



Committee on Transportation and Infrastructure

U. S. House of Representatives

Washington, DC 20515

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November 13, 2020

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Railroads, Pipelines, and Hazardous Materials
FROM: Staff, Subcommittee on Railroads, Pipelines, and Hazardous Materials
RE: Subcommittee Hearing on “Examining the Surface Transportation Board’s Role in Ensuring a Robust Passenger Rail System”

PURPOSE

The Subcommittee on Railroads, Pipelines, and Hazardous Materials will meet on Wednesday, November 18, 2020, at 10:00 a.m. in 2167 Rayburn House Office Building and via Cisco WebEx to hold a hearing titled “Examining the Surface Transportation Board’s Role in Ensuring a Robust Passenger Rail System.” The hearing will explore the role of the Surface Transportation Board (STB or Board) in passenger rail. The Subcommittee will hear testimony from members of the Surface Transportation Board, Amtrak, Metra, the American Public Transportation Association, the Association of American Railroads, and the Cato Institute.

BACKGROUND

The STB is a bipartisan, independent agency with jurisdiction over the economic regulation of railroads.¹ The STB’s predecessor agency, the Interstate Commerce Commission (ICC), was responsible for the economic regulation of railroads until Congress created the STB with the ICC

¹ <https://prod.stb.gov/about-stb/>.

*Termination Act of 1995 (ICCTA).*² Congress last reauthorized the STB in the *Surface Transportation Board Reauthorization Act of 2015* through Fiscal Year 2020.³

In general, the STB's jurisdiction includes the following:

- overseeing and monitoring railroad commercial practices nationally;
- enforcing freight railroads' common carrier obligations;
- evaluating challenges to the reasonableness of rail rates;
- reviewing proposed railroad mergers;
- ensuring rail carriers provide fair employee protective arrangements in certain transactions;
- monitoring rail carrier revenue adequacy;
- investigating rail service matters of regional and national significance; and
- authorizing construction, operation, discontinuance, and abandonment of rail lines and service.

ICCTA preempts most state laws, with some limited exceptions.⁴

The STB's jurisdiction over passenger rail issues—both intercity and commuter—is more limited than its jurisdiction over freight rail issues. In general, 49 U.S.C. 10501(a) provides that STB has jurisdiction over transportation by rail carriers [defined in 49 U.S.C. 10102(5) as a person providing common carrier railroad transportation for compensation] that is part of the interstate rail network. To assert jurisdiction over a particular interstate passenger rail project, STB must determine that the project has a sufficient nexus to the interstate rail network.⁵ The STB has applied this analysis to find that it has jurisdiction over projects such as a Los Angeles-to-Las Vegas rail connection,⁶ California's High-Speed Rail effort to link a number of cities from Los Angeles to San Francisco,⁷ and the Texas Central Railroad high speed rail project between Houston and Dallas.⁸

² Pub. L. No. 104-88. The ICC was the first independent federal regulatory agency, created in 1887 to exercise congressional Article I, Section 8 Commerce Clause power. Over time, the ICC's jurisdiction expanded to include all common carriers except airlines. Starting in the mid-1970's, a wave of de-regulation began to strip away the ICC's authority as industries were deregulated and the remaining federal authority was transferred to other agencies. Dempsey, Paul Stephen. *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*. 95 Marquette Law Rev. 1152 (2012).

³ Pub. L. No. 114-110.

⁴ Pub. L. No. 104-88; 49 USC 10501(b) & (c). See *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005) (ICCTA does not preempt state and local governments from exercising traditional police powers over the development of railroad property such as electrical, plumbing and fire codes).

⁵ See, e.g., *DesertXpress Enterprises, Ltd., Petition for Declaratory Order*, Docket No. FD 34914 (STB served May 7, 2010). See also *American Orient Express v. STB*, 484 F.3d 554 (D.C. Cir. 2007) (establishing that the plain meaning of the term "jurisdiction over transportation by rail carrier" applies to STB jurisdictional determinations).

⁶ *DesertXpress*, FD 34914.

⁷ *Cal. High-Speed Rail Auth., Constr. Exemption, Merced, Madera, and Fresno Ctnys., Cal.*, Docket No. 35724 (STB served June 13, 2013).

⁸ *Texas Central Docket R.R. and Infrastructure, Inc. & Texas Central R.R., LLC—Petition for Exemption—Passenger Rail Line Between Dallas and Houston, Tex.*, Docket No. FD 36025 (STB Served July 16, 2020).

BOARD MEMBERS

The STB is composed of five Board members appointed by the President and confirmed by the Senate.⁹ Each member serves a staggered five-year term, and members are permitted to serve up to a year after their term's expiration unless a successor is appointed. No more than three members may be appointed from the same political party. Currently, three of the five members are installed (two Republicans and one Democrat), with two nominees awaiting confirmation. The Board is assisted by a staff of approximately 142, mostly economists and lawyers.¹⁰

The Board currently consists of Chairman Ann D. Begeman (Republican), Vice Chairman Martin J. Oberman (Democrat), and Patrick Fuchs (Republican). Republican Michelle A. Schultz and Democrat Robert Primus are awaiting Senate confirmation to fill the two vacancies. Chairman Begeman's term expires at the end of 2020.

