

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN
RAILROADS,
425 3rd Street, SW, Suite 1000
Washington, DC 20024,

Plaintiff,

v.

DEPARTMENT OF
TRANSPORTATION,
1200 New Jersey Avenue, SE
Washington, DC 20590

RAY LAHOOD, in his official
capacity as SECRETARY OF
TRANSPORTATION,
1200 New Jersey Avenue, SE
Washington, DC 20590

FEDERAL RAILROAD
ADMINISTRATION,
1200 New Jersey Avenue, SE
Washington, DC 20590

JOSEPH C. SZABO, in his official
capacity as ADMINISTRATOR,
FEDERAL RAILROAD
ADMINISTRATION;
1200 New Jersey Avenue, SE
Washington, DC 20590,

Defendants.

Case: 1:11-cv-01499
Assigned To : Boasberg, James E.
Assign. Date : 8/19/2011
Description: General Civil

COMPLAINT

Plaintiff, by and through its attorneys, alleges as follows:

INTRODUCTION

1. This is a constitutional challenge to a statute that purports to vest Amtrak — a private, for-profit corporation — with the authority to promulgate binding rules governing the conduct of its contractual partners, the freight railroads.

2. Congress enacted the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (Oct. 16, 2008) (“PRIIA”) (Ex. A) as a response to Amtrak’s historically poor record of on-time performance and its chronic inability to generate revenues sufficient to cover its operating costs. Section 207 of PRIIA provides that Amtrak and the Federal Railroad Administration (FRA) “shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations”

3. Amtrak runs its trains outside the Northeast Corridor on tracks owned by private freight railroads. Section 213 of PRIIA provides that if Amtrak trains do not meet the Amtrak-drafted performance standards, the Surface Transportation Board may assess damages, payable directly to Amtrak, against the freight railroad hosting the Amtrak trains if the Board determines that the freight railroad is at fault by failing to give preference to the Amtrak trains.

4. Amtrak and the FRA jointly promulgated the “Metrics and Standards for Intercity Passenger Rail Service” on May 6, 2010 (Ex. B). The Metrics and Standards establish performance standards for Amtrak trains that cannot be achieved as a practical matter on numerous routes, and look to Amtrak-generated “Conductor Delay Reports” as

the best evidence for determining whether the railroads are at fault for failure to meet the standards.

5. Section 207 of PRIIA is unconstitutional because it improperly delegates lawmaking and rulemaking authority to a private company, and the Metrics and Standards — which were promulgated pursuant to Section 207 — are invalid.

6. Amtrak “is not a department, agency, or instrumentality of the United States Government.” 49 U.S.C. § 24301(a). Rather, it is a private entity that is “operated and managed as a for-profit corporation.” *Id.* PRIIA purports to vest Amtrak with the power to issue binding regulations governing the business operations of the freight railroads. It is a bedrock principle of constitutional law that Congress cannot empower a private entity to regulate other participants in the same industry. The constitutional violation is more egregious in this case because Amtrak is a financially interested private party that stands to directly benefit from violations of the very rules it created, and thus had the incentive to draft the Metrics and Standards in ways that were favorable to Amtrak and at the expense of the freight railroads. Section 207 of PRIIA has created a system in which Amtrak is now poised to reap substantial payments from the parties it is regulating, based on evidence that Amtrak will generate.

7. For these reasons, this Court should issue an order declaring that Section 207 of PRIIA is unconstitutional and vacating the Metrics and Standards because they were promulgated pursuant to an unconstitutional statute.

JURISDICTION AND VENUE

8. This is a challenge to the constitutionality of certain provisions of PRIIA, Division B of Pub. L. 110-432. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and may issue declaratory relief under 28 U.S.C. § 2201.

9. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States; the Department of Transportation and the Federal Railroad Administration reside in this judicial district; Secretary LaHood and Administrator Szabo perform their official duties in this judicial district; and a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

PARTIES

10. Plaintiff Association of American Railroads ("AAR") is a nonprofit trade association whose members include all of the Class I freight railroads (the largest freight railroads), as well as some smaller freight railroads and Amtrak. AAR represents its member railroads in proceedings before Congress, the courts, and administrative agencies in matters of common interest, such as the issues that are the subject matter of this litigation. AAR brings this action on behalf of its Class I member freight railroads: BNSF Railway Company, Canadian National Railway Company, Canadian Pacific Railway Limited, CSX Transportation, Inc., Kansas City Southern Railway Company, Norfolk Southern Railway Company, and Union Pacific Railroad.

