STB and ICC Regulation of Passenger Rail

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1. History of Rail Passenger Regulation

In 1887, Congress gave the STB's predecessor, the Interstate Commerce Commission (ICC),[1] jurisdiction over rail common carriers transporting passengers, freight, or both.[2] In 1906, sleeping car companies (which provided accommodations for passengers) and express companies (which handled time-sensitive freight on passenger trains) were added to the ICC's jurisdiction.[3]

Initially, the ICC's regulatory responsibilities focused on rates and discrimination. In 1920, Congress amended the statute to require that anyone seeking to provide rail service, extend the reach of its rail service into a new territory, or stop serving a territory must obtain ICC authorization.[4] However, whether a carrier could stop operating a particular passenger train was left to state

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[1] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), Congress abolished the ICC, transferred its rail regulatory functions and docket to the STB, and provided that ICC precedent applies to the STB.

[2] Act to Regulate Commerce, Chap. 104, 24 Stat. 379 (1887) ("[T]he provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad . . . .").

[3] Hepburn Act of 1906, 34 Stat. 584 (1906). *See* former 49 U.S.C. 10501(a)(1) (1994).

[4] Transportation Act of 1920, Pub. L. No. 66-152, § 402 (1920) (adding § 1(18), now codified at 49 U.S.C. 10901, 10903).

regulation until 1958,[5] when Congress provided a Federal, ICC procedure for rail carriers seeking to discontinue passenger service on an interstate train.[6]

Although most of the ICC's passenger cases could be considered dreary, a few were on the cutting edge of important social issues. The Interstate Commerce Act prohibits unreasonable discrimination in transportation, which essentially means that similarly situated shippers and passengers should not be treated dissimilarly. During my time at the ICC and now the Board, we saw mainly freight discrimination cases. But there was plenty of activity on the passenger side early on; indeed, as early as Volume 1 of the ICC Reports can we see two cases involving racial discrimination in the railroad industry. *Council v. Western & A. R. Co.*, 1 ICC 39 (1887); *Heard v. A. RR*, 1 ICC 428 (1887). Those cases, and the cases following for the next half-century, generally took a hands-off approach to claims of racial discrimination in reliance on the "separate-but-equal" doctrine.

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[5] *See Interstate Commerce Commission Activities* 1937-1962, at 54 (U.S. G.P.O. 1962) (Activities 1937-1962).

[6] Transportation Act of 1958, Pub. L. No. 85-625, § 5, 72 Stat. 568, 571-72 (1958) (adding § 13a, which was recodified in 1978 as 49 U.S.C. 10908 and repealed in 1995). Under that procedure, the carrier could discontinue a passenger train, after filing a notice with the ICC, if the ICC took no action within 30 days. The ICC could order the carrier to postpone the discontinuance for up to four months while the ICC investigated the proposal. If the ICC concluded that the service was needed and would not unreasonably burden interstate commerce, it could order the carrier to continue the service for up to a year (at which point the carrier could reinitiate its proposal).

That is, the theory was that there was no violation because each passenger was treated more or less similarly in that each was able to ride the train and get to wherever their ticket took them.

In 1941, however, the Supreme Court reversed that approach and set aside an ICC decision dismissing a complaint of discrimination in dining and sleeping cars. *Mitchell v. United States*, 313 U.S. 80 (1941). In 1955, in a case brought by Thurgood Marshall, the ICC followed up and found that requiring racially separate accommodations in trains and station waiting rooms contravened the antidiscrimination provisions of the Interstate Commerce Act. *NAACP v. S.L. & S.F. Ry.*, 297 ICC 335 (1955). And the agency issued a similar ruling for interstate bus carriers.

