

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

241323  
ENTERED  
Office of Proceedings  
August 19, 2016  
Part of  
Public Record

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

**STB Finance Docket No. 36048**

**AMTRAK'S REPLY TO THE MBTA'S  
PETITION TO HOLD PROCEEDINGS IN ABEYANCE**

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## INTRODUCTION

The Massachusetts Bay Transportation Authority (“MBTA”) is dissatisfied with the costs it is allocated under the Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy (“Uniform Policy”). It has therefore determined that its best option is to defer any payment under a contract with Amtrak for as long as possible. In service of its strategy of delay, the MBTA has filed (1) a complaint in federal court challenging the constitutionality of the statute that establishes the Northeast Corridor Commission (“NECC”) more than four years after the NECC was established, (2) a Petition to hold this proceeding in abeyance, and (3) a request for an open-ended suspension of its time to reply to Amtrak’s Petition for an order allocating costs between the MBTA and Amtrak on the Attleboro Line.

The MBTA’s Petition to hold these proceedings in abeyance tries to cast Amtrak’s Petition as an attempt by Amtrak to “jump ahead” of the MBTA’s federal court constitutionality challenge, but the fact is that Amtrak simply had to file its Petition when it did. Congress directed the Board to resolve disputes, and the MBTA left Amtrak with no other choice but to seek resolution from the Board when it refused to accept the Uniform Policy. Once the MBTA did not enter into a new agreement, Amtrak had the right under the statute to seek a determination from the Board.

In its Petition, the MBTA presents its constitutional challenge as a clear winner, and asks the Board to stay these proceedings because 49 U.S.C. § 24905 is quite likely to be struck down as unconstitutional. But the MBTA’s bravado is belied by the State of Massachusetts’ actions since the enactment of the statute. If the MBTA really believed the statute was unconstitutional, why did Massachusetts participate in the NECC and the development of the Uniform Policy over the last four years? The answer is simple. The MBTA came to its constitutional view only after

its positions on the Uniform Policy were overwhelmingly rejected by all participants, requiring the MBTA to find another way to delay its statutory obligations.<sup>1</sup>

Congress enacted §24905 to bring stability and predictability to Amtrak's funding in the Northeast Corridor, and it foresaw that some state commuter rail entities might resist the allocation method agreed upon by the NECC. Therefore, it established a mechanism for determining compensation to be paid by dissenting entities via the Board's authority, and it set an expeditious time limit for resolving the disputes by incorporating the procedures of §24903. That the MBTA filed a lawsuit in an attempt to delay these proceedings does not provide any basis for contravening Congress's mandate to decide this issue quickly. That the MBTA would rather not contribute the costs allocated to it under the Uniform Policy for as long as possible does not constitute "good cause," and the Board should deny its Petition.

A denial of the abeyance Petition will not simply prevent harm and delay. Rather, an expedient determination by the Board will actually benefit the federal court action. The MBTA's constitutional claim is primarily based on its misreading of the statute that the Board has no discretion when determining compensation. *See, e.g.,* MBTA Compl. at ¶¶44-45. A federal court considering the constitutionality of the statute can therefore benefit from the Board's interpretation of the statute in the context of deciding Amtrak's Petition.

Congress recognized that the current funding mechanism for the crucial Northeast Corridor was broken. Congress provided the stakeholders with a method for fixing this problem in a fair and equitable manner by agreement. It also provided the Board with the ability to deal with holdouts like MBTA and to do so quickly. The Board should reject the MBTA's attempt to

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<sup>1</sup> Amtrak believes that the MBTA's constitutional claims will ultimately be rejected on their merits, in large part because the claims are premised on a misunderstanding or misrepresentation of the statute. Amtrak does not address the details of those claims in this reply because the question of the statute's constitutionality is not before the Board.

avoid its obligations for the duration of its court and appellate litigation process, which could last many years.

### **BACKGROUND**

In Section 212 of the Passenger Rail Investment and Improvement Act (“PRIIA”), Congress created the NECC and mandated that the NECC develop a standardized policy for allocating costs for facilities and services along the Northeast Corridor (“NEC”). 49 U.S.C. § 24905. Section 212 directs the Secretary of Transportation to establish the NECC with members representing Amtrak, the Department of Transportation, the Federal Railroad Administration, each of the States (including the District of Columbia) that constitute the NEC, and non-voting representatives of freight railroad carriers using the NEC. 49 U.S.C. § 24905(a)(1)(A-D). The NECC is required to, among other tasks, develop a “standardized policy for determining and allocating costs, revenues and compensation for Northeast Corridor commuter rail passenger transportation ... that use Amtrak facilities or services or that provide such facilities to Amtrak” and to “develop a proposed timetable for implementing the policy.” 49 U.S.C. § 24905(c)(1)(A-B).