11. Outside the Northeast Corridor, Amtrak trains are operated on tracks owned by AAR's freight railroad members. Consequently, AAR's members are immediately

and directly impacted and harmed by PRIIA and the Metrics and Standards, which limit their ability to operate efficient rail networks and serve their customers. By mandating far better on-time performance than has been achieved in the past, the Metrics and Standards place greater demands on the host freight railroads and adversely affect their operations. Attempting to ensure the on-time performance of Amtrak trains necessarily impacts the operation and scheduling of freight traffic that runs on the same tracks.

Among other things:

- The presence of Amtrak trains on a freight line, combined with the need to give them dispatching priority, limits the discretion dispatchers have to maximize freight fluidity and capacity on the line.
- Passenger operating schedules impair a freight railroad's ability to run certain types of freight, including time-sensitive shipments.
- Passenger operations affect a host freight railroad's ability to perform maintenance on its lines, because the passenger train schedules constrain the creation of efficient "maintenance windows" in which the work can be performed without delaying rail traffic.
- Because of the relatively higher speeds of passenger trains, and the safety need to separate passenger from freight operations, passenger trains consume a disproportionate share of the capacity or "train slots" available on a line.

12. The FRA has released three quarterly reports demonstrating that the Metrics and Standards are not being satisfied on numerous routes, thus placing the freight railroads in continuing legal jeopardy. The freight railroads are now subject to

mandatory government investigations at Amtrak's request and face the prospect of substantial civil damage awards.

13. Section 207 of PRIIA also has an immediate impact on AAR's members in that it directs the freight railroads to "incorporate the metrics and standards . . . into their access and service agreements" with Amtrak "[t]o the extent practicable."

14. Defendant Ray LaHood is sued in his official capacity as Secretary of the U.S. Department of Transportation (DOT). Secretary LaHood is the federal official ultimately responsible for the actions and operations of the Department of Transportation, of which the FRA is a part. Secretary LaHood exercises cabinet-level oversight and supervisory authority over the management and policy of the FRA. Secretary LaHood is thus responsible, in his official capacity, for the FRA's role in the unlawful promulgation of the Metrics and Standards and for the related acts and omissions alleged herein.

15. Defendant DOT is an executive agency of the United States Government located at 1200 New Jersey Avenue, SE, Washington, DC 20590.

16. Defendant Joseph C. Szabo is sued in his official capacity as Administrator of the FRA. PRIIA gives the FRA joint authority for developing Metrics and Standards for measuring passenger train performance. Administrator Szabo is the federal official responsible for the operation and management of the FRA and is therefore responsible, in his official capacity, for the FRA's role in the unlawful promulgation of the Metrics and Standards and for the related acts and omissions alleged herein.

17. Defendant FRA is sued as the federal agency to which Congress delegated joint authority for promulgating the Metrics and Standards. The FRA is an executive

agency of the United States Government located at 1200 New Jersey Avenue, SE, Washington, DC 20590.

18. Defendants, and those subject to their supervision, direction, and control are responsible for the actions complained of herein. The relief requested in this action is sought against each Defendant, as well as against each Defendant's officers, employees, and agents, and against all persons acting in cooperation with Defendant(s), under their supervision, at their direction, or under their control.

BACKGROUND

A. The Birth of Amtrak

19. In the 1960s, many private railroads offered passenger service. By then, the creation of the interstate highway system and the growth of air travel, among other things, had already weakened the economics of passenger rail service, which had been the principal means of intercity passenger travel for more than a century. Although passenger service was not profitable — and the railroads that offered it incurred heavy losses doing so — they were common carriers and therefore required to offer passenger service unless relieved of this responsibility by the Interstate Commerce Commission or state regulatory authorities. In light of the economics, many railroads sought permission to discontinue passenger service.