PASSENGER RAIL ISSUES

I. Amtrak

Amtrak is the country's national intercity passenger railroad. It is a quasi-governmental entity, formed in the early 1970's when several major privately-owned railroads were in or nearing bankruptcy and Congress enacted legislation to relieve the freight railroads of their common carrier obligation to transport passengers.¹¹ While freight railroads no longer had to fulfill their common carrier passenger obligation, Congress included provisions requiring them to allow Amtrak trains to use rights-of-way for a fee and give preference to Amtrak-run trains except in emergencies.¹² Amtrak owns 363 miles of the 457-mile rail line that comprises the Northeast Corridor (D.C. to Boston), as well as 95.6 miles of track in Michigan and Indiana. Amtrak trains providing state-supported service and long-distance service largely operate over freight-owned rights-of-way.¹³

Key Amtrak-related statutory provisions within the STB's purview include the following:

General Jurisdiction:

Under 49 U.S.C. 24301(c), the STB's jurisdiction over Amtrak operations is limited; many STB provisions dealing with rates and other economic aspects of freight shipment do not apply to Amtrak.¹⁴

⁹ The STB is able to operate with only one Board member.

¹⁰ "Budget Request Fiscal Year 2021." Surface Transportation Board, available at <https://prod.stb.gov/wp-content/uploads/STB-FY-2021-Budget.pdf>.

¹¹ Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, (1970); Peterman, David Randall. CRS Report No. R44973, *Amtrak: An Overview* (September 17, 2017).

¹² 49 U.S.C. 24308.

¹³ Amtrak National Fact Sheet 2016-2017, P. 8, available at <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/National-Fact-Sheet-FY2016-0717.pdf>.

¹⁴ See 49 U.S.C. 24301(c), (stating "Application of Subtitle IV.—Subtitle IV of this title shall not apply to Amtrak, except for sections 11123, 11301, 11322(a), 11502, and 11706. Notwithstanding the preceding sentence, Amtrak shall continue to be considered an employer under the Railroad Retirement Act of 1974, the Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act").

Right of Access and Preference

Under 49 U.S.C. 24308(a), Amtrak is authorized to make agreements with freight railroads to use their facilities for a fee, and these agreements must include a penalty for untimely performance. Further, if Amtrak and the freight providers cannot come to an agreement, the STB has jurisdiction over the dispute and authority to prescribe reasonable terms for Amtrak to use the freight facilities.¹⁵ Pursuant to 49 U.S.C. 24308(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. . . .”

Dispute Mediation for Amtrak Northeast Corridor and State-Supported Routes

The *Fixing America’s Surface Transportation Act of 2015* (FAST) Act included provisions involving cost recovery by Amtrak for Amtrak’s operation of state-supported routes and for the costs allocated to states (including state commuter agencies and other entities) on the Northeast Corridor.¹⁶ Included was a provision that gave the Board jurisdiction to resolve cost allocation and access disputes between Amtrak, the states, and potential non-Amtrak operators of intercity passenger rail service. The FAST Act also directed the Board to establish procedures for the resolution of disputes.¹⁷ In response, the STB promulgated regulations at 49 CFR 1109.5 to establish procedures for mediation of these disputes.¹⁸

STB’s Role in Metrics and Standards for On-Time Performance

The *Passenger Rail Investment and Improvement Act of 2008* (PRIIA) included a provision that requires the Federal Railroad Administration (FRA) and Amtrak to jointly develop new or improved metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including on-time performance (OTP) and minutes of delay.¹⁹ As part of that process, PRIIA requires Amtrak and FRA to “consult with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, passenger representatives, and Amtrak employees about the appropriate metrics and standards.”²⁰ Congress enacted the provision to support the statutory Amtrak preference over freight traffic. The STB is the venue for enforcement if the OTP of any intercity passenger train averages less than 80% for any two consecutive calendar quarters.²¹

FRA first issued final metrics and standards under Section 207 of PRIIA in May 2010, but these metrics and standards never took effect because the Association of American Railroads (AAR) launched various legal challenges to the provision that tied it up in litigation.²² Ultimately, the courts invalidated an arbitration clause in section 207(d), but held that without this clause, the provision did not unconstitutionally facilitate Amtrak to exercise undue coercive power over its freight rail

¹⁵ 49 U.S.C. 24308(a)(2)(A).

¹⁶ Pub. L. No. 114-94.

¹⁷ 49 U.S.C. § 24712(c)(2) & 24905(c)(4).

¹⁸ Dispute Resolution Procedures under the Fixing America’s Surface Transportation Act of 2015, Docket No. EP-734 (Served Nov. 29, 2016); 49 CFR 1109.5.

