237400

GIBSON DUNN

ENTERED
Office of Proceedings
January 7, 2015
Part of
Public Record

Gibson, Dunn & Crutcher LLP

1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Thomas H. Dupree Jr.
Direct: +1 202.955.8547
Fax: +1 202.530.9670
TDupree@gibsondunn.com

January 7, 2015

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

Re: In Re: National Railroad Passenger Corporation's Complaint to Initiate Investigation of the Performance of the Capitol Limited (STB Docket No. NOR 42141)

Dear Ms. Brown,

Enclosed for filing in the above-referenced docket is CSX Transportation's Motion to Dismiss the National Railroad Passenger Corporation's Complaint to Initiate Investigation of the Performance of the Capitol Limited.

Please note that CSXT uses a different caption for this matter because Amtrak's proposed caption is incorrect for two reasons. First, it presupposes that the Board has already launched an investigation. Second, it concludes that the performance of the Capitol Limited is "substandard" before an investigation has occurred.

Thank you for your assistance with this matter.

Sincerely,

/s/ Thomas H. Dupree, Jr.

Thomas H. Dupree, Jr.

Counsel for CSX Transportation, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42141

IN RE NATIONAL RAILROAD PASSENGER CORPORATION'S COMPLAINT TO INITIATE INVESTIGATION OF THE PERFORMANCE OF THE CAPITOL LIMITED

MOTION TO DISMISS

Peter J. Shudtz
CSX TRANSPORTATION, INC.
1331 Pennsylvania Avenue, N.W.
Suite 560
Washington, D.C. 20004
Tel. (202) 783-8124
peter_shudtz@csx.com

Paul R. Hitchcock
Cindy Craig Johnson
Sean M. Craig
CSX TRANSPORTATION, INC.
500 Water Street, J150
Jacksonville, FL 32202-4423
Tel. (904) 359-1192
paul_hitchcock@csx.com

Thomas H. Dupree, Jr.
John Christopher Wood
Michael K. Murphy
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. (202) 955-8500
tdupree@gibsondunn.com

Charles D. Nottingham
CHARLES D. NOTTINGHAM PLLC
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006
Tel. (202) 215-5456
chipnottingham@verizon.net

Counsel for CSX Transportation, Inc.

Dated: January 7, 2015

MOTION TO DISMISS

CSX Transportation, Inc. moves the Board to dismiss Amtrak's complaint.

INTRODUCTION

Amtrak asks the Board to launch an investigation based on a statutory scheme that has been struck down as unconstitutional. In *Association of American Railroads v. United States Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), the D.C. Circuit invalidated Section 207 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"). That provision authorized Amtrak and the Federal Railroad Administration ("FRA") to jointly issue Metrics and Standards governing on-time performance. Section 213 of PRIIA, in turn, provides that the Board shall, at Amtrak's request, open an investigation of any route where on-time performance falls below 80 percent.

Because the D.C. Circuit has invalidated the Metrics and Standards governing on-time performance, there is no basis for the Board to assess whether its jurisdiction has properly been invoked. Nor is Amtrak correct in contending that the Board itself has the power to issue regulations governing on-time performance for purposes of a Section 213 investigation. Congress expressly gave that power to Amtrak and the FRA—not to the Board. For those reasons, the Board should decline to open an investigation and should dismiss Amtrak's complaint.

BACKGROUND

Section 207(a) of PRIIA, 49 U.S.C. § 24101 (note), provides that Amtrak and FRA "shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including . . . on-time performance and minutes of delay . . . ." Section 213 of PRIIA, 49 U.S.C. § 24308(f), provides

that "[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters," the Board "shall initiate" an investigation at Amtrak's request "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."

In 2010, Amtrak and the FRA jointly issued the Metrics and Standards. *See* 75 Fed. Reg. 26,839 (May 12, 2010) (available at www.fra.dot.gov/Elib/Document/1511). The Metrics and Standards defined On-Time Performance by establishing "three tests" that "must be met" in "a given quarter" for the standard to be deemed satisfied as to the route in question. Metrics and Standards at 26. The three tests are "Effective Speed" (defined as "a train's mileage, divided by the sum of (a) the scheduled end-to-end running time plus (b) the average endpoint terminal lateness"); "Endpoint OTP" ("A train is considered 'late' if it arrives at its endpoint terminal more than . . . 30 minutes [after its scheduled arrival time] for trips of 551 or more miles"); and "All-Stations OTP" (defined as "the percentage of train times . . . at all of a train's stations that take place within 15 minutes . . . of the time in the public schedule."). Metrics and Standards at 26-27.

