

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 563

COMMUTER RAIL SERVICE CONTINUATION SUBSIDIES
AND DISCONTINUANCE NOTICES

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (Board) is proposing to remove from the Code of Federal Regulations regulations concerning subsidies for the continuation of commuter rail service and notices of the discontinuance of commuter rail service.

DATES: Comments are due on July 14, 1997.

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SUPPLEMENTARY INFORMATION: Effective January 1, 1996, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), abolished the Interstate Commerce Commission (ICC) and established the Board. Section 204(a) of the ICCTA provides that "[t]he Board shall promptly rescind all regulations established by the [ICC] that are based on provisions of law repealed and not substantively reenacted by this Act."

It appears that some of the regulations at 49 CFR part 1157 are based on repealed statutes. On the other hand, statutes outside the ICCTA refer to and hence may require the retention in substance of part 1157. We are instituting this proceeding to determine whether these regulations may be eliminated, or whether they have continuing validity and must be retained.

Part 1157 deals with the determination of commuter rail continuation subsidies for the Consolidated Rail Corporation (Conrail) (subpart A) and notices of the discontinuance of commuter rail service by Amtrak Commuter Services Corporation (Amtrak Commuter) (subpart B). The subpart A regulations are based in part on former 49 U.S.C. 10362, which, together with former section 10361, pertained to the Rail Services Planning Office (RSPO) of the former ICC.¹ Both section 10361 and section 10362 were repealed by the ICCTA.² Moreover, the ICCTA removed the requirement in 45 U.S.C. 744(e) that RSPO issue regulations for rail passenger subsidies for Conrail. *See* section 327(3) of the ICCTA. Finally, under 49 U.S.C. 10501(c)(2) of the ICCTA, with certain exceptions not relevant here,³ "the Board does not have jurisdiction under this part over

¹ These and other statutes will be discussed in greater detail, *infra*.

² Besides former 49 U.S.C. 10362, the regulations in part 1157, subpart A give for their statutory authority 49 U.S.C. 10321 and 5 U.S.C. 559. Section 10321, dealing with the ICC's general authority, has been carried over to 49 U.S.C. 721, while 5 U.S.C. 559 remains part of the Administrative Procedure Act.

³ The exceptions, listed in section 10501(c)(3)(A), make safety, employee representation for collective bargaining, and other employee-related matters subject to applicable federal laws. Also, under section 10501(c)(3)(B), the Board has jurisdiction over transportation by local transportation authorities relating to use of terminal facilities (section 11102) and switch connections and tracks (section 11103).

mass transportation provided by a local governmental authority.”⁴ As described *infra*, however, the subpart A regulations are referred to in an Amtrak Commuter statute that is still in effect. Accordingly, we seek comment on whether subpart A can be eliminated.

The regulations in part 1157, subpart B are based on 49 U.S.C. 24505(e)(2).⁵ As noted, while the ICCTA removed references in 45 U.S.C. 744(e) to regulations issued by RSPO, section 24505(e)(2) still refers to RSPO prescribing regulations for Amtrak Commuter discontinuance notices. As indicated, however, under section 10501(c)(2) the Board does not have jurisdiction over local governmental authorities providing mass transportation. Additionally, neither the Board (nor the ICC before it) has jurisdiction to regulate any of Amtrak’s service. We also seek comment on whether the subpart B regulations can be eliminated.

BACKGROUND

To assist parties in commenting on whether part 1157 should be retained, we will briefly describe the rather complex statutory setting for the regulations.

The Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (1970) (*Amtrak Act*), created the National Railroad Passenger Corporation, known as Amtrak, a for-profit corporation. *See* 49 U.S.C. 24301 *et seq.*⁶ Railroads that entered into contracts with Amtrak were relieved of their duties to provide intercity rail passenger service.

The Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985, 45 U.S.C. 701 *et seq.* (3R Act) created Conrail as a for-profit corporation to reorganize the bankrupt rail services in the Northeast and Midwest. Conrail was required by the 3R Act to continue providing rail service if states or local transportation authorities made payments to subsidize unprofitable operations. Section 304. The 3R Act also created RSPO, which was authorized to issue standards for defining accounting terms used in section 304. Section 205(d).⁷

⁴ Under former 49 U.S.C. 10504(b)(2), the ICC did not have jurisdiction over mass transportation provided by a local governmental authority if the fares, or the authority to apply to the Commission for changes in those fares, were subject to the approval of the Governor of the state in which the transportation was provided. The ICCTA broadened this exemption, and the Board currently does not have jurisdiction whether or not the Governor can approve a fare. “This provision . . . changes the statement of agency jurisdiction to reflect curtailment of regulatory jurisdiction in areas such as passenger transportation [A]lthough regulation of passenger transportation is generally eliminated, public transportation authorities . . . may invoke the terminal area and reciprocal switching access remedies of section 11102 and 11103.” *See* H. R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167 (1995). *See also, Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois, D/B/A Metra--Exemption--Tariff Filing Requirements*, Docket No. 41506 (STB, served Mar. 29, 1996).

⁵ The statutory authority given for the regulations in part 1157, subpart B is “49 U.S.C. 504(d)(2)” while the text of the regulations cites “45 U.S.C. 504(d)(2).” Neither of these references is currently correct. Section 1137 of the Northeast Rail Service Act of 1981, discussed *infra*, contains a section 504(d)(2) which was originally codified at 45 U.S.C. 584(d)(2). Section 584 was repealed by Pub. L. No. 103-272, section 7(b), July 5, 1994, 108 Stat. 745, and recodified at 49 U.S.C. 24505(e)(2) as part of a general restructuring of the United States Code “[t]o restate the laws related to transportation in one comprehensive title” H.R. Rep. No. 180, 103d Cong., 2d Sess. 3 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 820.

⁶ The Amtrak Act was originally codified at 45 U.S.C. 501-566.

⁷ Under the eventual statutory codification, RSPO was established as “an office in the Interstate Commerce Commission.” Former 49 U.S.C. 10361. In resolving the issue of whether final orders or regulations of RSPO were to be considered orders or regulations of the ICC, the court held that “[a]lthough Congress gave to the RSPO final administrative responsibility for certain
(continued...)

Subsequently, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), which amended portions of the 3R Act and also added new sections. The 4R Act established, *inter alia*, a program of Federal financial assistance for the continuation of certain rail commuter passenger services in the Midwest and Northeast regions. Section 304(e) of the 4R Act (now codified at 45 U.S.C. 744(e)) amended the 3R Act by explicitly adding a section pertaining to rail passenger service. Under this provision, Conrail was to continue providing rail passenger service if a state or local transportation authority offered a subsidy to pay for the unprofitable service.

Of significance to this proceeding, section 309 of the 4R Act amended section 205(d) of the 3R Act (49 U.S.C. 10362) to require RSPO to develop standards for the computation of subsidies for the continuation of these commuter services.⁸ RSPO issued the regulations on August 3, 1976, 41 FR 32546.⁹ These standards were originally codified at 49 CFR part 1127 and are now found at 49 CFR part 1157, subpart A (subsidy standards).

Next, Congress enacted the Northeast Rail Service Act of 1981, Pub. L. 97-35, 95 Stat. 643 (NERSA).¹⁰ In the context of part 1157, NERSA made three important changes. First, under section 1136 of NERSA, codified at 45 U.S.C. 744a, Conrail was relieved on January 1, 1983, of any legal obligation to provide commuter service. Despite this change, however, 45 U.S.C. 744 was retained. Section 744(e), as noted, required Conrail to provide rail passenger service if a subsidy is paid under regulations issued by RSPO.

Second, section 1137 of NERSA amended the Amtrak Act and chartered Amtrak Commuter. Section 1137 was originally codified at 45 U.S.C. 581-91 and is now codified at 49 U.S.C. 24501-06. Under section 24505(a)(1), Amtrak Commuter is required to provide the commuter rail passenger service that Conrail was obligated to provide under the 3R and 4R Acts. Moreover, under section 24505(a)(2), Amtrak Commuter may provide passenger service if a commuter authority pays the avoidable costs plus a reasonable return on value less the revenues from the transportation. RSPO was to issue the regulations for such payments.¹¹

Finally, also under section 1137 and now codified at 49 U.S.C. 24505(e), Amtrak Commuter may discontinue rail passenger service on 60 days' notice if a commuter authority does not offer a subsidy or a subsidy payment is not paid when due. Under section 24505(e)(2) RSPO was directed to prescribe regulations for "the necessary contents of the notice required under this subsection."