The idea underlying the statute was that all interested parties would jointly negotiate in good faith a standardized policy that met Congress’s funding goals and would enter into contracts incorporating the standardized policy. However, Congress recognized that some parties might ultimately not agree to enter into such contracts. Thus, Congress declared that if Amtrak and any state commuter rail entity are unable to reach a new agreement in accordance with the standardized policy and on the timetable established by the NECC, the STB would “determine the appropriate compensation for such usage in accordance with the procedures and procedural schedule applicable to a proceeding under section 24903(c), after taking into

consideration the policy developed under paragraph (1)(A), as applicable.” 49 U.S.C. § 24905(c)(2). Section 212 further mandates that the “Board shall enforce its determination on the party or parties involved.” 49 U.S.C. § 24905(c)(1). Congress thus granted final decision-making authority to the Board and gave the Board the discretion to make its own determination and to enforce that determination.

The NECC fulfilled the mandate Congress gave it, collaborating to develop “a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation.” *Id.* The standardized policy sets out in detail the methods for allocation of all categories of the costs for facilities and services for the Northeast Corridor.

On September 17, 2015, the NECC approved the Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy (“Uniform Policy”) by a vote of 15 to 2 with one abstention. Massachusetts and New York voted no, and New Jersey abstained. The Uniform Policy was formally adopted by the Commission in October 2015. Importantly, no stakeholder, including the MBTA, has ever claimed that the Uniform Policy falls short of the statutory requirements of Section 212. And until now, neither Massachusetts nor the MBTA ever suggested that the NECC’s years of work should have been stopped before it even started because the NECC itself was unconstitutional.

The MBTA owns the Attleboro line, the portion of the NEC that runs from the Rhode Island border to Boston. Under the 2003 Attleboro Line Agreement, Amtrak provides the MBTA with dispatch and maintenance services on the rail line, and the MBTA permits Amtrak to operate the passenger rail service linking Boston to the rest of the NEC. The MBTA pays nothing for these services under the Agreement.

In July 2015, Amtrak began attempts to negotiate a sixth amendment to the Attleboro Line Agreement to implement the Uniform Policy. The parties negotiated for many months, but could not reach agreement on a sixth amendment.

In January 2016, the MBTA filed a complaint in federal court challenging PRIIA's constitutionality and alleging that Amtrak breached the Attleboro Line Agreement by complying with PRIIA. However, it did not serve its complaint on Amtrak immediately, and the parties continued their attempts to reach a negotiated agreement on a contract amendment. Finally, after nearly a year of delay and no resolution, the MBTA served Amtrak with its complaint. With that, it became clear that there was no way that the MBTA was going to amend the parties' agreement to incorporate the terms required by statute and the Uniform Policy, and so Amtrak had no choice but to submit this dispute to the Board for resolution.

### **ARGUMENT**

#### **I. AMTRAK'S PETITION SHOULD BE DECIDED PRIOR TO THE FEDERAL COURT ACTION**

The Board should allow this action to go forward because should the federal court in Boston consider the MBTA's constitutional claims, the Board's adjudication will assist the court. The MBTA's civil action turns in large part on whether the Board has discretion in this matter, or if, as the MBTA argues, the Board is bound by the statute to blindly accept and apply the Uniform Policy. The most efficient way to resolve that question would not be for the federal court to analyze the statute in a vacuum. It is for the Board to decide the appropriate compensation—using the authority and discretion Congress granted it under section 24905—and in doing so, answer the statutory question raised by the MBTA's civil suit. Making that decision requires denying the MBTA's Petition for abeyance.

For the Board to hold these proceedings in abeyance, the MBTA must demonstrate that there is “good cause” do so, and it has failed. 49 C.F.R § 1104.7. In *Pennsylvania R.R. Co. -- Merger -- New York Cent. R.R. Co.*, the Board faced similar circumstances and denied the motion for abeyance, finding that where the Board has the exclusive statutory authority to make a determination, its review should not be held in abeyance pending a federal court action. Docket No. FD-21989 (STB Served Sept. 28, 2009) at 1. Here, there is no dispute that the Board is the only entity permitted to determine appropriate compensation between Amtrak and the MBTA, which is what Amtrak seeks in its Petition.

