

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Public Record**

**Petition by National Railroad Passenger  
Corporation for Relief Pursuant to  
49 U.S.C. § 24905**

STB Finance Docket No. 36048

**RESPONSE TO AMTRAK'S REPLY TO MBTA'S PETITION TO  
HOLD PROCEEDING IN ABEYANCE**

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## INTRODUCTION

Amtrak’s reply to MBTA’s petition for an abeyance provides no sound reason for the Board to move forward with this proceeding while the District Court Litigation<sup>1</sup> is pending. The reply largely ignores the elephant in the room, *Ass’n of Am. RRs. v. Dep’t of Transp.*, 821 F.3d 19 (D.C. Cir. 2016) (“AAR”), which struck down an analogous provision in PRIIA § 207 on the same grounds MBTA has raised in the District Court Litigation. The reply only addresses AAR to suggest that the Board did not hold proceedings in abeyance while that litigation is pending, which is both misleading and beside the point, given what AAR ultimately revealed about the strength of MBTA’s constitutional claims. For the reasons given herein, Amtrak’s remaining arguments in support of moving forward with this proceeding are equally meritless.

## ARGUMENT

### **I. The AAR Case Illustrates Why an Abeyance Is Appropriate Here.**

Amtrak cites the Board’s order denying an abeyance in the Board’s companion proceeding in AAR<sup>2</sup> as supporting its opposition to an abeyance. Amtrak Reply 9 n.3.<sup>3</sup> To the contrary, AAR only reinforces the propriety of a stay in this action. The principal reason the Board declined to grant an abeyance in AAR was that Amtrak had advanced “an independent basis” for investigating on-time performance issues by relying on the Board’s independent authority to define “on-time performance” under PRIIA § 213, rather than relying on the metrics and standards promulgated under § 207 that AAR was challenging in federal court. *See Nat’l*

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<sup>1</sup> *Massachusetts Bay Transportation Authority v. National Railroad Passenger Corp.*, No. 16-10120 (D. Mass.) (the “District Court Litigation”).

<sup>2</sup> For ease of reference MBTA uses “AAR” to refer to both the federal court litigation and the companion Board proceedings.

<sup>3</sup> For purposes of this Response, “Amtrak Pet. for Relief” refers to Amtrak’s Petition for Relief Pursuant to 49 U.S.C. § 24905, “Amtrak Mem.” refers to Amtrak’s Memorandum in Support of Its Petition for Relief, “MBTA Pet.” refers to MBTA’s Petition to Hold Proceeding in Abeyance Pending Parallel District Court Litigation, and “Amtrak Reply” refers to Amtrak’s Reply to MBTA’s Petition.

*R.R. Passenger Corp. Section 213 Investigation*, Docket No. NOR 42134 (STB served Dec. 19, 2014) at 2, 6-9. In the instant proceeding, on the other hand, there is no independent statutory basis for the relief Amtrak seeks – Amtrak’s petition relies entirely on § 24905, the same statutory authority MBTA is challenging in the District Court Litigation. MBTA Pet. 15-16.

Amtrak also omits the fact that the Board significantly changed course in *AAR* soon after the initial order denying an abeyance. Reconsidering one rationale underlying its earlier decision, the Board stated that if it proceeded under a statutory provision that “were ultimately held unconstitutional, and if Amtrak [ultimately prevailed in its Petition for Relief], the parties and the Board would have expended substantial effort and expense without an enforceable result.” *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, Docket No. EP 726 (STB served May 15, 2015) at 3. As a result, the Board instituted a rulemaking to define “on-time performance” under PRIIA § 213, entirely independent of the constitutionally-deficient § 207 process, and then held the agency adjudication in abeyance until completion of the rulemaking. *See Nat’l R.R. Passenger Corp. Section 213 Investigation*, Docket No. NOR 42134 (STB served Dec. 28, 2015).