In 2013, the D.C. Circuit struck down PRIIA Section 207 as an unconstitutional delegation. The court held that Congress could not vest Amtrak—created by law as a private entity—with rulemaking power over other companies in the same industry. *See Ass'n of Am. R.R.*, 721 F.3d at 677. The Supreme Court granted the Government's petition for certiorari and held oral argument on December 8, 2014.

ARGUMENT

Amtrak's complaint must be dismissed because there can be no Section 213 investigation without the Section 207 Metrics and Standards—which define the On-Time Performance standard necessary to trigger an investigation. Amtrak's claim that the Board may issue its own definition of On-Time Performance is contrary to the statutory language and congressional intent.

I. The Board Cannot Commence A Section 213 Investigation Absent The Section 207 Metrics And Standards.

The trigger for a Section 213 investigation is a violation of the On-Time Performance standard or the "service quality" standards issued through the Section 207 rulemaking process. *See* 49 U.S.C. § 24308(f). Because Section 207 has been declared unconstitutional by the D.C. Circuit, the Board cannot begin a Section 213 investigation.

Throughout the federal litigation over the Metrics and Standards, the federal courts and the Government itself expressly recognized that a Section 213 investigation was triggered by a violation of the Section 207 Metrics and Standards:

- The district court stated that Section 213 empowers the Board "to initiate an investigation if Amtrak fails to meet the on-time performance standards laid out in the Metrics and Standards." *Ass'n of Am. R.R. v. U.S. Dept. of Trans.*, 865 F. Supp. 2d 22, 26 (D.D.C. 2012).
- The D.C. Circuit stated that: "Though § 207 provides the means for devising the metrics and standards, § 213 is the enforcement mechanism. If the 'on-time performance' or 'service quality' of any intercity passenger train proves inadequate under the metrics and standards for two consecutive quarters, the STB may launch an investigation . . . ." *Ass'n of Am. R.R.*, 721 F.3d at 669.

- The Solicitor General took the position in the Supreme Court that "the investigation by the Surface Transportation Board is triggered by there having been a failure by Amtrak to satisfy the metrics and standards." S. Ct. No. 13-1080, Tr. of Oral Arg. at 8 (Dec. 8, 2014) (attached hereto as Exhibit 1).

In fact, even before the litigation began, the Board itself had recognized that "Section 213 of PRIIA establishes a process for investigation by STB in certain circumstances when the new metrics and standards are not met . . . ." FRA Doc. No. 2009-0016-0014 (Feb. 13, 2009) (STB comments on proposed Metrics and Standards).

The statutory text confirms what the courts and the parties have long recognized: the triggering event for a Section 213 investigation is a violation of the Section 207 Metrics and Standards. Because the Metrics and Standards have been declared unconstitutional, there is no longer a triggering mechanism—and the Board thus cannot commence a Section 213 investigation. For that reason, the Board should dismiss Amtrak's complaint.

II. The Rationale Offered In The Board's *Canadian National* Ruling Is Erroneous.

In its recent *Canadian National* ruling, the Board concluded that it has the power to commence a Section 213 investigation notwithstanding the invalidation of the Metrics and Standards. In the Board's view, it has the power to create its own On-Time Performance standard—and can then use the new, Board-created standard as a triggering mechanism to launch a Section 213 investigation. The *Canadian National* reasoning is erroneous, and the Board should reconsider it.

A. Section 213 Uses The Metrics And Standards As The Trigger To A Board Investigation.

The Board's approach contradicts the statutory language. Section 213's reference to On-Time Performance refers to the On-Time Performance standard issued pursuant to Section 207.