⁷(...continued)

determinations, we conclude that the RSPO is sufficiently part of the ICC so that its orders are to be considered orders of the ICC for purposes of the Hobbs Act." *Southeastern Pennsylvania Transp. Auth. v. I.C.C.*, 644 F.2d 238, 240, n.3 (3rd Cir. 1981).

⁸ The RSPO subsidy regulations are also referenced in 45 U.S.C. 744(e).

⁹ RSPO originally published a notice of proposed rulemaking (NPR) on February 20, 1976, in *Standards for the Computation of Commuter Rail Passenger Service Subsidies*, Ex Parte No. 293 (Sub-No. 8). On May 16, 1976, it published a further NPR (41 FR 20104), and on June 30, 1976, it published a second NPR (41 FR 26936).

¹⁰ "NERSA . . . was designed essentially to extricate Conrail from its fiscally draining commitment to commuter services so that it could concentrate on freight services, while ensuring the orderly transfer of commuter services to new, viable providers." *Conrail v. Metropolitan Transit Authority*, 1996 U.S. Dist. Lexis 3519, at *4 (S.D.N.Y. 1996).

¹¹ Section 24505(b)(1) provides that "[a] commuter authority making an offer under subsection (a)(2) of this section shall . . . (B) make the offer according to regulations the Rail Services Planning Office prescribes under section 10362(b)(5)(A) and (6) of this title."

In response to NERSA, RSPO issued an NPR in Ex Parte No. 293 (Sub-No. 8), that was published in the *Federal Register* on September 9, 1982 (47 *FR* 39700). RSPO proposed to divide the regulations at 49 CFR part 1127 (which then contained the subsidy standards) into two sections: subpart A would contain the existing subsidy standards while subpart B would comprise the new discontinuance notice procedures.

While RSPO proposed new regulations under subpart B for discontinuance notices, it did not propose any changes to the subsidy standards. Instead, the NPR implicitly proposed to adopt the subsidy standards for use in Amtrak Commuter cases: “After January 1, 1983, [Amtrak Commuter] is required to take over the commuter operations currently provided by Conrail if a commuter authority offers a subsidy payment *which complies with RSPO’s Standards . . .*” (Emphasis supplied; citation omitted.) Final rules were adopted in a notice published in the *Federal Register* on January 5, 1983 (48 *FR* 413).

The ICCTA was the final legislative action applicable to these regulations. As noted, under 49 U.S.C. 10501(c)(2), “the Board does not have jurisdiction *under this part* over mass transportation provided by a local governmental authority.” (Emphasis supplied.) Moreover, under the ICCTA, sections 10361 and 10362 concerning RSPO were repealed.

As indicated, although Conrail, under 45 U.S.C. 744a, is no longer obligated to provide commuter passenger service, 45 U.S.C. 744(e) has not been repealed. The ICCTA did, however, eliminate from section 744(e) references to subsidy standards set by RSPO. For example, before the ICCTA, section 744(e)(4)(C) concerned a public body that “offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of this section and *regulations issued by [RSPO] pursuant to section 205(d)(5) of this Act . . .*” (Emphasis supplied.) The ICCTA removed the language pertaining to regulations issued by RSPO, and now the statute simply describes a public body that “offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of this section”

On the other hand, the ICCTA did not delete references in the Amtrak Commuter statute to RSPO regulations. Section 24505(b)(2) still states that RSPO “may revise and update the [subsidy] regulations”, and section 24505(e)(2) still requires RSPO to prescribe the notice of discontinuance regulations.

