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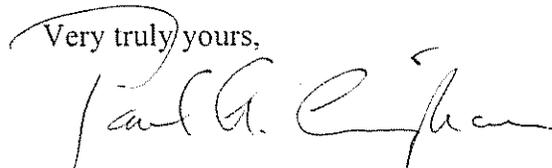
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

**Re: *In re National Railroad Passenger Corporation: Section 213
Investigation of Substandard Performance on Canadian National
Railway Company Rail Lines (STB Docket No. NOR 42134)***

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find the Motion for Abeyance of Canadian National Railway Company, Grand Trunk Western Railroad Company, and Illinois Central Railroad Company.

Very truly yours,



Paul A. Cunningham

Counsel for Canadian National Railway Company,
Grand Trunk Western Railroad Company, and
Illinois Central Railroad Company

Enclosure

cc: David W. Ogden, Esquire
William Herrmann, Esquire

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. NOR 42134

**IN RE NATIONAL RAILROAD
PASSENGER CORPORATION:
SECTION 213 INVESTIGATION OF
SUBSTANDARD PERFORMANCE ON
CN RAIL LINES**

MOTION FOR ABEYANCE

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*Counsel for Canadian National Railway Company,
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Illinois Central Railroad Company*

March 9, 2012

Canadian National Railway Company and its subsidiaries, Grand Trunk Western Railroad Company and Illinois Central Railroad Company (collectively “CN”) respectfully move the Surface Transportation Board (“Board”) to hold this proceeding (Docket No. NOR 42134) in abeyance until after the United States District Court for the District of Columbia rules on the pending cross-motions for summary judgment in *Association of American Railroads v. Department of Transportation*, No. 11-cv-1499 (D.D.C. filed Aug. 19, 2011) (“the AAR Suit” or “AAR”). (CN proposes that the issue of how to proceed after the District Court’s decision, if an appeal is filed, be deferred until the Board and the parties have the opportunity to review the District Court’s decision.) The AAR Suit will determine whether the statutory scheme and regulations on which this proceeding is based are constitutional. In order to avoid a burdensome process that may result in a legal nullity, CN proposes a short period of abeyance. Amtrak and CN can profitably use that period to work together on practical solutions to the real, practical railroading problems that underlie this proceeding, and CN further proposes (in its Response to Amtrak’s Petition) Board-supervised mediation to assist those efforts.¹

BACKGROUND

Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”) (Pub. L. 110-432, Division B) 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” Pursuant thereto, Amtrak and the FRA jointly issued a final rule establishing their “Metrics and Standards,” effective on May 11, 2010. 75 Fed. Reg. 26,839 (May 12, 2010).

¹ CN asked Amtrak to join its request for abeyance, but Amtrak declined.

On August 19, 2011, the Association of American Railroads (“AAR”)² filed the AAR Suit on behalf of its Class I freight railroad members, including CN. Ex. 1, AAR Compl. ¶ 10.³ The AAR Suit asserts that Section 207 of PRIIA is unconstitutional because it improperly vests “Amtrak – a private, for-profit corporation – with the authority to promulgate rules governing the conduct of its contractual partners, the freight railroads.” *Id.* ¶ 1. AAR claims that Section 207 violates (1) “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,” *id.* ¶ 51, and (2) “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,” *id.* ¶ 54. AAR and the respondents (the Department of Transportation (“DOT”), the Federal Railroad Administration (“FRA”), and their respective heads) have agreed that the AAR Suit requires no factual development and should be resolved through cross-motions for summary judgment, and the District Court has approved that procedure. The AAR Suit will be fully briefed, and ripe for judgment, when the respondents file their reply brief on March 30, 2012.

The present proceeding arises under 49 U.S.C. § 24308(f), which was enacted by Section 213 of PRIIA. Section 24308(f) provides that the Board may (and in certain circumstances

² AAR is a nonprofit trade association whose members include all of the Class I freight railroads (the largest freight railroads), and well as some small freight railroads and Amtrak.

³ The major pleadings in the AAR Suit are attached as exhibits to this Motion as follows:

Ex. 1: AAR Complaint (Aug. 9, 2011) (“AAR Compl.”)

Ex. 2: AAR Motion for Summary Judgment (Dec. 2, 2011) (“AAR MSJ”)

Ex. 3: DOT Cross-Motion for Summary Judgment and Response to AAR MSJ (Feb. 3, 2012) (“DOT MSJ”)

Ex. 4: AAR’s Reply in Support of its MSJ and Response to DOT’s Cross-Motion (Mar. 6, 2012) (“AAR Reply”).

“shall”) conduct an investigation “[i]f 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 [PRIIA] fails to meet those standards for 2 consecutive calendar quarters . . . ,” and that that investigation may result in Board recommendations (49 U.S.C. § 24308(f)(1)), or, if violations of preference are found, in a Board award of damages and other compulsory relief (49 U.S.C. § 24308(f)(2)). As Amtrak’s Petition (“Pet.”) makes clear, the Board investigation and the relief Amtrak seeks are premised on the Metrics and Standards, which Amtrak and FRA promulgated pursuant to the delegation of rulemaking power under Section 207 that is the subject of the AAR Suit. Amtrak’s Petition relies throughout on the Metrics and Standards:

- it discusses the process leading to their issuance (Pet. ¶¶ 21-24);
- it discusses their meaning and methodology (*id.* ¶¶ 30-40);
- it avers that Amtrak performance on routes that include rail segments operated by CN repeatedly failed to satisfy the Metrics and Standards (*id.* ¶¶ 24, 45-46, 49-80);
- it requests a Board investigation, pursuant to 49 U.S.C. § 24308(f)(1), “into the causes of the substandard on-time performance and excessive delays” alleged, which it has alleged to be “substandard” and “excessive” on the basis of the Metrics and Standards (*id.* ¶ 117);
- it seeks Board recommendations “so that on-time performance and delays on these trains comply with the Section 207 [Metrics and Standards]” (*id.* ¶ 118); and
- it asks the Board to award damages pursuant to 49 U.S.C. § 24308(f) (*id.* ¶ 119; *see also id.* ¶ 20), which authorizes the Board to award damages when failures to provide preference cause “delays or failures to achieve minimum standards investigated under paragraph (1),” 49 U.S.C. § 24308(f)(2) – *i.e.*, in this case, if they cause the failures to satisfy the Metrics and Standards that are the main subject of Amtrak’s Petition.⁴

⁴ Amtrak also erroneously refers to the Metrics and Standards as “mandatory performance standards,” *id.* ¶ 20, and describes at least some of them as unilateral obligations of host railroads, *id.* ¶ 39. Notwithstanding that PRIIA provides that the Board is to “review the accuracy of train performance data” and to consider all causes of poor performance, and notwithstanding that on some of the routes at issue, most of the route and most of the delays on

ARGUMENT

I. A Short Period of Abeyance Will Enable the Board to Avoid Futile and Burdensome Proceedings If the AAR Suit Prevails, and to Obtain Guidance for Novel and Complex Proceedings If the AAR Suit Fails

For the reasons set forth in AAR's Complaint and briefs (Exs. 1, 2, & 4), which CN hereby incorporates by reference, CN believes that that the delegation of rulemaking power to Amtrak in PRIIA should be held unconstitutional, with the result that Section 207 and the Metrics and Standards would be struck down.⁵ Given the complete dependency of Section 213, Amtrak's Petition, and the relief Amtrak seeks on Section 207 and the Metrics and Standards, a determination of unconstitutionality will leave no remaining authority or standards for this proceeding, which will then become a legal nullity.⁶

If, on the other hand, the AAR Suit fails, the District Court's ruling is still likely to provide the Board with useful guidance by clarifying the meaning of the PRIIA statute before the Board undertakes this case of first impression under the statute.⁷

the route involve track owned by other host railroads, the main section of Amtrak's Petition is entitled "CN's Failure to Meet the Section 207 Performance Standards on Each Route." Pet. at 17.

⁵ Unless invited by the Board, CN does not propose to re-brief the constitutional issues before the Board. However, CN's position is that the statute is unconstitutional, and nothing in these proceedings should be taken as a waiver of that position.

⁶ CN's obligation to give preference to Amtrak trains under 49 U.S.C. § 24308(c) preceded and was unchanged by PRIIA, and will remain if PRIIA is held unconstitutional. However, the Board's jurisdiction to enforce that obligation under § 24308(f)(2) is part of the PRIIA scheme and premised on the alleged preference violations causing failures to meet the Metrics and Standards. If the AAR Suit prevails, the STB's enforcement role under § 24308(f)(2) will be eliminated, but preference will remain enforceable, as it has been for decades, by action by the Department of Justice. *See* 49 U.S.C. § 24103(a)(1)(c); Pet. ¶ 20.

⁷ For example, if it upholds the statute, the District Court might do so on the basis, in part, that the Metrics and Standards should be understood to function solely as a trigger for investigation (as DOT argues, Ex. 3 at 13-14), and should not be used, as Amtrak's Petition attempts to use them, as mandatory requirements incumbent on the host railroad, or as evidence of preference violations (*see, e.g.*, Pet. ¶¶ 20, 38, 39).

As a matter of constitutional principle, the Board should not compel CN to participate in potentially burdensome proceedings that have no constitutional foundation. (Indeed, one of AAR's substantive arguments is that Congress cannot delegate power to Amtrak, a private entity, to promulgate regulations that have the effect of subjecting other members of the private rail industry to burdensome Government investigations. Ex. 4 at 20-21.) And as a matter of administrative economy, the Board should not undertake a novel, complex, wide-ranging, and fact-intensive investigation that may result in a nullity, or that could be more efficiently handled if the Board first awaited guidance from the District Court.⁸

In these circumstances, holding proceedings in abeyance would be appropriate and consistent with Board practice. It is well established that the Board has the power to hold a proceeding before it in abeyance pending the clarification of statutory or regulatory provisions that are critical to the proceeding. *See AEP Tex. N. Co. v. Surface Transp. Bd.*, 609 F.3d 432, 437 (D.C. Cir. 2010) (noting that Board held proceeding in abeyance "while it resolved the industry-wide rulemaking"); *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub No. 1), slip op. at 2 (STB served Feb. 27, 2006) ("Because several of these issues have been raised or

⁸ The investigation sought by Amtrak's Petition has the potential to be highly onerous for the Board, Amtrak, CN, and third parties. Amtrak's Petition is 119 paragraphs long and encompasses seven distinct routes, spanning a total of over approximately 4800 miles. While Amtrak's Petition self-servingly focuses on CN, there are other host railroads on all of those routes, and CN lines encompass less than 13% of the route miles on five of the routes. In total, CN's lines encompass a mere 31% of the route miles. Accordingly, the investigation described by § 24308(f)(1), which calls for the Board to consider all the causes of failures to meet the Metrics and Standards, could potentially involve various third parties (since Amtrak's and FRA's OTP Metric encompasses all delays, without distinguishing whether they were caused by Amtrak, CN, or third parties, and does not distinguish between delays on CN tracks and delays elsewhere on the route on tracks owned by other railroads). The formulation of recommendations under § 24308(f)(1) would necessarily involve considering complex scheduling issues and potential capital investments. And any determination under § 24308(f)(2) would require the Board to address difficult issues of first impression regarding the interpretation of § 24308(c), on which Amtrak has expressed self-serving views dramatically contrary to those of the rest of the industry.

are implicated in the rail rate cases pending before us, we are holding [two proceedings] in abeyance while we examine these important issues.”). And the Board has on multiple occasions held proceedings in abeyance when the resolution of a pending court matter is likely to clarify the applicable law or could significantly affect the proceeding. *See, e.g., Ariz. Elec. Power Coop. v. BNSF Ry.*, STB Docket No. 42113 (Sub-No. 1), slip op. at 1 (STB served Apr. 23, 2009) (“This decision orders a portion of [the petitioner’s] rate reasonableness complaint to be held in abeyance pending a determination by the U.S. District Court for the District of Arizona whether, and to what extent, a rail transportation contract exists”); *Certain Rates and Practices of NPR, Inc.* STB Docket No. WCC-102, slip op. at 1 (STB served Apr. 9, 1999) (noting that “the Board held the processing of the proceeding in abeyance pending the District Court’s disposition of the related action”); *PSI Energy Inc. v. CSX Transp., Inc.*, STB Docket No. 42034, slip op. at 1, 3 (STB served Sept. 11, 1998) (holding Board proceeding in abeyance “pending resolution of a court action” where the “resources of the Board and the carriers would be wasted if we were to proceed with a complaint and . . . the court were later to uphold the carriers’ [argument].”).

II. The Proposed Short Period of Abeyance Will Not Cause Undue Delay, and May Create a Window for Constructive, Problem-Solving Discussions, Including Board-Supervised Mediation

Even if the AAR Suit fails, and this Section 213 investigation ultimately proceeds, there is little, if any, downside to holding this proceeding in abeyance as proposed herein, for two reasons.

First, the period of abeyance will not cause undue delay. Briefing before the District Court will be complete, and the AAR Suit will be ripe for judgment, in just three weeks. Presumably, the District Court will enter judgment reasonably promptly. Whatever the result, an appeal may follow, and a further period of abeyance pending appeal may merit consideration in

light of the District Court's ruling. However, there is no need to anticipate the potential issue of abeyance pending appeal at this time, and CN is only presently requesting abeyance pending the District Court's decision.

Second, the period of abeyance need not and should not be wasted time, because the parties can use it to develop solutions to the problems underlying Amtrak's Petition. Significant disagreements exist between CN and Amtrak, but they share a common interest in efficient rail service and, as the final Metrics and Standards recognized,⁹ they must ultimately work together to address the practical railroading problems of Amtrak trains on CN lines. CN has attempted to find cooperative solutions in the past, and remains willing to do so in the future, notwithstanding Amtrak's unfortunate decision to switch from constructive discussions to an adversarial Petition.

Indeed, CN believes that the most constructive contribution the Board could make at this stage, would take the form of Board-supervised mediation. *Cf.* 49 C.F.R. § 1109.1 (2012) (any proceeding may be held in abeyance if the parties agree to pursue administrative dispute resolution procedures). PRIIA's provision for *recommendations* by the Board (49 U.S.C. § 24308(f)(1)) represents an effort by Congress to enable the Board to facilitate and provide structure to cooperative discussions between Amtrak and host railroads. Whether the means chosen in PRIIA are constitutional or not, that same goal can be achieved by granting a period of abeyance that allows the parties to focus on problem-solving rather than adversarial advocacy, and by convening a mediation. Accordingly, in its Response to Amtrak's Petition, CN is suggesting mediation.

⁹ See *Metrics and Standards for Intercity Passenger Rail Service*, available at www.fra.dot.gov/us/content/2165 (given "the freight railroads' long record of passenger operations, the FRA and Amtrak expect that all stakeholders will work closely together to . . . minimize the burdens and maximize the benefits felt by each other").

REQUESTED RELIEF

For the foregoing reasons, CN respectfully requests that the Board hold this proceeding (Docket No. NOR 42134) in abeyance until after the United States District Court for the District of Columbia rules on the pending cross-motions for summary judgment in the AAR Suit, *Association of American Railroads v. Department of Transportation*, 11-cv-1499 (D.D.C. filed Aug. 19, 2011).

Respectfully submitted,



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*Counsel for Canadian National Railway Company, Grand Trunk Western Railroad Company,
and Illinois Central Railroad Company*

March 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2012, I sent the foregoing Motion for Abeyance by e-mail to:

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Counsel for National Railroad Passenger Corporation



Caroline M. Gignoux

Exhibit 1

**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.

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.

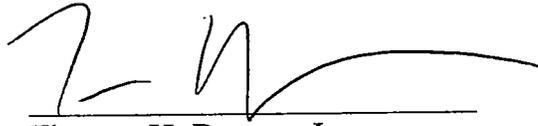
PRAYER FOR RELIEF

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,



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Dated: August 19, 2011.

EXHIBIT A

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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

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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.

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(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: 49 USC 24308.

“(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,

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Recommen-
dations.

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”;

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122 STAT. 4927

(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

EXHIBIT B

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2009-0016]

Metrics and Standards for Intercity Passenger Rail Service

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Response to Comments; Issuance of Metrics and Standards

SUMMARY: Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (PRIIA) charged the Federal Railroad Administration (FRA) and Amtrak jointly and in consultation with other parties, with developing new or improving existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations. In compliance with the statute, the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service and, on March 13, 2009, posted a draft document, entitled "Proposed Metrics and Standards for Intercity Passenger Rail Service," on the FRA's Web site at <http://www.fra.dot.gov/us/content/2165>. Simultaneously, the FRA published a notice in the Federal Register (74 FR 10983) requesting comments on the Proposed Metrics and Standards from 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. Seventeen comments were submitted to the corresponding docket (number FRA-2009-0016) at regulations.gov by the end of the comment period on March 27, 2009 and as a result, revisions have been made to the Metrics and Standards. The Final Metrics and Standards are included at the end of this document.

DATES: These metrics and standards are in effect as of May 12, 2010.

FOR FURTHER INFORMATION CONTACT: Neil E. Moyer, Chief, Financial and Economic Analysis Division, Office of Passenger and Freight Programs, Federal Railroad Administration (e-mail Neil.Moyer@dot.gov; telephone 202-493-6365); or Edgar E. Courtemanch, Sr. Principal, Operations Service Planning, Amtrak (e-mail CourteE@amtrak.com; telephone 202-906-3249).

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I. Background

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (PRIIA) charged the Federal Railroad Administration (FRA) and Amtrak with jointly developing, 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, new or improving 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. The statute further provided that such metrics shall, at a minimum, 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.

In compliance with the statute, the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service and, on March 13, 2009, posted a draft document, entitled "Proposed Metrics and Standards for Intercity Passenger Rail Service," on the FRA's Web site at <http://www.fra.dot.gov/us/content/2165>. Simultaneously, the FRA published a notice in the Federal Register (74 FR 10983) requesting comments on the Proposed Metrics and Standards from the stakeholders named in the PRIIA. In total, seventeen comments were submitted to the corresponding docket (number FRA-2009-0016) at regulations.gov by the end of the comment period on March 27, 2009.

The FRA and Amtrak have considered the comments of the respondents to Docket No. FRA-2009-0016, and through this notice are issuing final Metrics and Standards for Intercity Passenger Rail Service. This document also contains the FRA's responses, developed with Amtrak's concurrence, to the docket comments. The changes incorporated in the Metrics and Standards published with this notice in some cases reflect clarifications of, and in others, revisions to, the March 13 proposal. A more detailed explanation of these changes is provided below.

II. Discussion of Comments and Revisions to the Proposed Metrics and Standards

A wide variety of interested parties submitted written comments to FRA in response to the Proposed Metrics and Standards. Comments were submitted to the docket from five State Departments of Transportation, three State and regional passenger railroad agencies, three freight railroads, three railroad-related associations, and one labor organization. FRA also received one comment from an individual of unknown affiliation, likely an interested private citizen, and one brief procedural comment from the Surface Transportation Board. A full list of the parties that submitted comments can be found in Annex 4.

The comments are categorized according to the four main topics identified in the Proposed Metrics and Standards document. An additional category was created to address comments and recommendations of a more general nature. Within each category, this Supplementary Information includes a comparison of the proposed with the final Metrics and Standards; a brief summary of the comments received; and a response to those comments. In many cases, a response is provided to individual comments; in other cases, where a common

theme existed across two or more comments, the comment was consolidated and a single response provided. In both types of cases, we have noted where FRA and Amtrak have made changes to the Proposed Metrics and Standards based upon the comments and recommendations received.

The FRA and Amtrak sincerely appreciate the time and effort put forward by all participants in this effort.

A. General Comments on the Proposed Metrics and Standards

1. Procedural Comments

Implementation timing of Metrics and Standards. *Comment:* A procedural comment addressed the timing of the implementation of the metrics and standards and expressed concern that new performance measures will be applied retroactively to quarters prior to their finalization and implementation. *Response:* The FRA agrees that, in all fairness, stakeholders should only be held responsible for operations conducted following implementation of these Metrics and Standards. Accordingly, FRA will not publish the first quarterly report until the required data are available for the first full quarter following the publication of these Metrics and Standards. Thus, for example, if the present document is published by between April 1, 2010, and June 30, 2010, the first full quarter of effectiveness of the Metrics and Standards would extend from July 1, 2010 through September 30, 2010; data for that quarter would be obtained and analyzed, and the report would be prepared, in the subsequent weeks; and the first quarterly report would be published as soon as possible thereafter, and no later than January 1, 2011.

In keeping with the FY 2008 and successive appropriations acts, the FRA will continue to prepare and publish its quarterly On-Time Performance report until the quarterly reporting on these Metrics and Standards begins.

Reporting periods. *Comment:* The same party also noted that PRIIA only requires one quarter of data to be published in each quarterly report. *Response:* In actuality, the statute states that “[t]he 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....” That is, it says that the FRA will publish a quarterly report, not that it will publish a report containing a quarter’s worth of data. Moreover, it is the FRA’s position that for the metrics to be meaningful, it is necessary to collect and/or publish data for a variety of periods. For example, depending on the metric and the availability of comparable data, a typical quarterly report might show data for one or more of the following: (a) the quarter being reported upon, (b) the prior quarter (in the case of on-time performance data), (c) the four quarters ending with the quarter being reported upon, (d) the eight quarters ending with the quarter being reported upon (for rolling eight-quarter averages), and (e) the same periods detailed above ending one year previously.

Sufficiency of comment period. *Comment:* The Docket received two comments expressing concern with the stakeholder consultation that took place in developing the Proposed Metrics and Standards. In particular, the Transport Workers Union of America (TWU) stated that the 14-day period provided for submitting comments to the docket was inadequate and that any revisions to the Proposed Metrics and Standards document should incorporate a longer comment period (at least 30 days) with increased stakeholder involvement. *Response:* The FRA understands that some stakeholders would have liked more time to comment on the Proposed Metrics and Standards. However, the FRA and Amtrak have seriously considered all the

comments submitted and believe that the Final Metrics and Standards document reflects a marked improvement over the original proposal. In addition, subsequent to the enactment of the PRIIA, the American Recovery and Reinvestment Act of 2009 (“Recovery Act”) allocated \$8 billion in economic stimulus funding to a High-Speed Intercity Passenger Rail (HSIPR) investment program. As described in the strategic plan and guidance documents published by the FRA pursuant to the Recovery Act (and available at <http://www.fra.dot.gov/us/content/31> and <http://www.fra.dot.gov/us/content/2243>, respectively), various partnerships and implementing agreements among the stakeholders will be prerequisite to achievement of the HSIPR program goals in most corridors. Essential to such implementing agreements will be a mutual knowledge of the operational performance expectations of the various parties. As benchmarks for many of these expectations will be established in these Metrics and Standards, their timely publication is essential to the early completion of State/rail owner/passenger operator negotiations and thus, to the speedy implementation of the HSIPR program.

Accordingly, the Metrics and Standards presented at the end of this notice represent the performance measures that the FRA and Amtrak will implement, and on which the FRA will base its quarterly report to Congress. The Metrics and Standards themselves identify specific topics within the Other Service Quality and Public Benefits categories that will require further analysis, proposals, and public comment.

2. Comments Regarding Penalties

Enforcement and penalties. *Comment:* Several parties submitted concerns regarding the enforcement of standards and the penalties for not meeting the standards. The TWU and multiple State agencies requested further explanation on how the metrics will be applied to routes as well as the outcomes for meeting and for not meeting the standards. In particular, the TWU requested clarification regarding the enforcement mechanism for each standard as well as the name of the agency responsible for enforcement. It also requested details on the development of guidance for enforcement procedures. ***Response:*** As explained in the PRIIA, the Surface Transportation Board (STB) is the primary enforcement body of the standards, making them an appropriate entity to develop and communicate enforcement protocols.¹ As such, the FRA believes that the enforcement procedures are properly separate from these metrics and standards. The FRA’s only enforcement responsibility pertains to performance progress analysis of the worst-performing long-distance routes as provided for in Section 210 of PRIIA (49 U.S.C. 24710). None of these routes is currently State-supported.

Susceptibility of routes to enforcement. *Comment:* The California Department of Transportation (Caltrans) questioned whether Amtrak routes themselves can be penalized for not meeting performance standards. ***Response:*** Under Section 213 of PRIIA,² penalties for infraction of the standards are not intended for direct application to Amtrak routes, but rather to host rail carriers under specified circumstances. PRIIA Section 210 does give the FRA authority

¹ As explained in Section 213 of PRIIA, if service quality fails to meet the established standards for 2 consecutive calendar quarters, the STB may (and in some circumstances must) initiate an investigation to determine whether and to what extent this failure is due to causes that could reasonably be addressed by the host rail carrier or by Amtrak or other intercity passenger rail operators. If it determines that the failure to meet the standards is attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation, it may award damages against the host rail carrier, which the carrier shall remit either to Amtrak or to an entity for which Amtrak operates intercity passenger rail service as the STB deems appropriate.

² Section 213 describes Surface Transportation Board responsibilities for enforcement of the Metrics and Standards, particularly as they regard host rail carriers.

to withhold non-safety-related funds from a long-distance route that is among the worst performers under these Metrics and Standards, but only if that route fails to adhere to an Amtrak-devised performance improvement plan, and only after mandated notifications and an opportunity for Amtrak to request a hearing.

Effects of the standards on State-supported services. *Comment:* Washington State Department of Transportation (WSDOT) expressed concern that States funding Amtrak services could be penalized for underperforming routes and that such penalties could discourage future State support. WSDOT also inquired whether “credits” can be earned for routes that exceed performance standards. *Response:* PRIIA includes no provision imposing consequences or penalties on States, in their capacity as sponsors or subsidizers of intercity passenger services, if those routes fail to meet the standards specified in the Metrics and Standards. Similarly, PRIIA makes no provision for the awarding of credits for routes exceeding the standards. However, other benefits naturally accrue to States, Amtrak, and host railroads for outstanding performance, including lower-cost and/or higher-revenue operations, as well as heavier rail traffic volumes and consequent public benefits. Furthermore, the States, Amtrak, and host freight railroads are free to build direct incentives into their agreements, and in some cases have already done so.

Uses of the performance measures. *Comment:* The Caltrans requested clarification on how the performance measures will affect Amtrak’s and the FRA’s decision-making authority on State-supported routes. Caltrans also asked whether the Proposed Metrics and Standards were designed to compare routes against their own past performance or against those of other routes. *Response:* The Metrics and Standards are designed to allow for both historical and cross-sectional analysis and comparisons. In addition to their general use and utility, PRIIA mandates that Amtrak use them in evaluating its long-distance routes (Section 210) and in developing a plan to improve on-board service (Section 222), and that FRA use them in evaluating bids under the Alternate Passenger Rail Service Pilot Program (Section 214).

3. Concerns with Metrics and Standards Data

Independence and data integrity. *Comment:* One commenter was concerned about the lack of independence with respect to the gathering of data for and the calculation of the Proposed Metrics and Standards. In particular, the commenter suggested that insufficient separation exists between Amtrak personnel and the data used for these performance measures. Another party stated that sole use of Amtrak-provided operational and performance data is not justified in PRIIA. *Response:* PRIIA, the statutory basis for these performance measures, directly incorporates Amtrak into their creation by stating that FRA and Amtrak “shall jointly” develop the Metrics and Standards. It establishes no completely independent agency or funding mechanism for gathering and analyzing the relevant data. Thus, the statute affords no scope or basis for action regarding this comment.

Fairness. *Comment:* Two railroads expressed misgivings about the fundamental fairness of the performance measures. One railroad indicated that the proposed performance measures were biased towards Amtrak and provided insufficient improvements on existing measures. The other cited what it said were fairness issues with tying performance penalties to Amtrak’s schedules, which it argued are sometimes unrealistic. *Response:* The FRA and Amtrak aimed to encourage cooperation between Amtrak and the host railroads. For example, Annex 1 contemplates that Amtrak and its individual host railroads may agree that during a specific quarter, a specific train may incur more delay than usual, or may have an adjustment made to its public schedule, due to a major maintenance and construction project. Scheduling remains

primarily a topic for collaboration between Amtrak, its host railroads, and any sponsoring States, subject to the indirect constraints of the Effective Speed standard for OTP.

4. Effects of the Metrics and Standards

Administrative burdens. *Comment:* Several freight railroads stated that the proposed performance measures present an administrative burden and will require significant operational changes to make current Amtrak schedules realistic. They went on to assert that the Proposed Metrics and Standards will increase the cost of hosting Amtrak trains and noted that those costs may need to be passed on to Amtrak. ***Response:*** Amtrak and its host railroads each have their own train performance databases that often utilize different metrics or different definitions for the same metrics. As train performance data thus lacks uniformity among railroads, additional resources may be necessary to achieve comparable data. Similarly, the new All-Stations OTP will increase the number of OTP data points that may be subject to dispute between Amtrak and its hosts. Conversely, the heightened attention under PRIIA to performance measures on the part of both Amtrak and host railroads may lead to operational improvements that can result in lower costs and/or higher revenues to Amtrak and increased incentive payments to host railroads, mitigating administrative costs that stem from the Metrics and Standards. The FRA encourages Amtrak and host railroads to align metrics within their respective databases where possible and encourages Amtrak to continue with efforts to enhance train delay data through automation.

Effects on Amtrak/host relationships. *Comment:* Norfolk Southern Corp. (NS) stated that the proposed performance measures will hinder its working relationship with Amtrak, while the Association of American Railroads (AAR) and CSX Transportation, Inc. (CSX) said the Proposed Metrics and Standards may dissuade freight host railroads from agreeing to new Amtrak services. ***Response:*** The Metrics and Standards are not intended to deter future Amtrak service; rather they are to lead to improvements in whatever Amtrak service is offered. Based on the collaborative approach described in Annex 2, and on the freight railroads' long record of passenger operations, the FRA and Amtrak expect that all stakeholders will work closely together to implement this Congressional mandate efficiently and effectively, and in so doing minimize the burdens and maximize the benefits felt by each other.