It does *not* refer to another, unspecified On-Time Performance standard that the Board or another agency might create. Sections 207 and 213 were enacted simultaneously as part of PRIIA. "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007). This canon of construction "is doubly appropriate here," because Congress included the term On-Time Performance in both sections of the statute "at the same time," when it enacted PRIIA. *Id*. It violates this well-settled rule of statutory interpretation to conclude that Congress meant the Amtrak/FRA-developed On-Time Performance standard when it enacted Section 207, but was referring to a different On-Time Performance standard when it simultaneously enacted Section 213. The most natural reading—indeed, the only tenable reading—of Section 213's use of On-Time Performance is that it refers to the On-Time Performance standard developed through the Section 207 process.

When Congress intends to delegate authority to the Board to promulgate rules and define statutory terms, it does so explicitly. For instance, in the Rail Passenger Service Act of 1970, Congress explicitly delegated authority to the Interstate Commerce Commission to "prescribe such regulations as it considers necessary to provide safe and adequate service, equipment, and facilities for intercity rail passenger service." Pub. L. No. 91-518, § 801, 84 Stat. 1327, 1339 (1970) (codified at 45 U.S.C. § 641). Congress repealed this provision in the Amtrak Reorganization Act of 1979, explicitly removing power from the Commission to prescribe potentially broad-reaching regulations to ensure adequate service, and it has never returned such authority to the Board. *See* Pub. L. No. 96-73, § 111(b); 93 Stat. 537, 541 (1979).

B. The Board Lacks Authority To Enact Its Own "On-Time Performance" Standard For Purposes Of A Section 213 Investigation.

The Board stated that "the statute is silent, or at least ambiguous, regarding whether the Board may independently define 'on-time performance'" for purposes of a Section 213 investigation. *Nat'l. R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Can. Nat'l. Ry. Co*., Dkt. No. NOR 42134, Decision at 9 (STB Dec. 19, 2014). That is not correct. The statute expressly grants Amtrak and the FRA the power to define On-Time Performance for purposes of Section 213. It did not give this power to the Board. To be sure, Congress provided that Amtrak and the FRA must *consult* with the Board in defining On-Time Performance, *see* PRIIA § 207(a), but it plainly vested the rulemaking authority in Amtrak and the FRA. In *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013), the court considered whether the Department of Labor had rulemaking authority based on a statute that granted rulemaking authority to the Department of Homeland Security, but gave the Department of Labor a "consulting role"—the same structure that appears in PRIIA § 207. The court rejected the Department of Labor's claim that it could exercise rulemaking authority in this situation as "an absurd reading of the statute." *Id*. at 1084.

By giving Amtrak and the FRA the power to define On-Time Performance for purposes of a Section 213 investigation, Congress necessarily prohibited the Board from issuing its own definition. It is not remotely plausible to conclude, as the Board does, that Congress intended to allow competing definitions of On-Time Performance—one version created by Amtrak and the FRA, the other created by the Board. That would be a recipe for chaos. Grants of rulemaking power are necessarily exclusive: by vesting one entity with specific rulemaking power, Congress implicitly precludes other entities from wielding that same power. *See Bayou Lawn*, 713 F.3d at 1084-85 ("Even if it were not axiomatic that an agency's power to promulgate legislative

regulations is limited to the authority delegate[d] to it by Congress, . . . [courts] would be hard-pressed to locate that power in one agency where it had been specifically and expressly delegated by Congress to a different agency.”).

The Board is wrong in concluding that the statute is “silent” on the question of who may issue regulations defining On-Time Performance. *Canadian National*, slip op. at 9. But even if the Board were correct, it would still lack rulemaking authority. As the D.C. Circuit has held time and again, “if there is no statute conferring authority, a federal agency has none.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Indeed, “if congressional silence is a sufficient basis upon which an agency may build a rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change and ‘agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.’” *Bayou Lawn*, 713 F.3d at 1085 (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (citation omitted)).

The D.C. Circuit has forcefully rejected the Board’s reasoning that, under *Chevron*, it may permissibly interpret purported congressional silence as conferring rulemaking power. *See Canadian National*, slip op. at 9-10 (relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). This is not a case “in which principles of deference to an agency’s interpretation come into play,” as “[s]uch deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied ‘delegation of authority to the agency.’” *Ry. Labor Executives’ Ass’n v. Nat’l. Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (quoting *Chevron,* 467 U.S. at 843-44). Indeed, “[t]o suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in ‘thou shalt

not' terms), is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Id*. Incredibly, nowhere in its *Canadian National* ruling does the Board actually identify the statutory authority purportedly empowering it to define On-Time Performance.