By 1970, in the wake of technological advancement in the motor vehicle and aviation industries, passenger rail operations had become largely unprofitable and rail carriers were shedding those operations.[7] Congress created the National Railroad Passenger Corporation (commonly known as Amtrak) and established a timetable by which any rail carrier could transfer an intercity rail passenger service

[7] H.R. Rep. No. 91-1580 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4735, 4736-37.

to Amtrak.[8] Amtrak has the statutory right to use, for a fee, the facilities and services of other rail carriers.[9]

Commuter rail operations were not included in the services transferred to Amtrak.[10] Because those services also generally were not profitable, state or local governments assumed responsibility for many such services, either directly (conducting the operations themselves) or indirectly (subsidizing or contracting for a carrier to provide the service). In 1976, Congress removed such mass transit operations from ICC regulation if they were subject to state fare control.[11]

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[8] Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, 84 Stat. 1327 *et seq*. (1970). While Amtrak is not subject to the Board's general jurisdiction, selected provisions of the Interstate Commerce Act, as well as the rail tax laws, apply to Amtrak. *See* 49 U.S.C. 24301(c).

[9] *See* 49 U.S.C. 24308. In contrast, other rail carriers in the typical case can obtain forced access to other carriers' facilities only on competitive grounds. *See Midtec Paper Corp. v. Chicago & N.W. Transp. Co*., 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) (*Midtec*) (decisional criteria for obtaining access under 49 U.S.C. 11103).

[10] In 1981, Congress provided for the transfer of some commuter operations in the Northeast to an Amtrak subsidiary, Amtrak Commuter Services Corporation (Amtrak Commuter). Northeast Rail Service Act of 1981, Pub. L. No. 97-35, §§ 1133(2), 1137, 95 Stat. 643, 644-47 (1981).

[11] Rail Transportation Improvement Act, Pub. L. No. 94-555, § 206, 90 Stat. 2613, 2621 (1976). *See* current 49 U.S.C. 10501(c)(2). Such commuter rail operations may nevertheless be subject to rail tax laws. *See* 49 U.S.C. 10501(c)(3)(A)(iii).

2. American Orient Express

In 2005, the Board's authority to regulate passenger service at all was challenged in court by the now-defunct American Orient Express, which owned vintage railroad passenger cars that it used to provide vacation tours by hooking up to the back of various Amtrak trains. American Orient's motivation for asking the STB to declare that it was not a rail carrier subject to the STB's jurisdiction was that being a regulated rail carrier meant that it would have been subject to railroad tax laws, which it didn't want.[12] The Board's decision was upheld in court in a brief opinion finding that the "transportation by rail carrier" description clearly applied to American Orient. But the tougher part of the case, for me, was proving that the Board actually had jurisdiction over passenger operations after ICCTA.

Under the Interstate Commerce Act, the STB has general "jurisdiction over transportation by a rail carrier" between "a State and a place in the same or another State" as part of the interstate rail network. 49 U.S.C. 10501(a). The term "transportation" embraces the provision of facilities and services "related to the movement of passengers." 49 U.S.C. 10102(9). And the term "rail carrier" is defined broadly to include any "person providing common carrier railroad

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[12] *See* 45 U.S.C. 231(a)(1)(i) (Railroad Retirement Act) and 351(b) (Railroad Unemployment Insurance Act).

transportation for compensation" except for "electric railways not operated as part of the general system of rail transportation."[13] 49 U.S.C. 10102(5).

All of that counseled in favor of STB jurisdiction, since American Orient traveled through lots of states. But American Orient made an intriguing, though ultimately unsuccessful, argument that in ICCTA Congress actually meant to remove jurisdiction over all rail passenger transportation except for the subset of local governmental mass transit operations retained in subsection (c)(3)(B). American Orient cited to a statement in the Senate Report that the Senate bill would limit STB rail jurisdiction to freight transportation "because rail passenger transportation today (other than service by Amtrak . . .) is now purely local or regional in nature,"[14] and a Conference Report statement that "regulation of passenger transportation is generally eliminated . . ."[15]

We found that argument pretty forceful, but we relied on the principle that legislative history cannot be used to change the plain meaning of unambiguous

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[13] For purposes of the Interstate Commerce Act, that definition generally does not embrace mass transit provided by a local governmental authority, 49 U.S.C. 10501(c)(2) (which is regulated locally) or Amtrak, see 49 U.S.C. 24301(c). Electric railways that are not operated as part of the general railroad system have been excluded from some or all of the Interstate Commerce Act since 1910. *See* Mann-Elkins Act, Pub. L. No. 61-218, § 12, 36 Stat. 539, 552 (1910).

[14] S. Rep. 104-176, at 29 (1995).