5. Relationship to State Agency/Amtrak Contracts and Standards

Development of Metrics and Standards for State-supported services. *Comment.* Washington State Department of Transportation (WSDOT) made the case that States with State-supported services and Amtrak should be responsible for developing the Proposed Metrics and Standards in a process supported by a Federal appeals forum. ***Response:*** States have a role in the process of defining the Metrics and Standards as well as a vital interest in the end product of this process. However, Section 207 of PRIIA mandates that Amtrak and the FRA act as the lead parties in developing these performance measures.

Effect of Metrics and Standards on contracts between the States and Amtrak.

Comment: A number of State agencies expressed concern regarding the effect the Proposed Metrics and Standards might have on their intercity passenger rail agreements. In particular, several agencies stated that the Proposed Metrics and Standards should not replace State operating and performance contracts with Amtrak and other railroads. State agencies argued for the continued right to negotiate their own standards for State-supported services with rail carriers and to perform and use their own performance analyses. ***Comment:*** These Final Metrics and Standards are not intended to (a) alter or replace operating and performance agreements between States and Amtrak; (b) hinder States or Amtrak from negotiating standards

with each other, or from incorporating an appeals process into their agreements; or (c) limit the analytical tools employed by States or other stakeholders.

6. Relationship to agreements between Amtrak and host railroads.

Comment: Metro-North sought confirmation that the Metrics and Standards will not supersede any Amtrak-host railroad OTP agreements. *Response:* Section 207 of PRIIA states that, “to the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards . . . into their access and service agreements.”

7. Metrics and Standards, PRIIA, and ARRA

Comment: State agencies were also concerned with the possible interrelationships between the Proposed Metrics and Standards and both the American Recovery and Reinvestment Act of 2009 (ARRA) and other PRIIA-defined initiatives. Caltrans, in particular, requested clarification as to whether grant proposals under the FRA’s High-Speed Intercity Passenger Rail (HSIPR) program will be evaluated based on a project’s ability to improve performance measures or on a route’s previous ability to meet performance standards. Also, assurance was sought that projects requesting Federal funding will only be evaluated against applicable performance measures. The Capital Corridor Joint Powers Authority (CCJPA) indicated that high performing routes will be at a disadvantage when being considered for HSIPR funding. CCJPA also noted that non-Federal capital funding sources and traffic volume are not discussed as evaluation criteria.

Response: In response to these comments about the relationship of the Metrics and Standards to other PRIIA provisions and the HSIPR program, it is worth noting that:

1) The HSIPR program involves a merit-based evaluation process as described in Section 5 of the Interim Program Guidance, available at <http://www.fra.dot.gov/us/content/2243>.

2) In the absence of agreed Metrics and Standards at the time the Interim Program Guidance was published, the review criteria in Section 5 of the Guidance adopted generalized topics reflecting the underlying purposes of PRIIA Section 207—for example, “increased on-time performance.”

3) The application and review process for the first round of HSIPR funding (pursuant to the Interim Program Guidance published in the Federal Register on June 23, 2009) reached its conclusion on January 28, 2010, with the announcement of the first recipients selected to receive grant funding. As these Final Metrics and Standards had not been published at that time, they could not be applied to the first HSIPR funding competition.

4) The applicability of these Final Metrics and Standards to the application, review, and/or selection processes in future solicitations under the HSIPR program would be clarified in the HSIPR notices announcing such solicitations.

5) The above points do not preclude the FRA from incorporating, at its discretion, these Final Metrics and Standards in grant award negotiations with any entities selected to receive HSIPR grants.

B. Comments on Financial and Operating Measures

1. Summary of the Proposal and of the Final Metrics and Standards.

The Proposed Metrics and Standards included five different metrics under the Financial/Operating category: (1) Percent of Short-Term Avoidable Operating Cost Covered by Passenger-Related Revenue (excluding capital charges); (2) Percent of Fully Allocated Operating Cost Covered by Passenger-Related Revenue (excluding capital charges); (3) Long-term Avoidable Operating Loss per Passenger Mile (excluding capital charges); (4) Passenger-Miles per Train-Mile; and (5) Adjusted (Loss)³ per passenger-mile. The first four of these were to be reported at the route level and the last, at the system level. For all five, the proposed standard was to be continuous year-over-year improvement.

In these Final Metrics and Standards, the same measures are retained; all financial measures will be calculated both with and without State subsidies included in revenue. Continuous year-over-year improvement will be reported and assessed on a moving two-year (eight-quarter) average basis.

2. Comments and Responses

a. Additional Measures Needed

Comment: The Midwest High-Speed Rail Association (MHSRA) recommended incorporating measures on load factor and passenger and ticket revenue by origin-destination. It also proposed adding a metric and standard for passengers declined rail service due to lack of available space. **Response:** The metrics proposed by MHSRA are potentially useful for a number of purposes. However, they are very detailed, involve origin-destination data that is typically proprietary to common carriers, and (in the case of passengers denied rail service) involve steep challenges of measurement, including the elimination of duplicate inquiries by a single passenger for the same space. For all these reasons, these measures would exceed the scope and purpose of Section 207 of PRIIA and add significant complexities to the quarterly report. Therefore, these new measures are not included in the final Metrics and Standards.

b. Calculations of Financial Measures

The Docket received a number of comments regarding the process for calculating the various financial measures.

Treatment of State operating subsidies. Comment: A number of State agencies called for calculating the route-by-route financial measures both with and without State contributions included in revenue, in order to better illustrate Amtrak's operating losses before receiving State funds. **Response:** Numerous Amtrak routes are supported by State contributions, which—while indispensable to support continuing operations—tend to obscure an analysis of the inherent efficiency of the routes in question. It would be useful, feasible, and not unduly burdensome to report cost recovery and operating loss per passenger-mile calculations both with and without State contributions, and the Metrics and Standards now incorporate this change.

Treatment of fully-allocated costs. Comment: CCJPA questioned the fairness of the proposed fully allocated cost calculation, in particular, the fact that while overhead is allocated to State-supported services, revenues from Amtrak's ancillary businesses are not allocated in a similar manner. **Response:** A certain amount of Amtrak's overhead is related to each of Amtrak's routes and ancillary business. Amtrak's new fully allocated cost methodology allocates system-wide costs, such as General and Administrative and other overhead costs, to all

³ The definition of Adjusted (Loss) is: Net Operating Loss (before net interest expense), less Depreciation, Other Post-Employment Benefits (OPEB's) and project costs covered by capital funding.

of Amtrak's routes and businesses in a logical and equitable manner. CCJPA is correct that the fully allocated cost methodology does not simply spread revenues earned from Amtrak's operations among all routes, but assigns them to the routes and ancillary businesses with which they are associated. Attributing both costs and revenues to the routes and ancillary businesses to which they are related allows Amtrak to assess the performance of each individual route or business. Additional detail on Amtrak's fully allocated cost methodology is provided in the FRA's and Volpe Center's report entitled *Methodology for Determining the Avoidable and Fully Allocated Costs of Amtrak Routes*, available at <http://www.fra.dot.gov/Pages/1996.shtml> under "Intercity Passenger Rail Cost Analysis."

Accuracy of Amtrak's route accounting. *Comment:* The Wisconsin Department of Transportation (WisDOT) expressed concerns with the accuracy of Amtrak's new cost accounting system after experiencing perceived accuracy issues under the previous system. *Response:* Amtrak is in the process of implementing a new cost accounting system, called Amtrak Performance Tracking (APT), which will be used to calculate Short-Term Avoidable Operating Costs, Long-Term Avoidable Operating Costs, and Fully Allocated Costs for each route on a monthly basis. APT was designed to enhance transparency and also to assign costs more fairly, accurately, and consistently. All topics related to APT are addressed in great detail in the *Methodology* report referred to above.

Effects of service changes on fully-allocated costs. *Comment:* CCJPA also stated that fully allocated costs will need to be recalculated if a State discontinues a service. *Response:* That statement is accurate, but presents no challenges since Amtrak's new system will calculate the fully allocated costs of each Amtrak route monthly.

Equipment ownership. *Comment:* CCJPA requested that the Short-Term Avoidable Operating Cost calculation be defined in such a way that it can determine the effects of owning rail equipment. *Response:* Again, the FRA's and Volpe Center's forthcoming report provides a detailed explanation on how Fully-Allocated and Avoidable Operating Costs are estimated in Amtrak's new accounting system.

c. Continuous Improvement Measure

Comment: Both NS and Caltrans disagreed with the continuous year-over-year improvement standard proposed for certain metrics. Caltrans observed that such a standard serves to penalize high performing routes, and that—with regard to the financial measures—certain expenses, like fuel, cannot be controlled. *Response:* The FRA and Amtrak considered these comments in revising the Metrics and Standards. Continuous improvement standards will be based on an eight-quarter rolling average instead of a single quarter in order to smooth out the effects of transitory events. The Final Metrics and Standards also will apply an inflation adjustment to the dollar-denominated data from prior years used in multi-year rolling averages, to make them comparable with current-year data. With regard to high performing routes, as mentioned above, such routes will derive direct benefits from their high performance, independent of these performance measures.

d. Financial Measures Unsuitable for State Needs

Comment: One stakeholder, CCJPA, argued that the financial performance measures did not meet the needs of the States. CCJPA stated that the proposed metrics are not flexible enough to pertain to their contracts with California, Amtrak, and other railroads (e.g., CCJPA's fixed price annual contract with Amtrak). For that reason, it maintained that the proposed financial

standards should not supersede existing agreed-upon methods for calculating and reporting train performance at the State level. **Response:** As stated above under “Effect on State Agency Contracts and Standards,” the Metrics and Standards are not intended to circumscribe the flexibility of the States and Amtrak to arrive at mutually satisfactory agreements.

e. Mail Revenue

Comment: The National Association of Railroad Passengers (NARP) noted that although mail revenue is a component of a route’s total revenue calculation, Amtrak discontinued its mail transporting services in 2004. NARP recommended that Amtrak reexamine carrying mail on its trains to improve its financial performance. **Response:** NARP’s comment relates to business decisions of and between Amtrak and the U.S. Postal Service and does not affect the definition or implementation of the Metrics and Standards.

C. Measures of On-Time Performance (OTP) and Train Delays

1. Summary of the Proposal and of the Final Metrics and Standards

The Proposed Metrics and Standards dealt separately with OTP and train delays. A route’s OTP was to be discerned on the basis of three tests (only two tests until FY 2010): 1) Change in Effective Speed,⁴ 2) percent on time at the endpoint (Endpoint OTP), and 3) percent on time at all stations served (All-Stations OTP). For all routes, effective speed was to be no worse than in the baseline year, FY 2007. The Proposed Metrics and Standards implied that the effective speed for each quarter was to match or better that for all of FY 2007.

OTP under the final standard is to be discerned on the basis of three tests (only two tests until FY 2012): 1) Change in Effective Speed, 2) percent on time at the endpoint (Endpoint OTP), and 3) percent on time at all stations served (All-Stations OTP) (Effective as of FY 2012). The final standard makes clear that the effective speed is to be calculated on a rolling four-quarter basis and compared with a fixed FY 2008 baseline.

The standard for percent on time was to vary by route type and by year, as follows:

Route Type	Percent on time in first year	Percent on time in fifth year
Acela	90%	95%
Other Northeast Corridor (NEC) routes	85%	90%
All other corridors	80%	90%
Long-distance routes	80%	85%

The same OTP standards are to be applied to both Endpoint and All-Stations OTP, although the tolerances for determining whether a train was late would differ between the two metrics. The OTP percentages above have been retained intact in the Final Metrics and Standards.

The following table compares the original proposal for Train Delays with that contained in the final document:

⁴ Effective speed is 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.

Metric (Minutes per 10,000 Train-Miles)	Original Proposal	Final Metrics and Standards
<i>Off Northeast Corridor</i>		
Amtrak-responsible delays	250	325
Host-responsible delays	700	900
Cause of delay shown for information?	Yes	Yes

Metric (Minutes per 10,000 Train-Miles)	Original Proposal		Final Metrics and Standards	
<i>On Northeast Corridor</i>				
	Acela	All other services	Acela	All other services
Total train delays	-	-	265	475
Infrastructure delays	104	123	-	-
Passenger and Commuter Train Interference	67	116	-	-
Third-party delays	37	44	-	-
All other delays	76	187	-	-
Cause of delay shown for information?	No		Yes	

As indicated in the table, the delay allowances have been raised and (in the case of the NEC) simplified from those originally proposed. For both off- and on-NEC performance, further information on causes of delay will be provided in the quarterly reports (although not part of the standards). Annex 3 provides the rationale for the chosen allowances.

In an important change from the original proposal, Annex 1 provides a mechanism for collaboration between Amtrak and its host railroads in adjusting published timetables and delay allowances under certain circumstances involving major planned construction and maintenance efforts.

2. Comments and Responses

The largest number of comments on the Proposed Metrics and Standards concerned the measures for on-time performance and train delays.

a. General Comments on OTP

Which routes are covered? *Comment:* CCJPA inquired which Amtrak routes would be subject to the Proposed Metrics and Standards and asserted that corridor services are more sensitive to OTP than long-distance trains. *Response:* PRIIA draws no distinction among the types of routes to be evaluated; thus all intercity passenger rail routes are covered by the Metrics and Standards, irrespective of the source(s) and methods by which they are funded, their relative sensitivity to the metrics, or the order in which they were established as part of the Amtrak system.

State-supported routes. *Comment:* WSDOT recommended adding "State-Supported Routes" to the list of Amtrak service types in the report to explicitly highlight the fact that they are covered by the Metrics and Standards. *Response:* Isolating State-supported routes as a

service type for these Metrics and Standards would produce insufficient benefits to justify the added complexity. For example, some corridor routes have both State-supported and non-State-supported trains; and annual changes in Amtrak-State contracts could produce an ever-shifting set of State-supported routes, thus detracting from year-to-year comparability. Finally, the number of non-State supported corridors is very low, and has shown signs of diminishing over the long term, thus limiting the utility of isolating these few corridors as a separate service type.

“Host railroad.” *Comment:* Metro-North asked for clarification of the definition of a host railroad. *Response:* Host railroads are all entities that own and/or operate the track over which Amtrak operates. Host railroads include not only freight railroads, but also all commuter railroads and State or regional agencies that own track used in intercity passenger service. Amtrak itself serves as a host railroad when operating over its own infrastructure. Train delays will be identified by route by host railroad for each host railroad that Amtrak utilizes for an appreciable distance (15 miles or more).

Effects of the OTP standards. *Comment:* A few parties submitting comments expressed concern about the potential effect (or lack of effect) of the OTP standards. BNSF argued that the Proposed Metrics and Standards will not substantially improve Amtrak OTP. The Maryland Transit Administration and the Southern California Regional Rail Authority (SCRRA) both were concerned that Amtrak OTP improvements might negatively impact commuter railroads and commented that such OTP improvements should not come at the expense of commuter rail operations. *Response:* PRIIA Section 207 is a promising sign of increasing national attention to the reliability of Amtrak’s service, and the OTP provisions of the Metrics and Standards constitute complementary performance indicators addressing the multiple facets of reliable service. Consequently, there is every reason to expect further improvements in Amtrak’s OTP—especially when viewed against the backdrop of the progress in OTP that occurred in FY 2009 over FY 2008, as well as the ongoing Federal commitment to intercity passenger rail investments evidenced in the HSIPR program. The Metrics and Standards are not intended to disturb existing mechanisms that safeguard the integrity of commuter rail operations, such as agreements among commuter authorities, commuter rail operators, and railroads hosting commuter service.

Suitability of Amtrak schedules. *Comment:* Several freight host railroads indicated that Amtrak’s current schedules are not suitable for and, in fact, cannot support reliable OTP. To meet the performance standards, these respondents asserted, the schedules will need to be revised using computer modeling techniques that account for current traffic and seasonal patterns. For instance, BNSF stated that Amtrak’s current schedules are based on pure run time, not on Amtrak’s ability to meet on-time arrival standards; and that longer-distance trains need to build additional recovery time into their schedules since they encounter a greater number of random delays. *Response:* The setting of schedules is primarily a matter between Amtrak, its host railroads, and any sponsoring States; scheduled train timings fall within the scope of the Metrics and Standards only to the extent that they contribute, in combination with endpoint terminal delays, to an increase in effective speed over the baseline. While modern scientific techniques (e.g., train performance calculators, simulations of route performance given fixed passenger schedules and random arrivals of freight trains) are desirable and encouraged,—as they can assist the two parties and other stakeholders in developing reasonable and workable schedules,—there is no substitute for teamwork and goodwill among the parties. Indeed, Annex 2 addresses that very topic, by encouraging the stakeholders to work through these issues in a collaborative manner. That the freight railroad industry devoted significant attention to its

docket responses on the Metrics and Standards indicates that the industry understands their importance and desires to collaborate in their successful implementation.

OTP and infrastructure improvements. *Comment:* Freight railroad and State agency respondents wondered whether and how the Proposed Metrics and Standards will deal with the need for ongoing and future rail infrastructure improvements. Freight railroads argued that significant infrastructure improvements will be needed (with Federal funding) to achieve reliable OTP results given current Amtrak schedules. One freight railroad, CSX, specifically tied the Effective Speed measure back to the issue of necessary rail capital investments. *Response:* These Metrics and Standard will yield increasingly robust OTP and delay reports that will provide a valuable data resource to Amtrak, States, and host railroads in pinpointing the routes that are most in need of improvement, and in isolating the causes of the most serious delays on each route. In that way, the Metrics and Standards will assist all parties in identifying the most effective and efficient ways to improve intercity passenger rail service. In turn, that knowledge will help to provide a basis for investments by, and partnerships among, the various stakeholders, and will assist them in prioritizing capital funds from available sources.

Adjustments for major construction and maintenance. *Comment:* Several State agencies recommended incorporating a mechanism into the OTP standards to adjust for periods when track work is being performed. For example, WSDOT recommended dismissing performance penalties that stem from delays occasioned by track work. *Response:* Annex 1 to the Metrics and Standards provides guidelines under which stakeholders can work together to temporarily adjust delay allowances and public Amtrak schedules during planned periods of major maintenance and construction.

Automation. *Comment:* Several stakeholders were concerned about the data collection process for OTP data and stated that more automated and technically advanced data collection mechanisms are needed in order to reliably track OTP. They also noted that such mechanisms would take time to implement. *Response:* The FRA agrees that more automated data collection mechanisms could be beneficial to the OTP reporting process and acknowledges that such improvements will take time for development, testing, and deployment. Amtrak has stated that it will investigate the possibility of integrating OTP data gathering capabilities with new technologies that it may be implementing (e.g. GPS tracking systems); in that regard, Annex 2 mentions “potential automation of station arrival and departure time recording.”

Data availability. *Comment:* One commenter stated that data collection methods need to be developed for the Effective Speed and All-Stations OTP measures. *Response:* Amtrak has assured the FRA that it is currently capable of providing data for both Effective Speed and All-Stations OTP. Furthermore, the FRA has been successfully making use of Amtrak data to calculate effective speed in seven quarterly OTP reports to Congress (available at <http://www.fra.dot.gov/us/content/1996>),

b. Comments on Effective Speed Measure

Several concerns emerged regarding the proposed Effective Speed measure.

Rationale for an “effective speed” test. *Comment:* Several freight host railroads argued that the Effective Speed measure has limited applicability to OTP. BNSF argued that the baseline set for the standard was never agreed upon and the AAR stated that the associated schedules are unrealistic. For this reason, it expressed its opposition to using the measure to guard against lengthened schedules. AAR claimed that train speed is not a consideration for

passengers choosing to travel by train, while CSX maintained that the Effective Speed metric was superfluous since passengers are most concerned with on-time arrivals. Caltrans stated that the metric cannot be used to assess the possible speed of a route.

Response: The FRA and Amtrak strongly believe that the preservation of the “effective speed” test fulfills a number of purposes simultaneously:

- It serves as a bulwark against the “schedule creep” that has seen actual travel times experienced by passengers on many—but not all—American passenger rail routes worsen significantly over the past half-century.⁵
- Similarly, by underlining the importance of shortening (or at least preventing deterioration in) door-to-door travel times, it emphasizes the key role of the rail mode in serving the public convenience and necessity and accords in principle with the high-speed emphasis of the Administration as described in its Strategic Plan for high-speed rail.⁶ To solve OTP challenges simply by lengthening schedules does not comport with prevailing Federal policy toward intercity passenger rail.
- Finally, as is the case with all-stations OTP, it emphasizes that the expeditious and reliable transportation of **all** intercity rail passengers on **all** routes—regardless of the region, the population density, and the type of rail service—is an important goal of both the FRA and Amtrak. In particular, in view of the thousands of city-pair markets and diverse travel purposes served by long-distance trains, the FRA and Amtrak cannot agree with some respondents that OTP is more important on some types of routes than on others; nor can it accept that door-to-door travel times are irrelevant to rail passengers.

Baseline. Comment: Multiple stakeholders stated that the proposed baseline for the Effective Speed measure is not adequate and/or reasonable. The Virginia Department of Transportation (VDOT) stated that the baseline should be derived from comprehensive route and consist analyses. **Response:** The FY 2007 baseline was historically and logically based, as FY 2007 was the fiscal year immediately preceding the enactment of the Consolidated Appropriations Act, 2008 (Public Law 110-161, December 2007); it was this Act that first expressed the Congressional mandate for the Secretary of Transportation to establish OTP standards for Amtrak routes, and to publish a quarterly report on each route’s OTP. The FRA and Amtrak believe, however, that the PRIIA (enacted October 16, 2008) represents a more enduring manifestation of Congressional intent, as it is a multi-year authorization rather than an appropriation. Accordingly, the baseline year for Effective Speed has been changed to FY 2008, the last full Fiscal Year prior to the enactment of PRIIA Section 207. While subject to certain refinements in calculation methods,⁷ the FY 2008 baseline must be regarded as representing most closely the prevailing Congressional intent as expressed in the PRIIA.

⁵ Some of these variations reflect changes in routes and in stopping patterns, often caused by the reduction in service from many trains to one train daily in each direction on most long-distance routes.

⁶ The Strategic Plan is available at <http://www.fra.dot.gov/us/content/31>.

⁷ For the reports to Congress, the FRA calculated the baseline indirectly, adding (for each route) the scheduled trip time to the average minutes late over the course of FY 2007. Amtrak has more direct methods of calculating effective speed from its operating data, which will be implemented for purposes of the quarterly Metrics and Standards reports.

Seasonality. Comment: AAR and several freight host railroads stated that the baseline does not account for seasonal differences in rail operations or for the expected increase in freight-rail demand. BNSF, in particular, commented that late Amtrak trains during periods of heavy freight traffic are the result of congestion and that Amtrak should respond to such congestion in the same manner as the freight railroads do by increasing its run times during such periods. BNSF and AAR recommended that the effective speed baseline be adjusted seasonally to account for seasonal variations in rail operations.

Response: The baseline covers an entire fiscal year, thereby accounting for a full four-season spectrum of traffic and climate conditions. The FRA agrees that the result for a single quarter could potentially reflect a seasonal skew, and has therefore adjusted the Metrics and Standards to use a four-quarter rolling average instead. However, to directly adjust the effective speed (or any other OTP) standard on a seasonal basis would be undesirable in that it would contradict one of the basic tenets and inherent advantages of passenger rail transportation—consistency of schedules and performance in all seasons.

Connection between effective speed and delays. Comment: NS stated that Effective Speed has no direct relation to delays or to the causes of delays. **Response:** Effective Speed is indeed related to delays since it incorporates the average lateness of trains, which results from the delays that trains encounter.

Deletion of effective speed measure. Comment: One respondent recommended simply eliminating Effective Speed and proposed substituting in its place the average running speed of individual trains. **Response:** The FRA and Amtrak perceive no reason to substitute, for effective speed, a measure that does not incorporate the effects of both OTP and scheduled train timings.

c. Comments on Endpoint OTP Measure

Despite a number of issues raised by respondents and discussed below, the FRA and Amtrak maintain that the Endpoint OTP measures are useful. For example, Performance Improvement Programs resulting from OTP scores that fall below the standard will act as catalysts for identifying operational improvements and near-term infrastructure projects in which to invest.

Schedules and recovery time. Comment: VDOT recommended utilizing the FRA's methodology for calculating recovery time when adjusting schedules. **Response:** As mentioned above under "Suitability of Amtrak schedules," schedule-setting *per se* remains primarily the responsibility of Amtrak, the host railroads, and a route's sponsoring State (if any). The FRA's recovery time calculation, included in the guidance manual "Railroad Corridor Transportation Plans" (<http://www.fra.dot.gov/us/content/1415>), is one tool that can be used to help assess the need for adjusted schedules. However, the FRA and Amtrak realize that the model's applicability varies among actual operating environments, which may necessitate significant adjustments to the calculations.

Endpoint OTP Tolerances. Comment: Related to the issue of schedule is that of OTP tolerances. CSX and the AAR commented that on-time arrival tolerances associated with the long-distance trains are insufficient for their route length. As described in the Proposed Metrics and Standards, a train is considered "late" if it arrives at its endpoint terminal more than 10 minutes after its scheduled arrival time for trips up to 250 miles; 15 minutes for trips 251-350 miles; 20 minutes for trips 351-450 miles; 25 minutes for trips 451-550 miles; and 30 minutes for trips of 551 or more miles; except that all Acela trips are considered late if they arrive at their

endpoint terminal more than 10 minutes after their scheduled arrival time. *Response:* Long-distance trains already have more recovery time built into their schedules than corridor-type services,⁸ which compensates for on-time arrival tolerances being capped at 551 or more miles. Thus, we are not persuaded of the need to change the tolerances.

Endpoint OTP and freight traffic levels. *Comment:* The AAR also stated that, historically, Amtrak OTP levels above 80 percent have occurred during periods of decreased demand for freight rail. *Response:* By definition, to be “reliable,” the quality of passenger rail service should be consistent over time, from season to season and year to year, regardless of the demand levels for freight and commuter service. If, in future periods of freight traffic growth, the application of these Metrics and Standards reveals negative trends, Section 207 will have served an important purpose: the identification of routes needing improvement to restore operating consistency. Once that identification is made, focused studies and Performance Improvement Programs can reveal specific remedies and assist stakeholders in setting priorities and seeking funding.

Limitations and proposed changes to Endpoint OTP. *Comment:* Some respondents pointed to limitations of, and possible changes to, the Endpoint OTP metric. CSX, for example, observed that Endpoint OTP does not reveal Amtrak’s performance on individual host railroads or the causes of substandard OTP. As such, CSX requested that Endpoint OTP be deemed an insufficient trigger for STB investigations.

Response: Section 213 of PRIIA mandates that percent on-time standards be used by the STB as a basis for initiating investigations on Amtrak’s service: “If [among other possible reasons] the on-time performance [i.e., Endpoint OTP] averages less than 80- percent for two calendar quarters,” the STB’s investigative discretion or mandate takes effect. Each of the OTP metrics, by itself, reveals only one aspect of service reliability. Train delay data by cause and by host railroad has been incorporated into the Metrics and Standards to complement the Endpoint OTP figures, which only illustrate the frequency of lateness.

Endpoint OTP and host railroad performance. *Comment:* AAR recommended reporting Endpoint OTP by host railroad while CSX and NS recommended using host railroads’ contract performance with Amtrak instead. *Response:* As noted above, individual host railroad performance will be illustrated through the train delay metrics. Thus, the FRA does not believe that it is necessary to also report Endpoint OTP by host railroad. (Nor would it be consistently meaningful: many routes make use of more than one host, and Endpoint OTP says nothing about responsibilities for late delivery of trains at intermediate junctions between hosts.) In response to the comments by CSX and NS, the standards embedded in host railroad contracts are not suitable as general performance measures for the purposes of this effort as contracts differ among the host railroads, significantly limiting their comparability. Furthermore, as mentioned above, Congress directed Amtrak and the host railroads to adopt these Metrics and Standards in their access and service agreements—not the reverse.

Proposal for site-specific standard-setting. *Comment:* Caltrans stated that the performance standards should be based on current track conditions and track improvements that will realistically occur by 2013. *Response:* Although useful, this concept raises practical

⁸ For example, trains in the San Joaquin corridor between Bakersfield and Oakland, CA (316 miles) have approximately 40 minutes of recovery time and other adjustments incorporated into their schedules. The Auto Train between Sanford, FL and Lorton, VA (855 miles) has approximately 2 hours, 45 minutes of recovery time and other adjustments.

difficulties in that (a) implementation of these Metrics and Standards must precede project selection decisions in the HSIPR program, thus making track conditions impossible to predict; (b) the concept implies separate standards for each route, a source of undesirable complexity; and (c) for intercity passenger rail to attract the kind of demand that will allow it to reach its full potential to yield public benefits, the standards for 2014—while achievable—must also be customer-centric and competitive with other modes, rather than constrained by current conditions.

d. Comments on All-Stations OTP Measure

Numerous parties expressed misgivings about the All-Stations OTP measure and its potential impact on operations. The FRA and Amtrak, however, firmly believe that the benefits of this measure will more than counterbalance its potential drawbacks. Furthermore, as a matter of principle, the nature of passenger rail service mandates All-Stations OTP: a single train, unlike an airline flight, can serve hundreds of origin/destination pairs, the passengers on each of which deserve a consistently high quality of service that can only be obtained if trains are on time throughout their runs.

Potential drawbacks. *Comment:* The CCJPA, AAR, and several freight host railroads stated that analysis of All-Stations OTP data would be an excessive administrative and financial burden, which the AAR claimed would be unjustified given the light passenger traffic at intermediate stations. VDOT implied that All-Stations OTP might actually have the effect of harming Amtrak's Endpoint OTP. Caltrans stated that spreading out recovery time for the All-Stations OTP metric will require thorough analysis and consideration of current operating practices. BNSF commented that Amtrak trains holding at intermediate stations because of reallocated recovery time will create additional delays down their rail line.

Response: FRA analysis shows that passengers utilizing intermediate stations amount to a significant portion of Amtrak's ridership—indeed, on many routes, a majority of the riders. Moreover, FRA and Amtrak believe that every intercity rail passenger deserves a consistently high quality of service under the OTP and other metrics and standards. Thus, both principle and travel demand patterns call for the measurement of OTP at intermediate points, despite the potential burden and operational impacts of this standard as identified by the respondents.