The Board’s concern in *AAR* with the “substantial [waste of] effort and expense” proved well-founded, as the federal courts subsequently struck down PRIAA § 207 as unconstitutional for reasons that apply equally to 49 U.S.C. § 24905. MBTA Pet. 9-13. With *AAR* on the books, it makes even less sense to move forward with this proceeding, particularly given Amtrak’s threat to broaden it to include additional state commuter rail authorities. Amtrak Mem. 1 n.2.<sup>4</sup>

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<sup>4</sup> Amtrak cites one decision in support of its argument that MBTA has failed to demonstrate “good cause,” contending that the Board once denied an abeyance when it “faced similar circumstances.” Amtrak Reply 6. The decision relied upon, *Pennsylvania Railroad Co. – New York Central Railroad Co.*, Docket No. FD-21989 (STB served Sept. 28, 2009), is entirely inapposite. In that proceeding, employees who prevailed in an agency employment arbitration filed a district court action “to confirm” the arbitration decision even though the relevant statute granted the Board exclusive authority to review arbitration decisions awarding benefits under agency-imposed employee-protective decisions. *Id.* at 1. The Board refused to hold its proceeding in abeyance because, by

## II. Resolution Of This Proceeding Will Not Aid The District Court Litigation.

Amtrak argues that the Board should move forward with this proceeding and in doing so give substance to § 24905, so that the District Court is not left to decide MBTA's constitutional challenges to the statute "in a vacuum." Amtrak Reply 7. According to Amtrak, this "vacuum" exists because the Board is not bound to apply the Northeast Corridor Commission's ("Commission") cost-sharing policy (the "Policy") in deciding cases under § 24905, but instead has apparently unbounded "discretion" in how it acts. *Id.* at 6. Indeed, Amtrak assails the notion that the Board must "rubber stamp" the Commission's Policy, arguing that "[t]here is no way to read the statute as binding the Board to the terms of the Uniform Policy," *id.* at 6, and that MBTA's assumption to the contrary is a "misreading of the statute," *id.* at 2.

The suggestion that this proceeding should move forward *in advance* of the District Court Litigation, so as to inform the latter, has no merit. To begin, Amtrak is wrong when it claims that MBTA's federal action "turns . . . on whether the Board has discretion in this matter." Amtrak Reply 5. Section 24905 is unconstitutional not only because the Commission's Policy serves as a rule of decision in this case, but also because promulgation of the Policy constitutes the forbidden exercise of regulatory authority in ways entirely unconnected to this Board proceeding. Under AAR, for example, the Commission's promulgation of the Policy constitutes the exercise of regulatory authority because – separate and apart from any action by the Board – Amtrak and state commuter rail agencies such as MBTA are required by statute to incorporate the Policy into bilateral agreements. 821 F.3d at 32-33; 49 U.S.C. § 24905(c)(2) (providing that parties "shall implement new agreements for usage of facilities or services based on the

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statute, the question improperly posed in the district court could be decided only by the Board. *Id.* The Board does not "face[] similar circumstances" here at all, as Amtrak concedes that the Board cannot resolve MBTA's constitutional challenges to § 24905. Amtrak Reply 2, 5, 6, 8.

[Policy]”). The District Court’s resolution of MBTA’s constitutional challenge therefore does not depend on how the Board applies the Policy in the context of this adjudicatory proceeding.

In any event, Amtrak’s argument that the Board need not adhere to the Commission’s Policy, for its part, is simply not credible, for it contradicts what Amtrak asked the Board to do in its Petition for Relief. The Petition for Relief asks the Board to “determine the appropriate compensation between MBTA and Amtrak based on the Uniform Policy developed by the Commission.” Amtrak Pet. for Relief 2. It states that doing so “should be a simple process” because the Board need only use the Policy developed by the Commission, incorporate MBTA-specific data, “and enforce its finding on the parties.” Amtrak Mem. 15. It further maintains that the Board should not “consider any alternative” formula or “rework the terms of the Uniform Policy in ways” that were not considered, or that were rejected, by the Commission. *Id.* at 15-16. Even putting aside that inconsistency, § 24905 provides that the Board must decide this proceeding consistent with the (unconstitutional) Policy, referencing no other substantive standards for the Board to apply. MBTA Pet. 15-16; MBTA District Court Compl. ¶ 45. The Board’s ultimate application of the Policy in this proceeding, accordingly, is not necessary before the District Court can resolve the constitutional issues before it.<sup>5</sup>

### **III. Granting an Abeyance Will Not Impose Costs on Other States.**

Amtrak suggests that if the Board does not move forward and decide this proceeding, then “Amtrak or someone else” – which can only be a reference to other state commuter rail agencies – “will be forced to bear the MBTA’s share of costs.” Amtrak Reply 8. This argument fails for several reasons. First, the majority of Amtrak’s \$28.8 million demand from MBTA is

