP definition, if adopted, will serve to not only limit the number and scope of potential complaints by stakeholders under PRIIA that would be filed with the Board it will also narrow the Board’s own investigation trigger under PRIIA.

Limiting the definition of OTP to monitor only endpoint stations may result in lackluster performance along the Amtrak routes that is unacceptable to passengers and/or contracting States, with little or no incentive to improve intermediate station service. For example, on the Capital Limited route, passengers waiting to board or disembark at the intermediate stop of Toledo are routinely delayed as a result of the freight congestion in and around the rail yard at Elkhart, Indiana. Under the proposed definition of OTP, as long as the Capitol Limited reaches either Washington D.C. or Chicago, its end point destinations on time, there would be no redress for the Toledo delays. Consequently, ridership at Toledo will suffer, resulting in the loss of Amtrak revenues and limiting transportation options of the surrounding community.

The importance of monitoring intermediate station OTP cannot be overstated. On Amtrak’s long-distance trains (excluding the Auto Train), endpoint-to-endpoint passengers comprise just 6 % of total riders. Typically a single long distance train seat is sold to multiple passengers who ride various segments over the course of the entire Amtrak route. For instance, the vast number of passengers boarding the Silver Star that begins in Washington D.C. do not ride all the way to its final destination of Miami and are primarily concerned that they arrive at their intermediate stops in Richmond, Rocky Mount or Charleston on time. Similarly, passengers waiting to board at the intermediate stops also care that the train is on-time. Of further concern is the fact that many of the intermediate stops along the Amtrak routes do not have physical station buildings, leaving passengers waiting for hours outside in potentially unsafe areas. To state the obvious, the public policy goal is not that a **train** arrives at its destination on time but that the **passengers** do. A definition of OTP that ignores intermediate stops violates this principle.

To address these shortcomings, ELPC et al. recommends that the definition of OTP be expanded to include monitoring of all intermediate stations on intercity passenger routes. Including intermediate stops is essential, as most Amtrak passengers travel between to, or from intermediate stations on the typical routes. This approach is also consistent with the prior

administrative precedent, the statutory mandates under PRIIA, the intent of Congress and is also utilized by other transportation modes.

### III. THE PRIIA STATUTE, APPLICABLE ADMINISTRATIVE PRECEDENT AND CONGRESSIONAL INTENT COMPEL THE BOARD TO ADOPT AN ALL STATIONS OTP DEFINITION.

The adoption of an all stations as the definition of OTP under PRIIA is appropriate and warranted. In Section 101(c)(4) of PRIIA, Congress mandates:

Amtrak shall . . . operate Amtrak trains, to the maximum extent feasible, **to all station stops** within 15 minutes of the time established in public timetables. 49 U.S.C. Sec. 24101(c) (4) (Emphasis added.)

During the 2009 rulemaking on the metrics and standards under Section 213 of PRIIA, the Administration acknowledged the importance monitoring the service at all stops. In the comments to the final rule, the Federal Rail Administration stated that:

All-stations OTP recognizes that most Amtrak passengers travel between to, or from intermediate stations on the typical routes. Moreover Section 207 of PRIIA lays great emphasis in the quality of service to less-well-served communities, which are precisely those that are not at the endpoints of their routes. To capture the timekeeping perceived by the average passenger; there, it is essential to measure how well Amtrak and its hosts are succeeding in meeting the Congressional mandate to serve “**all station stops** within 15 minutes of the time established in public timetables.”[emphasis added]  
Federal Rail Administration, Department of Transportation, and Proposed Staff Exposure Draft: Proposed Metrics and Standards for Intercity Passenger Rail Service, p.42, (Mar. 13, 2009)

The Federal Rail Administration further stated: “The nature of passenger rail service mandates All-Stations OTP: a single trains, unlike an airline flight, can serve hundreds of origin/destination pairs, the passengers on each of which deserve a consistently high quality of service that can only be obtained if trains are on time throughout their runs.” Id at 114.

Providing quality intercity service at all stations is fundamental principal that has been embodied in prior administrative regulations. The Board acknowledges that the proposed definition confining measurement of OTP to only endpoints is based in part on prior ICC definitions, notably the 1973 ICC regulation. This approach fails to recognize, however, that, in less than a year later in 1974, the ICC revised the 1973 regulation to include *all stops*.

In 1974, the ICC initiated a proceeding determine the quality of intercity rail passenger service with a view toward determining whether the Commission should prescribe additional rules and regulations. The Commission held public hearings and took testimony from over 300 public witnesses and railroad representatives. As a result, the ICC determined that Rule 6(b) should be changed to clarify passenger right and the carriers’ obligations. “The public should be able to rely upon train schedules at intermediate stops as well as the “final terminus” of a route.

351 ICC 883, 910, 997 (1976). Rule 6(b) was subsequently amended to incorporate the requirement that “the train shall arrive at its final terminus and at all intermediate stops no later than 5 minutes after the scheduled arrival time per 100 miles of operation, or 30 minutes after scheduled arrival time, whichever is the less.” Id. Rule 6(b) remained in effect, measuring all station OTP until the ICC’s jurisdiction over passenger rail was terminated in 1979. The reasoning of ICC, which is no less appropriate today, coupled with the goals of PRIIA, necessitates that the proposed definition of OTP should be expanded to include all station OTP.

Finally, all stations OTP is used by other modes of transportation. Airlines use intermediate stops in evaluating delays. For example, Southwest Flight 2766 flies daily from Los Angeles to Washington D.C. with a stop in Milwaukee. One can easily determine that this flight arrives at Milwaukee on time 82% of the time, with an average delay of 13 minutes. <http://www.flightstats.com/go/FlightRating/flightRatingByFlight.do?airline=WN&flightNumber=2766&departureAirportCode=LAX&arrivalAirportCode=MKE> Delays are costly to airlines as well, and at least one airline, Virgin America, has structured its schedule to avoid all intermediate connections solely in order to boost its on-time performance. Unfortunately, running express intercity passenger trains without intermediate stops is not an option for Amtrak.

#### IV. EXPANDING THE PROPOSED DEFINITION TO INCLUDE ALL STATION OTP SHOULD NOT INCREASE RECORD KEEPING AND EVIDENTIARY BURDENS

In the current data driven environment that provides real time information on locations, it is unlikely that there will be technical barriers to compiling intermediate station arrival and departure times on Amtrak routes. Among other things, locomotives now have GPS making it fairly easy to access their location and on-time arrival and departure information. In addition, railroads are incorporating real-time dispatching services on their lines; the Norfolk Southern employs Auto Router in its dispatching center in Pontiac, Michigan. It stands to reason that the railroads should be able to generate OTP data without much time and expense. Indeed, even Amtrak passengers can access the internet to obtain on-time arrival and departure times. (<https://www.amtrak.com/find-train-bus-stations-trains-routes>). Finally, additional internet sites such as the Dixie Land provide real time snap shot information so that members of the public today can see the OTP of any train at any intermediate station in the Amtrak network. See Attachment 2, Dixie Land screen shot of Southwest Chief, February 7, 2016.

For all of the reason set forth above, ELPC et al. requests that the Board expand the proposed definition of OTP to include all intermediate stops.