Scheduling implications. *Comment:* Both State agencies and freight host railroads acknowledged that the All-Stations OTP metric will require Amtrak and host railroads to agree to schedule adjustments to reallocate recovery time among intermediate stations.

Response: The FRA and Amtrak fully realize that introduction of the All-Stations OTP standard will involve a challenging process of readjustment, in which Amtrak, its railroad hosts, and (where applicable) State sponsors of service will collaboratively analyze and, as needed, modify train schedules. The FRA encourages these parties to develop a strategy and plan to address this challenge as soon as possible. To allow for an orderly transition to All-Stations OTP, the FRA and Amtrak have adjusted the implementation schedule: the All-Stations standard will not go into effect until FY 2012, two years after the other standards, to provide additional time for needed operational and scheduling adjustments. (All-Stations OTP data will, however, be published for information only, beginning with the first quarterly Metrics and Standards report.)

Effects of planned construction and maintenance. *Comment:* NS stated that freight host railroads have inadequate input into the schedule setting process, and that—even with

revised schedules—All-Stations OTP will unfairly penalize host railroads when conducting planned track work and receiving late Amtrak trains in the midst of such work. **Response:** Annex 1 provides a means of revising public schedules (hence the operation of All-Stations OTP) during periods of major construction and maintenance as agreed upon by Amtrak, the freight railroad host, and (as appropriate) the State sponsor of service.

Alternative approaches. Comment: Several parties proposed alternatives to the All-Stations OTP or alternative methods for calculating All-Stations OTP. CSX and multiple State agencies recommended simplifying the All-Stations OTP metric by calculating OTP only at strategic intermediate points. Caltrans, on the other hand, recommended maintaining this metric but calculating it based on the average minutes of early or late arrivals at each station. The CCJPA recommended eliminating the All-Stations OTP measure on shorter routes, while NS recommended eliminating the measure completely. **Response:** The Final Metrics and Standards retain “All-Station OTP” as originally proposed. Reducing the number of stations covered raises serious questions about how the list of stations is to be pruned, and implies that some passengers’ and some cities’ quality of train service is more important than that of others. As Amtrak has assured the FRA that the production of All-Stations OTP data is eminently feasible, there is no reason to implement changes to it on the grounds of data availability.

Other issues. Comment: Caltrans asserted that the All-Stations OTP standards are unrealistically high and, further, that results for this metric will necessarily be lower than for Endpoint OTP. **Response:** FRA’s own analysis suggests that, at least for some routes, All-Stations OTP could be comparable to or even higher than Endpoint OTP. It should also be noted that the calculation of All-Stations OTP uses a 15 minute grace period, which allows for that level of delays while still recording on-time operation. Even if All-Stations OTP temporarily yields less favorable results than those of Endpoint OTP, the heightened attention to intermediate stations will have long-term benefits both for rail passengers and for Amtrak’s traffic volumes and revenues. **Comment:** Caltrans also requested confirmation that State agencies will not be responsible for collecting and analyzing the All-Stations OTP data. **Response:** Amtrak—and not State agencies or other parties—will be responsible for collecting All-Stations OTP data, which will be analyzed by both Amtrak and FRA personnel.

d. Comments on Train Delay Measures

Which delays to report? Comment: The AAR and CSX stated that measuring delays for trains that are on-time is an excessive burden and irrelevant to passengers (i.e., this performance measure should only be used to report delays for late trains). **Response:** Reporting delays only for late trains limits the insight and comparability of the train delay data. Reporting all delays experienced by all trains better aligns the metric with the OTP standards, which utilize all train operations in their calculations (as opposed to only late train operations), and it gives an average amount of delays experienced during the operations of each route. A train that is meeting its OTP standard may still experience some high levels of delay along its route, a situation that might ultimately lead to revision of the train’s schedule to remove excessive recovery time. Reporting all train delays gives Amtrak, host railroads, and FRA an opportunity to analyze comprehensively a route’s performance and to develop plans to mitigate any challenges that are revealed, thereby further improving the route’s OTP.⁹ As a result, train delays has been retained as a key element in the Final Metrics and Standards.

⁹ Beyond these objective benefits of tracking all delays, it is not necessarily true that train delays are irrelevant to individual passengers: For some passengers at least, anecdotal evidence suggests that sitting on a stopped train in the

Pure vs. scheduled run time. *Comment:* Multiple stakeholders objected to the use of pure run time as the basis for train delay data outside of the NEC.¹⁰ CSX argued that freight railroads are held to a higher performance standard than Amtrak, which measures itself on scheduled run time within the NEC. Several freight railroads argued that use of pure run time does not align with the public's service expectations, which are based on schedules. WSDOT stated that pure run time does not account for planned capital improvement projects, while Caltrans commented that use of pure run time oversimplifies train operations on congested corridors. BNSF stated that OTP measures are only relevant if they are compared to Amtrak's public timetable. Both State agencies and freight railroads recommended basing this metric on scheduled run time. ***Response:*** Again, reporting all train delays gives Amtrak, host railroads, and FRA a better opportunity to identify areas of frequent delays on routes, to further improve route reliability. On the NEC, which at this time is a unique high-speed intercity passenger rail operation, the levels of allowable train delays have been significantly lowered to account for Amtrak's use of scheduled run-time. (Total delay allowances off the NEC amount to 1,225 minutes per 10,000 train-miles; on the NEC, there is a total allowance of only 260 minutes for Acela and 470 minutes for all other services.)

Adjustments for out-of-slot trains and track work. *Comment:* Metro-North and Caltrans, respectively, argued that train delay data should be adjusted for out-of-slot trains and for planned track work. ***Response:*** The standard for train delays off the NEC has been increased to 900 minutes per 10,000 train-miles (from the original 700 minutes) in the final Metrics and Standards, which will help host railroads absorb delays they incur as a result of receiving late Amtrak trains. Additionally, delay-minute standards may be temporarily adjusted to account for major track maintenance and construction projects that have been planned by host railroads (see Annex 1 for conditions and other details).

Source of delay data. *Comment:* Both State agencies and freight host railroads questioned the source of data on delays. In particular, they criticized the use of Amtrak's conductor delay reports as the primary data source for assessing delays due to concerns with the accuracy of those reports. The AAR and BNSF recommended that the freight railroads' delay data also be considered when analyzing delays. The AAR and CSX stated that a more automated source of delay data is needed. ***Response:*** While we understand these concerns, the source of delay data for the Metrics and Standards is based on the valuable, consistent, comparable information it provides. While some individual host railroads have stated that they produce their own train delay data, no uniform database for minutes of delay across the Amtrak system exists that can replace Amtrak's conductor delay reports. However, individual host railroads can use their own data, when practicable following reporting of the delay, to help resolve discrepancies with Amtrak and help identify the incidents that may have contributed to delays. The FRA agrees that more automated sources of delay data would be beneficial; as noted above, Amtrak has said it will examine integrating more automated OTP measurement mechanisms into future IT implementation efforts (e.g., GPS tracking).

middle of a cornfield is not only frustrating but also cause for anxiety, as it implies that the train might be late at the passenger's destination. Passengers cannot be expected to know the intricacies of train scheduling, dispatching, and recovery time.

¹⁰ In simplified terms, "pure" run time means that between any two points (say, A and B), Amtrak and the freight railroad will have agreed on how long it should take an Amtrak train to make the run in the absence of any delaying factors. This "pure" run time, plus an allowance ("recovery time" or "pad") for delays, yields the scheduled running time between A and B. Outside the NEC, all delays that cause a train to exceed its "pure" run time are registered as delays, even if the train makes the run between A and B within the scheduled running time.

Source of delay standard. *Comment:* Questions arose regarding the regression analysis methodology used to establish the various standards for measuring train delays (as described in the Proposed Metrics and Standards). Both CSX and Caltrans stated that regression analyses and resulting performance standards related to delay data should be implemented on a route-by-route basis instead of collectively to account for different characteristics among Amtrak's routes.

Response: A separate delay standard for each route is not practicable; for example, such a standard would need to be altered each time a route or its schedule is changed. Still, the FRA recognizes that different characteristics exist among Amtrak's routes; to account for such variations, 200 minutes have been added to the off-NEC host-responsible train delay standard of 700 delay-minutes per 10,000 train-miles that was originally proposed. Annex 3 describes the derivation of the delay allowances used in the Final Metrics and Standards.

Delay categories. *Comment:* State agencies and host railroads commented that the off-NEC train delay categories are too broad, making it difficult to identify incidents which may have contributed to delays. Both CSX and Metro-North recommended that proposed groupings of delay categories be broken out to provide more detail. Multiple freight railroads indicated that the proposed categories wrongly suggest that many delays are dispatching-related. BNSF further stated that some delays may actually improve Amtrak's overall trip performance, which is not reflected in the proposed Metrics and Standards format. *Response:* The inclusion of a train delay allowance in the Metrics and Standards (rather than a zero-tolerance standard) recognizes that a subset of train delays may arise in the normal course of operations, as part of a good-faith effort by all parties to expedite the passage of passenger trains over a complex railway network, or to improve the infrastructure used in passenger service. In terms of the level of detail that will be provided on the source of train delays, these will be provided as metrics for informational purposes only.

Measurement of delays. *Comment:* Metro-North requested an explanation as to whether delay minutes on the NEC will be reported on a per 10,000 train-miles basis. *Response:* To clarify, train delays on the NEC will be reported on a per 10,000 train-mile basis, which is the same format used to report delays off the NEC. This text was inadvertently left out of the table in the draft.

Comment: NS argued that Delays per 10,000 Train-Miles is an inappropriate measure since no route operates such a distance. NS also commented that the proposed train delay measure does not indicate the frequency and severity of late trains. Furthermore, it recommended removing the entire performance measure from the Metrics and Standards. *Response:* Clearly, even the longest Amtrak routes are significantly shorter than 10,000 miles. However, reporting delays on a uniform per train-mile basis is important since there is no consistent route length in the Amtrak system. Amtrak's regularly scheduled services all operate well over 10,000 train-miles each month. With respect to the proposed deletion of the delay standard, PRIIA Section 207 explicitly requires that the FRA and Amtrak jointly develop "metrics and minimum standards for . . . on-time performance and minutes of delay [emphasis added]." Furthermore, although train delay does not indicate the frequency or the severity of late trains, it can provide a starting point for research into the reasons for poor OTP. This initial indicator may be valuable to Amtrak, the host railroads, and any sponsoring State(s) as they seek to raise service quality levels on specific routes.

d. Additional OTP measures proposed

Several recommendations were submitted proposing additional OTP measures.

OTP for other services. *Comment:* Maryland Transit recommended including data on commuter and freight train OTP on reports pertaining to the NEC. *Response:* While data on commuter and freight OTP might shed further light on operational issues and challenges on the NEC, such data falls outside the scope of these Metrics and Standards. (Section 207 of PRIIA specifically states that the Metrics and Standards are for measuring the performance of intercity passenger train operations.)

Host railroad metric. *Comment:* The AAR proposed including a new host railroad metric that would measure performance on the host railroads' own lines based on factors that they can control. *Response:* The AAR did not explain how its proposed host railroad metric would be developed or calculated; therefore, this proposal was not sufficiently elaborated for evaluation as part of the docket review.

Measures of the severity of lateness. *Comment:* The AAR and CSX proposed including a performance measure calculated based on increments of late train arrivals, e.g., the percentage of trains arriving within 30, 60, and 90 minutes of schedule, in order to enable investigations to be focused on trains that are relatively more late. *Response:* The severity of late train arrivals is a component of the Effective Speed measure, of which the total train run time (scheduled time plus endpoint terminal lateness) makes up the denominator. Accordingly, there is no pressing need in the Metrics and Standards for an analysis of train arrivals by lateness increment. Nevertheless, for specific purposes—for example, the development of performance improvement plans for the worst-performing long-distance routes under Section 210 of PRIIA—such a distribution may prove highly informative and beneficial.

D. Other Service Quality Measures

1. Summary of the Proposal and of the Final Metrics and Standards

In the Other Service Quality area, most metrics and standards are derived from Amtrak's Customer Satisfaction Index (CSI). The topics cover the full range of the passenger experience on and off the train. Of these, most require a "very satisfied" rating from 80 percent of passengers in 2010, and 90 percent in 2014; the only divergences from this standard is for overall service in 2010 (82 percent). As the measures for the "overall station experience" and the "overall sleeping car experience" are not currently included in the CSI, their implementation continues to be deferred.

Two other metrics, not based on the CSI, fall within this category: Equipment-caused service interruptions per 10,000 train-miles, and the presentation of Amtrak passenger comment data by subject matter and major route grouping. No standards would attach to these items, which would be included in the quarterly Metrics and Standards report for information only.

2. Comments and Responses

a. Additions to the Customer Satisfaction Index (CSI) in the Proposed Metrics and Standards

Comment: NARP expressed support for including CSI metrics for passengers' station and sleeping car experiences. *Response:* While sufficient CSI data to create standards for stations and sleeping cars currently do not exist, the FRA will work with Amtrak on incorporating these topics into the CSI and developing metrics and standards for them.

b. Other proposed topics

Comment: An individual of unknown affiliation commented that food service should be available on all trains over one hour in duration, that clean restrooms should be standard on all trains, and that safe boarding/detraining should be standard at all stations. The FRA inferred that the respondent was recommending these items for inclusion as performance standards.

Response: The suggested metric on food availability is too prescriptive, in view of the wide-array of operational characteristics that exist across Amtrak's routes, to be incorporated into the Metrics and Standards. In addition, the suggested standard for safe boarding/detraining is outside the scope of the PRIIA Section 207 mandate, particularly as safety issues fall under Division A of Public Law 110-432, the Rail Safety Improvement Act of 2008, of which Section 404 mandates a study of methods to improve or correct passenger station platform gaps "to minimize the safety risks associated with such gaps for railroad passengers and employees." Also, clean restrooms are already considered in the Metrics and Standards as an aspect of the "On-Board Cleanliness" measure.

c. Sources of Other Service Quality Standards

Comment: WSDOT asked about the source of the Other Service Quality standards and whether comparable foreign data were used to assist in setting these standards. **Response:** While acknowledging the potential insights that data from foreign countries and other modes might provide, the FRA and Amtrak regard the CSI as the most practical and readily available source for metrics and standards in the area of Other Service Quality factors.

d. Objectivity of Data Sources

Comment: The TWU noted that the Other Service Quality measures are largely tied to subjective customer response data that are strongly correlated with OTP. The TWU encouraged the use of more objective and credible data sources in establishing standards and stated that the Metrics and Standards should not be implemented until the Other Service Quality data sources are strengthened. **Response:** FRA and Amtrak acknowledged in the Proposed Metrics and Standards that the CSI has some limitations—for instance, the correlation of responses in all areas with on-time performance. Still, as mentioned above, the FRA and Amtrak believe that the CSI provides a practical foundation for the Other Service Quality standards in compliance with the PRIIA. Moreover, the PRIIA's stringent deadlines did not allow for, nor did the PRIIA authorize or fund, extensive research into methods for setting and reporting on Other Service Quality criteria and standards; nor did the PRIIA provide for any new survey instruments or inspection mechanisms, which would likely have been necessary to implement any research recommendations.

e. Level of Other Service Quality Standards

Comment: Several parties submitted comments regarding the appropriate level at which the Other Service Quality standards should be set. NARP, WSDOT, and Caltrans indicated that the Other Service Quality goals were too high, while WisDOT stated they were too low. WSDOT noted that many stations used by Amtrak are not in fact owned by Amtrak, and that standards prescribing station improvements will be a burden for the (often local) station owners to implement. WSDOT recommended the removal of the metric on On-Board Food Service satisfaction due to the inconsistent nature of responses, while TWU requested more information on the Equipment-Caused Service Interruptions measure to better assess its appropriateness.

Response: The FRA believes that the Other Service Quality standards are appropriate. These standards were based on the historical trends of the CSI data, which demonstrate a pattern

of annual improvement. With regard to stations, the proposed metric is Percent of Passengers “Very Satisfied” with the overall station experience. The FRA and Amtrak have not yet proposed a standard for this metric, for which data do not yet exist. However, assessing passenger reactions to the station experience is worthwhile—regardless of the availability of funding for any investments that would improve that experience, and irrespective of the stations’ ownership. With regard to on-board food service, despite discrepancies in how respondents rate Amtrak’s food service, this metric is valuable as a basic indicator of how well Amtrak’s investment in food service aligns with customer needs and expectations. Finally, regarding Equipment-Caused Service Interruptions, this metric is intended to offer some insight into the reliability and soundness of the fleet as experienced by passengers. While details are yet to be fully worked out, the Proposed Metrics and Standards provided a definition of service interruption as well as a brief description of the mechanics to be used in calculating this metric. Also, to reiterate, this metric would be calculated on a route-by-route basis, not for the system as a whole; and no standard is being proposed for this metric.

E. Public Benefits, Including Service Availability and Connectivity

The original proposal contained a fourth category of metrics, “service availability/connectivity,” that would measure the degree to which long-distance passengers are transferring among routes and the availability of train service to communities lacking other public transport options—topics mandated by Congress in PRIIA Section 207. In recent months, the implementation of a new Federal policy toward intercity passenger rail—as exemplified by the HSIPR program and its strategic plan and interim guidance—has focused the Nation’s attention on the full spectrum of public benefits inherent in the rail mode. Accordingly, the scope of the former “service availability/connectivity” category has been expanded to address “public benefits” generally. The measures of “connectivity” and “availability of other modes” will remain intact, as originally proposed, as part of “Public Benefits”; in addition, an analysis will be undertaken of opportunities for incorporating energy-saving and environmental measures into the Metrics and Standards. Proposals emanating from this analysis of Public Benefits will, of course, be made available for public comment.

With regard to the service availability/connectivity category of the original proposal, the only comment received was from NARP. *Comment:* NARP stated that intermediate stations currently receiving late night service should receive daytime service through increased frequencies rather than by adjusting schedules. NARP also recommended that language be modified to leave open the possibility of future additions to service. *Response:* The reduction in passenger rail service over the past half-century has left many long-distance routes with one daily train each way—a situation inevitably leaving many communities with poorly-timed service in one or both directions. Thus, NARP’s comment treats a serious and difficult issue. Still, scheduling issues, including whether or not to increase train frequencies on a particular route, are a business decision outside the scope of these Metrics and Standards—and indeed, are referred to in a separate section of PRIIA (Section 208).

METRICS AND STANDARDS FOR INTERCITY PASSENGER RAIL SERVICE

In accordance with Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), the Federal Railroad Administration (FRA) and Amtrak are jointly issuing the following Metrics and Standards for intercity passenger rail service. All Metrics and Standards will be measured and applied on a quarterly basis, except where otherwise noted.

<u>Metric/ Standard Category</u>	<u>Metric/Standard Subcategory</u>	<u>Standard Applies By</u>	<u>Statutory Requirement</u>	<u>Added Measure</u>	<u>Standard; Comments</u>
Financial	Percent of Short-Term Avoidable Operating Cost ¹¹ Covered by Passenger-Related Revenue (exclude capital charges), both with and without State subsidy included in revenue	route	✓		Continuous year-over-year improvement on a moving eight-quarter average basis. Dollar-denominated metrics (surpluses/losses per passenger-mile) will be reported in constant dollars of the reporting year (based on the OMB GDP Chain Deflator).
	Percent of Fully Allocated Operating Cost ¹² Covered by Passenger-Related Revenue (exclude capital charges), both with and without State subsidy included in revenue	route	✓		
	Long-term avoidable operating loss ¹³ per PM (exclude capital charges), both with and without State subsidy included in revenue	route		✓	
	Adjusted (Loss) ¹⁴ per passenger-mile, both with and without State subsidy included in revenue	system		✓	
	Passenger-Miles per Train-Mile	route	✓		

¹¹ "Short-Term Avoidable Operating Costs" are those costs that would cease to exist one year after a specific route ceases to operate.

¹² "Fully-Allocated Costs" of a route are the total costs of operating the route, including all types of production costs (direct materials, direct labor, and fixed and variable overhead) and also a share of marketing, administrative, financing, and other central corporate expenses.

¹³ The "long-term avoidable operating loss" of a route is the improvement in Amtrak's bottom line that would accrue five years after, and solely due to, the elimination of a given route.

¹⁴ The definition of Adjusted (Loss) is: Net Loss of Amtrak's Operating Business Lines, adjusted to eliminate the effects of Depreciation, Other Post-Employment Benefits (OPEB's), project costs covered by capital funding, and net interest expense.

<u>Metric/ Standard Category</u>	<u>Metric/Standard Subcategory</u>	<u>Standard Applies By</u>	<u>Statutory Requirement</u>	<u>Added Measure</u>	<u>Standard; Comments</u>
On-Time Performance	On-Time Performance (OTP). This congressionally-mandated metric/standard will consist of two tests (Nos. 1 and 2) starting in FY 2010, and three tests (Nos. 1, 2, and 3) beginning in FY 2012. All tests applicable in a given quarter must be met.	Route ¹⁵	✓		
	Test No. 1: Change in “Effective Speed” —which is 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.				Effective speed for each rolling four-quarter period must be equal to or better than the average effective speed during FY 2008.
	Test No. 2: Endpoint OTP ¹⁶				In FY 2010, Endpoint OTP must be at least 80% for all routes except Acela (90%) and other Northeast Corridor (NEC) corridor routes (85%). ¹⁷ By FY 2014, Endpoint OTP must be at least 95% for Acela, 90% for all other NEC and non-NEC corridor routes, ¹⁸ and 85% for long-distance routes. If public Amtrak schedules are adjusted for major maintenance and construction projects (see Annex 1), Endpoint OTP will be calculated against the adjusted schedule.

¹⁵ Each route comprises two or more trains (at least one in each direction). The Internet version of the quarterly Metrics and Standards report will contain a link to train-by-train information that will allow all stakeholders to characterize performance at the train level and facilitate compliance with all relevant sections of PRIIA.

¹⁶ A train is considered “late” if it arrives at its endpoint terminal more than 10 minutes after its scheduled arrival time for trips up to 250 miles; 15 minutes for trips 251-350 miles; 20 minutes for trips 351-450 miles; 25 minutes for trips 451-550 miles; and 30 minutes for trips of 551 or more miles. These tolerances are based on former ICC rules. The exception is that all Acela trips, regardless of run length, are considered late if they arrive at their endpoint terminal more than 10 minutes after their scheduled arrival time.

¹⁷ For purposes of the Change in Effective Speed, Endpoint OTP, and All-Stations OTP metrics and standards, “other NEC corridor trains” are all Northeast Regional and Keystone service trains, including the Northeast Regional trains operating between Washington and points in Virginia.

¹⁸ “Non-NEC corridor trains” refers to trains in all Amtrak services other than the Northeast Corridor trains (Acela, Northeast Regional, and Keystone), and other than the long-distance trains (Auto Train, California Zephyr, Capitol Limited, Cardinal, City of New Orleans, Coast Starlight, Crescent, Empire Builder, Lake Shore Limited, Palmetto, Silver Meteor, Silver Star, Southwest Chief, Sunset Limited, and Texas Eagle.)

<u>Metric/ Standard Category</u>	<u>Metric/Standard Subcategory</u>	<u>Standard Applies By</u>	<u>Statutory Requirement</u>	<u>Added Measure</u>	<u>Standard; Comments</u>
	<p>Test No. 3 (Effective as of FY 2012): All-Stations OTP—which is defined as the percentage of train times (departure time from origin station and arrival time at all other stations) at all of a train’s stations that take place within 15 minutes (10 minutes for Acela) of the time in the public schedule.¹⁹</p>				<p>Effective FY 2012, All-Stations OTP must be at least 80% for all routes except Acela (90%) and other NEC corridor routes (85%). By FY 2014, All-Stations OTP must be at least 95% for Acela, 90% for all other NEC and non-NEC corridor routes, and 85% for long-distance routes. Results for this metric will be published beginning with the first report under Section 207, even though the test is not in effect until FY 2012. If public Amtrak schedules are adjusted for major maintenance and construction projects (see Annex 1), All-Stations OTP will be calculated against the adjusted schedule.</p>
<p>Train Delays</p>	<p>Train Delays.²⁰ This Congressionally-mandated metric/standard will consist of two groups of tests—“off” and “on” the Northeast Corridor (NEC)²¹: See Annex 1 for special provisions with respect to train delay due to major planned maintenance and construction projects.</p>		<p>✓</p>		<p>Annex 3 describes the rationale for the standards adopted in the Train Delay category.</p>
	<p>Train Delays—Off NEC</p> <p>Amtrak-Responsible²² Delays per 10,000 Train-Miles</p>	<p>Route¹⁵</p>			<p>Delays must be not more than 325 minutes per 10,000 Train-Miles.</p>

¹⁹ The 15-minute tolerance for All-Stations OTP is based on 49 U.S.C. Section 24101(c)(4).

²⁰ As calculated by Amtrak according to its existing procedures and definitions.

²¹ For this purpose, the NEC is defined as the entire main line between Boston, New York, and Washington, except for the portion owned by Metro-North between New Rochelle and New Haven. Also included in the NEC definition are the Keystone line between Philadelphia and Harrisburg and the Springfield line between New Haven, Hartford, and Springfield. Metro-North, on its New Rochelle-New Haven segment, is the host railroad.

²² “Amtrak-responsible” refers to delays coded on Amtrak Conductor Delay Reports as Passenger-Related (ADA, HLD), Car Failure (CAR), Cab Car Failure (CCR), Connections (CON), Engine Failure (ENG), Injuries (INJ), Late Inbound Train (ITI), Service (SVS), System (SYS), or Other Amtrak-Responsible (OTH).

<u>Metric/ Standard Category</u>	<u>Metric/Standard Subcategory</u>	<u>Standard Applies By</u>	<u>Statutory Requirement</u>	<u>Added Measure</u>	<u>Standard; Comments</u>
	Host-Responsible ²³ Delays per 10,000 Train-Miles	Route ¹⁵ and host			Delays must be not more than 900 minutes per 10,000 Train-Miles. Major reported causes of delay will also be shown for information (with no standard attached to them). The 900-minute standard is intended to absorb routine/seasonal maintenance, track work, and other routine construction projects. On a case-by-case basis, an additional delay allowance above this standard may also be applied to account for major maintenance and construction projects. See Annex 1 for further details.
	Train Delays— On NEC: Total Delays ²⁴ per 10,000 Train-Miles	Route ¹⁵ and host			Delays must be not more than 265 minutes per 10,000 Train-Miles for Acela, and 475 minutes per 10,000 Train-Miles for all other services on the NEC. Reported causes of delay will also be shown for information (with no standard attached to them). The 265- and 475-minute standards are intended to absorb routine/seasonal maintenance, track work, and other routine construction projects. On a case-by-case basis, an additional delay allowance above this standard may also be applied to account for major maintenance and construction projects. See Annex 1 for further details.

²³ "Host-responsible" refers to delays coded on Amtrak Conductor Delay Reports as Freight Train Interference (FTI), Slow Orders (DSR), Signals (DCS), Routing (RTE), Maintenance of Way (DMW), Commuter Train Interference (CTI), Passenger Train Interference (PTI), Debris Strikes (DBS), Catenary or Wayside Power System Failure (DET, used in electrified territory only), or Detours (DTR).

²⁴ "Total delays" for purposes of the NEC delay standard is all delays except 3rd Party delays.

<u>Metric/ Standard Category</u>	<u>Metric/Standard Subcategory</u>	<u>Standard Applies By</u>	<u>Statutory Requirement</u>	<u>Added Measure</u>	<u>Standard; Comments</u>	
The following metrics and standards are based on Amtrak's Customer Satisfaction Index:						
Other Service Quality	Percent of Passengers "Very Satisfied" ²⁵ with Overall Service	route	✓		82 percent in 2010; 90 percent by 2014	
	Percent of Passengers "Very Satisfied" with Amtrak personnel	route	✓		80 percent in 2010; 90 percent by 2014	
	Percent of Passengers "Very Satisfied" with Information Given	route	✓			
	Percent of Passengers "Very Satisfied" with On-Board Comfort	route	✓			
	Percent of Passengers "Very Satisfied" with On-Board Cleanliness	route	✓			
	Percent of Passengers "Very Satisfied" with On-Board Food Service	route	✓			
	<i>Future:</i> Percent of Passengers "Very Satisfied" with the overall station experience	route	✓		Future metric and standard; standard to be determined	
	<i>Future:</i> Percent of Passengers "Very Satisfied" with the overall sleeping car experience	route	✓		Future metric and standard; standard to be determined	
	The following measures are for information only and are based on sources other than the Customer Satisfaction Index.					
	Equipment-caused service interruptions per 10,000 train-miles	route	✓			Metric only. This is an initial metric, intended to reflect objectively the quality of mechanical maintenance as perceived by the passenger. No standard is proposed.
Presentation of Amtrak passenger comment data by subject matter and major route grouping (NEC, other corridors, long-distance)	type of route			✓	Information only. No standard proposed; presented as supplementary information.	

²⁵ "Very Satisfied" with the service quality is defined as a score in the top three steps on a scale of eleven evaluation ratings that respondents can ascribe to each facet of the service. For a given service factor, "80 percent" means that 80 percent of respondents rated Amtrak in the top three of the eleven steps of the scale.

<u>Metric/ Standard Category</u>	<u>Metric/Standard Subcategory</u>	<u>Standard Applies By</u>	<u>Statutory Requirement</u>	<u>Added Measure</u>	<u>Standard; Comments</u>
Public Benefits	Connectivity measure: Percent of passengers connecting to/from other routes. To be updated annually.	long-distance route	✓		Metric only. No standard possible; improvement could require network changes
	Availability of other modes: Percent of passenger-trips to/from underserved communities. ²⁶ To be updated annually.	route, system	✓		Metric only. No standard possible; improvement could require network changes
	Energy-Saving and Environmental Measures. This is a new grouping of one or more measures under “Public Benefits.” A forthcoming analysis will identify various methodologies for incorporating environmental benefits and energy savings into these Metrics and Standards at a later date. Any proposals in this regard will be made available for public comment.				