20. In 1970, Congress enacted the Rail Passenger Service Act to revive the failing intercity passenger train industry. The Act established the National Railroad Passenger Corporation, better known as Amtrak, to assume the role of provider of

intercity passenger rail service. Congress has specifically provided that Amtrak “is not a department, agency, or instrumentality of the United States Government” but is rather a private, “for-profit corporation” authorized by the Government to operate intercity passenger rail service. *See* 49 U.S.C. § 24301(a).

21. Amtrak began offering passenger service on May 1, 1971. Because the nation’s rail infrastructure was at the time largely owned by the freight railroads, the only option was to operate Amtrak’s passenger trains on the freight railroads’ tracks. The same is true today: Amtrak runs primarily on tracks owned by freight railroads. In fact, 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads.

22. Amtrak has entered into contracts with the freight railroads that host the Amtrak trains. These contracts — commonly known as operating agreements — are painstakingly negotiated documents that were executed soon after Amtrak’s creation and have been amended or renegotiated over the years. The operating agreements generally provide that the railroads will grant Amtrak the use of their tracks at agreed-upon rates, and spell out the rights and duties of the parties, consistent with the freight railroads’ statutory obligations. The FRA has described the operating agreements between Amtrak and its host railroads as “private agreements among private parties.” *See* Report of the Inspector General, U.S. Department of Transportation, *Amtrak Cascades and Coast Starlight Routes: Implementation of New Metrics and Standards Is Key to Improving On-Time Performance* (Sept. 23, 2010).

B. Amtrak's Difficulties

23. Amtrak is not, and has never been, self-sufficient. It relies on heavy federal subsidies to continue operations. There are many reasons for the problems that plague Amtrak: travelers prefer cars for short trips; air travel is far faster and often less expensive for long trips; many Amtrak stations lack nearby car rental facilities; and much of Amtrak's equipment is antiquated.

24. In addition to these difficulties, Amtrak has long struggled to run its trains on time. Its endemic delays have, in turn, deterred travelers from choosing Amtrak, thereby making its precarious financial situation even worse. In 2007, Congress requested the U.S. Department of Transportation's Inspector General "to produce a quantitative assessment of Amtrak's poor OTP [On-Time Performance]." The Inspector General concluded that "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." The report further determined that:

Amtrak is unable to generate sufficient revenues from ticket sales and other sources to cover its operating costs or pay any of its debt or capital costs.

As a result, in FY 2008, Amtrak will receive a Federal subsidy of \$1.3 billion, including \$475 million in operating subsidies. 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.

See Report of the Inspector General, U.S. Department of Transportation, Effects of Amtrak's Poor On-Time Performance (March 28, 2008).

C. The Passenger Rail Investment and Improvement Act of 2008

25. On October 16, 2008, Congress passed the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (PRIIA). PRIIA reauthorizes Amtrak, and makes numerous amendments to Title 49 of the U.S Code.

26. Section 207(a) of PRIIA purports to authorize Amtrak, jointly with the Federal Railroad Administration, to develop and promulgate binding "metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." It provides:

Within 180 days after the date of enactment of this Act [Oct. 16, 2008], the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.

27. Section 207(a) of PRIIA further provides: “Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation.”

28. Section 207(c) of PRIIA, entitled “Contracts With Host Rail Carriers,” provides: “To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.”

29. Section 213 of PRIIA provides: “If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters . . . the Surface Transportation Board may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation.”

30. As part of its investigation, the Board shall “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.”

PRIIA, § 213. “If the Board determines that delays or failures to achieve minimum

standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation," as required by 49 U.S.C. § 24308(c), "the Board may award damages against the host rail carrier" and "prescrib[e] such other relief to Amtrak as it determines to be reasonable and appropriate." PRIIA, § 213.

31. In fashioning a remedy, the Board may consider the need for compensation as well as deterrence, and may "order the host rail carrier to remit the damages awarded under this subsection to Amtrak," which must use the money "for capital or operating expenditures on the routes" at issue. PRIIA § 213.

32. The statute also provides that compliance with the Metrics and Standards may be relevant factors in choosing among competitive bidders under PRIIA § 214, and in allocating capital grants benefiting the states under PRIIA § 301.

D. The Metrics and Standards

33. Pursuant to the statutory mandate, Amtrak and the FRA jointly drafted Metrics and Standards for measuring the on-time performance and train delays for Amtrak trains operated on tracks owned by the freight railroads.