C. The Board's Reliance On Congressional "Purpose" Is Misplaced.

Rather than identify a statutory basis for its exercise of rulemaking power, the Board relies on the ostensible "purpose" of Congress, and concludes that Congress would not have wanted the Board to be unable to enforce such an "important" provision. *Canadian National*, slip op. at 6-8. This rationale fails because an agency may not rewrite the text of a statute—in this case, a statute giving Amtrak and the FRA the power to define On-Time Performance—in an effort to fulfill what the agency divines as the statute's underlying purpose. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. ___, 134 S. Ct. 2427, 2446 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

Moreover, the Board's reasoning is not persuasive. Its "severability" analysis, *Canadian National*, slip op. at 7-8, is misplaced because the question is not whether Section 213 is "severable" from Section 207—even if it were, that would not entitle the Board to define On-Time Performance. Its discussion of legislative history, *id.* at 8, is similarly unpersuasive. The fact that Congress wished to create a mechanism for improving Amtrak's on-time performance does not give the Board the right to ignore the scheme that Congress wrote into law, and to arrogate to itself a power Congress chose to give to Amtrak and the FRA rather than to the Board. And the Board's repeated mentions of the fact that on-time performance metrics "were already existing at the time of PRIIA's passage," *id.* at 7 (quotation marks and emphasis omitted); *see also id*. at 8, 9, undercuts the Board's argument. Congress knew that these metrics existed—and deemed them unacceptable for purposes of a Section 213 investigation. Indeed,

Congress could not have spoken more clearly in this regard, by directing Amtrak and the FRA to develop a "new" On-Time Performance standard or to "improve [the] existing" standard. *See* PRIIA § 207(a).

CONCLUSION

The Board should dismiss Amtrak's Complaint.

Respectfully submitted,

/s/ Thomas H. Dupree, Jr.
Thomas H. Dupree, Jr.
John Christopher Wood
Michael K. Murphy
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. (202) 955-8500
tdupree@gibsondunn.com

Peter J. Shudtz
CSX TRANSPORTATION, INC.
1331 Pennsylvania Avenue, N.W.
Suite 560
Washington, DC 20004
Tel. (202) 783-8124
peter_shudtz@csx.com

Paul R. Hitchcock
Cindy Craig Johnson
Sean M. Craig
CSX TRANSPORTATION, INC.
500 Water Street, J150
Jacksonville, FL 32202-4423
Tel. (904) 359-1192
paul_hitchcock@csx.com

Charles D. Nottingham
CHARLES D. NOTTINGHAM PLLC
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, DC. 20006
Tel. (202) 215-5456
chipnottingham@verizon.net

Counsel for CSX Transportation, Inc.

Dated: January 7, 2015

CERTIFICATE OF SERVICE

I certify that, on this 7th day of January, 2015, I have caused a true and correct copy of the foregoing Response to the National Railroad Passenger Corporation's Complaint to Initiate Investigation to be served upon the parties listed below by electronic mail.

William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Linda J. Morgan
lmorgan@nossaman.com
Kevin M. Sheys
ksheys@nossaman.com
Katherine C. Bourdon
kbourdon@nossaman.com
Nossaman LLP
1666 K Street N.W., Suite 500
Washington, D.C. 20006

Counsel for National Railroad Passenger Corporation

James A. Hixon
John M. Scheib
Greg E. Summy
Garrett D. Urban
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
dmeyer@mofo.com
Klinton S. Miyao
Aaron D. Rauh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W., Suite 6000
Washington, D.C. 20006

Counsel for Norfolk Southern Railway Company

/s/ Thomas H. Dupree, Jr.
Thomas H. Dupree, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42141

IN RE NATIONAL RAILROAD PASSENGER CORPORATION'S COMPLAINT TO INITIATE INVESTIGATION OF THE PERFORMANCE OF THE CAPITOL LIMITED

MOTION TO DISMISS

EXHIBIT 1

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - - - - - - - - - - - - - - x
3 DEPARTMENT OF :
4 TRANSPORTATION, ET AL., :
5 Petitioners : No. 13-1080
6 v. :
7 ASSOCIATION OF AMERICAN :
8 RAILROADS. :
9 - - - - - - - - - - - - - - - - - - x
10 Washington, D.C.
11 Monday, December 8, 2014
12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:08 a.m.
16 APPEARANCES:
17 CURTIS E. GANNON, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of Petitioners.
20 THOMAS H. DUPREE, JR., ESQ., Washington, D.C.; on behalf
21 of Respondent.
22
23
24
25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 CURTIS E. GANNON, ESQ.