[15] Conference Report at 167 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 850, 852.

statutory language. *See U.S. ex rel. Totten v. Bombardier Corp*., 380 F.3d 488, 494 (D.C. Cir. 2004). Instead, we asserted that the legislative history of the ICC Termination Act, read as a whole, supported a finding of continued jurisdiction: While the Senate bill would have repealed the agency's jurisdiction over rail passenger transportation altogether,[16] the Conference Committee rejected that approach in favor of a more modest "curtailment" of that jurisdiction.[17] The bill that was reported out of the Conference Committee and enacted (1) retained general jurisdiction over rail passenger transportation in section 10501(a); (2) expanded the statutory exemption for mass transit;[18] (3) repealed the passenger train discontinuance procedures; and (4) clarified that the few governmental mass transit providers that remain under STB jurisdiction can invoke 49 U.S.C. 11102 and 11103 (governing access to terminal facilities of, and switch connections to, other carriers, respectively). And tied to all of this was Congress' intent to

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[16] S. Rep. 104-176, at 29 (1995).

[17] Conference Report at 167 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 850, 852.

[18] Compare this current provision with former 49 U.S.C. 10504(b) (1994), which had exempted mass transportation provided by a local governmental authority only if the fares were "subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided"—a significant limitation for any commuter operations provided by a regional, multi-state authority.

preempt state and local regulation to the maximum extent permitted by the Constitution.[19]

Thus, we said that ICCTA's legislative history shows that Congress anticipated little need for regulatory activity in the rail passenger area because—other than Amtrak's intercity services and the commuter operations addressed in section 10501(c)—there were few, if any, rail passenger operations being conducted on the interstate rail network at that time.[20] But there was no way for Congress to know then what, if any, other rail passenger operations might be introduced in the future. So Congress left the statutory language providing a place-holder so that any such operations that might develop would come within the STB's jurisdiction under section 10501(a).

Apparently we were persuasive, in fact so persuasive that the court, in upholding the Board's finding that American Orient fell under the definition of a

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[19] *See* H.R. Rep. No. 104-311, at 96 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 793, 808 (under section 10501(b), "[a]lthough states retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.").

[20] Purely local tourist operations—such as dinner trains and scenic rides on historic trains (usually pulled by a steam-operated locomotive over narrow-gauge track)—do not come within the STB's jurisdiction because they are not considered part of the interstate rail network. *See* 49 U.S.C. 10501(a)(2)(A).

regulated rail carrier, did not even address the claim that passenger jurisdiction had been abolished in ICCTA. *American Orient Express v. STB*, 484 F.3d 554 (D.C. Cir. 2007).

3. DesertXpress

Since then, nobody to my knowledge has directly challenged the Board's jurisdiction over interstate passenger rail services, although the parties in *DesertXpress* came at it from a slightly different angle. In *DesertXpress*, a private business (as opposed to the semi-public Amtrak) sought authority to build a passenger line between Los Angeles and Las Vegas. A competitor objected on jurisdictional grounds, claiming that even though the movement went between two states, it was non-jurisdictional because it was isolated and not part of the interstate rail system. The Board rejected that argument, pointing out that the statute plainly gives it authority over common carrier service between two states. The "part of the interstate rail system" language on which the competitors relied had been inserted into ICCTA not to limit the Board's jurisdiction, but rather to clarify that the Board **could** have jurisdiction over a movement that did **not** cross state lines if the operation had connections that made it part of the interstate system. *DesertXpress Enterprises, Ltd. – Petition for Declaratory Order*, Docket No. FD 34914 (STB served May 7, 2010).

4. All Aboard Florida, California Hi Speed, and Texas Central

Since *DesertXpress*, we've had a few difficult cases involving construction of passenger lines within a state that involve this question: whether the operations were sufficiently connected to the interstate system to put them within the STB's jurisdiction. The jurisdictional determination is important because the Interstate Commerce Act generally preempts state and local law, so a finding of jurisdiction would in many cases oust states and localities from regulating.