²⁶ “Underserved communities” would be defined for this purpose as those more than 25 miles from a place with 50,000 or more inhabitants. This definition, which assumes that places with a population of 50,000 or more (and their environs within a radius of 25 miles) are not “underserved,” is preliminary and subject to change as research progresses.

List of Annexes

Annex 1: Additional Delay Allowance for Major Maintenance and Construction Projects

Annex 2: Collaboration Anticipated in Achieving Metrics and Standards

Annex 3: Explanation of Train Delay Analysis

Annex 4: Lists of Parties Submitting Written Comments

Annex 1: Additional Delay Allowance for Major Maintenance and Construction Projects

- To facilitate advance planning for major maintenance and construction projects and thereby minimize customer impact of such projects, Amtrak and individual host railroads may agree that during a specific quarter, a specific train will incur more Host- or Amtrak-responsible delay than usual due to a major maintenance and construction project.
- The Section 207 delay standards (e.g., 900 minutes of host-responsible delay per 10,000 train-miles off-NEC) are intended to absorb routine track work, signal, and related maintenance (including seasonal work), and other routine or small projects. As such the process described herein applies only to major maintenance and construction projects. “Major maintenance and construction projects” are typically characterized by:
 - Sufficient scale and scope that they cannot be absorbed by normal recovery time and delay standards. “Sufficient scale and scope” are typically indicated by a combination of at least three of the following:
 - System gang rather than Division gang
 - Host is changing freight schedules
 - Project duration at least 4 days
 - Affects at least half of Amtrak trains in the affected Amtrak service
 - Planned sufficiently in advance to allow at least 4 weeks advance notice to Amtrak (e.g., to allow schedules to be adjusted and passengers to be notified as appropriate)
 - Duration of the work is limited in both time and geography (the project has dedicated resources, a timeline, and a conclusion; it is not ongoing maintenance on a route all season long)
- FRA’s quarterly report will indicate any major maintenance and construction allowance agreed upon by Amtrak and the host for that quarter.
 - Amtrak will keep records of any major maintenance and construction allowances, and will provide this information to FRA quarterly for inclusion in the report
 - Delay minutes will continue to be recorded and reported normally
- Where a major maintenance and construction allowance has been agreed upon by Amtrak and a host, the delay standard is considered to be met if either of the following is true:
 1. Delays are within the applicable standard (e.g., 900 minutes of host-responsible delay per 10,000 train-miles off NEC; 325 minutes of Amtrak-responsible delay per 10,000 train-miles off NEC), or
 2. Delays are within the applicable standard plus applicable major maintenance and construction allowance
- Where public Amtrak schedules are adjusted in response to major maintenance and construction, All-Stations OTP and Endpoint OTP will be reported against the adjusted schedules. Therefore, the OTP standards will not be adjusted for major maintenance and construction.

Due to the increased impact to customers when major maintenance and construction plans are changed close to the actual date of the work, unless otherwise agreed by Amtrak and the host, major maintenance and construction allowances shall apply only if the work is done in accordance with the plan (e.g., agreed-upon dates, schedule changes, etc.) originally agreed to by Amtrak and the host.

Annex 2: Collaboration Anticipated in Achieving Metrics and Standards

Good-faith collaboration between Amtrak and host railroads, as well as State and other stakeholders as appropriate, will be needed to ensure that the implementation of the above Section 207 standards is a success. Subject to the parties' statutory rights, examples of such collaborative efforts may include:

- Review of passenger and freight schedules, in particular to ensure that Amtrak schedule Recovery Time is appropriately allocated to support the All-Stations OTP standard. Amtrak and hosts may also explore temporarily lengthening Amtrak schedules vs. today during periods with seasonal operating variations, such as major maintenance and construction projects,²⁷ and potentially shortening Amtrak schedules vs. today where appropriate. The preferences of, and of course the contractual obligations of Amtrak and the host railroads toward State stakeholders will be fully taken into account in any such exploratory talks. Where available, joint host-Amtrak simulation modeling may be used as a source of information in evaluating schedules and recovery time assumptions, within the context of the Performance Improvement Program process.
- Collaborating to establish new analytical and reporting processes based on the Section 207 Standards. For example, for hosts that today measure themselves internally based on the compensation (incentive/penalty) provisions of their operating agreements with Amtrak, Amtrak and FRA anticipate that host internal management reports will need to be revised to monitor compliance with Section 207 Standards. Amtrak and hosts can work collaboratively to design new reporting processes.
- Potential automation of station arrival and departure time recording. Amtrak is currently working on these data enhancements.
- Expansion of Performance Improvement Programs as an opportunity to focus in more detail on potential operating, maintenance, and capacity improvements on individual routes, including incorporating the above processes as appropriate. Performance Improvement Programs may be used to analyze traffic patterns and to validate freight and passenger train operating plans to ensure they are designed to allow passenger trains to achieve the Section 207 Standards.

The above is not intended to affect, add to, or detract from the responsibilities of any party under the Section 207 Metrics and Standards.

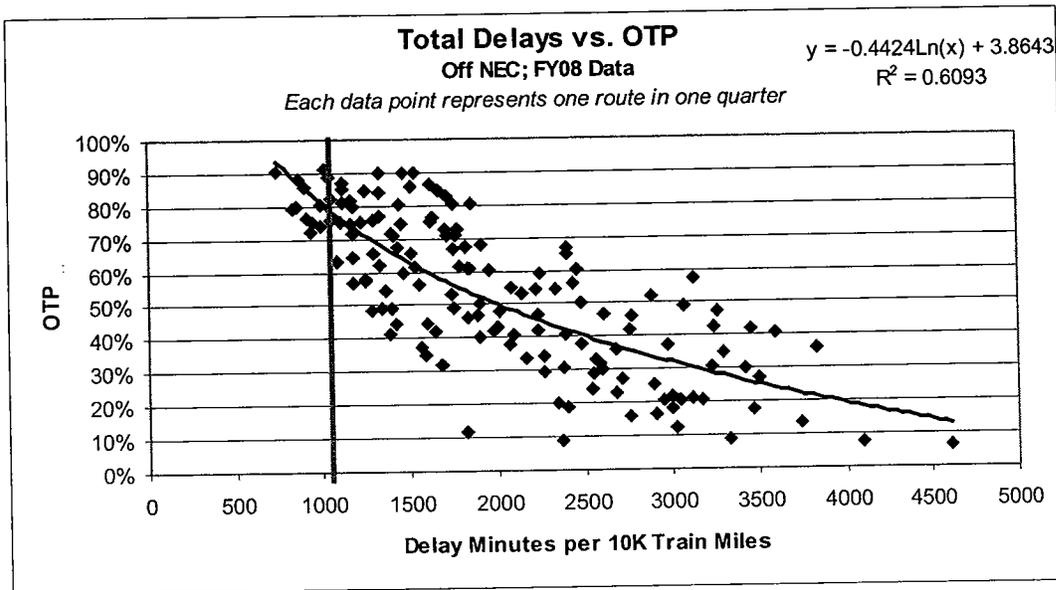
²⁷ Variations for major maintenance and construction projects will be subject to the process outlined in Annex 1.

Annex 3: Explanation of Train Delay Analysis

Regressions were run to determine the relationship between percent on time and delay minutes per 10,000 train-miles. Separate studies were undertaken for Northeast Corridor (NEC) and off-Northeast Corridor routes, in order to account for the difference in how delays are measured in the Northeast Corridor as well as the desire to set tighter standards for Northeast Corridor operations than for host railroad operations.

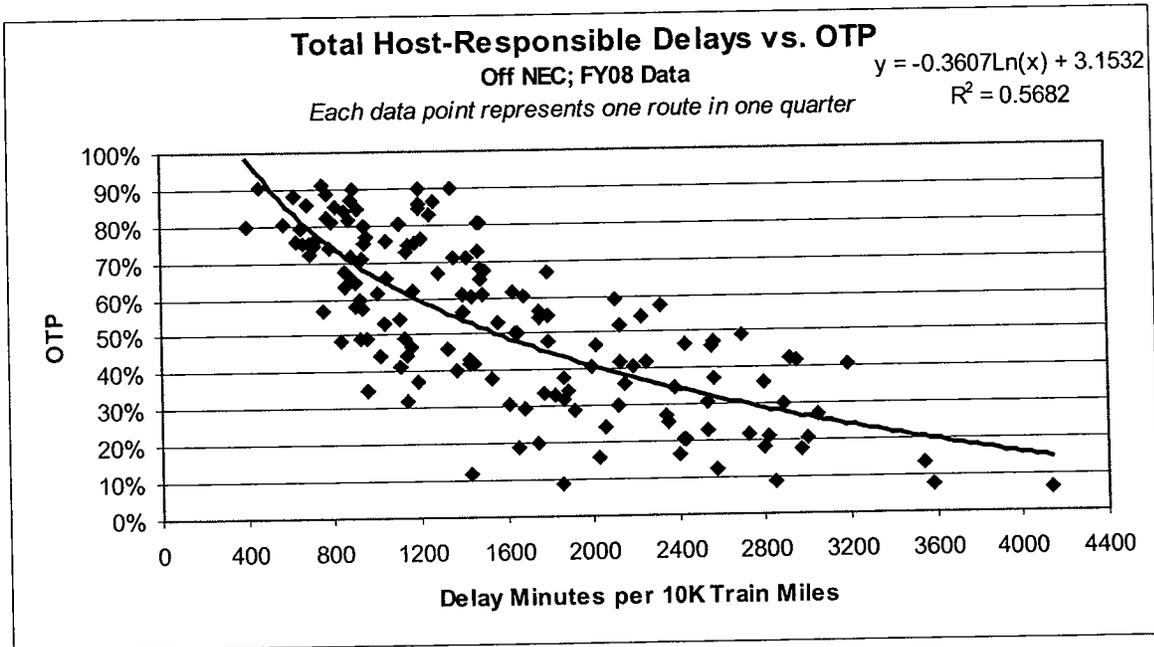
Off the Northeast Corridor, it was determined that 1,030 minutes of delay per 10,000 train miles correlates with an 80 percent endpoint on time arrival rate (see Figure A-1). After rounding up to 1,050 minutes, this delay must be apportioned between Host, Amtrak, and 3rd Party responsible causes.

Figure A-1: Total Delays off the NEC Corridor vs. Percent On Time



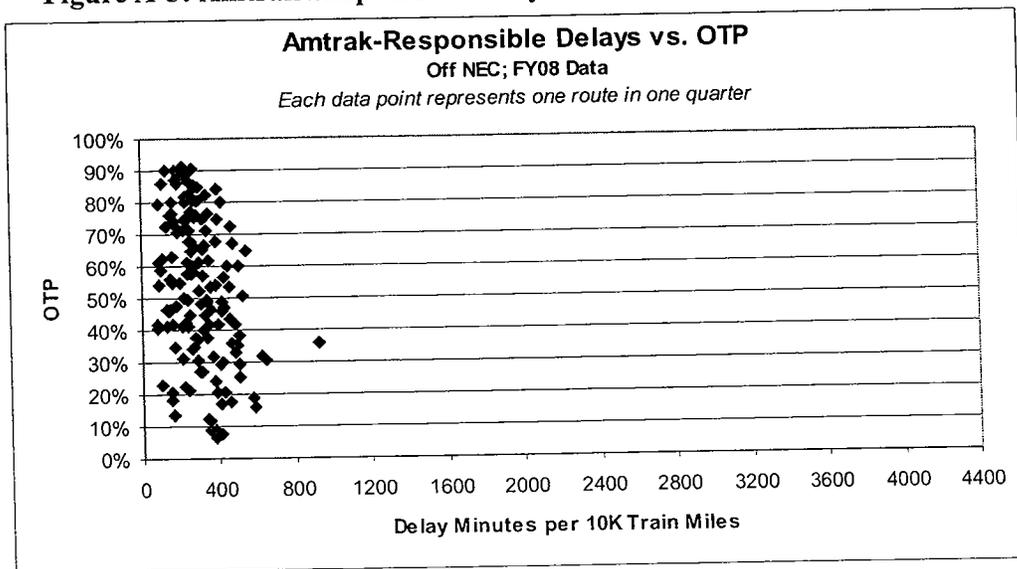
Regressions were then run to determine the relationship between host-responsible delays and OTP. This analysis found that 690 minutes of host-responsible delay per 10,000 train miles correlates with 80% OTP (Figure A-2). This number was rounded up to generate the originally-proposed standard of 700 minutes per 10,000 train miles.

Figure A-2: Total Host Responsible Delays off the NEC vs. Percent On Time



As illustrated in Figure A-3, Amtrak-responsible delays off the Northeast Corridor are not a large enough portion of total delays to independently drive OTP up or down. Therefore, the non-Host delays (1,050 – 700 = 350 mins) were apportioned between Amtrak and 3rd Party responsibility based on historical experience. During the study period of Amtrak’s FY 2008, Amtrak delays represented 70% of combined Amtrak and 3rd-Party (i.e., non-Host) delay minutes. The standard for Amtrak-responsible delays therefore was originally proposed as 70% of 350 minutes = 245 minutes, rounded up to 250 minutes per 10,000 train miles.

Figure A-3: Amtrak Responsible Delays off the NEC vs. Percent On Time



The final delay standards for Host- and Amtrak-responsible delays have been adjusted to 900 minutes and 325 minutes, respectively, per 10,000 train miles. This standard represents a 30 percent increase in allowable delays but is within the regression range that correlates to OTP. This adjustment is intended to:

- Ensure that the delay standards are sufficient to absorb any seasonal variations and/or routine maintenance or construction projects where the Major Maintenance and Construction adjustments outlined in Annex 1 have not been granted
- Allow Amtrak and hosts additional flexibility to collaborate in how to achieve the OTP standards, which must be met regardless of whether or not the delay standards also are met in a particular situation.

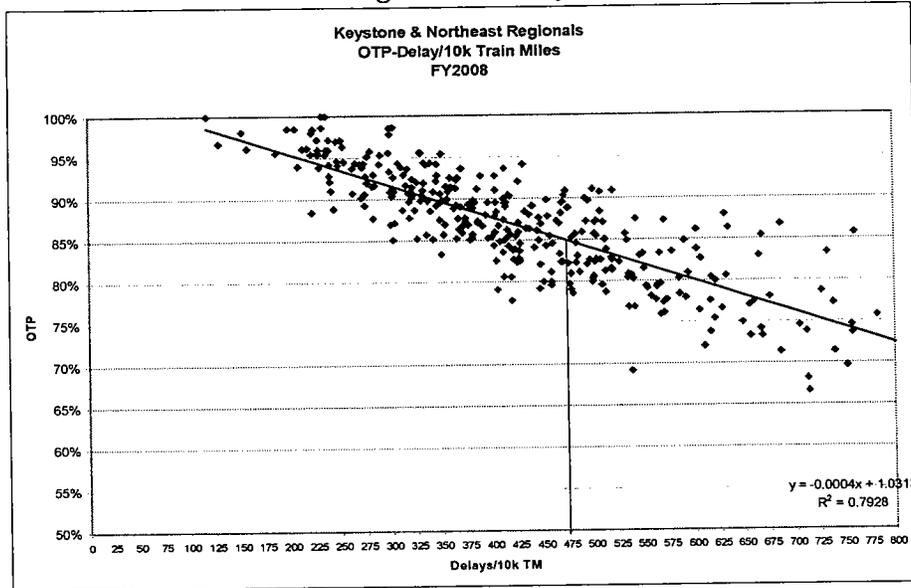
Similar regression studies were undertaken to determine the correlation between endpoint on-time performance and minutes of delay on the Northeast Corridor²⁸. Two separate studies were completed, one for Acela Express service using a 90% endpoint arrival rate and one for Northeast Regional/Keystone services using an 85% endpoint arrival rate.

An existing Acela Express mathematical regression model was applied using daily FY08 data to determine the minutes of delay threshold that correlates to 90% endpoint on time performance. It was determined that 285 minutes of delay per 10,000 train miles was the mid-point of the high-low delay minutes range that correlates with a 90% endpoint on time arrival rate. Delays per 10,000 train miles were then apportioned across the delay categories based on minutes of delay incurred by each category in FY08.

The Keystone & Northeast Regionals On Time Performance (OTP)-Delay study used daily performance and delay data from FY08. The study evaluated the relationship between OTP and delays. OTP was defined as the share of trains that arrived at endpoint within their endpoint tolerance for a particular day and delays were defined as total delay minutes incurred normalized to 10,000 miles operated. The OTP and delay data were plotted and the relationship (shape, slope, intercept, R^2) calculated. The total delay target of 470 minutes of delay per 10,000 train miles was derived by finding the total delays incurred on days when endpoint arrival performance was 85% or better. It was determined that 470 minutes of delay per 10,000 train miles was the mid-point of the high-low delay minutes range that correlates with an 85% endpoint on time arrival rate (Figure A- 4). Delays per 10,000 train miles were then apportioned across the delay categories based on minutes of delay incurred by each category in FY08.

²⁸ Off-Northeast Corridor Host railroad delay standards apply to Metro North Railroad.

Figure A- 4: Total Delays on the NEC vs. Percent On Time for Northeast Regional and Keystone Services



Similar to off-Northeast Corridor delays, the final delay standards for on-NEC delays where Amtrak is Host and is responsible for all delays except third party delays has been adjusted to 265 minutes of delay per 10,000 train miles for Acela Express and 475 minutes of delay for all other services. These standards represent total delays not including third party delays and represent an adjustment in allowable delays that is within the regression range that correlates to OTP. The adjustment of the standards is intended to ensure that the delay standards are sufficient to absorb any seasonal variations and/or routine maintenance or construction projects where the Major Maintenance and Construction adjustments outlined in Annex 1 have not been used.

Annex 4: Lists of Parties Submitting Written Comments

Listing by Type of Respondent

State Departments of Transportation
California Department of Transportation, Division of Rail (Caltrans)
Maryland Transit Administration (MTA)
Virginia Department of Rail and Public Transportation (VDOT)
Washington State Department of Transportation (WSDOT)
Wisconsin Department of Transportation, Railroads and Harbors Section (WisDOT)
State Intercity and Commuter Passenger Rail Agencies
Capitol Corridor Joint Powers Authority (CCJPA)
Metro-North Commuter Railroad Company (MNR)
Southern California Regional Rail Authority (SCRRA)
Freight Host Railroads
Burlington Northern Santa Fe Railway (BNSF)
CSX Corporation (CSX)
Norfolk Southern Corporation (NS)
Railroad-Related Organizations
Association of American Railroads (AAR)
Midwest High Speed Rail Association (MHSRA)
National Association of Railroad Passengers (NARP)
Labor Unions
Transport Workers Union of American, Railroad Division (TWU)
Unaffiliated Individuals
Anne Marie Desiderio
Federal Agencies
Surface Transportation Board (STB)

Alphabetical Listing of Respondents

Anne Marie Desiderio
Association of American Railroads (AAR)
Burlington Northern Santa Fe Railway (BNSF)
California Department of Transportation, Division of Rail (Caltrans)
Capitol Corridor Joint Powers Authority (CCJPA)
CSX Corporation (CSX)
Maryland Transit Administration (MTA)
Metro-North Commuter Railroad Company (MNR)
Midwest High Speed Rail Association (MHSRA)
National Association of Railroad Passengers (NARP)
Norfolk Southern Corporation (NS)
Southern California Regional Rail Authority (SCRRA)

Surface Transportation Board (STB)
Transport Workers Union of America, Railroad Division (TWU)
Virginia Department of Rail and Public Transportation (VDOT)
Washington State Department of Transportation (WSDOT)
Wisconsin Department of Transportation, Railroads and Harbors Section (WisDOT)

Exhibit 2

No. 1: 11-cv-1499 (JEB)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION OF AMERICAN RAILROADS,

Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION,
et al.,

Defendants.

MOTION FOR SUMMARY JUDGMENT

Plaintiff Association of American Railroads, pursuant to Fed. R. Civ. P. 56 and Local Rule 7(h), moves for summary judgment in its favor declaring unconstitutional Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (Division B of Pub. L. 110-432) (Oct. 16, 2008) (“PRIIA”); vacating the Metrics and Standards; declaring that any action previously taken by Defendants pursuant to Section 207 of PRIIA is null and void, including promulgating the Metrics and Standards; 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; and awarding Plaintiff its reasonable costs, including attorney’s fees, incurred in bringing this action.

As set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, there are no genuine issues of material fact in dispute, and Plaintiff is entitled to judgment as a matter of law.

Pursuant to Local Rule 7(f), Plaintiff respectfully requests oral argument on this motion.

DATED: December 2, 2011.

Respectfully submitted,

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No. 1: 11-cv-1499 (JEB)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION OF AMERICAN RAILROADS,

Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION,
et al.,

Defendants.

**AAR'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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<i>Aqua Slide ‘N’ Dive Corp. v. Consumer Prod. Safety Comm’n</i> , 569 F.2d 831 (5th Cir. 1978)	23
* <i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936).....	<i>passim</i>
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	20
<i>Currin v. Wallace</i> , 306 U.S. 1 (1939).....	25
<i>Diamond v. Atwood</i> , 43 F.3d 1538 (D.C. Cir. 1995).....	20
<i>First Am. Bank, N.A. v. United Equity Corp.</i> , 89 F.R.D. 81 (D.D.C. 1981)	20
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i> , 130 S. Ct. 3138 (2010).....	22, 23
<i>Gibson v. Berryhill</i> , 411 U.S. 564 (1973).....	32
<i>Lebron v. Nat’l R.R. Passenger Corp.</i> , 513 U.S. 374 (1995).....	26, 27
<i>Nat’l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Corp.</i> , 470 U.S. 451 (1985).....	7, 8, 26
<i>Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.</i> , 503 U.S. 407 (1992).....	8
* <i>Pittston Co. v. United States</i> , 368 F.3d 385 (4th Cir. 2004).....	<i>passim</i>
<i>Quiban v. U.S. Veterans Admin.</i> , 724 F. Supp. 993 (D.D.C. 1989).....	20
* <i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U.S. 381 (1940).....	24, 30
<i>United States ex rel. Totten v. Bombardier Corp.</i> , 380 F.3d 488 (D.C. Cir. 2004)	4, 27
<i>United States v. Frame</i> , 885 F.2d 1119 (3d Cir. 1989)	25
<i>Young v. United States ex rel. Vuitton et Fils S.A.</i> , 481 U.S. 787 (1987)	32

Statutes, Rules and Regulations

18 U.S.C. § 208 23

49 U.S.C. § 24301(a) 1, 4, 7, 26

49 U.S.C. § 24308 8

Pub. L. 110-432, Division B, Section 207 (Oct. 16, 2008).....*passim*

Pub. L. No. 105-134, § 415(2)..... 28

Fed. R. Civ. P. 56..... 20

Proposed Metrics and Standards for Intercity Passenger Rail Service
(March 13, 2009).....*passim*

Metrics & Standards for Intercity Passenger Rail Service (May 6, 2010).....*passim*

Other Authorities

Katherine Shaver, *At 40, Amtrak Struggles to Stay Up to Speed*,
Wash. Post (May 15, 2011)..... 8

Metrics & Standards for Intercity Passenger Rail Service Under Section 207 of
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Metrics & Standards for Intercity Passenger Rail Service under Section 207 of
the Passenger Rail Investment and Improvement Act of 2008, Response to
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**AAR’S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Plaintiff Association of American Railroads (AAR) respectfully submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment. AAR seeks a declaration that Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) is unconstitutional, and that the “Metrics and Standards” promulgated by Amtrak and the Federal Railroad Administration (FRA) pursuant to that statutory authority are consequently invalid. *See* Pub. L. 110-432, Division B, Section 207 (Oct. 16, 2008) (attached as Ex. A to Declaration of Thomas H. Dupree, Jr. (“Dupree Decl.”)); Metrics and Standards for Intercity Passenger Rail Service (May 6, 2010) (Dupree Decl. Ex. D).¹

INTRODUCTION

This is a constitutional challenge to a statute that purports to vest Amtrak — an entity established by law as a private, for-profit corporation, *see* 49 U.S.C. § 24301(a) — with the authority to promulgate binding regulations governing the conduct of its contractual partners, the freight railroads.

Since the dawn of the modern administrative state, it has been a bedrock principle of constitutional law and the separation-of-powers principle that Congress cannot

¹ AAR brings this action on behalf of all of its Class I member railroads excluding Amtrak.

delegate rulemaking authority to private companies. This strict prohibition applies with particular force when the private company is empowered to regulate its competitors, or other private companies in the same industry.

Yet that is precisely what Congress did here. Section 207 of PRIIA empowers Amtrak and the Federal Railroad Administration to “jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.” Amtrak runs its trains outside the Northeast Corridor on tracks owned by private freight railroads pursuant to contracts between Amtrak and the host railroad. PRIIA provides that if Amtrak trains do not meet the Amtrak-drafted performance standards, the Surface Transportation Board may launch an investigation and assess damages, payable directly to Amtrak, against the freight railroad hosting the Amtrak trains. *See* PRIIA § 213. PRIIA further provides that the freight railroads “shall” amend their existing contracts with Amtrak — namely the operating agreements that govern Amtrak’s use of the freight railroads’ tracks — by “incorporat[ing]” the Amtrak-drafted regulations into the contracts to the extent practicable. *See* PRIIA § 207(c).

Amtrak has long been unable to generate sufficient revenues to cover its operating costs, and receives a substantial annual federal subsidy to enable it to continue operations. A 2008 report by the U.S. Department of Transportation’s Inspector General found 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.” Report of the

Inspector General, U.S. Department of Transportation, *Effects of Amtrak's Poor On-Time Performance* (Mar. 28, 2008) (Dupree Decl. Ex. F) at 2. PRIIA thus creates the potential for the Government to direct the payment of additional subsidies from the freight railroads to Amtrak.

On May 6, 2010, Amtrak and the FRA jointly issued their final rule establishing the Metrics and Standards. *See* Metrics and Standards for Intercity Passenger Rail Service (May 6, 2010) (Dupree Decl. Ex. D). The rule establishes and defines performance standards for Amtrak trains that simply cannot be achieved as a practical matter on numerous routes, and looks to Amtrak-generated “Conductor Delay Reports” as the best evidence for determining whether the host freight railroads are at fault for failing to meet the Amtrak-generated standards.

As shown below, Section 207 of PRIIA is unconstitutional and the Metrics and Standards must be declared invalid as a result. While Congress may confer limited rulemaking authority on officers or agencies within the Executive Branch, it has long been established that Congress cannot delegate to private companies or individuals the power to regulate the conduct of other private parties. In *Carter Coal*, the Supreme Court held that a congressional delegation of rulemaking authority “to private persons whose interests may be and often are adverse to the interests of others in the same business” is “legislative delegation in its most obnoxious form” and is unconstitutional. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). That core holding remains good law. *See, e.g., Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (citing *Carter Coal*

and explaining that Congress may not vest private parties with regulatory authority over other private parties).

There can be no question that Amtrak is a private entity. Congress has expressly provided by statute that Amtrak “is *not* a department, agency, or instrumentality of the United States Government” but is rather a private entity that is “operated and managed as a for-profit corporation.” 49 U.S.C. § 24301(a) (emphasis added). The D.C. Circuit has squarely held that “Amtrak is not the Government,” *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004) (Roberts, J.), and it is the longstanding position of the Department of Justice that Amtrak is not a government agency. *See id.*

PRIIA violates the nondelegation doctrine and the Constitution’s separation of powers principle by placing legislative and rulemaking powers in the hands of a private entity — Amtrak — that participates in the very industry it is supposed to regulate and stands to benefit from the regulations it issues. Just as Congress could not delegate to McDonald’s the authority to promulgate binding regulations governing the business operations of The Coca-Cola Company — by, for example, empowering McDonald’s to issue performance standards for soda shipments under which Coca-Cola must pay McDonald’s if those standards are not met — Congress cannot empower Amtrak to promulgate binding regulations governing *its* contractual partners, the freight railroads. The fact that Congress included the FRA in the rulemaking and directed that the Metrics and Standards be developed and promulgated “jointly” cannot salvage the statute. It is

well settled that the Constitution limits private parties to no more than an “advisory” or “ministerial” role in the exercise of legislative or rulemaking authority, *see Pittston Co.*, 368 F.3d at 395; it plainly does *not* permit empowering a private, for-profit corporation as a *co-equal* with a federal agency in the rulemaking process.

The constitutional violation in this case is particularly acute because Amtrak is not a neutral and disinterested private party, but a for-profit corporate entity with a direct financial stake in the substance of the regulations. Because violations of the Metrics and Standards may subject the freight railroads to substantial fines payable directly to Amtrak, Amtrak had the incentive to draft the regulations in ways that favor Amtrak at the expense of the freight railroads.

In fact, Amtrak’s regulations are skewed in Amtrak’s favor and expose the freight railroads to inevitable violations. Among other things, the Metrics and Standards rely on Amtrak-generated “Conductor Delay Reports” to assign responsibility for particular delays. Thus, Amtrak has not only written the rules governing the business operations of the freight railroads — it also creates and supplies the evidence that will be used to determine responsibility for violations of the rules it drafted. PRIIA § 207 has created a system in which Amtrak is now poised to reap substantial payments from the parties it is regulating.

Likewise, PRIIA § 207 requires the freight railroads to amend their operating agreements with Amtrak by incorporating the very regulations that Amtrak drafted. The Department of Transportation has acknowledged that these operating agreements are

“private agreements among private parties.” 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) (Dupree Decl. Ex. G) at 29. It is constitutionally impermissible for Congress to grant a private party the power to unilaterally rewrite contracts in its favor, depriving the other side of the benefit of the bargain and achieving through regulatory fiat what it could not achieve through negotiation.

The Constitution does not permit Congress to delegate its lawmaking and rulemaking authority in this way. PRIIA § 207 violates the nondelegation doctrine and the separation-of-powers principle, as well as the due process rights of the freight railroads. For these reasons, this Court should hold PRIIA § 207 unconstitutional, and declare the Metrics and Standards invalid.