34. On March 13, 2009, Amtrak and the FRA posted their proposed Metrics and Standards on the FRA's website. The FRA simultaneously filed a notice in the Federal Register requiring that comments on the proposed Metrics and Standards be submitted within 14 days. *See Metrics and Standards for Intercity Passenger Rail Service*, 74 Fed. Reg. 10983 (March 13, 2009).

35. On May 6, 2010, Amtrak and the FRA jointly issued their responses to the comments and issued their final rule establishing the Metrics and Standards. The Metrics

and Standards became effective on May 11, 2010. *See* Metrics and Standards for Intercity Passenger Rail Service, 75 Fed. Reg. 26839 (May 12, 2010). The FRA posted the Metrics and Standards on its website. *See* www.fra.dot.gov/us/content/2165.

On-Time Performance

36. The Metrics and Standards provide that Amtrak's on-time performance be assessed by three metrics: Effective Speed, Endpoint On-Time-Performance, and All-Stations On-Time Performance.

37. Effective Speed is the distance of the route divided by the average time it actually takes for Amtrak trains on the route to get from one endpoint to the other. To be deemed satisfactory, a route's Effective Speed must be equal to or better than the route's Effective Speed in 2007.

38. Endpoint On-Time Performance measures how often the trains on the route arrive on time at the endpoint terminal. A train on a short trip is deemed "late" if it arrives at its endpoint more than 10 minutes after its scheduled arrival time. A train on a longer trip is granted a tolerance of 30 minutes. To be deemed satisfactory, Endpoint OTP must be at least 80 percent (increasing to 85 and 90 percent in future years).

39. All-Stations On-Time Performance measures how often the trains on the route arrive on-time (within 15 minutes of the public timetables) at each station on the route. To be deemed satisfactory, All-Stations OTP must be at least 80 percent (increasing to 85 and 90 percent in future years).

40. To satisfy the On-Time Performance metric, a route must maintain an Effective Speed equal to or better than the route's Effective Speed in 2007, and it must

maintain an 80 percent Endpoint and All Stations On-Time Performance (increasing to 85 and 90 percent in future years). If a route fails any one of these three requirements, its performance is not deemed satisfactory and the host railroad may be subject to civil sanctions.

41. Historically, Amtrak has achieved 80 percent OTP on routes over 400 miles only twice since Amtrak was founded in 1971 and has achieved 80 percent OTP less than half the time on shorter trips.

Delay Minutes

42. The Metrics and Standards establish limits on the permissible minutes of delay attributable to the host railroads. Freight railroads are allowed no more than 900 minutes of host-responsible delays per 10,000 route miles. Delays are assessed on a route-by-route basis, and are calculated based on deviations from the route's "pure run time" (the fastest possible trip for an Amtrak train over a route, with no other traffic or delays). Thus, if the pure run time for a route is 1 hour, and a train completes the route in 1 hour 10 minutes, that is recorded as a 10-minute delay, even if the published schedule for the route identifies it as a 1 hour 10 minute trip.

43. The host railroad is not responsible for all delays. In cases where a third party or Amtrak itself is responsible for the delay, those delay minutes do not count toward the host railroad's limit. However, the Metrics and Standards explain that the basis for determining who is at fault for a particular delay will be Amtrak's Conductor Delay Reports. These are reports prepared by the conductor of the delayed Amtrak train and are, according to Amtrak, based solely on what the conductor personally observes or

assumes. In many cases, the conductor must complete the report and assign fault based on very limited information, *e.g.*, when the train is stopped for reasons unknown to the conductor. In other cases, the conductor may lack full understanding of the reason for a delay, *e.g.*, in a case where the host railroad directs the Amtrak train to stop in order to permit the Federal Railroad Administration to inspect the track, the conductor may not realize that the delay was prompted by the Government rather than the host railroad. Consequently, in many instances, the conductor misidentifies the true root cause of a delay.