¹⁹ Pub. L. No. 110-690 section 207.

²⁰ *Id.*

²¹ 49 U.S.C. § 24308(f).

²² Goldman, Ben. CRS Report No. R45783: *Improving Intercity Passenger Rail Service in the United States* (June 25, 2019), P. 11.

competitors.²³ After the Supreme Court declined to consider the case in June 2019, it was remanded for FRA and Amtrak to develop new metrics and standards.²⁴

Earlier this week, FRA issued a final rule establishing a customer OTP metric, which represents the total number of customers on an intercity passenger rail train who arrive at their destination point within 15 minutes of their published scheduled arrival time divided by the total number of customers on such intercity passenger rail train.²⁵ FRA, with Amtrak, set a minimum standard for customer OTP of 80 percent for any two consecutive calendar quarters.²⁶ This OTP standard will be used in cases where STB investigates substandard performance under 49 U.S.C. 24308(f).

The *Moving Forward Act* (H.R. 2), which passed the House on July 1, 2020, included provisions related to Amtrak's preferential access to freight-owned corridors. Specifically, section 9204 provides a means for Amtrak to seek judicial enforcement of the statutory right of preference directly in Federal court without intermediaries. Section 9205 updates existing provisions to allow Amtrak to add additional services on host railroads, while providing that any unreasonable interference to freight service they would create is mitigated by capital investments.

II. Authority over Commuter Rail Passenger Transportation

STB has limited authority over commuter rail transportation. STB does not have jurisdiction over public transportation provided by a local government.²⁷ Some commuter rail transportation is provided by public authorities, whereas some partner with Amtrak for various commuter rail services and others contract out their operations or services to the private sector. An entity providing commuter rail operations may be under the Board's jurisdiction if STB determines the entity to be a "rail carrier," defined as a person providing common carrier railroad transportation for compensation. However, it does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.²⁸ Also, the STB can determine compensation when agreement cannot be reached between Amtrak and commuter rail authorities (or other carriers) related to certain railroad assets that were acquired under the *Regional Rail Reorganization Act of 1973* and the *Railroad Revitalization and Regulatory Reform Act of 1976*.²⁹

Additionally, in 2008, PRIIA authorized the STB to conduct nonbinding mediation at the request of a public transportation authority or a rail carrier.³⁰ Either party may apply for STB's nonbinding mediation if, after a reasonable period of negotiation, the public transportation authority cannot reach an agreement with the rail carrier to use trackage of, and have related services provided by, the rail carrier for purposes of commuter rail transportation. Either party may also apply for nonbinding mediation if, after a reasonable period of negotiation, the public transportation authority

²³ *Association of American Railroads v. DOT*, No. 17-5123 (DC Cir. 2018).

²⁴ *Trains Magazine*, Supreme Court declines AAR request on Amtrak performance standards (updated) (June 3, 2019), available at <https://trn.trains.com/news/news-wire/2019/06/03-supreme-court-declines-aar-request-on-amtrak-performance-standards>.

²⁵ 85 Fed. Reg. 17835 (March 31, 2020).

²⁶ *Id.*

²⁷ 49 U.S.C. 10501(c)(2).

²⁸ 49 U.S.C. 10102(5).

²⁹ 49 U.S.C. 24903.

³⁰ Pub. L. No. 110-432, div. B, title IV, Sec. 401(a).

cannot reach an agreement with the rail carrier to acquire an interest in a railroad right-of-way for the construction and operation of a segregated fixed guideway facility to provide commuter rail passenger transportation.³¹ This authority is codified at 49 U.S.C. section 28502 (trackage use) and section 28503 (rights-of-way). To date, this process has not been used.

H.R. 2 included provisions that would amend sections 28502 and 28503 to require that a rail carrier must provide “good faith consideration” to a “reasonable request” from a provider of commuter rail passenger transportation for access to trackage and provision of related service and to such a request for access to rail right-of-way for purposes of commuter rail passenger transportation.³² Additionally, under H.R. 2, in circumstances in which dispatching for the relevant trackage is controlled by a rail carrier other than the trackage owner or the right-of-way owner, both the controlling rail carrier and the owner of the trackage or right-of-way would be subject to STB’s nonbinding mediation authority and included in any mediation process.

WITNESSES

Ms. Ann D. Begeman
Chairman
Surface Transportation Board

Mr. Martin J. Oberman
Vice Chairman
Surface Transportation Board

Ms. Romaine C. Brown
Chair of the Board of Directors
Metra

Mr. Stephen Gardner
Senior Executive Vice President
Amtrak

Mr. Ian Jefferies
President and Chief Executive Officer
Association of American Railroads

Mr. Randal O’Toole
Senior Fellow
Cato Institute

Mr. Paul Skoutelas
President and Chief Executive Officer
American Public Transportation Association

³¹ 49 U.S.C. §§ 28502 and 28503, respectively.

³² Sections 9401 and 9402, Title IV, Division D, H.R. 2, the Moving Forward Act, respectively.