STATEMENT OF FACTS

1. The Birth of Amtrak

In the 1960s, a variety of 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 — as common carriers railroads were required to offer passenger service unless relieved of this responsibility by the Interstate Commerce Commission or state

regulatory authorities. *See Nat'l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Corp.*, 470 U.S. 451, 454 (1985). Eventually, the dismal economics compelled many railroads to seek permission to discontinue passenger service. *Id.*

In 1970, Congress enacted the Rail Passenger Service Act to “revive the failing intercity passenger train industry and retain a high-quality rail passenger service for the nation.” *Atchison*, 470 U.S. at 454. The Act established the National Railroad Passenger Corporation, better known as Amtrak, to assume the role of provider of intercity passenger rail service. *Id.* 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.” 49 U.S.C. § 24301(a); *see also Atchison*, 470 U.S. at 454-55 (Amtrak is a private, “for-profit corporation” that “is not ‘an agency or establishment’ of the Government but is authorized by the Government to operate or contract for the operation of intercity rail passenger service.”).

Amtrak began offering passenger service on May 1, 1971. *See Atchison*, 470 U.S. at 456. 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 over 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. AAR Comment on Proposed Metrics and Standards (Mar. 27, 2009) (Dupree Decl. Ex. H) at 2; *Nat'l R.R. Passenger Corp. v.*

Boston & Maine Corp., 503 U.S. 407, 410 (1992) (“Most of Amtrak’s passenger trains run over existing track systems owned and used by freight railroads.”).

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. *See* Declaration of Paul E. Ladue, ¶ 12 (U.S. rail operating affiliates of Canadian National Railway Company (“CN”)); Declaration of Virginia Marie Beck, ¶ 13 (CSX Transportation); Declaration of Mark M. Owens, ¶ 12 (Norfolk Southern); Declaration of Peggy Harris, ¶ 12 (Union Pacific). 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. *See* 49 U.S.C. § 24308; *Atchison*, 470 U.S. at 454. The Department of Transportation has recognized that “the operating agreements between Amtrak and its host railroads are private agreements among private parties.” 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) (Dupree Decl. Ex. G) at 29.

2. Amtrak’s Difficulties

Amtrak is not, and has never been, self-sufficient. It relies on heavy federal subsidies to continue operations. *See* Katherine Shaver, *At 40, Amtrak Struggles to Stay*

Up to Speed, Wash. Post May 15, 2011, at C1 (Dupree Decl. Ex. Q) (Amtrak received a \$1.48 billion federal subsidy this year and has run billion-dollar operating deficits for more than a decade). 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. 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. See Report of the Inspector General, U.S. Department of Transportation, *Effects of Amtrak's Poor On-Time Performance* (Mar. 28, 2008) (Dupree Decl. Ex. F) at 1.

3. The Passenger Rail Investment and Improvement Act

Congress enacted PRIIA in 2008. See Pub. L. 110-432, Division B (codified generally in Title 49) (attached in relevant part as Dupree Decl. Ex. A).

Section 207(a) of PRIIA 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.

The section further provides that:

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 public transportation.

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.”

Section 213(a) of PRIIA empowers the Surface Transportation Board to investigate and punish violations of the Metrics and Standards. It provides that the Board “may” initiate an investigation if Amtrak’s “on-time performance” — a term defined by the Metrics and Standards, *see* PRIIA § 207(a) (Amtrak and FRA shall develop metrics and standards “for measuring . . . on-time performance and minutes of delay”) — falls below 80 percent for two consecutive quarters. Indeed, in the final rule, Amtrak and the

FRA expressly stated that “the STB’s investigative discretion or mandate takes effect” when there has been a violation of the on-time performance metric established by the Metrics and Standards. *See Metrics & Standards for Intercity Passenger Rail Service* (May 6, 2010) (Dupree Decl. Ex. D), at 17. The Board may also initiate an investigation if “the service quality of intercity passenger train operations for which minimum standards are established under [PRIIA § 207] fails to meet those standards” for two consecutive quarters. PRIIA § 213. And in either circumstance, the Board “shall” launch an investigation if Amtrak or a host railroad files a complaint. *Id.* The Board’s investigation 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.” *Id.*

Section 213(a) further provides: “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(a). In fashioning a remedy, the Board may consider the need for compensation as well as deterrence, *id.*, 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. *Id.*

In sum, as Amtrak and the FRA have explained, “the Surface Transportation Board is the primary enforcement body of the standards,” and “penalties for infraction of the standards are not intended for direct application to Amtrak routes, but rather to host rail carriers under specified circumstances.” Metrics and Standards for Intercity Passenger Rail Service (May 6, 2010) (Dupree Decl. Ex. D), at 5.

4. The Proposed Metrics and Standards

Amtrak and the FRA issued proposed Metrics and Standards on March 13, 2009. See Proposed Metrics and Standards for Intercity Passenger Rail Service (Mar. 13, 2009) (Dupree Decl. Ex. B).

On-Time Performance. The proposed rule provided that Amtrak’s on-time performance be assessed on a route-by-route basis by reference to three separate metrics, all of which must be satisfied: Effective Speed, Endpoint On-Time Performance, and All-Stations On-Time Performance.

- 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. See Dupree Decl. Ex. B at 1 & n.2, 13-14.
- Endpoint On-Time Performance measures how often trains on the route arrive on time at the endpoint terminal. (Trains are granted a certain tolerance, *i.e.*, a train on a short trip is only deemed “late” if it arrives at its endpoint more than

10 minutes after its scheduled arrival time, and a train on a longer trip is granted a tolerance of 30 minutes.) *See* Dupree Decl. Ex. B at 2 & n.3, 14. To be deemed satisfactory, Endpoint OTP must be at least 80 percent (increasing to 85 and 90 percent in future years). *Id.* at 2.

- 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). Dupree Decl. Ex. B at 2, 14.

Thus, 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). Amtrak and the FRA have stated that the On-Time Performance "category is all the more important because deficiencies in performance could subject host railroads to fines administered by the Surface Transportation Board" Dupree Decl. Ex. B at 6.

Delay Minutes. The proposed rule also established limits on permissible delays. Specifically, it provided that the host freight railroads were allowed no more than 700 minutes of delays per 10,000 route miles. Dupree Decl. Ex. B at 2. 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. (Published train schedules, like published airline schedules, typically build in a small extra amount of time to account for the fact that pure run time is rarely achieved.)

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. Dupree Decl. Ex. B at 15 (minutes of delay "is derived from conductor 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. *See CSX Transportation, Inc. Comment on Proposed Metrics & Standards*

(Dupree Decl. Ex. I) at 3 (listing examples); Caltrans Comment on Proposed Metrics & Standards (Dupree Decl. Ex. L) at 5; Ladue Decl. ¶ 5.

5. The Final Metrics And Standards.

Amtrak and the FRA gave interested parties 14 days to submit comments on the proposed Metrics and Standards. *See* Metrics & Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110-432, Notice and Request for Comments, 74 Fed. Reg. 10983 (Mar. 13, 2009) (Dupree Decl. Ex. C). Seventeen comments were submitted. *See* Metrics & Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Response to Comments and Issuance of Metrics and Standards, 75 Fed. Reg. 26839 (May 12, 2010) (Dupree Decl. Ex. E); www.regulations.gov, Dckt. No. FRA-2009-0016.

Having allowed a mere 14 days for comments, Amtrak and the FRA waited well over a year to issue the final rule. On May 6, 2010, Amtrak and the FRA issued the final version of the Metrics and Standards. *See* Dupree Decl. Ex. D. The final version generally mirrored the proposed version. The Final Rule retained the three measurements of On-Time Performance, although it delayed the effective date of the All-Stations On-Time Performance metric until FY 2012. In response to criticism that the 700-minute delay standard was unrealistic and unattainable, Amtrak and the FRA increased the delay allowance to 900 minutes.

The Metrics and Standards became effective on May 11, 2010. *See* Dupree Decl. Ex. E. 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* Dupree Decl. Ex. M. In a cover letter accompanying the report, the FRA Administrator acknowledged that Amtrak has "provided the data necessary to populate this report." *Id.* The report determined that the Metrics and Standards were not achieved on numerous routes during the July-September 2010 period.

The FRA issued subsequent quarterly reports in April 2011, July 2011, and September 2011. *See* Dupree Decl. Exs. N, O, P. Those reports, which cover performance through June 2011, reflect the same conclusion: the Metrics and Standards are not being met on numerous routes. *See* Ladue Decl. ¶ 5; Beck Decl. ¶ 8; Owens Decl. ¶ 7; Harris Decl. ¶ 7.

The freight railroads are already burdened by their obligation to host Amtrak trains. PRIIA and the Metrics and Standards exacerbate that burden in at least three respects. *First*, the Metrics and Standards place greater demands on the host freight railroads and adversely affect their operations and ability to serve their customers. *See* Ladue Decl. ¶ 13 ("The Metrics and Standards impose substantial, immediate, and continuing burdens on CN."); Beck Decl. ¶ 9 ("While the Metrics and Standards seek to measure Amtrak's performance, they have had a direct and significant impact on many aspects of CSXT's operations."); Owens Decl. ¶ 8 (same); Harris Decl. ¶ 8 (same). As one railroad official has explained, efforts "to achieve the Metrics and Standards will come at the expense of our freight traffic, which in many cases must be delayed." Beck Decl. ¶ 10. "For this reason, the Metrics and Standards adversely affect our business by

making it more difficult to serve our freight customers and to operate an efficient freight rail network.” *Id.*

The Metrics and Standards have affected, and will continue to affect, the freight railroads’ operations in numerous ways — a point that Amtrak acknowledged on the very day that the FRA and Amtrak issued their regulations. On May 12, 2010, a senior Amtrak official emailed a copy of the regulations to a Union Pacific official, and stated: “These Metrics and Standards will have a big impact on UP and Amtrak.” Harris Decl. ¶ 13.

That prediction was accurate. As a consequence of the Metrics and Standards, freight railroads have taken the following steps:

- They have modified freight train schedules to accommodate Amtrak trains, thereby delaying the efficient movement of freight traffic on the network.
- They have rescheduled maintenance work — and, when necessary, rerouted freight traffic — so as not to delay Amtrak, scheduling maintenance to start in the early morning or during the night.
- They have diverted internal resources away from daily train operations monitoring and directed them toward ensuring compliance with the Metrics and Standards.
- They have responded to Amtrak requests that they put in writing the immediate changes to their operations to ensure compliance with the

Metrics and Standards, and conducted extensive meetings and negotiations with Amtrak over these changes.

- They have dedicated resources to mapping out potential infrastructure improvements, including track and signal upgrades, necessary to ensure compliance with the Metrics and Standards, and scheduled the timing of already-planned capital improvements in ways that will not disrupt Amtrak trains.
- They have devoted increased internal resources, and hired external consultants, to investigate the accuracy of Amtrak's Conductor Delay Reports, which will apparently serve as the primary evidentiary basis for determining when a railroad is at fault for a particular delay.
- They have devoted increased internal resources, and hired external consultants to devise ways of measuring performance in order to produce documentation and other support to defend themselves against investigations and enforcement actions arising from violations of the Metrics and Standards.
- They have dismissed requests by commuter train operators to alter schedules affecting Amtrak trains, thereby delaying the efficient movement of commuter trains on the network.

See Ladue Decl. ¶¶ 5-11; Beck Decl. ¶ 11; Owens Decl. ¶ 9; Harris Decl. ¶¶ 8-10.

In fact, during the notice-and-comment period, when the freight railroads stated that “the proposed performance measures present an administrative burden and will require *significant operational changes* to make current Amtrak schedules realistic” — and further stated that “the Proposed Metrics and Standards will increase the cost of hosting Amtrak trains” — Amtrak and the FRA *did not dispute* any of this, and expressly agreed that “additional resources may be necessary” to assess and ensure compliance with the Metrics and Standards. Dupree Decl. Ex. D, at 7 (emphasis added).

Second, the release of the FRA’s four quarterly reports demonstrating that the Metrics and Standards are not being satisfied on numerous routes places the freight railroads in continuing legal jeopardy. *See* Dupree Decl. Exs. M, N, O, P; Ladue Decl. ¶ 5; Beck Decl. ¶ 8; Owens Decl. ¶ 7; Harris Decl. ¶ 7. The freight railroads are now subject to mandatory government investigations at Amtrak’s request and face the prospect of substantial civil sanctions and penalties, as well as negative publicity and reputational harm.

Third, Section 207 of PRIIA directs the freight railroads to “incorporate the metrics and standards . . . into their access and service agreements” with Amtrak “[t]o the extent practicable.” *See* Ladue Decl. ¶ 12 (because CN’s operating agreement “does not presently incorporate the Metrics and Standards,” Section 207 burdens CN with “modifying its existing Operating Agreement with Amtrak in order to comply with PRIIA”); Beck Decl. ¶ 15 (noting conflicts between CSX’s operating agreement and the Metrics and Standards); Owens Decl. ¶¶ 10, 13 (Amtrak officials are using the Metrics

and Standards in negotiations and “have told us that they expect us to begin incorporating the Metrics and Standards into the [Norfolk Southern] Operating Agreement pursuant to the statute, when that Agreement is next re-negotiated.”); Harris Decl. ¶ 13 (quoting statement of senior Amtrak official: “These Metrics and Standards will have a big impact on UP and Amtrak.”).

LEGAL STANDARDS

Summary judgment is proper when the pleadings, and any discovery materials or affidavits on file, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Either party may move for summary judgment at any time, even as early as the commencement of the action and before the defendant has answered the complaint. Fed. R. Civ. P. 56(a), (b), advisory committee’s note; *see also First Am. Bank, N.A. v. United Equity Corp.*, 89 F.R.D. 81, 87 (D.D.C. 1981) (“[A]n answer to the complaint is not a prerequisite to the consideration of a motion for summary judgment.”).

The parties have agreed that this case may be resolved through dispositive motions. Whether PRIIA § 207 is unconstitutional presents a pure question of law, *Quiban v. U.S. Veterans Admin.*, 724 F. Supp. 993, 1001 (D.D.C. 1989), that does not require factual development. Moreover, the challenge is ripe and fit for immediate judicial review because PRIIA and the Metrics and Standards impose an immediate and

direct impact on the freight railroads' business operations; because the railroads are under immediate threat of investigation; because the railroads face the risk of severe fines as many routes are currently not meeting the standards; and because PRIIA commands the freight railroads to incorporate the Metrics and Standards, to the extent practicable, into their operating agreements with Amtrak.

ARGUMENT

I. Congress May Not Delegate Rulemaking Power To Private Companies.

The Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, § 1, cl. 1. Whereas Congress may vest Executive Branch agencies with rulemaking authority, it may not grant such power to private companies.

More than 70 years ago, the Supreme Court squarely held that it is unconstitutional to delegate to private individuals the power to promulgate regulations governing the conduct of other private parties. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In *Carter Coal*, the Court considered the constitutionality of the Bituminous Coal Conservation Act, which conferred on a majority of coal producers and miners the power to issue rules setting maximum labor hours and minimum wages. *See id.* at 310–11. The Court struck down the statute as unconstitutional, explaining that a delegation of rulemaking authority to a private party "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the

interests of others in the same business.” *Id.* at 311. The Court emphasized that “one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.” *Id.*

The holding of *Carter Coal* — that Congress may not constitutionally grant a private party the power to regulate another private entity — remains good law. The Fourth Circuit recently applied *Carter Coal* in *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), where it held that “Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others.” *Id.* at 395 (emphasis in original). The court explained that “[a]ny delegation of regulatory authority” to a private party was presumptively suspect, and that “[b]ecause the Combined Fund in this case is a *private* entity, rather than a part of the executive branch of government, improper delegation of power to it would represent ‘legislative delegation in its most obnoxious form.’” *Id.* at 394 (quoting *Carter Coal*, 298 U.S. at 311) (emphasis in original).

Prohibiting the delegation of rulemaking authority to private entities ensures governmental accountability and protects the rights of regulated parties. When power is delegated outside the federal government, the lines of accountability are blurred. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010). Congress is thereby able to diffuse responsibility for the formulation of policy,

undermining an important democratic check on government decisionmaking. *See id.* at 3155 (“Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of the pernicious measure, or series of pernicious measures ought really to fall.”) (internal quotation marks omitted).

Delegating rulemaking power to private entities not only permits the government to diminish or avoid its responsibility for controversial decisions, it places the coercive power of the government in parties without regulatory expertise. An industry expert “is not necessarily an expert in government regulation of private individuals,” and “[d]etermining the best way to run your own [affairs] is not the same as deciding how the government should force your neighbor to run his.” *Aqua Slide ‘N’ Dive Corp. v. Consumer Prod. Safety Comm’n*, 569 F.2d 831, 843-44 (5th Cir. 1978). Private parties may formulate policy inconsistent with the underlying statutory scheme without due regard for the public good.

Moreover, private entities lack the impartiality of government regulators and may be biased by their own self-interest. This danger is acute in circumstances where the private entity stands to obtain a direct financial benefit from the regulatory scheme it has been empowered to design. The private entity has a clear self-interest in drafting regulations that are likely to benefit itself at the expense of competitors or other participants in the industry. Certainly a government official would be barred by federal law from drafting regulations in which he or she had a personal financial interest. *See* 18 U.S.C. § 208.

Over the years, courts have recognized a narrow exception to the general prohibition on delegation to private parties: when the power conferred is “advisory” or “ministerial.” For example, in *Sunshine Anthracite Coal Co. v. Adkins*, the Supreme Court upheld provisions of a statute authorizing members of the coal industry to propose minimum coal prices to the National Bituminous Coal Commission, a government agency. 310 U.S. 381 (1940). The Court upheld the statute, explaining that Congress had not impermissibly delegated its legislative authority to the industry, because under the statutory scheme, the private actors merely *proposed* minimum prices — it was the government that ultimately *determined* the minimum price. *Id.* at 388, 399. The Court held that because “[t]he members of the [industry] function subordinately to the Commission” and because the Commission, not the industry, “determines the prices,” the statute did not effect an unconstitutional delegation. *Id.* at 399.

Likewise, the Fourth Circuit in *Pittston* upheld the challenged statute on the ground that the “powers given to the [private party] are of an administrative or advisory nature.” 368 F.3d at 396. The statute in that case established a fund that provided benefits to retired coal miners. The statute granted the government sole authority to define the nature of the fund and who must contribute; to specify the amounts that must be paid; to identify beneficiaries; and to designate the nature and amount of benefits. In contrast, the private parties were merely authorized to collect premiums and pay the beneficiaries. *See id.* The court concluded that the statute gave the private parties

“ministerial and advisory tasks in a manner and to an extent that does not violate the nondelegation doctrine.” *Id.* at 398.

The Third Circuit upheld the Beef Promotion and Research Act of 1985 for the same reason. *See United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989) (abrogated on other grounds). The Beef Act authorized two private entities comprised of members of the beef industry to collect assessments and *propose* how the funds would be spent. *Id.* at 1122, 1128. The Secretary of Agriculture, however, had unfettered authority to *determine* how the funds were to be spent. *Id.* at 1129. The Court held that the Act was not an unconstitutional delegation because “no law-making authority has been entrusted to the members of the beef industry.” *Id.* at 1128–29. Rather, the private entities merely “serve an advisory function” and “a ministerial one.” *Id.* at 1129.²

² Courts have recognized an additional exception to the general bar on delegation to private parties: when the law or regulation only becomes effective upon a favorable vote of a majority of regulated parties. The Supreme Court has explained that such a scheme “does not involve any delegation of legislative authority” in that “Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market unless two-thirds of the [regulated parties] favor it.” *Currin v. Wallace*, 306 U.S. 1, 15 (1939) (internal quotation marks omitted). That exception is obviously not applicable here.

II. PRIIA Unconstitutionally Authorizes Amtrak To Promulgate Binding Regulations Governing Its Business Partners.

PRIIA is an unconstitutional delegation of legislative and rulemaking authority to a private entity with a strong financial self-interest in regulating its business partners. In sharp contrast to statutory schemes in which private parties merely serve an advisory or ministerial role, PRIIA expressly confers on Amtrak the power to issue binding regulations that directly affect the business operations of its contractual partners, the freight railroads. Indeed, absent Amtrak's approval, the FRA was powerless to issue the Metrics and Standards.

As the Fourth Circuit held in *Pittston*, "Congress may employ private entities for ministerial or advisory roles, ***but it may not give these entities governmental power over others.***" 368 F.3d at 395 (emphasis altered). Yet that is precisely what Congress has done in PRIIA.

A. Amtrak Is A Private Party For Purposes Of PRIIA.

Amtrak is a federally chartered corporation engaged in the commercial enterprise of offering intercity and commuter rail passenger service. By the terms of its authorizing statute, Amtrak "shall be operated and managed as a for-profit corporation" and "***is not a department, agency, or instrumentality of the United States Government.***" 49 U.S.C. § 24301(a) (emphasis added). Amtrak has private shareholders, and operates as a commercial carrier financially, administratively, and legally distinct from the United States. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995); *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985). As the

D.C. Circuit succinctly stated: “Amtrak is not the Government.” *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004) (Roberts, J.). The Government itself recognizes that Amtrak is a private corporation. In *Totten*, for example, the court noted that “[i]n its brief, the Government candidly concedes that ‘Congress has specified that Amtrak is not itself an agency of the Government.’” 380 F.3d at 491-92.

Amtrak’s status as a private entity for purposes of the nondelegation doctrine is further confirmed by *Lebron*. In that case, the Supreme Court explained that the statute designating Amtrak as a private entity “is **assuredly dispositive** of Amtrak’s status” for purposes of statutes that “impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act.” 513 U.S. at 392 (emphasis added). The Court went on to hold that the statute was not dispositive of Amtrak’s status “for the purpose of individual rights guaranteed against the Government by the Constitution,” such as the First Amendment claim presented by the *Lebron* plaintiff, an artist who wished to install a controversial display in New York’s Penn Station. *Id.* at 394. Here, of course, the constitutional claim at issue involves a **structural** limitation arising from the Constitution’s separation-of-powers principle.

In fact, subsequent to *Lebron*, Congress amended 31 U.S.C. § 9101(2) by **deleting** Amtrak from the list of “mixed-ownership Government corporations” — a list that includes, among others, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation — to make absolutely clear that Amtrak is a private actor. *See* Pub. L.

No. 105-134, § 415(2). In signing the amendment into law, President Clinton explained that the change will “free Amtrak to operate . . . more like a private entrepreneurial corporation.” *See* 33 Weekly Compilation of Presidential Documents 1955 (Dec. 8, 1997).

That Amtrak is a private actor for purposes of PRIIA is further reinforced by the very purpose of the statute: to improve Amtrak’s commercial operations and make Amtrak profitable. The Inspector General’s report found that poor on-time performance costs Amtrak more than \$100 million per year in lost revenues and increased costs, and PRIIA is aimed at improving Amtrak’s profitability by enhancing its operational performance and consistency of schedules. *See* Dupree Decl. Ex. B at 6, 14. Given that PRIIA’s purpose and effect is to boost the bottom-line of a for-profit corporation, Amtrak is plainly a private actor for purposes of the statute.

B. PRIIA Impermissibly Delegates Legislative And Rulemaking Power To Amtrak.

PRIIA § 207 empowers Amtrak to exercise legislative and rulemaking authority. The Metrics and Standards are binding regulations that govern the conduct of the freight railroads and carry the force of law. Violations of the Metrics and Standards subject the freight railroads to the risk of substantial civil penalties and sanctions under PRIIA § 213(f). And the coercive nature of the Metrics and Standards is exacerbated by the requirement that the freight railroads incorporate the Metrics and Standards into their contracts with Amtrak to the extent practicable under PRIIA § 207(c).

PRIIA § 207 does not limit Amtrak to an “advisory” or “ministerial” role — the limitation necessary to ensure a constitutionally-permissible delegation. To the contrary, the plain text of the statute enshrines Amtrak and the FRA as *co-equal partners* in the rulemaking process. Throughout the rulemaking, Amtrak and the FRA emphasized that they were acting jointly and as co-equals. *See, e.g.*, Metrics & Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Response to Comments and Issuance of Metrics and Standards, 75 Fed. Reg. 26839 (May 12, 2010) (Dupree Decl. Ex. E) (“the FRA and Amtrak have jointly made, and are jointly issuing, revisions to the Metrics and Standards”). In fact, during the notice-and-comment period, when the freight railroads submitted public comments raising concerns about Amtrak’s role, the FRA and Amtrak rebuffed these objections by explaining that PRIIA “directly incorporates Amtrak into the[] creation” of the Metrics and Standards. *See* Metrics and Standards for Intercity Passenger Rail Service (Dupree Decl. Ex. D) at 6.

The fact that the FRA participated in the rulemaking process and ultimately approved the Metrics and Standards does not cure the constitutional infirmity. That is because the FRA was merely granted *equal* authority — rather than *superior* authority — in the rulemaking. That the government must retain superior authority is clear from the cases discussed above in which courts approved the private party playing an “advisory” or “ministerial” role. It is also clear from *Adkins*, where the Supreme Court held that a statute granting private parties a role in determining prices was not an unconstitutional

delegation because the private parties “*function subordinately* to the [government]” in the statutory scheme: the private parties merely proposed prices, and the government had sole, unfettered authority to determine the prices. *See* 310 U.S. at 399 (emphasis added).

Here, Amtrak is not “function[ing] subordinately” to the government. Indeed, the rulemaking authority PRIIA grants Amtrak and the government is *identical*. When two parties have identical authority in the rulemaking process, it follows as a matter of logic that one cannot be subordinate to the other. This is not a case where Amtrak merely proposed regulations for the government’s consideration and approval. Quite the contrary: without *Amtrak’s* approval, the government was powerless to issue the Metrics and Standards at all.

The very dangers that the nondelegation doctrine protects against — biased rulemaking by financially self-interested private parties — have materialized in this case. It should be no surprise that the Metrics and Standards are exceedingly favorable to Amtrak and expose the freight railroads to inevitable non-compliance. To take just a few examples:

- Requiring Amtrak trains to achieve an 80 percent Endpoint On-Time Performance as measured and determined by the Metrics and Standards is not even remotely realistic. Amtrak has achieved 80 percent OTP on routes over 400 miles only twice since Amtrak was founded in 1971. Even on shorter routes, Amtrak achieves 80 percent OTP less than half the time. *See* AAR Comment on Proposed Metrics & Standards (Dupree Decl. Ex. H) at 6; Beck

Decl. ¶ 6 (the Metrics and Standards “impose stringent performance goals for Amtrak trains that cannot, as a practical matter, be achieved on many of CSXT’s routes”); *id.* at ¶ 7 (Inspector General’s finding that “approximately half of short distance routes and approximately 25 percent of long distance routes are achieving 80 percent on-time performance”); Owens Decl. ¶ 6 (Amtrak has never achieved 80 percent on-time performance on Norfolk Southern route, and in fact averages less than 60 percent); Harris Decl. ¶ 6 (Metrics and Standards set performance goals that cannot “as a practical matter” be achieved on certain Union Pacific routes).

- The Metrics and Standards identify Amtrak-generated Conductor Delay Reports as the best evidence for determining who is at fault for a particular delay. As their name indicates, Conductor Delay Reports are documents prepared by Amtrak conductors, who necessarily have a very limited view of events from their vantage point on board a delayed train. Because conductors are often unaware of the true reason for the delay, their reports often fail to identify the true cause of a delay and incorrectly attribute it to the freight railroads. *See* CSX Transportation, Inc. Comment on Proposed Metrics & Standards (Dupree Decl. Ex. I) at 3 (listing examples); Caltrans Comment on Proposed Metrics & Standards (Dupree Decl. Ex. L) at 5; Ladue Decl. ¶ 5.
- Measuring Delay Minutes based on deviations from a route’s “pure run time” — the fastest possible trip for an Amtrak train over a route, with no delays

from other traffic — is utterly unrealistic. It is the equivalent of drawing up D.C.-area bus schedules on the assumption that the buses will encounter no traffic on the Washington Beltway.

In short, Amtrak and the FRA have designed the system so as to expose the freight railroads to unavoidable noncompliance and the risk of substantial payments to Amtrak. Preventing this sort of rulemaking — where the regulator has a clear and undeniable financial self-interest — is precisely the reason why the Constitution prohibits Congress from vesting private companies with legislative or rulemaking authority.

C. Empowering Amtrak To Regulate The Freight Railroads Also Violates The Freight Railroads' Due Process Rights.

Delegations to private parties are unconstitutional for the additional and independent reason that such delegations violate the due process rights of regulated third parties. Entities wielding government power must be disinterested such that personal interests do not influence the discharge of a public duty. *See, e.g., Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (holding that partiality is forbidden in the exercise of sovereign authority, and noting in the instant case the mere “*potential* for private interest to influence the discharge of public duty”) (emphasis in original); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (due process is violated when an interested party wields government authority in making decision).

The Supreme Court in *Carter Coal* held that delegating rulemaking authority to a private company not only violates the separation-of-powers principle, but the Fifth Amendment due process rights of the other participants in the industry who are subject to

the regulation. The Court explained that granting a corporation “the power to regulate the business of another, and especially of a competitor” is “clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.” 298 U.S. at 311-12 (collecting cases); *see also Pittston Co.*, 368 F.3d at 398 (no constitutional violation because the private individuals “are not able to use their position for their own advantage — to the disadvantage of their fellow citizens — as was permitted by the Bituminous Coal Conservation Act struck down in *Carter*”).

The due process violation is compounded because PRIIA, and the Metrics and Standards, potentially supplant the painstakingly-negotiated operating agreements between Amtrak and the freight railroads. PRIIA materially changes the terms of the parties’ bargains by imposing new performance requirements that, as described in the attached declarations, overturn the terms of carefully-negotiated private contracts governing the freight railroads’ obligations with respect to Amtrak’s performance. The statute provides that the Metrics and Standards shall be incorporated into the operating agreements “[t]o the extent practicable,” PRIIA § 207(c), thus enabling Amtrak to enhance its own commercial position at the expense of the freight railroads by regulatory fiat. As the FRA has explained, “Congress directed Amtrak and the host railroads to adopt these Metrics and Standards in their access and service agreements” Dupree Decl. Ex. D at 17.

Because PRIIA empowers Amtrak to wield regulatory power and to develop rules governing the commercial operations of its contractual partners in ways that accrue to

Amtrak's benefit, the statute is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Carter Coal Co.*, 298 U.S. at 311. For this reason too, Section 207 of PRIIA is unconstitutional and the Metrics and Standards must be vacated.