All Aboard Florida involved an approximately 230-mile rail line between Miami and Orlando within the existing Florida East Coast RR right-of-way. Because the line would not connect with Amtrak or any other interstate passenger rail service provider, and because the carrier had no plans to provide through ticketing with Amtrak or any other interstate rail passenger operator for transportation beyond Florida, a majority of the Board (with one dissent) found it to be intrastate and not subject to Board jurisdiction, even if some of the passengers would make their trip an interstate journey by multimodal transportation. *All Aboard Florida—Operations LLC and All Aboard Florida—Stations—Construction and Operation Exemption—in Miami, Fla. And Orlando, Fla.*, Docket No. FD 35680 (STB served Dec. 21, 2012).

In *California Hi Speed*, the planned operation is an 800-mile highspeed rail corridor from San Francisco to San Diego scheduled to be built in sections. There are all sorts of funding issues with that project, and other issues involving preemption, of which I'm sure you're all aware, but initially the main issue before the Board was whether the first portion of the system to be constructed would have enough "connectivity" to the interstate system (here, Amtrak) to fall within STB authority. The Board found in 2013, with concurring and dissenting expressions, that CHST was a jurisdictional line because there was "extensive connectivity" that will permit it to connect and coordinate with Amtrak to enable passengers to travel both within and outside California. *Cal. High-Speed Rail Auth.—Constr. Exemption—Merced, Madera and Fresno Cntys., Cal.*, FD 35724, slip op. at 4 (STB served June 13, 2013). In a subsequent case about that project (FD 35861, *California High-Speed Rail Authority—Petition for Declaratory Order*), the Board found, with a dissent, that 49 U.S.C. § 10501(b) preempts certain remedies allowing injunctions under the state environmental provisions because, if successful, injunctive relief would enjoin construction of a Board-authorized project. And after different California state courts came to different conclusions on the preemption issues, in *Friends of the Eel River v. North Coast Railroad Authority*, the California Supreme Court issued a long decision concluding that,

because of the particular facts of the case, the state environmental laws were not preempted.

In *Texas Central*, the Board determined that construction and operation of a proposed rail line between Dallas, Tex., and Houston, Tex., would not require Board approval. The Board noted that it would be constructed and operated entirely within the State of Texas and found it would not be part of the interstate rail network because there were no concrete plans today for through ticketing and no direct connection to Amtrak or any other interstate passenger rail carriers, and because its connections with Amtrak—which was about ½-mile away by foot—were too remote. *Texas Central Railroad and Infrastructure, Inc. & Texas Central Railroad, LLC—Petition for Exemption—Passenger Rail Line Between Dallas and Houston, Tex.*, Docket No. FD 36025 (STB served July 18, 2016). Texas Central has asked the Board to reconsider that decision, arguing that it has arrangements under which passengers will be able to buy a single through ticket for transportation on both the Texas Central and Amtrak portions of their journey, which would include travel on a "connecting transfer service" operated by Texas Central, between the Amtrak and Texas Central stations in Dallas and Houston. The case is pending at the agency, so stay tuned.

4. Amtrak

The Board has certain regulatory authority involving Amtrak, including authority to ensure that Amtrak may operate over other railroads' track, and to address disputes and set the terms and conditions of shared use if Amtrak and railroads (or regional transportation authorities) fail to reach voluntary agreements.[21] Also, during an emergency, the Board may require a rail carrier to provide facilities, on terms prescribed by the Board, to enable Amtrak to conduct its operations. The Board has authority to direct commuter rail operations in the event of a cessation of service by Amtrak.[22] We can issue an order under 49 U.S.C. § 24903(c)(2) prescribing the terms for a commuter line and Amtrak to use Amtrak's facilities.[23] And we can rule on the appropriate compensation

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[21] The Board recently issued a decision addressing several of the issues in one of those cases involving Amtrak and CN, but the parties are also in mediation. See *Application of the National Railroad Passenger Corporation under 49 U.S.C. § 24308(a)—Canadian National Railroad Company*, Docket No. FD 35743 (STB served Aug. 9, 2019).

[22] That authority was nearly called into play during a strike shortly after the turn of the Century, but the matter was settled privately before the agency became involved.