E. FRA Determines The Metrics And Standards Are Not Being Met On Numerous Routes.

44. The Metrics and Standards became effective on May 11, 2010. In February 2011, the FRA issued its first quarterly report identifying the freight railroads' lines on which the Metrics and Standards are not being met. *See Quarterly Report on the Performance and Service Quality of Intercity Passenger Train Operations.* (All quarterly reports are available at www.fra.dot.gov/us/content/2165.) In a cover letter accompanying the report, the FRA Administrator stated that Amtrak has "provided the data necessary to populate this report." The report determined that the Metrics and Standards were not achieved on numerous routes during the July-September 2010 period.

45. The FRA issued its second quarterly report in April 2011. That report, which covers performance during the October-December 2010 period, reflects the same conclusion: the Metrics and Standards are not being met on numerous routes.

46. The FRA issued its third quarterly report in July 2011. This report covers performance during the January-March 2011 period. Like the two prior reports, it determines that the Metrics and Standards are not being achieved on numerous routes.

CLAIMS FOR RELIEF

CLAIM ONE: VIOLATION OF THE UNITED STATES CONSTITUTION (NONDELEGATION AND SEPARATION OF POWERS)

47. Plaintiff incorporates by reference the foregoing allegations.

48. The Constitution bars Congress from delegating to private parties the power to regulate the conduct of other private parties.

49. Amtrak “is not a department, agency, or instrumentality of the United States Government” but a private entity that is “operated and managed as a for-profit corporation.” 49 U.S.C. § 24301(a).

50. Section 207 of PRIIA purports to vest Amtrak with legislative and rulemaking authority to issue regulations that govern the conduct of the freight railroads. Amtrak has now exercised that authority by promulgating the Metrics and Standards.

51. Section 207 of PRIIA violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity that participates in the very industry it is supposed to regulate.

CLAIM TWO: VIOLATION OF THE UNITED STATES CONSTITUTION (DUE PROCESS)

52. Plaintiff incorporates by reference the foregoing allegations.

53. Vesting the coercive power of the government in interested private parties violates the due process rights of regulated third parties, as secured by the Fifth Amendment to the United States Constitution.

54. Section 207 of PRIIA violates the due process rights of the freight railroads because it purports to empower Amtrak to wield legislative and rulemaking power to enhance its commercial position at the expense of other industry participants.

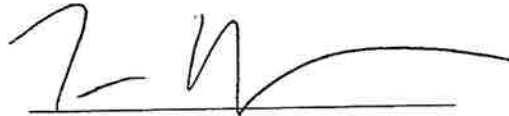
PRAYER FOR RELIEF

Wherefore, Plaintiff AAR respectfully requests that the Court issue an order:

- (a) Declaring that Section 207 of PRIIA is unconstitutional;
- (b) Vacating the Metrics and Standards;
- (c) Declaring that any action previously taken by Defendants pursuant to Section 207 of PRIIA is null and void, including promulgating the Metrics and Standards;
- (d) Enjoining Defendants and their officers, employees, and agents from implementing, applying, or taking any action whatsoever pursuant to Section 207 of PRIIA or the Metrics and Standards;
- (e) Awarding Plaintiff its reasonable costs, including attorney's fees, incurred in bringing this action; and

(f) Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. H. Dupree, Jr.', written over a horizontal line.

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Dated: August 19, 2011.

EXHIBIT A

the appropriated amounts for each area of expenditure in a given fiscal year, in the following 2 accounts:

- (1) The Amtrak Operating account.
- (2) The Amtrak General Capital account.

Amtrak may not transfer such funds to another account or expend such funds for any purpose other than the purposes covered by the account in which the funds are deposited without approval by the Secretary.

Deadlines.

(c) REVIEW AND APPROVAL.—

Notification.

(1) 30-DAY APPROVAL PROCESS.—The Secretary shall complete the review of a grant request (including the disbursement schedule) and approve or disapprove the request within 30 days after the date on which Amtrak submits the grant request. If the Secretary disapproves the request or determines that the request is incomplete or deficient, the Secretary shall include the reason for disapproval or the incomplete items or deficiencies in a notice to Amtrak.

(2) 15-DAY MODIFICATION PERIOD.—Within 15 days after receiving notification from the Secretary under the preceding sentence, Amtrak shall submit a modified request for the Secretary's review.

(3) REVISED REQUESTS.—Within 15 days after receiving a modified request from Amtrak, the Secretary shall either approve the modified request, or, if the Secretary finds that the request is still incomplete or deficient, the Secretary shall identify in writing to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate the remaining deficiencies and recommend a process for resolving the outstanding portions of the request.