CONCLUSION

This Court should grant summary judgment in AAR's favor and issue an order declaring that PRIIA § 207 is unconstitutional and vacating the Metrics and Standards.

The Court should also grant all further relief to which AAR may be entitled.

Respectfully submitted,

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Dated: December 2, 2011.

No. 1: 11-cv-1499 (JEB)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION OF AMERICAN RAILROADS,

Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION,
et al.,

Defendants.

**STATEMENT OF UNDISPUTED FACTS
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

1. Outside the Northeast Corridor, Amtrak trains are operated on tracks owned by AAR's freight railroad members. *See* Declaration of Paul E. Ladue, ¶ 3; Declaration of Virginia Marie Beck, ¶ 3; Declaration of Mark M. Owens, ¶ 3; Declaration of Peggy Harris, ¶ 3.

2. 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads. AAR Comment on Proposed Metrics and Standards (Mar. 27, 2009) (attached as Ex. H to Declaration of Thomas H. Dupree, Jr.) at 2.

3. Amtrak has entered into contracts with the freight railroads that host Amtrak trains. These contracts — commonly called operating agreements — govern

Amtrak's operations on the freight railroads' tracks. *See* Ladue Decl. ¶ 12; Beck Decl. ¶ 13; Owens Decl. ¶ 12; Harris Decl. ¶ 12.

4. Pursuant to Section 207 of PRIIA, Amtrak and the FRA jointly proposed metrics and standards for measuring, among other things, the on-time performance and train delays for Amtrak trains on March 13, 2009. Proposed Metrics and Standards for Intercity Passenger Rail Service (Mar. 13, 2009) (Dupree Decl. Ex. B).

5. 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 & Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110-432, Notice and Request for Comments, 74 Fed. Reg. 10983 (Mar. 13, 2009) (Dupree Decl. Ex. C). Seventeen comments were submitted. Metrics & Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Response to Comments and Issuance of Metrics and Standards, 75 Fed. Reg. 26839 (May 12, 2010) (Dupree Decl. Ex. E).

6. 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. Metrics and Standards for Intercity Passenger Rail Service (May 6, 2010) (Dupree Decl. Ex. D.).

7. The Metrics and Standards became effective on May 11, 2010. *See* Metrics & Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Response to Comments and Issuance of Metrics and Standards, 75 Fed. Reg. 26839 (May 12, 2010) (Dupree Decl. Ex. E).

8. As a consequence of the Metrics and Standards, freight railroads have modified their operations and redirected internal and external resources in an effort to satisfy the Metrics and Standards. *See* Ladue Decl. ¶¶ 5-11; Beck Decl. ¶ 11; Owens Decl. ¶ 9; Harris Decl. ¶¶ 8-10.

9. The Federal Railroad Administration has issued four Quarterly Reports that demonstrate that the Metrics and Standards are not being met on many routes. Dupree Decl. Exs. M, N, O, P.

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Dated: December 2, 2011.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2011, a true and correct copy of Plaintiff's Motion for Summary Judgment, Memorandum of Points and Authorities, Statement of Undisputed Facts, the Dupree Declaration, the Ladue Declaration, the Beck Declaration, the Owens Declaration, the Harris Declaration, and Proposed Order were filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF System.

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Exhibit 3

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Standards could lead to fines being imposed by the Surface Transportation Board (STB). To obviate this perceived problem, Plaintiff argues that Amtrak is a private entity and so cannot exercise governmental power under the non-delegation and separation-of-powers principles of the Constitution. Plaintiff also contends that Amtrak's involvement in developing the Metrics and Standards violates the Due Process Clause: It asserts that Amtrak cannot exercise governmental authority because it is a private entity that has a financial interest in the content of the Metrics and Standards, owing to a statutory provision which permits Amtrak to receive certain fines levied by the STB.

Even if Amtrak is a private entity for purposes of Plaintiff's claims, Plaintiff's claims fall short. A private entity can exercise governmental authority if the Government retains control. It did here. The degree of governmental control is evident from the make-up of Amtrak: the President of the United States appoints eight of nine Amtrak board members (the board appoints the ninth); the President can remove board members; and, Congress provides Amtrak with essential capital, including around \$1.5 billion for fiscal year 2011, and has stayed closely involved in the operation of Amtrak. What is more, the Metrics and Standards were developed jointly by FRA and Amtrak and were issued only because the FRA assented. Finally, contrary to Plaintiff's contentions, the Metrics and Standards cannot serve as the basis for any fines. A freight railroad can be fined by the STB, a governmental agency, only for violating a separate, long-standing, and unchallenged statutory provision which provides that, with limited exceptions, Amtrak trains have a preference over freight transportation in using a rail line, junction, or crossing. With respect to fine, the Metrics and Standards merely guide the STB's

decision of whether to initiate an investigation under that other provision. Thus, with respect to assessing fines, the Government remains in charge.

Though the Court need not determine whether Amtrak is part of the Government for purposes of Plaintiff's claims to decide this case, in fact, Amtrak is part of the Government for these purposes. Determining whether Amtrak is an agency or instrumentality of the Government is not uncharted territory. The Supreme Court concluded in 1995 that Amtrak is part of the Government "for the purpose of individual rights guaranteed against the Government by the Constitution," because the Government created (by statute) and controlled (by appointing the majority of its board of directors) Amtrak. *Lebron v. Nat'l R.R. Pass. Corp.*, 513 U.S. 374, 393-94 (1995). It is still true today that, as judged under the *Lebron* standard, the Government created and controls Amtrak. And Plaintiff's due process claim asserts an individual right. *Lebron*, thus, dictates the fate of that claim. Plaintiff's other claims deserve like treatment. Plaintiff offers no principled reason for treating Amtrak differently based on the label it affixes to its claim, and no reason is apparent: The claims are essentially the same and Amtrak's nature does not change based on the label Plaintiff chooses.

Finally, Amtrak's role in the development of the Metrics and Standards passes the applicable Due Process Clause requirements. Specifically, Amtrak does not have an impermissible pecuniary interest in the Metrics and Standards. The involvement of the STB, the agency that investigates and adjudicates any complaint arising from the Metrics and Standards, and which Plaintiff does not claim harbors any bias, dictates that a relaxed due process standard applies – as does the fact that Amtrak participated in a non-adjudicatory, legislative-type process. Amtrak's role in the creation of the Metrics and

Standards easily passes muster under this relaxed standard because: (1) the FRA, which Plaintiff does not allege to be biased, co-authored the Metrics and Standards, and its involvement would have decreased Amtrak's desire to act in a biased fashion; (2) as Amtrak is politically accountable and the freight railroads have ample political muscle, Amtrak would not have an interest in acting in a biased manner; and (3) Amtrak's interest in biased Metrics and Standards is weak because of the many contingencies that stand between the Metrics and Standards and Amtrak's pecuniary interests.

For these reasons, as more fully elaborated below, the Court should enter judgment in favor of Defendants and deny Plaintiff's motion for summary judgment.¹

BACKGROUND

I. Historical, Statutory, and Regulatory Background

Congress created Amtrak in 1970 to "avert the threatened extinction of passenger trains in the United States." *Lebron*, 513 U.S. at 383. In the 1950s and 1960s, railroads lost passengers (and freight) to other modes of transportation. Congressional Budget Office, *The Past and Future of U.S. Passenger Rail Service*, at 5-7 (Sept. 2003) (attached as Exhibit 1). This competition, combined with "rigid regulation" by the Interstate Commerce Commission (ICC), inflicted punishing losses on the railroads. *Id.* at 5. The railroads viewed passenger service as their primary Achilles heel. *Id.* at 7. But they could not eliminate passenger service of their own accord; prior to 1970, the law obligated railroads, as common carriers, to provide passenger service, unless relieved of the obligation by the ICC or state regulatory authorities. *Nat'l R.R. Pass. Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985). Accordingly, to avert

¹ Summary judgment is warranted because defendants are entitled to judgment on the law and there are no genuine disputes of material fact. *See* Fed. R. Civ. P. 56(a).

financial ruin, many of the railroads asked the ICC to relieve them of their obligation to provide passenger service. *Id.* Congress, however, determined that “the public convenience and necessity require the continuance and improvement” of passenger rail service. Rail Passenger Service Act of 1970 (RPSA), § 101, 84 Stat. 1327. Thus, Congress established Amtrak as the successor of those railroads that wished to abandon passenger rail service. RPSA, § 401(a) (codified at 45 U.S.C. §§ 561-566) (repealed and incorporated in sections of 49 U.S.C. subtit. V, part C).

As a condition of turning over passenger rail service to Amtrak, Congress obligated the freight railroads to lease their tracks and facilities to Amtrak, at rates agreed to by Amtrak and the host freight railroads (or prescribed by the STB). *See* 49 U.S.C. § 24308(a). This measure was necessary because the freight railroads owned and dispatched the trains on the tracks that Amtrak would need to provide service. (Outside of the Northeast Corridor – where Amtrak owns the tracks over which its trains operate – Amtrak continues to lease the majority of track miles used by its trains.) And to ensure the “improvement” of passenger rail service for the public good, Congress granted Amtrak a general preference over freight transportation with regard to the tracks that its trains would have to share with freight trains: “Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the [Surface Transportation] Board orders otherwise under this subsection.” *Id.* § 24308(c). This preference requirement is essential to achieving timely Amtrak train performance because without it the host freight railroad would prioritize its own freight traffic over Amtrak’s trains.

Amtrak's corporate structure and goals reflect the public nature of its duty, as recognized in § 101 of the RPSA. First, Amtrak's board of directors consists of nine members, eight of whom are selected by the President of the United States, and one of whom is selected by the President's other appointees. 49 U.S.C. § 24302. The President appoints seven members, with the advice and consent of the Senate; the eighth member is the Secretary of Transportation, who serves *ex officio*; and, the ninth member is the President of Amtrak, who is selected by the other members of the board. *Id.* Second, the Government owns more than 90% of Amtrak's stock. To be specific, the Government owns 109,396,994 shares of the 118,782,688 outstanding shares of stock. Nat'l R.R. Pass. Corp and Sub., Consolidated Financial Statements for the Years Ended Sept. 30, 2011 and 2010 (Consolidated Financial Statements), at 17-18 (Dec. 2011) (attached as Exhibit 2). Third, Amtrak depends on substantial, annual federal appropriations to operate in its current form: "The Company has a history of recurring operating losses and is dependent on subsidies from the Federal Government to operate the national passenger rail system and maintain the underlying infrastructure. These subsidies are usually received through annual appropriations." *Id.* at 6. Finally, the public nature of Amtrak's duty is revealed by the public interest goals that Congress has articulated for Amtrak, such as the goal of "provid[ing] additional or complementary intercity transportation service to ensure mobility in times of national disaster or other instances where other travel options are not adequately available." 49 U.S.C. § 24101(c)(9).

Notably, Congress has not stayed its hand since creating Amtrak. Rather, it has remained closely involved in the operations of Amtrak by enacting substantial pieces of legislation in an effort to improve national passenger rail service. *See, e.g.,* Amtrak

Improvement Act of 1978, Pub. L. No. 95-421; Amtrak Reorganization Act of 1979, Pub. L. No. 96-73; Amtrak Improvement Act of 1981, Pub. L. No. 97-35; and Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134. Congress's most recent effort to enhance passenger rail service, the Passenger Railroad Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432 (attached, in relevant part, as Exhibit 3), is the subject of this litigation.

The PRIIA directs Amtrak and the FRA to “jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations” PRIIA § 207, codified at 49 U.S.C. § 24101, note. In other words, Congress ordered the FRA, in conjunction with Amtrak, to establish standards to, among other things, “measure[] [the] on-time performance and delays incurred by intercity passenger trains on the rail lines of each [host] rail carrier” *Id.* Congress further instructed Amtrak and the FRA to “consult[]” with the STB and a variety of stakeholders during this process, including “rail carriers over whose rail lines Amtrak trains operate.” *Id.* This provision gives a voice to those freight carriers that share their tracks and facilities with Amtrak. The PRIIA also provides that if the Metrics and Standards are not completed within 180 days, then any one of the parties involved in the development of the Metrics and Standards can ask the (STB) to appoint an arbitrator to resolve any disputes through binding arbitration. PRIIA (Ex. 3) § 207(d). (This provision was not invoked.) The STB, “a quasi-independent three-member body within the Department of Transportation,” *Iowa, Chicago & Eastern R.R. Corp. v. Washington Cnty., IA*, 384 F.3d 557, 558-59 (8th Cir. 2004), is the successor to the ICC and primarily regulates economic matters in the freight railroad industry, *see Tyrrell v. Norfolk*

Southern Ry. Co., 248 F.3d 517, 523 (6th Cir. 2001). While the STB is administratively affiliated with the DOT, its decisions cannot be reviewed by the Secretary of Transportation or any other DOT official. *See* 49 U.S.C. § 703(c).

To give teeth to these Metrics and Standards (and thereby stimulate passenger railroad improvement), Congress also authorized the STB to investigate substandard on-time performance of intercity passenger trains and to penalize host railroads when substandard performance is attributable to a railroad's failure to provide preference to Amtrak over freight transportation. PRIIA § 213, codified at 49 U.S.C. § 24308(f). For example, “[i]f the on-time performance of [an Amtrak train] averages less than 80 percent for any 2 consecutive calendar quarters,” then the STB may initiate an investigation of its own accord. *Id.* Indeed, if Amtrak misses the 80% mark, the STB *must* initiate an investigation if requested to do so by Amtrak or “a host freight railroad over which Amtrak operates.” 49 U.S.C. § 24308(f)(1). During the investigation, the STB may “review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays.” *Id.* And, as a procedural matter – no doubt to ensure fairness – the STB must, among other things, “obtain information from all parties involved.” *Id.*

Following the investigation, the STB *may* fine – or, in the parlance of the statute, “award damages against” – the host railroad, but only if the substandard on-time performance flows from the “rail carrier’s failure to provide preference to Amtrak over freight transportation as required under [49 U.S.C. § 24308],” the longstanding statutory preference requirement. 49 U.S.C. § 24308(f)(2). In awarding damages, the STB shall consider “the extent to which Amtrak suffers financial loss as a result of host rail carrier

delays or failure to achieve minimum standards.” *Id.* § 24308(f)(3)(a). Further, with respect to the payment of the damages, the PRIIA provides that the STB “shall, as it deems appropriate, order the host rail carrier to remit the damages” to Amtrak and that “[s]uch damages shall be used for capital or operating expenditures on the routes over which delays” were the result of the failure of the host railroad to grant preference to Amtrak over freight traffic. *Id.* § 24308(f)(4)

The FRA issued final Metrics and Standards after consulting with freight railroads, among others. FRA, Metrics and Standards for Intercity Passenger Rail Service, Docket No. FRA-2009-0016, effective May 12, 2010 (attached as Exhibit 4). This consultation included soliciting comments on a draft version of the Metrics and Standards. As a result of these comments, including comments from Plaintiff and some of its individual members, the FRA and Amtrak revised the draft Metrics and Standards. Several of these revisions benefit host freight railroads. For example, the final version permits almost 30% more minutes of “host-responsible delays” than the draft version had allowed. *Id.* at 12 (table), 21 (explaining that the change was made, in part, because of a comment from CSX, which is a freight railroad on whose behalf Plaintiff sues). Also, in response to a comment from Plaintiff and several host freight railroads, the method of calculating a standard – the so-called effective speed measure – was changed from single quarter average to a “four-quarter rolling average”: “The FRA agrees that the result for a single quarter could potentially reflect a seasonal skew, and has therefore adjusted the Metrics and Standards to use a four-quarter rolling average instead.” *Id.* at 16. And to account for concerns expressed by freight railroads about needing more time to prepare for the implementation of one of the new standards, the “implementation schedule” was

delayed by two years “to provide additional time needed for operational and scheduling adjustments.” *Id.* at 18. In short, the FRA and Amtrak did not turn a deaf ear to the freight railroads’ concerns. To the contrary, the FRA and Amtrak acknowledged that “[g]ood-faith collaboration between Amtrak and host railroads . . . will be needed to ensure that the implementation of the above Section 207 standards is a success.” *Id.* at 33.

II. This Action

Plaintiff claims that § 207 of the PRIIA improperly delegates “lawmaking and rulemaking authority” to a private entity (*i.e.*, Amtrak) insofar as it authorized Amtrak to “jointly” issue the Metrics and Standards. Compl. ¶ 5. To support the notion that Amtrak is a private entity, Plaintiff’s complaint invokes 49 U.S.C. § 24301(a). Complaint, Aug. 19, 2011 (Compl.), Doc. No. 1, ¶ 6. Section 24301(a) states that Amtrak “is not a department, agency, or instrumentality of the United States Government” and shall be “operated and managed as a for profit corporation.” Compl. ¶ 49. Plaintiff presents its basic allegation as two separate claims. In its first claim, Plaintiff alleges that § 207’s grant of authority violates the non-delegation doctrine and the separation-of-powers doctrine.² Compl. ¶ 47-51. And in its second claim, Plaintiff alleges that § 207’s grant of authority violates the Due Process Clause of the Fifth Amendment because it “vest[s] the coercive power of the government in [an] interested private part[y].” Compl. ¶ 53. Amtrak is an interested party, according to the Plaintiff, because Amtrak can receive damage awards under § 213 of the PRIIA. Compl. ¶ 3. As

² Defendants understand the basis of Plaintiff’s invocation of the separation-of-powers doctrine to be that Congress has allegedly delegated executive power – the power to make rules – as well as legislative power to Amtrak, and has thereby infringed on the Executive Branch’s prerogatives. *See Pittson Co. v. United States*, 2002 WL 32172290, at *3 n.12 (E.D. Va. Aug. 20, 2002) (discussing a similar claim).

relief, Plaintiff seeks, among other things, a declaration that § 207 is unconstitutional and that the Metrics and Standards are void. Compl. at p. 17.

ARGUMENT

I. Congress's Delegation of Authority to Amtrak is Constitutional Even if Amtrak is a Private Entity Because the Government Retained Sufficient Control Over the Exercise of Its Authority.

Plaintiff's claims lack merit even if, as Plaintiff claims, Amtrak is a private entity. Private parties can exercise governmental power if the Government has the final say regarding the exercise of its coercive authority. Both of Plaintiff's claims rest on the notion that Amtrak exercised coercive authority without adequate governmental oversight. Compl. ¶¶ 48, 51, 53, 54. Not so. Amtrak acted under the auspices of the Government and, in any case, exercised only advisory authority.

The law does not flatly prohibit private parties from exercising governmental authority. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940); *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989) (abrogated on other grounds). Rather, it requires that any delegation of authority be accompanied by constraints sufficient to ensure that the Government has the final say regarding the exercise of its coercive power. Thus, the Supreme Court upheld the statutory scheme at issue in *Sunshine Anthracite*, under which groups of coal producers could set prices for coal, because those prices became effective only if approved by a Government agency, the National Bituminous Coal Commission. 310 U.S. at 388. *Frame* tells a similar story. Under the statute at issue in that case, the Cattlemen's Board – a group of private cattle ranchers and importers – collected assessments from the cattle industry and took “the initiative in planning how those funds

will be spent.” *Frame*, 885 F.2d at 1123, 1128. The Third Circuit upheld the statute because “the amount of government oversight of the program is considerable.” *Id.* at 1128. Notably, the Secretary of Agriculture appointed and could remove the members of the Board, and the Secretary had to approve budget proposals before they would become effective. *Frame*, 885 F.2d at 1128-29. And in *Pittston*, the Fourth Circuit upheld a statute that permitted a private board to decide whether to refer a coal company to the Secretary of Treasury for an enforcement action (for the nonpayment of certain premiums), because it viewed the Board’s role as “just an ‘advisory’ role”; the Secretary ultimately made the decision of whether to impose a penalty. 368 F.3d at 397.

The Government exercised ample control over Amtrak. The precedent rehearsed above demonstrates the importance of a Government-approval requirement to the constitutionality of a delegation. Government approval was required prior to power being exercised here: Amtrak could not enact the Metrics and Standards on its own. 49 U.S.C. § 24101, notes, § 207, Metrics and Standards. The Metrics and Standards went into effect only because the FRA approved of, and issued, them. *Id.*

Also, as demonstrated by *Frame*, structural controls (such as appointment and removal powers) influence the determination of whether the Government sufficiently monitored the exercise of its authority. *Frame*, 885 F.2d at 1128-29; *Lebron*, 513 U.S. at 397 (discussing structural controls of Amtrak). The Government’s levers of structural control over Amtrak are abundant. First, the President of the United States, with the consent of the Senate, appoints all eight of the externally appointed board members, 49 U.S.C. § 24302(a); and, the President may remove those board members, *see Holdover and Removal of Members of Amtrak’s Reform Bd.*, 2003 WL 24170382, at *3-5 (Op. Off.

of Legal Counsel Sept. 22, 2003). Second, Amtrak depends heavily on federal appropriations to survive in its current form. Consolidated Financial Statements (Ex. 2) at 6 (“The Company has a history of recurring operating losses and is dependent on subsidies from the Federal Government to operate the national passenger rail system and maintain the underlying infrastructure.”). In Fiscal Year 2011 alone, the Government provided Amtrak with around \$1.5 billion. *Id.* Finally, Congress, by statute, defines the goals of, and assigns tasks to, Amtrak, *see, e.g.*, 49 U.S.C. §§ 24101(c), 24710, 24902.

Amtrak’s role would be unproblematic even without these controls, because, insofar as fines are concerned, it exercised only advisory authority. In *Pittston*, the Fourth Circuit deemed the private body’s power to refer a coal company to the Secretary of Treasury for a possible enforcement action as advisory. 368 F.3d at 397. Similarly, the Metrics and Standards here act as a mechanism to determine when a freight railroad can be subject to an investigation by the STB. Recall, “[i]f the on-time performance of [an Amtrak train] averages less than 80 percent for any 2 consecutive calendar quarters,” as determined according to the Metrics and Standard, then the STB may initiate an investigation of its own accord. 49 U.S.C. § 24308(f)(1). And if Amtrak misses the 80% mark, the STB *must* initiate an investigation if requested to do so by Amtrak or a host freight railroad over which Amtrak operates. *Id.*

The Metrics and Standards, then, with respect to fines, merely act as a trigger to an STB investigation. To be clear, under the PRIIA, the STB cannot fine railroads for failing to satisfy the Metrics and Standards; the STB can fine railroads and impose other relief only if they fail to abide by the statutory preference requirement. 49 U.S.C. § 24308(f)(2); 49 U.S.C. § 24308(c) (preference requirement) (“Except in an emergency,

intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the [STB] orders otherwise under this subsection.”). In short, with respect to fines, the power exercised through the Metrics and Standards is essentially the advisory power of referral, and Amtrak’s involvement is, therefore, constitutional.³

Plaintiff highlights three concerns that underlie the limits on delegations of governmental power:

- (1) Accountability – “Prohibiting the delegation of rulemaking authority to private entities ensures governmental accountability and protects the rights of regulated parties[,]” Pl.’s Br. at 22;
- (2) Expertise – “Delegating rulemaking power to private entities not only permits the government to diminish or avoid its responsibility for controversial decisions, it places the coercive power of the government in parties without regulatory expertise[,]” *id.* at 23;
- (3) Bias – “[P]rivate entities lack the impartiality of government regulators and may be biased by their own self-interest[,]” *id.*

But the involvement of Amtrak in the joint creation of the Metrics and Standards does not raise any of these concerns. First, Amtrak is accountable to the public. The President of the United States appoints its board members, one of which is the Secretary of Transportation, 49 U.S.C. § 24302, and he may remove them, *see Holdover and Removal of Members of Amtrak’s Reform Bd.*, 2003 WL 24170382, at *3-5. What is more, Amtrak’s survival depends on congressional appropriations. Consolidated Financial Statements (Ex. 2) at 6. Second, expertise is not lacking. The FRA provides regulatory expertise: It has been regulating the railroad industry since 1966. *See* 49 U.S.C. § 103.

³ Plaintiff argues that the Metrics and Standards will affect freight railroads because the PRIIA requires that Amtrak and the freight railroads “incorporate” them into their “access and service agreements” (*i.e.*, the agreements that relate to Amtrak’s usage of the freight railroads’ tracks and facilities) “to the extent practicable.” Plaintiff’s Memo. in Support of Summary Judgment, Dec. 2, 2011 (Pl.’s Br.), Doc. No. 8, at 28, 33. But, as Plaintiff acknowledges, this incorporation has not occurred yet, *id.* at 19-20, and given the flexibility of the statutory language (“to the extent practicable”), the nature of the incorporation is not clear – and could vary by contract. Thus, at this time, the equivocal incorporation requirement does not establish that Amtrak has exerted non-advisory governmental power.

Finally, the PRIIA does not permit biased rulemaking. The FRA is a Government agency, and it jointly developed and approved the Metrics and Standards, 49 U.S.C. § 24101, notes, § 207, Metrics and Standards, and Amtrak is accountable to governmental officials, namely, Congress and the President.

Moreover, there is no evidence Amtrak acted in a biased fashion. Plaintiff highlights three supposed examples of bias, but none is persuasive. First, Plaintiff criticizes the Metrics and Standards because they set standards that require dramatically better performance from Amtrak. Pl.'s Br. at 30-31. But this demonstrates that Amtrak and the FRA heeded Congress' call for meaningful improvement, not that they acted in a biased fashion, *see* PRIIA (Ex. 3) § 228(a)(14) ("This division makes meaningful and important reforms to increase the efficiency, profitability and on-time performance of Amtrak's long-distance routes."); meaningful improvement requires meaningful change. Second, Plaintiff laments that the Metrics and Standards direct the FRA to use Amtrak-created conductor reports to compile statistics regarding the performance of freight railroads. Pl.'s Br. at 31. As the FRA and Amtrak explained in response to a comment objecting to the use of these reports, however, "no uniform database for minutes of delay across the Amtrak system exists that can replace Amtrak's conductor delay reports." FRA, Metrics and Standards (Ex. 4) at 20. And, in any case, if the STB gets involved, it "has [the] authority to review the accuracy of the train performance data" and "shall obtain information from all parties involved." 49 U.S.C. § 24308(f)(1). Finally, Plaintiff denigrates the "pure run time" standard, which measures the time it takes for an Amtrak train to travel between two points with no delays, as "the equivalent of drawing up D.C.-area bus schedules on the assumption that the buses will encounter no traffic on the

Washington Beltway.” Pl.’s Br. at 31-32. Plaintiff’s metaphor is colorful but inapt. Pure run time is not used as a synonym for scheduled run time. It is used to determine the extent of delays on Amtrak routes, so that the situations creating the delays can be thoughtfully addressed. FRA, Metrics and Standards (Ex. 4) at 13, 20. To borrow Plaintiff’s metaphor, just as one would not try to determine the toll traffic takes on travel times around the Beltway by looking only at actual travel times, one would not use scheduled travel times to determine the extent of delays on a train route.

Contrary to Plaintiff’s allegations, the conduct of the FRA and Amtrak during the development of the Metrics and Standards demonstrates the evenhandedness of their decision making. The FRA and Amtrak modified the Metrics and Standards that they had originally proposed to account for concerns voiced by freight railroads. To wit, they increased the limits of permissible freight railroad caused delays, changed the calculation of a standard (the measure of effective speed), and delayed implementation of another standard. *See* above § X. Alleged bias never looked so fair.

II. Plaintiff’s Claims Fail Because Amtrak is the Government for Purposes of the Constitution’s Due Process Clause and Non-Delegation and Separation-of-Powers Principles.

Both of Plaintiff’s claims rest on the proposition that Amtrak is a private entity. Compl. ¶ 48 (Claim One) (“The Constitution bars Congress from delegating to *private* parties the power to regulate the conduct of other private parties.”) (emphasis added); ¶ 53 (Claim Two) (“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.”) (emphasis added). Though the Court need not address the nature of Amtrak to decide this case, the proposition forwarded by

Plaintiff is false. For purposes of the Constitution's non-delegation principle, separation-of-powers principle, and Due Process Clause, Amtrak is part of the Government. Indeed, the Supreme Court stated in *Lebron* that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 394. This statement squarely forecloses Plaintiff's Due Process claim. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780, 2786 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power.") (plurality opinion). And their non-delegation and separation-of-powers claim fares no better: Plaintiff gives no reason why the rule that applies to its Due Process claim should not equally apply to essentially the same claim when it is couched in "non-delegation" or "separation-of-powers" terms.

Lebron involved a constitutional challenge to Amtrak's ability to regulate the content of a billboard in one of its stations. 513 U.S. at 376-77. Amtrak, through a contractor, leased billboard space to a controversial artist. *Id.* at 376. The leasing contract stipulated that Amtrak retained the authority to prohibit billboard displays based on the content of the display. *Id.* at 376. The artist proposed a politically charged work criticizing the Coors Brewing Company. *Id.* at 377. Amtrak prohibited the artist from posting the piece because of its political content. *Id.* The artist sued, alleging, among other things, that Amtrak violated the First Amendment. *Id.* Amtrak countered that it was a private corporation, *id.* at 392, as demonstrated by Congress's statement that Amtrak "is not a department, agency, or instrumentality of the United States Government . . .," 49 U.S.C. § 24301(a)(3). The Court rejected Amtrak's argument. It acknowledged that Congress could define the nature of Amtrak "for purposes of matters

that are within Congress's control,” such as “whether [Amtrak] is subject to statutes that impose obligations or confer powers upon Government entities,” and whether Amtrak will enjoy “those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate.” *Lebron*, 513 U.S. at 392. But the Court explained that Congress does not have the authority to make the “final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions.” *Id.* at 392. Why not? Congress cannot overrule the Constitution. “If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment.” *Id.* at 392.