PART 1157 REGULATIONS

The regulations in part 1157, subpart A, pertaining to the determination of commuter rail service subsidies, are detailed and long. The subsidy standards prescribe various responsibilities for RSPO. Under section 1157.3(d)(4), upon request of either party, RSPO will mediate disputes about the subsidy agreement, the subsidy standards, and certain plans. Under section 1157.4, parties desiring an interpretation of the standards can file a written petition; RSPO will issue an interpretation unless it determines that the subsidy standards need to be amended, in which case it will institute a rulemaking proceeding. Under section 1157.7(d), in an impasse over joint special studies, either party may submit the dispute to RSPO for resolution. Finally, under section 1157.3(f), the subsidized carrier is to submit financial status reports to RSPO.

The regulations at 49 CFR part 1157, subpart B, implement the statutory requirement of section 24505(e) that the contents of an Amtrak Commuter discontinuance notice be prescribed. The regulations repeat the statutory criteria that Amtrak Commuter can discontinue service on 60 days’ notice if it is not offered a subsidy or a subsidy is not paid when due. The regulations prescribe the form and content of the notice and method of posting. They also require that the notice be served on the subsidizer, governor, designated state agency, RSPO, and Amtrak.

DISCUSSION AND CONCLUSIONS

The changes made by the ICCTA require us to reexamine part 1157. We note that these regulations were issued by an office (RSPO) that has been abolished. They provide, moreover, for continuing responsibilities by that office, particularly in subpart A (mediation, issuing interpretations). Thus, at a minimum, the regulations must be modified to remove the references to,

and continuing duties of, RSPO. In subpart B, RSPO's only function was to receive a copy of the notice, and this responsibility can be easily eliminated.

The Federal Circuit has recently held:

“When a statute has been repealed, the regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life, defeating the statutory change.” *Aerolineas Argentinas v. U.S.*, 77 F.3d 1564, 1575 (Fed. Cir. 1996).

The broader issue, however, is whether the remaining regulations have a validity independent of the existence of RSPO and the jurisdiction of the Board. While the ICCTA deleted the RSPO references at 45 U.S.C. 744(e) pertaining to Conrail, 49 U.S.C. 24505(b) still incorporates RSPO subsidy regulations in the requirements for an offer to provide subsidy to Amtrak Commuter. We also note that under 49 U.S.C. 10501(c)(2) the Board does not have jurisdiction over mass transportation provided by a local government authority. On its face, this restriction appears to eliminate our authority to modify, or resolve disputes under, the subsidy and notice regulations.¹² Nonetheless, it can be argued that there is still a need for the regulations, which, because of their utility, are “frozen in time” (at least until further statutory changes are made). We seek comment on these issues.

The Board preliminarily concludes that the removal of the rule, if adopted, would not have a significant effect on a substantial number of small entities. The rule removal will lessen the filing requirements of rail passenger carriers. Any harm to passengers that are considered small entities would be minimal and, in any event, are required by law. The Board, however, seeks comments on whether there would be effects on small entities that should be considered.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹² Under section 10501(c)(1)(A)(i) and (ii), the term “local governmental authority” has two meanings. First, it takes the definition of 49 U.S.C. 5302(a)(6): State political subdivision, an authority of a state or political subdivision, an Indian tribe, or a public corporation, commission or board established under state law. It also “includes a person or entity that contracts with the local governmental authority” Section 10501(c)(1)(A)(ii). Under section 10501(c)(1)(B), “Mass transportation” means the rail services described in section 5302(a)(7): transportation providing regular and continuing general or specific public transportation.

By comparison, section 24501(a)(2) states that Amtrak Commuter “provides by contract commuter rail passenger transportation for a commuter authority” The terms “commuter authority” and “commuter rail passenger transportation” are similar to “local governmental authority” and “mass transportation”. Under 49 U.S.C. 24102(4), commuter authority is defined as “a State, local, or regional entity established to provide, or make a contract providing for, commuter rail passenger transportation.” Under section 24102(5), commuter rail passenger transportation is “short-haul rail passenger transportation in metropolitan and suburban areas usually having reduced fare, multiple-ride, and commuter tickets and morning and evening peak period operations.” Thus, under either definition, the Board appears to have no jurisdiction over such activities.

List of Subjects in 49 CFR Part 1157

Railroads, Reporting and recordkeeping requirements, Uniform System of Accounts

Decided: June 2, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

Part 1157—[Removed]

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 721(a), title 49, chapter X of the Code of Federal Regulations is proposed to be amended by removing part 1157.