4 On behalf of the Petitioners 3

5 ORAL ARGUMENT OF

6 THOMAS H. DUPREE, JR., ESQ.

7 On behalf of the Respondent 26

8 REBUTTAL ARGUMENT OF

9 CURTIS E. GANNON, ESQ.

10 On behalf of the Petitioners 47

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 JUSTICE SCALIA: It was raised.

2 MR. GANNON: It certainty was raised.

3 JUSTICE SCALIA: And it's -- and it's argued

4 here.

5 MR. GANNON: It -- it has been argued in the

6 red brief here. And we do think that we're correct on

7 the merits with respect to the due process issue and

8 that -- for two principal reasons. One is that what is

9 at stake here is not the equivalent of what was going on

10 in the due process cases. This is not like the

11 de-licensing of optometrists in the Gibson v. Berryhill

12 case. It's not like the wage and hour requirements in

13 Carter Coal, because -- because the analogy to those

14 things here is the statutory preference requirement

15 rather than the antecedent metrics and standards.

16 JUSTICE SCALIA: Yes. But the statutory

17 preference requirement requires -- would require

18 consideration of whatever is determined by this body,

19 right?

20 MR. GANNON: The statutory preference

21 requirement is independent of the metrics and standards

22 and preexists them. That is what the Surface

23 Transportation Board would be enforcing in a proceeding

24 under Section 24308(f). The metrics and standards --

25 JUSTICE SCALIA: What must it consider?

1 MR. GANNON: The metrics and standards play
2 a triggering and gatekeeping role. The -- these
3 provisions are reprinted in the government's brief on
4 pages 15A and 16A of the appendix, that the -- the
5 investigation by the Surface Transportation Board is
6 triggered by their having been a failure by Amtrak to
7 satisfy the metrics and standards. But I think that --
8 that -- that is -- and if we're talking about the due
9 process cases, that is not the prohibition that
10 the Court has been concerned about. If you look at
11 cases like Roberge, which talked about Cusack, it said
12 that it's okay to have something that is presumptively
13 bad banned by the legislature.
14 Here, the analogy to that is the statutory
15 preference, and it's okay, then, to allow a private
16 party to relax its application in certain circumstances.
17 And we think that's the role that the metrics and
18 standards play here, because Congress could have allowed
19 Amtrak to ask for an STB investigation into violations
20 of the statute any time it wanted to. And instead what
21 they said is that it is only -- you are only going to
22 get that investigation when you have failed to -- to
23 perform at an adequate level such that we think there's
24 been adequate injury. And then in that investigation,
25 you are going to have to establish that the injury to

1 you was caused by the violation of the statute.
2 JUSTICE KENNEDY: So in your -- in your
3 view, the case would come out the same way if Amtrak
4 could issue these metrics and standards entirely on its
5 own, without consultation with the -- or cooperation
6 with the government. Same -- same case --
7 MR. GANNON: One of the --
8 JUSTICE KENNEDY: -- same result?
9 MR. GANNON: One prong of our argument is,
10 yes, that because this is not regulatory in that sense,
11 this is more like the neighbors being able to veto the
12 billboard in the neighborhood in Cusack, which the Court
13 said was okay in Roberge, because the statutory
14 preference is presumptively bad. Violations of the
15 statutory preference by the freight railroads were the
16 thing that Congress wanted to be enforceable here, and
17 the metrics and standards just cabin the circumstances
18 in which Amtrak can seek that kind of enforcement.
19 If I could return to the Chief Justice's
20 question about the --
21 CHIEF JUSTICE ROBERTS: You may. You may.
22 JUSTICE SOTOMAYOR: That doesn't stop -- do
23 the metes and standards stop you from initiating or stop
24 the agency from initiating a review, even if a carrier
25 meets the metes and standard?