The Court determined that Amtrak was “by its very nature” an agency or instrumentality of Government for “for the purpose of individual rights guaranteed against the Government by the Constitution.” *Id.* at 393-94. The decision was based on past practice and “reason itself.” *Id.* at 397, 400. With respect to past practice, the Court explained that it and Congress had long treated Government-created and -controlled corporations as part of the Government. *Id.* at 396. As for reason, the Court highlighted the indicia of the Government’s control of Amtrak: (i) Amtrak “was created by a special statute, explicitly for the furtherance of federal governmental goals”; and, (ii) the Government had the authority to appoint six of the eight externally appointed members of the Amtrak board of directors. *Id.* at 397. In short, for purposes of the claim in *Lebron*, Amtrak was part of the Government.

Nothing regarding Amtrak's status has changed – at least not in Plaintiff's favor. Of course, it remains true that Amtrak was created by statute to further governmental goals. Indeed, Congress has continued to refine its view of the purposes served by Amtrak in light of changing circumstances; Amtrak is not the forgotten vestige of a by-gone era. For example, in the PRIIA, Congress noted that there is a need to “maintain Amtrak as a national passenger rail system” because “[l]ong-distance trains [] provide transportation during periods of severe weather or emergencies that stall other modes of transportation,” such as the September 11, 2001 terrorist attacks. PRIIA (Ex. 3) § 228. The other evidence of Governmental control of Amtrak is stronger today than it was when *Lebron* was decided, because the Government has an even bigger say in the composition of Amtrak's board of directors. Instead of appointing six of eight externally appointed board members, the Government now appoints all eight of the externally appointed board members. 49 U.S.C. § 24302(a). The Government also has a hefty financial stake in Amtrak. The Government owns 92% of the outstanding shares of Amtrak Stock. Consolidated Financial Statements (Ex. 2) at 17-18. And as Plaintiff acknowledges, Compl. ¶ 23. What is more, Amtrak relies on federal appropriations to survive in its current form. Consolidated Financial Statements (Ex. 2) at 6,12.

In accord with *Lebron*, for purposes of Plaintiff's claims, Amtrak is an agency or instrumentality of the Government. Little needs to be said about the application of *Lebron* to Plaintiff's due process claim. The Court concluded that Amtrak was an entity of the Government for “the purpose of individual rights guaranteed against the Government by the Constitution.” *Lebron*, 513 U.S. at 394. The facts underlying the holding in *Lebron* have not changed in any way that undercuts the holding, and a due

process claim seeks to protect rights of the individual against the Government, *see, e.g., J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2786 (plurality). Thus, this claim fails. Hardly more needs to be said about Plaintiff's claims under the non-delegation and separation-of-powers principles. Plaintiff's claims under these principles are virtually identical to their due process claims. *Compare* Compl. ¶¶ 47-51 *with* Compl. ¶¶ 52-54. Plaintiff recognizes the close similarity, as it relies heavily on a single case, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311-312 (1936), as support for both claims, Pl.'s Br. at 21-22, 32, and refers to its claims in the singular, Pl.'s Br. at 27 ("Here, of course, the constitutional *claim* at issue involves a structural limitation arising from the Constitution's separation-of-powers principle.") (emphasis added). Observers have also recognized the near identity of such claims. David Horton, *Arbitration as Delegation*, 86 New York Univ. L. Rev. 437, 473-74 (2011) (discussing the similarity of due process and non-delegation claims);⁴ *Pittson Co.*, 2002 WL 32172290, at *3 n.12 (explaining the similarity of non-delegation and separation-of-powers claims). Given this similarity, the Court should not adopt a different test for determining governmental status to resolve Plaintiff's non-delegation or separation-of-powers claim, as opposed to its due process claim.

Both of Plaintiff's claims relate to whether Amtrak is part of the Government. The Court in *Lebron* sensibly considered indicia of Government control to determine whether Amtrak could take the blame, as a governmental entity, for its actions insofar as they affected individual rights. The question now is whether Amtrak can take credit for

⁴ Notably, Plaintiff's due process argument is a substantive due process argument. They base their substantive due process claim on *Carter Coal Co.*, 298 U.S. at 311-312. Pl.'s Br. at 32-33. This *Lochner*-era decision rests upon substantive due process notions of "arbitrary" and otherwise unfair governmental action. *Carter Coal*, 298 U.S. at 311-12; *Synar v. United States*, 626 F.Supp. 1374, 1383 n.8 (D.D.C. 1986) (three judge panel including then-Judge Scalia) (noting that the *Carter* "Court's holding appears to rest primarily upon denial of substantive due process rights"); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990) (noting the "substantive due process origins" of the *Carter Coal* holding).

being part of the Government – under the constitutional provisions invoked by Plaintiff – insofar as its actions affect individual rights. Coins have two-sides, not one. The same test should apply.

Plaintiff’s argument that Amtrak is a private entity for purposes of its suit is unconvincing. Plaintiff relies in part on Congressional enactments and statutory purpose. It emphasizes the statement in 49 U.S.C. § 24301(a)(3) that Amtrak “is not a department, agency, or instrumentality of the United States Government” Pl.’s Br. at 26. It notes that Congress deleted Amtrak from the list of mixed-ownership Government corporations. *Id.* at 27-28. And it points to the PRIIA’s statutory purpose: “Given that PRIIA’s purpose and effect is to boost the bottom-line of a for-profit corporation, Amtrak is plainly a private actor for purposes of the statute.” *Id.* at 28. These arguments fail as a matter of logic and precedent. It is Amtrak’s status for purposes of two constitutional principles and the Due Process Clause that matters, not its status under the PRIIA or any other statute.⁵ Plaintiff does not allege a violation of the PRIIA; rather, it argues the PRIIA violates the Constitution. And, as the Supreme Court decided in *Lebron*, Congress does not have the last word when it comes to determining the status of Amtrak for constitutional questions, such as whether Amtrak is an agency or

⁵ Defendants do not dispute that Congress can define the nature of an entity such as Amtrak for purposes of the reach of its own statutes. As the Court stated in *Lebron*, Congress’s view of Amtrak “is assuredly dispositive of Amtrak’s status as a Government entity for purposes of matters that are within Congress’s control—for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* . . . , the Federal Advisory Committee Act, 5 U.S.C.App. § 1 *et seq.*, and the laws governing Government procurement, *see* 41 U.S.C. § 5 *et seq.* . . .” *Lebron*, 513 U.S. at 392. Thus, for example, Amtrak is not subject to the APA, *see, e.g., United States v. Jackson*, 381 F.3d 984, 990 (10th Cir. 2004), and is not the government for purposes of the False Claims Act, *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490-92 (D.C. Cir. 2004).

instrumentality of the Government for purposes of the Constitution's non-delegation principle.⁶ *See Lebron*, 513 U.S. at 392-93.

Plaintiff also cites *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004), in which the court stated, "Amtrak is not the Government." But, as with most things, context is king. And the context in *Totten* was that the court was assessing the status of Amtrak under the False Claims Act, not the Constitution. *Id.* at 491-92. Indeed, the D.C. Circuit explained that "the Supreme Court deemed [49 U.S.C. § 24301(a)(3)] assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control. . . .Totten offers no reason, and we can think of none, why *False Claims Act coverage* is not a matter within Congress's control." *Totten*, 380 F.3d at 492 (emphasis added) (internal quotation marks omitted).

Surprisingly, Plaintiff even tries to turn *Lebron* to its advantage. Plaintiff asserts that *Lebron* held that: (i) Congress's view of Amtrak is dispositive of Amtrak's status for purposes of statutes like the PRIIA; and (ii) Congress's determination is relegated to the sideline only for constitutional claims of individual rights protected by the Constitution, and not for "constitutional claim . . . involv[ing] a structural limitation arising from the

⁶ Plaintiff maintains that "Amtrak has private shareholders, and operates as commercial carrier, financially, administratively, and legally distinct from the United States." Pl.'s Br. at 26. These assertions are irrelevant or incorrect. That Amtrak has private shareholders does not mean that it is a private entity for purposes of Plaintiff's claims. After all, Amtrak had private shareholders when *Lebron* was decided, and the key inquiry is whether Amtrak was created by the Government and remains in the Government's control. The assertion that Amtrak "operates as [a] commercial carrier" similarly does not matter. Amtrak operates as a commercial carrier in the sense that a statute directs that Amtrak be operated as a for-profit entity. 49 U.S.C. § 24301(a)(2). But that was true at time of *Lebron*, and the Court did identify this fact as a relevant point for determining Amtrak's status. The assertion that Amtrak is financially distinct from the United States is untrue: Amtrak receives sizeable infusions of cash from the Federal Government every year. Amtrak Consolidated Financial Statements (Ex. 2) at 6. Similarly false is the contention that Amtrak is administratively distinct: The President of the United States appoints all eight externally appointed administrators, *i.e.*, members of the board of directors. 49 U.S.C. § 24302(a). Finally, the allegation that Amtrak is legally distinct is either irrelevant or false: It is irrelevant to the extent Plaintiff refers to Amtrak's status under various statutes, and it is false to the extent Plaintiff is referring to the claims at issue in this case.

Constitution’s separation-of-powers principle.” Pl.’s Br. at 27. Neither supposed holding helps Plaintiff. Plaintiff’s first point is a nonsequitur. As explained above, it is not Amtrak’s status under the PRIIA that matters, but its status for purposes of the constitutional provisions invoked by Plaintiff. And Plaintiff’s second point is no more persuasive. Plaintiff raises a due process claim, which is a claim to vindicate an alleged “individual right[] guaranteed against the Government by the Constitution,” *Lebron*, 513 U.S. at 394, regardless of its genesis in a structural principle. *See J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2786 (plurality) (“The Due Process Clause protects an individual’s right to be deprived of life, liberty, or property only by the exercise of lawful power.”). Indeed, in *Bond v. United States*, the Supreme Court explained that “[t]he structural principles secured by the separation-of-powers protect the individual as well [as the branches of government].” 131 S. Ct. 2355, 2365 (2011). In any case, as explained earlier, irrespective of the label stamped on Plaintiff’s claims, the *Lebron* test gets at the central issue underlying both of them: Are there sufficient indicia of Government control to demonstrate that Amtrak is part of the government for purposes of these claims? There are.⁷

III. Section 207 of the PRIIA Comports with the Due Process Clause Even if Amtrak is a Private Entity Because a Relaxed Standard Applies and Amtrak’s Alleged Financial Interest is Weak.

Plaintiff contends that the PRIIA violates the Due Process Clause of the Fifth Amendment by granting governmental authority to an economically interested private party (*i.e.*, Amtrak). Compl. ¶¶ 52-54. Even if the Court determines that Amtrak is a

⁷ That Plaintiff’s claims all present the same basic legal question is driven home by Plaintiff’s use of the singular “claim” when discussing the issue: “Here, of course, the constitutional *claim* at issue involves a structural limitation arising from the Constitution’s separation-of-powers principle.” Pl.’s Br. at 27 (emphasis added).

private entity for purposes of Plaintiff's claims, this contention fails for the reason set out in first section of this brief. But the contention fails for another reason. The Due Process Clause does not prohibit a potentially interested party from exercising governmental authority when (1) an unbiased governmental actor serves as a filter between the potentially interested party and the governed, and (2) the potentially interested party's interest in acting in a biased fashion is weak. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Indeed, the Due Process Clause is particularly forgiving of the involvement of a potentially interested party when the involvement takes the form of rulemaking, as opposed to adjudication. *Friedman v. Rogers*, 440 U.S. 1, 18 (1979) (concluding that there was no constitutional violation when a plaintiff was regulated by an administrative board dominated by bitter industry rivals).

Plaintiff relies heavily on *Carter Coal*, 298 U.S. 238. Pl.'s Br. at 32-34. In that *Lochner*-era decision, the Court invalidated wage and hour restrictions set by certain industry participants because of the potential biases of those participants. *Carter Coal*, 298 U.S. at 311. But this case differs from *Carter Coal* in at least two crucial respects: (1) with respect to fines, the Metrics and Standards merely act as a trigger to an investigation by a disinterested governmental agency, the STB, which may issue fines and other relief on the basis of a separate statutory provision (the preference requirement), not the Metrics and Standards; and (2) the private party in *Carter Coal* acted alone,⁸ whereas here, Amtrak acted with a unbiased Government partner, the FRA.

In light of these differences, *Marshall v. Jerrico, Inc.* serves as a more appropriate analog for this case than *Carter Coal*. In *Jerrico*, a restaurant chain was fined by the Department of Labor for child labor violations after a hearing before an administrative

⁸ Again, Defendants assume for purposes of this argument that Amtrak is a private entity.

law judge (ALJ). 446 U.S. at 240-41. The restaurant chain sued, arguing that the administrative scheme violated the Due Process Clause because money collected as civil penalties went to the agency to defray administrative costs and therefore made the agency representative at the administrative hearing an interested party. 446 U.S. at 241. The Court rejected the claim. First, although the Court did “not say with precision” what standard applied, it did apply a more relaxed due process standard to the agency representative than it would apply to an adjudicator because, ultimately, the disinterested ALJ, not the agency representative, decided what penalty to dole out.⁹ 446 U.S. at 247-250. Second, “under a realistic appraisal of psychological tendencies and human weakness,” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), the Court noted that the likelihood that the agency representative would act in a biased fashion was remote because his salary was fixed and the budgetary consequences for the agency were minimal. 446 U.S. at 250-252.

Like the agency representative in *Jerrico*, Amtrak lacks the final word. Amtrak does not issue any fines, the STB does. And the STB issues fines only if a freight railroad has violated the separate statutory preference requirement. 49 U.S.C. § 24308(a)(2). Thus, as in *Jerrico*, the institutional arrangement in this case warrants a relaxed due process standard.

Not only does the institutional arrangement call for a relaxed due process standard, a la *Jerrico*, but the regulatory context does as well. *Friedman v. Rogers*, 440 U.S. 1 (1979), is instructive. The Plaintiff in *Friedman* was a commercial optician in

⁹ With regard to adjudicators, a common formulation of the due process standard states that an official lacks the constitutionally required neutrality if he harbors a pecuniary interest in the outcome of the case that “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true. . . .” *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60, 93 (1972).

Texas. *Id.* at 5-6. He challenged the constitutionality of the Texas Optometry Board because professional opticians – the bitter professional rivals of commercial opticians – dominated the regulatory board’s ranks, holding four of six membership slots. *Id.* at 3-6. The Supreme Court concluded that the Plaintiff had “no constitutional right to be regulated by a Board that is sympathetic to the commercial practice of optometry.” *Id.* at 18. Following *Friedman*, courts have applied a relaxed due process standard in the rulemaking context. *N.Y. State Dairy Foods v. Ne. Dairy Compact Comm’n*, 198 F.3d 1, 13-14 (1st Cir. 1999) (“The Due Process Clause sets a significantly lower bar for legislative functions [that adjudicative ones.]”); *White Eagle Co-Op Assoc. v. Johanns*, 508 F. Supp. 2d 664, 672 (N.D. Ind. 2007) (same).

Under the relaxed due process standard applicable in this case, Amtrak’s role in helping develop the Metrics and Standards easily withstands scrutiny. “[A] realistic appraisal of psychological tendencies and human weakness” indicates that the likelihood that Amtrak would act in a biased fashion was remote. *Larkin*, 421 U.S. at 47. First, the statute partnered Amtrak with the FRA, which Plaintiff does not allege was biased. As the FRA could – and would – strip any bias out of the Metrics and Standards, there would have been little point in Amtrak trying to shade the Metrics and Standards in its favor.

Second, the structure of Amtrak and political realities would have blunted any interest by Amtrak to act in a biased fashion. Amtrak is politically accountable: the Secretary of Transportation serves as one of the board of directors; members of its board of directors can be removed by the President of the United States, *Holdover and Removal of Members of Amtrak’s Reform Bd.*, 2003 WL 24170382, at *3-5; and it depends on continuing congressional appropriations to retain its current form, Consolidated Financial

Statement (Ex. 2) at 6. Moreover, the parties who would be adversely affected by biased Metrics and Standards – major freight railroads – undoubtedly have the political strength necessary to inform the political branches of any perceived unfairness in the regulatory process. *See* Lobbying Report, Association of American Railroads, 2011, at 1 (stating that the Association spent over \$4.5 million in lobbying activities in *one quarter* of 2011) (attached as Exhibit 5). In this environment, Amtrak would have nary an interest in putting a thumb on the scale.

Finally, Amtrak had only a weak interest in biased Metrics and Standards. Violations of the Metrics and Standards do not produce fines. Only violations of the separate preference requirement may result in fines. The word “may” in the last sentence is important: Even if the STB identifies a violation of the preference requirement, it need not necessarily fine the freight railroad. Thus, for Amtrak to receive any benefit from a fine depends on contingency (a freight railroad failing to satisfy the Metrics and Standards) piled on contingency (the STB opening an investigation) piled on contingency (the STB finding a violation of the separate preference requirement) piled on contingency (the STB deciding to issue a fine). More is required: “[I]t is exceedingly improbable that . . . decisions would be distorted by some expectation that all of these contingencies would simultaneously come to fruition.” *Jerrico*, 446 U.S. at 252. But there is no more.¹⁰

¹⁰ Plaintiff cites two Supreme Court cases other than *Carter Coal* to support its due process claim, namely, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987), and *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973). Pl.’s Br. at 32. Neither case carries the day. In *Young*, the Court held that a special prosecutor in a contempt action had an impermissible conflict of interest because he represented the client on whose behalf the underlying court order was entered. 481 U.S. at 805-806. The Court distinguished *Young* from *Jerrico* because of the certainty that the special prosecutor would be subject to the potentially distorting influence. *Id.* at 807. There is no such certainty in this case given the involvement of the FRA, the structure of Amtrak, and the contingent nature of any financial interest, as explained in the text. *Gibson* fares no better. It arose in the adjudicatory context, which, as explained in the text, is subject to a different due process analysis.

CONCLUSION

The Court should enter judgment in favor of defendants and dismiss Plaintiff's suit.

Dated: February 3, 2012

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(attached to Defendants' Memorandum in Support of Summary Judgment as Exhibit 2).

4. Amtrak has a "history of recurring operating losses and is dependent on subsidies from the Federal Government to operate the national passenger rail system and maintain the underlying infrastructure. These subsidies are usually received through annual appropriations." *Id.* at 6.
5. In Fiscal Year 2011, the Government provided Amtrak with around \$1.5 billion in appropriations. *Id.* at 6.
6. Congress has articulated goals for Amtrak, including that it "provide additional or complementary intercity transportation service to ensure mobility in times of national disaster or other instances where other travel options are not adequately available." 49 U.S.C. § 24101(c)(9).
7. The Passenger Rail Investment and Improvement Act of 2008 (PRIIA) directs Amtrak and the Federal Railroad Administration (FRA) to "jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations" PRIIA, Pub. L. No. 110-432 (attached, in relevant part, as Exhibit 3 to Defendants' Memorandum in Support of Summary Judgment), § 207, codified at 49 U.S.C. § 24101, note.
8. The FRA issued final Metrics and Standards after consulting with, among others, freight railroads. FRA, Metrics and Standards for Intercity Passenger Rail Service, Docket No. FRA-2009-0016, effective May 12, 2010 (attached to Defendants' Memorandum in Support of Summary Judgment as Exhibit 4).

Response to Plaintiff's Statement of Undisputed Facts

1. Not disputed.
2. Not disputed, but immaterial to summary judgment.
3. The first sentence is undisputed. The second sentence is disputed to the extent it suggests that these agreements alone define the relationship between Amtrak and host freight railroads, as statutory provisions, like 49 U.S.C. § 24308(c), also play a part. But this potential dispute is not material to summary judgment.
4. Not disputed.
5. To the extent the word “simultaneously” in the first sentence means “on March 13, 2009,” this paragraph is not disputed.
6. Defendants do not dispute that “[o]n May 6, 2010, Amtrak and the FRA jointly issued their responses to the comments” on the proposed Metrics and Standards, but state that whether Amtrak and the FRA issued a final rule is a legal conclusion, not a statement of fact.
7. Not disputed, but immaterial to summary judgment.
8. Defendant is without knowledge of the truth of this allegation. In any event, this allegation is immaterial to summary judgment because it relates to jurisdiction, rather the merits of the dispute. *See Kirkham v. Societe Air France*, 429 F.3d 288, 294 (D.C. Cir. 2005).
9. Defendants dispute that Quarterly Reports demonstrate that the Metrics and Standards “are not being met on many routes.” The Reports demonstrate, at most, that the Metrics and Standards *were* not met during the time period

measured; they do not demonstrate current (non)compliance. But this dispute is immaterial to summary judgment because it does not pertain to the constitutionality of the metrics and standards.

Dated: February 3, 2012

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Exhibit 4

No. 1: 11-cv-1499 (JEB)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION OF AMERICAN RAILROADS,

Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION,
et al.,

Defendants.

**AAR'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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AAR'S COMBINED REPLY AND OPPOSITION MEMORANDUM

Plaintiff Association of American Railroads (AAR) respectfully submits this combined reply memorandum in support of its motion for summary judgment and in opposition to the Government's motion for summary judgment.

INTRODUCTION

In attempting to defend Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA), the Government only confirms that the provision is constitutionally suspect. The Constitution does not permit Congress to create a corporation; declare that it “is not a department, agency, or instrumentality of the United States Government” (49 U.S.C. § 24301(a)); direct that the corporation be “operated and managed as a for-profit” entity (*id.*); then grant the corporation regulatory authority over other private companies in the same industry (PRIIA § 207) — while at the same time declaring that the corporation is exempt from the Administrative Procedure Act and thus freed from the rulemaking constraints that bind federal agencies. *See* Gov't Br. 21 n.5 (“Amtrak is not subject to the APA”).

No court has ever upheld such a scheme. It is contrary to the principles of constitutional government and the separation of powers to vest Article I lawmaking authority in a for-profit corporation and then direct it to regulate other private companies in the same industry. As a for-profit corporation in the railroad industry, Amtrak cannot simultaneously serve as a neutral and disinterested government regulator of that industry.

There is no support for the Government's suggestion that Amtrak should be treated as a governmental entity vested with full legislative and rulemaking authority. Amtrak is not an impartial regulatory agency. The Government's argument that Amtrak is part of the Government for purposes of exercising legislative power, Gov't Br. 16-23, rests upon a gross misreading of *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995). In *Lebron*, the Court held that while Amtrak may be deemed a government actor for purposes of "individual rights" such as a First Amendment claim, Amtrak is *not* part of the Government for purposes of "the inherent powers . . . of Government agencies that it is within the power of Congress to eliminate." *Id.* at 392, 394. It is obviously within the power of Congress to grant or deny rulemaking authority to federal agencies. Indeed, the Court made this point explicit when it stated that 49 U.S.C. § 24301(a) — the statute providing that Amtrak "is not a department, agency, or instrumentality of the United States Government" — is "*assuredly dispositive* of Amtrak's status as a Government entity for purposes of . . . whether it is subject to . . . the Administrative Procedure Act." 513 U.S. at 392 (emphasis added). Nothing in *Lebron* remotely suggests that Amtrak is vested with sovereign lawmaking authority under Article I of the Constitution — and that Congress is powerless to withhold or limit that authority.

There is no merit to the Government's fallback claim that Section 207 is constitutional even if Amtrak is a private entity. Gov't Br. 11-16. The law is well settled that such delegations are constitutional *only* where the private entity's role is "advisory" or "ministerial," *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004), and the

private entity “function[s] subordinately” to the Government, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). Here, Section 207 vests **equivalent** rulemaking authority in Amtrak and the Federal Railroad Administration (FRA), and they functioned as co-equals throughout the rulemaking. There is simply no way to read the plain language of Section 207 and conclude that Amtrak’s role was advisory or ministerial, or that it was functioning subordinately to the FRA. *See* PRIIA § 207(a) (“the Federal Railroad Administration and Amtrak shall jointly . . . develop new or improve existing metrics and minimum standards”).

Throughout its brief, the Government attempts to downplay the significance of the Metrics and Standards by arguing that they “merely guide the STB’s decision of whether to initiate an investigation,” and “for Amtrak to receive any benefit from a fine depends on contingency . . . piled on contingency.” Gov’t Br. 2-3, 27. But even if fines are not imposed immediately, the Metrics and Standards still carry the force of positive law. They are undeniably coercive, and the freight railroads have attested to the many ways in which the Metrics and Standards are currently impacting their business operations — evidence that the Government has made no effort to rebut. *See* Ladue Decl. ¶¶ 5-11; Beck Decl. ¶ 11; Owens Decl. ¶ 9; Harris Decl. ¶¶ 8-10 (attached as Exs. 20-24 to AAR’s Motion for Summary Judgment).

Moreover, there is a notable omission in the Government’s brief. Although the Government discusses at length the on-time performance provisions of the Metrics and Standards, it all but ignores PRIIA § 207(c) — entitled “Contracts With Host Rail

Carriers” — which provides that: “To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under [Section 207(a)] into their access and service agreements.” This provision purports to give Amtrak regulatory authority over its painstakingly-negotiated agreements with the freight railroads — agreements that the Government has described as “private agreements among private parties.” Dupree Decl. Ex. G at 29. Amtrak entered into these contracts as a private entity, yet under Section 207 Amtrak may revisit these contracts in its role as Government regulator. Indeed, Amtrak officials are now seeking to enshrine the Metrics and Standards into existing contracts to which the freight railroads are already bound, thus attempting to achieve through regulatory fiat what they could not achieve through negotiation. *See* Owens Decl. ¶¶ 10, 13. The fact that the Government buries its discussion of Section 207(c) in a footnote, *see* Gov’t Br. 14 n.3, is an implicit concession that it has no rebuttal.

Section 207 is a classic example of “legislative delegation in its most obnoxious form” because “it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.” *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Amtrak runs most of its trains over tracks owned and maintained by the private freight railroads. The fact that Amtrak has now filed a petition against one of those railroads, Canadian National, claiming that it “refused to adopt measures necessary to satisfy the standards [Amtrak] developed pursuant to Section 207,” *see* Surface

Transportation Board Dckt. No. NOR 42134, ¶ 4 (Jan. 19, 2012) (attached as Ex. A to Declaration of Porter N. Wilkinson), is the clearest possible evidence that Amtrak's interests "are adverse to the interests of others in the same business." *Carter Coal*, 298 U.S. at 311.

This Court should grant summary judgment in AAR's favor and declare PRIIA § 207 and the Metrics and Standards unconstitutional.

ARGUMENT

I. Amtrak Is Not The Government.

Congress has expressly provided that Amtrak is not the Government. 49 U.S.C. § 24301(a) (Amtrak "is not a department, agency or instrumentality of the United States Government" and instead shall be "operated and managed as a for-profit corporation"). The D.C. Circuit has said that "Amtrak is not the Government." *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004) (Roberts, J.). The Justice Department has said that Amtrak is not the Government. *Id.* at 491-92. The President said last month that "Amtrak is not an agency or instrument of the U.S. Government." See Executive Office of the President, OMB, *Budget of the U.S. Government* (FY 2013), at 1014. And Amtrak to this day announces on its website that "Amtrak is a private corporation and not a federal agency." See www.amtrak.com (FOIA Annual Report 4 (2011)); see also Amtrak FOIA Handbook 1 (2008) ("The National Railroad Passenger Corporation, also known as Amtrak, is not a government agency or establishment. [It] is a private corporation operated for profit . . .").

The Government now argues that Amtrak *is* the Government — at least for purposes of this case. Under the Government’s approach, the test for whether Amtrak is or is not the Government appears to turn on whichever outcome best serves the Government’s litigating position at the time. *Compare* Gov’t Br. 3 (attacking AAR’s claims by insisting that “Amtrak’s nature does not change”), *with id.* at 22 (attempting to explain shifting Government litigating positions by arguing that Amtrak’s nature does change because “as with most things, context is king”).

A. *Lebron* Confirms That Amtrak Is A Private Actor For Purposes Of Nondelegation And The Separation Of Powers.

The Government’s argument that Amtrak is part of the Government rests entirely on its mistaken reading of *Lebron* — a case that strongly supports *AAR*’s position. *See Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995). In *Lebron*, an artist alleged that Amtrak had violated his First Amendment rights when it prohibited him from displaying a politically controversial piece of artwork in Penn Station. The Court rejected Amtrak’s argument that it could not be held liable for constitutional violations, stating that Amtrak should be treated as part of the Government “for purposes of the First Amendment.” *Id.* at 400; *see also id.* at 394 (Amtrak “is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution.”).

In holding that Amtrak could be sued for First Amendment violations, the Supreme Court did not remotely suggest that Amtrak may exercise the sovereign authority of the United States by enacting federal laws or regulations. No court has ever

adopted the reading of *Lebron* that the Government urges this Court to accept. In fact, the Supreme Court's opinion strongly indicates that Amtrak is *not* part of the Government for purposes of the nondelegation and separation-of-powers challenges in this case.

First, *Lebron* states that Amtrak is part of the Government for the limited purpose of "individual rights" guaranteed under the Constitution, such as the artist's First Amendment challenge, whereas the challenge in this case seeks to enforce a *structural* limitation in the Constitution — namely the separation-of-powers principle and the prohibition on congressional delegation of the Article I legislative power to private actors. *See* U.S. Const. art. I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."). Thus, by its own terms, *Lebron* does not foreclose the nondelegation challenge presented here.

The Government seemingly recognizes this point. Because it cannot contend that AAR's nondelegation challenge involves individual rights as opposed to structural limitations, it focuses on the fact that AAR has also alleged a separate and independent due process challenge, and argues that the Court should reject the due process challenge under *Lebron* and then reject the nondelegation challenge as an afterthought because "[t]he claims are essentially the same." Gov't Br. 3. But the claims are obviously not "the same," and the fact that PRIIA § 207 may *also* violate the Due Process Clause does not cure the nondelegation violation. Under the Government's bootstrapping approach, Amtrak would be a private company if a plaintiff raised only a nondelegation challenge,

but if the plaintiff also alleged a due process violation, at that point *Lebron* is triggered and Amtrak becomes part of the Government for both claims.