[23] We had such a case involving SEPTA—see *Petition by the Southeastern Pennsylvania Transportation Authority for Relief under 49 U.S.C. § 24903*, Docket No. FD 36281 (STB served March 27, 2019); and we have one that's been recently filed involving Chicago Metra—see *Petition by the National Railroad Passenger Corporation (Amtrak) for Proceeding under 49 U.S.C. § 24903(c)(2)*, Docket No. FD 36332 (STB served July 26, 2019).

amounts between Amtrak and certain local transportation authorities under the Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy (Policy) developed by the Northeast Corridor Commission (NEC Commission).[24] These cases are all interesting, and they can be hot potatoes.

But from a lawyer's perspective, the most interesting stuff we've done (or perhaps I should say "not done") regarding Amtrak lately would have to involve our authority to determine whether poor performance by Amtrak was a result of a host railroad's failure to give Amtrak "preference" in operating its trains. In Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Congress gave the Board the authority to investigate the reasons for persistent Amtrak train delays if *either* the "on-time performance" on a route dips below a certain level, *or* if certain metrics and standards, to be developed jointly by the Federal Railroad Administration and Amtrak, are not met. PRIIA also gave FRA and Amtrak the responsibility to develop performance metrics that presumably would be useful in determining "on-time performance." The Board had a couple of "preference" cases filed,[25] but before it could process them, the

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[24] That authority was invoked in in *Petition of the National Railroad Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, Docket No. FD 36048, in a case involving Amtrak and the Massachusetts Bay Transportation Authority, but the matter was settled privately.

[25] *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*,

constitutionality of the PRIIA delegation to FRA and Amtrak became embroiled in a years-long litigation that went through a couple of district courts, the D.C. Circuit a couple of times, and the Supreme Court.

In August 2011, the Association of American Railroads (AAR) challenged the FRA/Amtrak metrics and standards in the U.S. District Court for the District of Columbia, on the ground that Section 207 of PRIIA—the source of the metrics and standards—placed legislative and rulemaking authority in the hands of Amtrak, a private entity. The District Court granted summary judgment in favor of the government,[26] but the District of Columbia Circuit reversed, holding that Amtrak is a private entity for purposes of the delegation of powers doctrine and, accordingly, that Section 207 was an unlawful delegation of regulatory authority to a private entity.[27] The Supreme Court granted certiorari and, in March 2015, reversed, holding that Amtrak is a governmental entity for purposes of analyzing the constitutional issues surrounding the delegation of authority in Section 207. The Court remanded the case to the D.C. Circuit for consideration of AAR's other

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Docket No. NOR 42134, and *National Railroad Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd.*, Docket No. NOR 42141.

[26] *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 865 F. Supp. 2d 22 (D.D.C. 2012).

[27] *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013).

arguments regarding the constitutionality of Section 207, which the D.C. Circuit had declined to reach. [28]

On remand, the D.C. Circuit again found section 207 unconstitutional, this time on the ground that the statute violates the Due Process Clause by allowing an interested party (Amtrak) to regulate the freight railroads. The D.C. Circuit also found that Section 207(e) of PRIIA, which allowed either FRA or Amtrak to initiate binding arbitration before an STB-appointed arbitrator in the event that they did not timely adopt metrics and standards, violated the Appointments Clause because the arbitrator would be a "Superior Officer" who can only be appointed by the President.[29]

While all this was going on, the Board tried to step into the gap and issue its own metrics and standards to give some certainty and to permit its own preference cases to go forward. But Union Pacific challenged the Board's decision in the 8th Circuit, which in 2016 found that the Board lacked authority to issue the rules given the express delegation to FRA/Amtrak. *Union Pac. R.R. v. STB*, 863 F.3d 816 (8th Cir. 2017).

Finally, after having been twice rebuffed in the D.C. Circuit, the Government persuaded that court to rule that the offending provision of PRIIA

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[28] *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225 (2015).

[29] *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d. 19 (D.C. Cir. 2016).

regarding arbitration could be severed and, once that was done, the remaining operative provisions of PRIIA section 207 would be constitutional. And on June 3, 2019, the Supreme Court denied AAR's certiorari petition, meaning that the latest D.C. Circuit opinion finding the operative portion of section 207 to be constitutional stands. FRA and Amtrak are now to promulgate new on-time performance regulations after which the Board's investigative authority under PRIIA section 213 will become effective. Once that happens, it's possible that the Board could hear cases involving the preference provision of the statute.