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<sup>5</sup> Contrary to Amtrak’s suggestions (Amtrak Reply 6-7), MBTA’s assertion that this action will require discovery and expert testimony (MBTA Pet. 8, 17) is in no way inconsistent with the Board applying the Policy to this dispute. The anticipated discovery and expert testimony pertains to problems with the *application* of the Policy that caused Amtrak to make a grossly inflated claim for \$28.8 million under the Policy, not a challenge to the Policy itself. *Id.*

for operating expenses (principally maintenance costs) on the Attleboro Line. The Policy provides no basis for shifting operating costs with respect to a particular line segment onto state commuter rail authorities that do not use that segment. Second, Amtrak is providing most of its maintenance and operational services on the MBTA-owned Attleboro Line by virtue of the Attleboro Line Agreement, which Amtrak willingly entered in 2003 and which will be terminated as of February 2017. After that date (absent a new bilateral agreement between MBTA and Amtrak), MBTA, as owner of the Attleboro Line, will be responsible for maintaining its own tracks or hiring someone to do so; the costs will not be incurred by Amtrak or the other state authorities. Third, as for capital expenditures, Amtrak again cites no basis in law or the Policy under which other state authorities would be asked to pay more to Amtrak to account for capital expenditures along the Attleboro Line, nor does it show that there are capital needs along the Attleboro Line that would go unaddressed if MBTA does not make payments to Amtrak. Finally, even if the Board moves forward, it is not certain that the Board would order MBTA to make payments to Amtrak while the District Court Litigation challenging the basis for any payments remains pending (and the Board should not).

**IV. Amtrak’s Contention that MBTA’s Constitutional Claims Would Have Been Filed Years Ago If They Had Merit Is Frivolous.**

Finally, Amtrak repeatedly suggests that MBTA’s constitutional claims should have been asserted years ago and that the “delay” is evidence that MBTA must not believe in its own claims. *E.g.*, Amtrak Reply 1, 11. The latter suggestion is absurd. As noted above, the strength of MBTA’s constitutional claims is confirmed by the D.C. Circuit’s decision in *AAR*, which Amtrak – tellingly – never addresses substantively.

As to the cries of delay: If MBTA had attempted to litigate the constitutionality of § 24905 before the Commission had adopted its final Policy in October 2015 and before Amtrak

had made its \$28.8 million demand under that Policy, there would have been serious doubts under Article III of the Constitution concerning the ripeness of the dispute. Furthermore, until the FAST Act was passed in December 2015, the Policy was not binding with respect to Board compensation determinations. *See* PRIIA, Pub. L. 110-432, 122 Stat. 4848, 4923 (Oct. 16, 2008) ((instructing the Board “to determine the appropriate compensation amounts . . . in accordance with section 24904(c) of this title”). The December 2015 FAST Act altered the nature of the Policy, making it the rule of decision for the Board. *See* FAST Act, Pub. L. 114-94, 129 Stat. 1312, 1657 (Dec. 4, 2015). MBTA’s constitutional and Administrative Procedure Act claims include (*inter alia*) an allegation that § 24905 is unconstitutional because it sets up the Policy as the Board’s rule of decision, an issue that simply was not presented prior to the FAST Act. MBTA Pet. 10-11. MBTA reasonably initiated the District Court Litigation within mere months of the final Policy being adopted and within mere weeks of passage of the FAST Act.

### **CONCLUSION**

For the reasons previously given, MBTA asks that the Board hold these proceedings in abeyance pending the district court’s resolution of the District Court Litigation.<sup>6</sup>

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<sup>6</sup> On August 23, 2016, Amtrak and the Commission filed motions to dismiss MBTA’s complaint in the District Court Litigation. MBTA believes those motions are meritless. In any event, they provide no basis for the Board to deny an abeyance; if the District Court Litigation is finally dismissed, the Board could promptly resume proceedings thereafter.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of August, 2016, a copy of the foregoing RESPONSE TO AMTRAK'S REPLY TO MBTA'S PETITION TO HOLD PROCEEDING IN ABEYANCE was served via e-mail, as agreed upon by the Parties, upon the following:

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