Second, the *Lebron* Court explained that while Amtrak is part of the Government for purposes of the constitutional *obligations* of Government — such as the obligation to respect an artist’s First Amendment rights — Amtrak is *not* part of the Government for purposes of the inherent *powers and privileges* of the Government. This was the basis on which the Court distinguished its prior case holding that the Bank of the United States was not vested with the inherent powers of the Government. *See* 513 U.S. at 399 (discussing *Bank of the United States v. Planters’ Bank of Ga.*, 22 U.S. (9 Wheat.) 904 (1824)). The Court explained that “it does not contradict [*Bank of the United States*] to hold that [Amtrak] is an agency of the Government, for purposes of the constitutional obligations of Government rather than the privileges of the government.” 513 U.S. at 399 (internal quotation marks omitted). Thus, the *Lebron* Court was quite clear that while Amtrak is a Government agency for purposes of the Government’s constitutional obligations, it is not a Government agency for purposes of the Government’s inherent powers. The Government’s flip statement that “coins have two-sides” (Gov’t Br. 21) simply misreads *Lebron*.

In fact, the Court stated that the statute designating Amtrak as a private corporation is *dispositive* for purposes of determining whether Amtrak may exercise the “inherent powers . . . of Government agencies that it is within the power of Congress to eliminate.” 513 U.S. at 392. There can be no dispute that rulemaking is an “inherent

power . . . of Government agencies that . . . is within the power of Congress to eliminate.” Congress has control over the rulemaking powers that it chooses to delegate to an agency. If it wishes to limit or even eliminate an agency’s rulemaking authority, it may do so. Indeed, Amtrak could not have promulgated the Metrics and Standards had it not been granted statutory authorization from Congress. For this reason, the Government’s statement that “Congress cannot overrule the Constitution,” Gov’t Br. 18, has no relevance here. Nothing in the Constitution requires that Congress delegate its legislative authority to Amtrak.

The *Lebron* Court reinforced the distinction between the constitutional obligations and the constitutional powers of Government by explaining that Amtrak does *not* enjoy many of the inherent powers of Government agencies. For example, the Court said that there is “no doubt” that Amtrak lacks the inherent power of federal agencies to incur obligations or pledge the credit of the United States — powers very similar to an agency’s inherent power to promulgate regulations on behalf of the United States. *See* 513 U.S. at 392. In fact, the Court stated that Congress’ designation of Amtrak as a private corporation “is assuredly dispositive of Amtrak’s status as a Government entity for purposes of . . . whether it is subject to . . . the Administrative Procedure Act” — the statute that governs rulemaking agencies in our federal system. *Id.* Courts have thus held, based on Amtrak’s private charter, that Amtrak is *not* subject to the Administrative Procedure Act. *See United States v. Jackson*, 381 F.3d 984, 990 (10th Cir. 2004); *see also* Gov’t Br. 21 n.5 (“Amtrak is not subject to the APA”).

Accepting the Government's position that Amtrak is part of the Government for rulemaking purposes would result in the bizarre and untenable outcome that Amtrak may promulgate regulations, but is not bound by the restrictions and procedural safeguards in the APA, including the prohibition on arbitrary and capricious agency action, the numerous notice-and-comment requirements, and the universe of other restrictions that the APA imposes on government agencies when they engage in rulemaking. Nor is it clear how Amtrak rules could even be challenged in federal court if the APA does not apply. Under the Government's proposed approach, Amtrak would be a unique entity within our constitutional system: a for-profit super-agency freed from the constraints of the APA and endowed with rulemaking powers that exceed all other agencies within the Executive Branch.

In sum, *Lebron* "**constrains** governmental action by whatever instruments or in whatever modes that action may be taken." 513 U.S. at 392 (emphasis added and internal quotation marks omitted); *see also id.* at 397 ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). *Lebron* plainly does not **empower** the Government to delegate to Amtrak the lawmaking power of the United States. The Government tries to turn *Lebron* on its head by transforming this rights-vindicating decision into a license to trample on private rights and the separation-of-powers principle by empowering a for-profit corporation to regulate its contractual partners through the exercise of coercive federal power. By admonishing that the Government cannot use the

corporate form to evade its constitutional obligations, the Supreme Court did not rule that Congress was otherwise free to manipulate the corporate form by vesting Amtrak with sovereign lawmaking power in order to help it make a profit at the expense of private companies in the same industry.

B. The Purported Indicators Of Federal “Control” Cannot Transform Amtrak Into Part Of The Government.

The Government strives mightily to portray Amtrak as part of the Government. It argues that Amtrak receives substantial federal funding, notes that the President appoints some of the members of Amtrak’s Board, and argues that one may draw an inference from these facts that Congress intended Amtrak to be part of the Government. But any such inference is trumped by the express statutory provision that Amtrak “is not a department, agency, or instrumentality of the United States Government.” 49 U.S.C. § 24301(a). Congress literally could not have spoken more clearly on this question. The only way the Government can override the plainly-expressed will of Congress is by persuading this Court to disregard Section 24301(a) under *Lebron* — an argument refuted above.

The Government’s arguments are meritless in any event. The suggestion that Amtrak should be deemed an impartial federal regulator is implausible given that it is “operated and managed as a for-profit corporation.” 49 U.S.C. § 24301(a). Indeed, Congress has commanded Amtrak to “use its best business judgment in acting to minimize United States Government subsidies” by “improving its contracts with operating rail carriers,” and to “undertake initiatives . . . designed to maximize

[Amtrak's] revenues.” 49 U.S.C. § 24101(c)-(d). Amtrak operated under a similar mandate when exercising its purported regulatory authority under PRIIA: Congress expressly provided that one of PRIIA's objectives is “to increase [Amtrak's] profitability.” *See* PRIIA § 228(a)(14). Where, as here, Amtrak had a direct financial stake in the regulations it was authorized to promulgate — and acted under a statutory mandate to conduct itself like a for-profit corporation and “maximize its revenues” — it cannot be seriously contended that Amtrak is a neutral and disinterested federal rulemaking agency.

Treating Amtrak as a federal agency with rulemaking power would be directly at odds with the way Amtrak has existed since its founding more than 40 years ago. Courts have repeatedly stated that Amtrak is a private company that does *not* possess rulemaking authority. *See, e.g., Ehm v. Nat'l R.R. Passenger Corp.*, 732 F.2d 1250, 1255 (5th Cir. 1984) (“Amtrak has no rulemaking authority” aside from prescribing rules for FOIA implementation); *Held v. Nat'l R.R. Passenger Corp.*, 101 F.R.D. 420, 423 (D.D.C. 1984) (“Amtrak has no rulemaking authority.”). The Justice Department's Office of Legal Counsel has acknowledged this point as well, explaining that Amtrak does not “engage in regulation through agency adjudication and rulemaking.” *See Holdover and Removal of Members of Amtrak's Reform Board*, 2003 WL 24170382, at *4 (O.L.C. Sept. 22, 2003).

PRIIA § 207 itself recognizes that Amtrak is not part of the Government. Section 207(d) provides that if the Metrics and Standards are not completed within 180 days, an arbitrator may be appointed “to assist the parties in resolving their disputes through

binding arbitration.” This provision would make absolutely no sense if Amtrak were indeed part of the Government. Disagreements among federal agencies are resolved by the President, not by an independent arbitrator. The Defense Department and State Department do not settle policy disputes through binding arbitration; under our system of constitutional government, such disputes are elevated to the top decisionmakers within the executive branch rather than outsourced to an arbitrator.

Although the Government suggests that it maintains control over Amtrak’s activities, the truth is that “Amtrak’s day-to-day operations are not subject to close government supervision,” and “[t]he officers and employees who conduct Amtrak’s day-to-day affairs are not federal employees.” *Ehm*, 732 F.2d at 1255. In fact, Amtrak has become even more like a private business in recent years, notwithstanding the Government’s inexplicable statement that since *Lebron*, “[n]othing regarding Amtrak’s status has changed — at least not in Plaintiff’s favor.” Gov’t Br. 19. The Government ignores the fact that in 1997, two years after *Lebron* was decided, Congress removed Amtrak from the list of “mixed-ownership Government corporations,” for purposes of “free[ing] Amtrak to operate . . . more like a private entrepreneurial corporation.” Pub. L. No. 105-134, sec. 2, 111 Stat. 2570, 2571 (1997); Presidential Statement on Signing the Amtrak Reform and Accountability Act of 1997, 33 Weekly Comp. Pres. Doc. 1955 (Dec. 8, 1997). This change was significant, in that it relieved Amtrak from many of the audit, accounting and budget reporting requirements set forth in the Government Corporation Control Act, 31 U.S.C. §§ 9101-9109. The purpose of the change was to

enable Amtrak to “operate as much like a private business as possible.” *See* S. Rep. No. 105-85, at 1 (1997), *reprinted in* 1997 U.S.C.C.A.N. 3055, 3055.

The Government also glosses over the fact that Amtrak has private shareholders. *See* Gov’t Statement of Undisputed Facts ¶ 3. It would be anomalous, to say the least, to sell the public shares of stock in a government regulatory agency. And with regard to the Government’s claim that Amtrak is part of the Government because it receives federal funding, it would surprise many private companies that receive federal funding to learn that the Government now views them as part of the Government. *See Forsham v. Harris*, 445 U.S. 169, 180 (1980) (“Grants of federal funds” do not “serve to convert the acts of the recipient from private acts to government acts absent extensive, detailed, and virtually day-to-day supervision.”). In fact, the Fifth Circuit has already rejected this argument, stating that “[w]e do not think that Amtrak’s financial accountability to the federal government constitutes government control over Amtrak within the meaning of [the APA].” *Ehm*, 732 F.2d at 1255. The suggestion that receipt of federal funds empowers a corporation to regulate its competitors is nonsensical: surely the Government would not suggest that the post-bankruptcy General Motors could regulate Ford on the theory that GM, like Amtrak, depended on federal funding for its survival.

Finally, the Government errs in relying on the fact that the President appoints some (but not all) of Amtrak’s Board Members. The Government’s argument is undercut by the opinion of its Office of Legal Counsel, which has explained that, under *Lebron*, “a government’s appointment authority is *not* given dispositive weight in determining

whether a nominally private entity is, in fact, ‘what the Constitution regards as the Government.’” *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 2009 WL 6365082, at *10 n.9 (O.L.C. Dec. 7, 2009) (emphasis added) (quoting *Lebron*, 513 U.S. at 392). And as explained below, because not all of Amtrak’s Board Members are presidentially appointed — and because Congress has imposed limits on the President’s appointment power — Amtrak’s Board Members cannot exercise rulemaking power consistent with the Appointments Clause in any event.

C. Even If Amtrak Were Somehow Deemed A Government Agency, Section 207 Cannot Stand.

As shown above, *Lebron* forecloses the suggestion that Amtrak is part of the Government for purposes of a nondelegation and separation-of-powers challenge, and nothing in Amtrak’s structure or operations warrants a contrary conclusion. But even if Amtrak were somehow deemed a Government agency, PRIIA § 207 would still be unconstitutional.

First, regardless of how Amtrak is characterized, it was created to operate as a business to compete in the market for intercity passenger transportation — a role that is incompatible with the role of a disinterested federal regulator of the freight railroad industry. This is not a case where an enforcement or oversight agency has a “slight,” “speculative” or “indirect” financial incentive to act in its own self-interest. *Cf.* Gov’t Br. 25-26 (citing *Marshall v. Jerrico*, 446 U.S. 238 (1980); *N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm’n*, 198 F.3d 1 (1st Cir. 1999); *White Eagle Coop. Assoc. v.*

Johanns, 508 F. Supp. 2d 664 (N.D. Ind. 2007)). Rather, this is a case where the agency itself has entered the marketplace as a commercial actor and is wielding the sovereign powers of Government for its direct financial advantage.

It is well settled that when the Government launches an agency into the commercial world to compete with private enterprises, it sheds the powers and privileges of the sovereign. *See, e.g., Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5 (1986) (sovereign immunity “inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise”) (abrogated on other grounds). Just as agencies acting like private businesses cannot claim the sovereign immunity of Government, they cannot claim a similar inherent privilege of Government — the power to make laws and issue regulations.

Second, if the Government were correct that Amtrak is a federal agency with regulatory authority, that would render Amtrak’s structure unconstitutional under the Appointments Clause. The Constitution grants the President unfettered authority to appoint principal officers of the United States, *see* U.S. Const. art. II, § 2, cl. 2, and the Supreme Court has held that “rulemaking” power may properly “be exercised only by ‘Officers of the United States,’ appointed in conformity with” the Clause. *Buckley v. Valeo*, 424 U.S. 1, 140-43 (1976) (holding that Federal Election Commission could not constitutionally exercise rulemaking authority because its members had not been appointed consistent with the Appointments Clause); *accord Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459, at *39 (O.L.C. April

16, 2007) (“[W]e conclude that an individual who will occupy a position to which has been delegated by legal authority a portion of the sovereign powers of the federal Government . . . must be appointed pursuant to the Appointments Clause.”).

Amtrak’s Board Members were not appointed pursuant to the Appointments Clause. Although the President’s appointment authority must be unfettered, *see Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring), Congress has placed strict limits on whom the President may appoint to serve on Amtrak’s Board, *see* 49 U.S.C. § 24302(a)(2). Congress has also imposed substantive consultation requirements on the President before he can make an appointment. *See id.* Furthermore, the President of Amtrak (also a Board Member) is appointed not by the President of the United States, but rather by the other eight Board Members. *See id.* § 24303(a). Assuming he is a principal officer, the scheme is unconstitutional *per se* because he is not appointed by the President. But even if the Amtrak president were deemed an inferior officer, the eight other Board Members are not the “Head[]” of a “Department[].” U.S. Const. art. II, § 2, cl. 2 (“Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”); *see also Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3163 (2010).

II. PRIIA Impermissibly Delegates Legislative And Rulemaking Authority To Amtrak.

The Supreme Court has held that the Constitution does not permit Congress to delegate legislative or rulemaking authority to private parties. *See Carter v. Carter Coal*

Co., 298 U.S. 238, 311 (1936) (delegation of rulemaking authority to private parties “is legislative delegation in its most obnoxious form; for it is not even delegation to an official or official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business”). Although private parties may play a limited part in the process, they can have no more than an “advisory” or “ministerial” role. *See Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989) (abrogated on other grounds). Because Section 207 plainly confers far more than an advisory or ministerial role upon Amtrak — indeed, it empowers Amtrak as a *co-equal* with the FRA in the rulemaking process — it is unconstitutional.

A. Amtrak Does Not Play An “Advisory” Or “Ministerial” Role In The Statutory Scheme, Nor Does It “Function Subordinately” To The Government.

The Government’s brief argues legal standards that it appears to have created from whole cloth: that delegations to private parties are permissible as long as the Government “retains control,” Gov’t Br. 2, or “has the final say,” *id.* at 11. The Government claims to have distilled these standards from three cases: *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), *Pittston*, and *Frame*. But what those cases actually hold is that delegations to private parties are constitutional only when the private party “function[s] subordinately” to the Government (*Sunshine Anthracite*, 310 U.S. at 399), performs a “ministerial” function (*Frame*, 885 F.2d at 1129), or where the “powers given to the [private party] are of an administrative or advisory nature” (*Pittston*, 368 F.3d at 396).

The fact that the Government posits a fabricated legal standard rather than argue based on the actual legal standard is telling.

When the correct legal standard is applied, this is not a difficult determination. Amtrak is obviously not “functioning subordinately” to the Government or performing an “advisory” or “ministerial” function. Quite the contrary, PRIIA makes Amtrak a *co-equal* in the rulemaking process, *see* Section 207(a) (“the Federal Railroad Administration and Amtrak shall jointly . . . develop new or improve existing metrics and minimum standards”), and Amtrak and the FRA in fact functioned as co-equals in the rulemaking process, *see* 74 Fed. Reg. 10983, 10983 (Mar. 13, 2009) (Amtrak and FRA “have jointly drafted performance metrics and standards”); Dupree Decl. Ex. E at 26839 (final rule) (“[T]he FRA and Amtrak have jointly made, and are jointly issuing, revisions to the Metrics and Standards.”). The text of the statute affords no basis for concluding that one party is advising the other, or that one party is functioning subordinately to the other. Amtrak and the FRA are given equal and co-extensive roles in the rulemaking process.

Section 207 would be unconstitutional even under the Government’s manufactured “retain control” or “final say” standards. PRIIA vests Amtrak and the FRA with equal and shared authority to promulgate regulations. Where two parties are absolute co-equals, it is wrong to say that one party has “retained control.” In a situation where the Democrats control the Senate and the Republicans control the House, no one would say that the Democrats have “retained control” of Congress. The Government

contends that it exercised control over Amtrak because “Amtrak could not enact the Metrics and Standards on its own.” Gov’t Br. 12. By that logic, Amtrak also controlled the Government. Nor does the FRA have the “final say.” If the FRA drafted regulations that Amtrak disapproved, the FRA-drafted regulations could not be issued and *Amtrak* would have the “final say.”

The Government argues that Amtrak “exercised only advisory authority,” but only “insofar as fines are concerned.” Gov’t Br. 13. This statement acknowledges that Amtrak exercised far more than advisory authority in all other respects, such as in developing and promulgating the regulations. Moreover, the STB’s role in imposing fines has little bearing on the question at issue: whether Amtrak was exercising legislative authority when it promulgated the Metrics and Standards. Regardless of whether the STB ultimately imposes a fine, the Metrics and Standards carry the force of positive law and consequently coerce action by the freight railroads. Indeed, as set forth in the declarations from AAR members attached to AAR’s motion for summary judgment, the freight railroads are taking many steps in an effort to comply with the Metrics and Standards. For this reason, the Government’s observation (Gov’t Br. 2) that the freight railroads can only be fined for violation of Amtrak’s statutory preference rights is misplaced. The Metrics and Standards coerce action even absent an enforcement proceeding; it is not as though the railroads are free to ignore the Metrics and Standards on the basis that there is no consequence from noncompliance. Indeed, the fact that Amtrak has now filed a petition against Canadian National based on alleged failures to

meet the Metrics and Standards — even though the Metrics and Standards have not been incorporated into the Canadian National operating agreement — demonstrates the risks of noncompliance. *See* Wilkinson Decl. Ex. A.

Moreover, in focusing on the performance-related aspects of the Metrics and Standards and the fines that may ensue, the Government simply ignores Section 207(c), which provides that the freight railroads “shall” amend their contracts with Amtrak to incorporate the Metrics and Standards “to the extent practicable.” Granting Amtrak regulatory authority over its operating agreements with the freight railroads obviously makes Amtrak far more than a mere “advisor” to the STB. The requirement that the Metrics and Standards be incorporated into these private contracts is further proof that they have coercive force and are not simply a “trigger” for a Government investigation. Gov’t Br. 13.

The Government’s only response to Section 207(c)’s clear legislative mandate appears in Footnote 3 of its brief. The Government insists that Section 207(c) does not have any effect on the freight railroads because “this incorporation has not occurred yet” and “the nature of the incorporation is not clear,” owing to the phrase “to the extent practicable.” Gov’t Br. 14 n.3. Neither argument is persuasive. That the incorporation has not yet occurred makes no difference given that the statute provides that the freight railroads “shall” amend their contracts and does not make incorporation contingent on some future event. Indeed, senior Amtrak officials have already used this provision for leverage in negotiations with the freight railroads. *See* Owens Decl. ¶¶ 10, 13; *see also*

Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974) (“Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.”). Moreover, unless the Government is prepared to say that “to the extent practicable” renders Section 207(c) a nullity and that the freight railroads do not need to incorporate any of the Metrics and Standards, the statute must have *some* real-world effect even if the full extent of the integration has not yet been finalized.

B. Section 207 Presents The Very Dangers The Nondelegation Doctrine And The Separation Of Powers Principle Protect Against.

The Government argues that none of the concerns that underlie the constitutional prohibition on delegations to private parties are present in this case. Gov’t Br. 14-16. But the primary reason for the prohibition — the danger that a private party may pursue its own financial interest by exercising the coercive power of the United States Government — has plainly materialized here. Amtrak cannot be a neutral and disinterested federal regulator because it is under a general statutory mandate to operate like “a for-profit corporation,” 49 U.S.C. § 24301(a), and it issued the regulations in this case pursuant to a statute with an express purpose of increasing Amtrak’s profitability. Indeed, had Amtrak *not* regulated its business partners with an eye toward its own profitability, it would arguably have been violating federal law. It is self-evident that a

corporation cannot simultaneously act as a disinterested federal regulator of its industry at the same time it is attempting to maximize its own profits.

The Government literally has no answer to this point. Instead, it insists that “Amtrak is accountable to the public” because the President “appoints its board members.” Gov’t Br. 14. But the President does not appoint *all* of Amtrak’s board members, *see* 49 U.S.C. § 24303(a), and any public accountability is diminished because Amtrak holds itself out as a private corporation and even the President has publicly stated that Amtrak is not the Government. Public accountability depends on the public’s understanding of who the responsible decisionmaker is, and Amtrak, Congress and the President himself have all repeatedly stated in the plainest possible terms that Amtrak is not part of the Government. Accepting *arguendo* the Government’s argument that it exercises control over Amtrak through the appointment power, the only way the public would know that Amtrak is a Government entity is by reading the Justice Department’s briefs in those cases where it takes the litigating position that Amtrak is part of the Government; the public could be forgiven for taking at face value the statements of Congress, the President and Amtrak itself that Amtrak is *not* part of the Government. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), the Supreme Court explained that public accountability for nondelegation purposes depends on a “clear” chain of command, because if the identity of the responsible decisionmaker is not clear, “the public cannot determine on whom the blame or the punishment of the pernicious measure, or series of pernicious measures ought

really to fall.” *Id.* at 3155 (internal quotation marks omitted). Here, there is no “clear” chain of command — and hence no public accountability — because Amtrak and the Government itself have repeatedly and emphatically told the public that Amtrak is not part of the Government.

Next, the Government argues that “[t]he FRA provides regulatory expertise.” Gov’t Br. 14. But this is a non sequitur, as the relevant question for purposes of a nondelegation challenge to vesting Amtrak with rulemaking authority is whether *Amtrak* has regulatory expertise — and the Government does not even attempt to argue that it does. Indeed, Amtrak has no experience in regulating the business operations of a freight railroad. *See Aqua Slide ‘N’ Dive Corp. v. Consumer Prod. Safety Comm’n*, 569 F.2d 831, 844 (5th Cir. 1978) (An industry expert “is not necessarily an expert in government regulation of private individuals,” and “[d]etermining the best way to run your own [affairs] is not the same as deciding how the government should force your neighbor to run his.”).

The Government argues that “there is no evidence Amtrak acted in a biased fashion.” Gov’t Br. 15. As an initial matter, the relevant question is whether the scheme creates the *potential* for bias, *see Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (focusing on the mere “*potential* for private interest to influence the discharge of public duty”) — and PRIIA § 207 clearly creates the potential for biased rulemaking. Indeed, given the statutory mandates to act as a for-profit corporation and to

maximize its revenue, Amtrak would arguably have violated federal law had it *not* drafted the Metrics and Standards in ways favorable to Amtrak.

Amtrak's ability to make money depends in part on the level of obligation imposed on the freight railroads whose tracks Amtrak uses. Now Amtrak has been given regulatory authority to impose greater obligations on those railroads through a statute enacted for the express purpose of increasing Amtrak's profitability. The statute gives Amtrak the power to regulate its business partners in ways that may result in substantial monetary payments to Amtrak, and confers upon Amtrak the authority to revisit its painstakingly-negotiated operating agreements with the freight railroads — agreements that the Government itself has described as "private agreements among private parties." Dupree Decl. Ex. G at 29.

Although the Government denies that Amtrak regulated in a biased fashion, it never disputes AAR's central point that the Metrics and Standards establish performance standards that cannot as a practical matter be achieved on numerous routes. *See, e.g.*, AAR Motion at 30 (achieving on-time performance standards "is not even remotely realistic"). Instead, the Government simply declares that "meaningful improvement requires meaningful change," Gov't Br. 15, a nonresponsive statement that does not contest the now-undisputed fact that the Metrics and Standards will impose even greater burdens on the freight railroads in an effort to produce benefits for Amtrak. The minor modifications that Amtrak and FRA made in response to public comments on the initial

version of the Metrics and Standards, *id.* at 16, obviously do not establish that the rulemaking was free from bias.

Indeed, the Government *admits* that Amtrak had an incentive to engage in biased rulemaking, but insists that the incentive was not that strong or was mitigated by the FRA's involvement. *See* Gov't Br. 27 (arguing that Amtrak "had only a weak interest in biased Metrics and Standards"); *id.* at 4 (arguing that FRA's participation "decreased Amtrak's desire to act in a biased fashion"). Of course, regulators exercising Government power should have *no* bias — not just a "decreased" bias — and the fact that even the Justice Department concedes that Amtrak had *some* interest in biased rulemaking speaks volumes.

III. Empowering Amtrak To Regulate The Freight Railroads Also Violates The Freight Railroads' Due Process Rights.

The Supreme Court has held that granting a private corporation "the power to regulate the business of another, and especially of a competitor" is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Carter Coal*, 298 U.S. at 311-12. The Government's argument that *Lebron* eliminates AAR's due process claim fails for the reasons set forth above. *See* Part I(A) *supra*. *Lebron* holds that Amtrak may not violate an individual's rights secured under the United States Constitution. It certainly does not hold that Amtrak may exercise the sovereign legislative power of the United States. Contrary to the Government's interpretation — an interpretation that has never been adopted by any court — *Lebron* is a rights-vindicating decision that *constrains* federal power and *protects* individual rights.

The Government's reliance on *Marshall v. Jerrico*, 446 U.S. 238 (1980), is misplaced. *Jerrico* was not a case about the delegation of legislative power. Rather, it was a case where the Court upheld a section of the Fair Labor Standards Act that provided that civil penalties collected for violations of the statute must be returned to the Labor Department to reimburse enforcement expenses. *Jerrico* is so far removed from the facts of this case — a for-profit corporation directed to “increase [its] profitability” by regulating its business partners and other private companies in the same industry — that it underscores the weakness of the Government's arguments. The fact that Government relies so heavily on *Jerrico* as the “appropriate analog” for this case (Gov't Br. 25) — rather than the many cases from the Supreme Court and federal courts of appeals that actually involve nondelegation challenges — is a telling indicator that the Government has found no case that upholds a statute like PRIIA § 207.

Jerrico is further distinguishable in that the Court found that there was no “realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain.” 446 U.S. at 250. Here, of course, the incentives for Amtrak to draft Amtrak-friendly regulations are substantially greater — a point Amtrak itself has recognized. In the words of a senior Amtrak official who emailed a copy of the regulations to a Union Pacific official on the day the regulations issued: “These Metrics and Standards will have a big impact on UP and Amtrak.” Harris Decl. ¶ 13.

None of the cases cited by the Government suggest that nondelegation challenges are reviewed under the “relaxed” due process standard set forth in *Jerrico*. Indeed, *all* of

the nondelegation cases cited in both the Government's and AAR's brief rely on the test set forth in *Carter Coal* and its progeny — that delegations to private parties are *per se* invalid unless the private party is playing an “advisory” or “ministerial” role and is “functioning subordinately” to the Government.

The Government tries to distinguish *Carter Coal* on the grounds that the private party in that case “acted alone,” whereas here Amtrak partnered with the FRA, which “could — and would — strip any bias out.” Gov't Br. 24, 26. The Government cites no case for the obviously incorrect proposition that any danger of bias is eliminated if a decision is made jointly by a biased decisionmaker and an unbiased decisionmaker.

The Government also makes the extraordinary claim that there is no danger of biased rulemaking because AAR spends millions of dollars on “lobbying activities,” thereby ensuring that “Amtrak would have nary an interest in putting a thumb on the scale.” *See* Gov't Br. 27 & Ex. 5 (filing AAR's lobbying report as an exhibit). Aside from improperly denigrating what the Justice Department has long honored and defended as the constitutionally-protected right to petition the Government for redress of grievances, this comment is directly contrary to the Supreme Court's repeated holdings that purported corporate “wealth” and spending do not provide a basis for limiting an individual's or corporation's due process rights. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (“The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement” to the protections of the Due Process Clause.).

The Government attempts to dismiss *Young* in a footnote. *See* Gov't Br. 27 n.10. But *Young* is highly relevant: the Court there held that a self-interested actor could not wield Government authority (in that case, a private lawyer could not prosecute a contempt action where any recovery would redound to his client's benefit). *See* 481 U.S. at 805. This case is even worse: Amtrak was vested with Government authority to issue regulations governing the operations of its business partners; it issued regulations skewed in its favor and establishing largely unachievable performance standards that must be integrated into contracts with Amtrak to the extent practicable; and it is now prosecuting an action under those very regulations where any recovery will redound to Amtrak's benefit.

CONCLUSION

This Court should grant summary judgment in AAR's favor and issue an order declaring that PRIIA § 207 is unconstitutional and vacating the Metrics and Standards. The Court should also grant all further relief to which AAR may be entitled.

Respectfully submitted,

Dated: March 6, 2012.

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No. 1: 11-cv-1499 (JEB)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION OF AMERICAN RAILROADS,

Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION,
et al.,

Defendants.

**RESPONSE TO DEFENDANTS'
STATEMENT OF UNDISPUTED FACTS**

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Disputed to the extent it suggests Amtrak receives direct appropriations from Congress. "In recent fiscal years, appropriated funds for Amtrak have been provided to the [Department of Transportation], which through its agency the Federal Railroad Administration (the "FRA"), provides those funds to Amtrak pursuant to operating funds and capital funds grant agreements." Nat'l R.R. Pass. Corp and Sub., Consolidated Financial Statements for the Years Ended

Sept. 30, 2011 and 2010, at 6 (Dec. 2011) (attached to Defendants' Memorandum in Support of Summary Judgment as Exhibit 2).

5. Disputed to the extent it suggests Amtrak receives direct appropriations from Congress. *Id.*
6. Undisputed.
7. Undisputed.
8. Disputed. The FRA and Amtrak jointly issued the final Metrics and Standards. *See Metrics & Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Response to Comments and Issuance of Metrics and Standards, 75 Fed. Reg. 26839, 26839 (May 12, 2010) (Dupree Decl. Ex. E).*

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Dated: March 6, 2012.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2012, a true and correct copy of Plaintiff's Reply Memorandum in support of its Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment, response to the Defendants' Statement of Undisputed Facts, and the Wilkinson Declaration, were filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF System.

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