49 USC 24101
note.
Deadline.

SEC. 207. METRICS AND STANDARDS.

(a) IN GENERAL.—Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation. Amtrak shall provide reasonable access to the Federal Railroad Administration in order to enable the Administration to carry out its duty under this section.

Publication.

(b) QUARTERLY REPORTS.—The Administrator of the Federal Railroad Administration shall collect the necessary data and publish

a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

(c) **CONTRACTS WITH HOST RAIL CARRIERS.**—To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.

(d) **ARBITRATION.**—If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.

SEC. 208. METHODOLOGIES FOR AMTRAK ROUTE AND SERVICE PLANNING DECISIONS.

(a) **METHODOLOGY DEVELOPMENT.**—Within 180 days after the date of enactment of this Act, the Federal Railroad Administration shall obtain the services of a qualified independent entity to develop and recommend objective methodologies for Amtrak to use in determining what intercity passenger routes and services it will provide, including the establishment of new routes, the elimination of existing routes, and the contraction or expansion of services or frequencies over such routes. In developing such methodologies, the entity shall consider—

(1) the current or expected performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services;

(2) connectivity of a route with other routes;

(3) the transportation needs of communities and populations that are not well served by intercity passenger rail service or by other forms of intercity transportation;

(4) Amtrak's and other major intercity passenger rail service providers in other countries' methodologies for determining intercity passenger rail routes and services; and

(5) the views of the States and other interested parties.

(b) **SUBMITTAL TO CONGRESS.**—Within 1 year after the date of enactment of this Act, the entity shall submit recommendations developed under subsection (a) to Amtrak, the Committee on Transportation and Infrastructure of the House of Representatives, and the Committee on Commerce, Science, and Transportation of the Senate.

(c) **CONSIDERATION OF RECOMMENDATIONS.**—Within 90 days after receiving the recommendations developed under subsection (a) by the entity, the Amtrak Board of Directors shall consider the adoption of those recommendations. The Board shall transmit a report to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate explaining its reasons for adopting or not adopting the recommendations.

SEC. 209. STATE-SUPPORTED ROUTES.

(a) **IN GENERAL.**—Within 2 years after the date of enactment of this Act, the Amtrak Board of Directors, in consultation with the Secretary, the governors of each relevant State, and the Mayor

Deadlines.
49 USC 24101
note.
Recommendations.

Reports.

49 USC 24101
note.
Deadline.

(B) an analysis of any significant obstacles that would hinder such an achievement;

(C) a detailed description and cost estimate of the specific infrastructure and equipment improvements necessary for such an achievement; and

(D) an initial assessment of the infrastructure and equipment improvements, including an order of magnitude cost estimate of such improvements, that would be necessary to provide regular high-speed service—

(i) between Washington, District of Columbia, and New York, New York, in 2 hours and 15 minutes; and

(ii) between New York, New York, and Boston, Massachusetts, in 3 hours.

(3) REPORT.—Within 1 year after the date of enactment of this Act, Amtrak shall submit the report required under this subsection to—

(A) the Committee on Commerce, Science, and Transportation of the Senate;

(B) the Committee on Appropriations of the Senate;

(C) the Committee on Transportation and Infrastructure of the House of Representatives;

(D) the Committee on Appropriations of the House of Representatives; and

(E) the Federal Railroad Administration.

(e) REPORT ON NORTHEAST CORRIDOR ECONOMIC DEVELOPMENT.—Within 2 years after the date of enactment of this Act, the Northeast Corridor Infrastructure and Operations Advisory Commission shall transmit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the role of Amtrak's Northeast Corridor service between Washington, District of Columbia, and New York, New York, in the economic development of the Northeast Corridor region. The report shall examine how to enhance the utilization of the Northeast Corridor for greater economic development, including improving—

(1) real estate utilization;

(2) improved intercity, commuter, and freight services; and

(3) optimum utility utilization.

SEC. 213. PASSENGER TRAIN PERFORMANCE.

(a) IN GENERAL.—Section 24308 is amended by adding at the end the following:

“(f) PASSENGER TRAIN PERFORMANCE AND OTHER STANDARDS.—

“(1) INVESTIGATION OF SUBSTANDARD PERFORMANCE.—If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board (referred to in this section as the ‘Board’) may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation,

49 USC 24308.

Recommendations.

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, 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.

“(2) PROBLEMS CAUSED BY HOST RAIL CARRIER.—If the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required under subsection (c), the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.

“(3) DAMAGES AND RELIEF.—In awarding damages and prescribing other relief under this subsection the Board shall consider such factors as—

“(A) the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards; and

“(B) what reasonable measures would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.

“(4) USE OF DAMAGES.—The Board shall, as it deems appropriate, order the host rail carrier to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service. Such damages shall be used for capital or operating expenditures on the routes over which delays or failures to achieve minimum standards were the result of a rail carrier’s failure to provide preference to Amtrak over freight transportation as determined in accordance with paragraph (2).”

49 USC 24308 note.

(b) FEES.—The Surface Transportation Board may establish and collect filing fees from any entity that files a complaint under section 24308(f)(1) of title 49, United States Code, or otherwise requests or requires the Board’s services pursuant to this division. The Board shall establish such fees at levels that will fully or partially, as the Board determines to be appropriate, offset the costs of adjudicating complaints under that section and other requests or requirements for Board action under this division. The Board may waive any fee established under this subsection for any governmental entity as determined appropriate by the Board.

Waiver authority.

(c) AUTHORIZATION OF ADDITIONAL STAFF.—The Surface Transportation Board may increase the number of Board employees by up to 15 for the 5 fiscal year period beginning with fiscal year 2009 to carry out its responsibilities under section 24308 of title 49, United States Code, and this division.

49 USC 24308.

(d) CHANGE OF REFERENCE.—Section 24308 is amended—

(1) by striking “Interstate Commerce Commission” in subsection (a)(2)(A) and inserting “Surface Transportation Board”;

(2) by striking “Commission” each place it appears and inserting “Board”;

(3) by striking “Secretary of Transportation” in subsection (c) and inserting “Board”; and

(4) by striking “Secretary” the last 3 places it appears in subsection (c) and each place it appears in subsections (d) and (e) and inserting “Board”.

SEC. 214. ALTERNATE PASSENGER RAIL SERVICE PILOT PROGRAM.

(a) **IN GENERAL.**—Chapter 247, as amended by section 210, is amended by adding at the end thereof the following:

“§ 24711. Alternate passenger rail service pilot program

“(a) **IN GENERAL.**—Within 1 year after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008, the Federal Railroad Administration shall complete a rulemaking proceeding to develop a pilot program that—

Deadline.
Regulations.

“(1) permits a rail carrier or rail carriers that own infrastructure over which Amtrak operates a passenger rail service route described in subparagraph (B), (C), or (D) of section 24102(5) or in section 24702 to petition the Administration to be considered as a passenger rail service provider over that route in lieu of Amtrak for a period not to exceed 5 years after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008;

“(2) requires the Administration to notify Amtrak within 30 days after receiving a petition under paragraph (1) and establish a deadline by which both the petitioner and Amtrak would be required to submit a bid to provide passenger rail service over the route to which the petition relates;

Notification.
Deadlines.

“(3) requires that each bid describe how the bidder would operate the route, what Amtrak passenger equipment would be needed, if any, what sources of non-Federal funding the bidder would use, including any State subsidy, among other things;

“(4) requires the Administration to select winning bidders by evaluating the bids against the financial and performance metrics developed under section 207 of the Passenger Rail Investment and Improvement Act of 2008 and to give preference in awarding contracts to bidders seeking to operate routes that have been identified as one of the five worst performing Amtrak routes under section 24710;

“(5) requires the Administration to execute a contract within a specified, limited time after the deadline established under paragraph (2) and award to the winning bidder—

“(A) the right and obligation to provide passenger rail service over that route subject to such performance standards as the Administration may require, consistent with the standards developed under section 207 of the Passenger Rail Investment and Improvement Act of 2008; and

“(B) an operating subsidy—

“(i) for the first year at a level not in excess of the level in effect during the fiscal year preceding the fiscal year in which the petition was received, adjusted for inflation;

“(ii) for any subsequent years at such level, adjusted for inflation; and