**A. A Determination by the Board Would Assist the Federal Court**

The MBTA claims that this proceeding will involve complicated proof and a potential waste of resources on discovery that may be, in the end, unnecessary. MBTA Pet. at 8. But the MBTA’s civil claims are premised on the opposite notion, since they assert that the Board must impose the Uniform Policy on the MBTA. MBTA Compl. at ¶¶ 44-45. The MBTA is simply wrong—and this proceeding would crystalize that fact for the federal court. Section 24905 instructs the Board to “determine the appropriate compensation ... *after taking into consideration* the policy developed” by the NECC. 49 U.S.C. § 24905(c)(2) (emphasis added). There is no way to read the statute as binding the Board to the terms of the Uniform Policy.

In fact, the MBTA seems to acknowledge this. If all that were required here is for the Board to issue an order stating that the MBTA must pay according to the terms of the Uniform Policy, there would not be much for the Board to do. Yet, the MBTA asserts that “the proceeding here would not be a simple process if it goes forward.” MBTA Pet. at 8 (internal citations omitted). The MBTA foresees both fact and expert discovery on “issues related to compensation for track usage and services”—i.e., whether the Uniform Policy properly allocates

costs. *Id.* The MBTA asserts that it will also develop evidence that Amtrak misapplied the Uniform Policy. *Id.* But if the Board is a rubber stamp, how could that discovery be necessary? If the Board in fact lacks discretion under § 24905, as the MBTA elsewhere claims, why would the MBTA be permitted discovery into what a better methodology would be? The answer is that the MBTA is wrong that the Board lacks discretion.

While Amtrak believes the statute is perfectly clear, it also believes that the better approach is for the Board to move this proceeding forward and exercise its discretion rather than force the federal court or an appellate court to decide the question in a vacuum.<sup>2</sup> Doing so will remove any doubt as to the validity of the MBTA's claim that the Board lacks the authority to make its own determination regarding compensation "after taking into consideration" the Uniform Policy, which can only happen if the Board denies the request to hold Amtrak's Petition in abeyance. *Raymond J. Lucia Cos., Inc. v. Sec. & Exch. Comm'n*, No. 15-1345, 2016 WL 4191191, at \*6 (D.C. Cir. Aug. 9, 2016) (rejecting constitutional challenge to SEC administrative law judges and holding that "[b]ecause the Commission has reasonably interpreted its regulatory regime to mean that no initial decision of its ALJs is independently final, such initial decisions are no more final than the recommended decisions issued by FDIC ALJs").

**B. The MBTA Ignores the Harms That Would Be Caused by Holding This Proceeding in Abeyance**

The Board has extensive expertise in determining compensation matters such as these, and the many years of consideration by the NECC have laid much of the ground work that the Board will need to come to a determination about appropriate compensation with respect to the Attleboro Line. The Board is the proper entity to analyze the questions raised by Amtrak's

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<sup>2</sup> It is worth noting here that the MBTA could pursue its constitutional claims in an appeal of the Board's determination. *See, e.g., Elgin v. Dep't of Treasury*, 132 S.Ct. 2126 (2012).

Petition and section 24905. As the MBTA concedes, Amtrak's Petition does not require the Board to make any determination about the constitutionality of the statute. Rather, Amtrak's Petition asks the Board to make a routine compensation determination. Amtrak Pet. at 9-10. The MBTA argues that this proceeding may become completely moot if it prevails on its constitutional challenge, and therefore, it should be stayed to see whether the statute stands. This argument entirely ignores the benefit that a determination by the Board would provide to the federal court's analysis of the constitutional claims.

Perhaps more importantly, the MBTA's argument ignores the serious harms that would be caused by holding the Petition in abeyance. In anticipation that the necessary funding for NEC maintenance and operations would be administered through implementation of the Uniform Policy, Congress altered the funding mechanism for the Northeast Corridor. If the Board refuses at this stage to act during the potential years of federal court litigation and appeals, Amtrak or someone else will be forced to bear the MBTA's share of costs. This is wholly antithetical to the statute and unfair to the Amtrak and the other participants. It is important to note here that Amtrak has already signed contracts, is close to signing contracts, or is in productive discussions about contracts with all but one other rail entity.

**C. The MBTA's Arguments that Amtrak's Petition Cannot Proceed in Parallel to the Federal Court Action Support Resolving Amtrak's Petition before the Federal Court's Determination**

The MBTA argues that Amtrak's Petition cannot even proceed in parallel to the federal court action for two reasons: (1) because the Board cannot resolve the constitutionality challenge, and (2) because "this is not a case where the pertinent issues presented by the parties can be decided in parallel, both by the Court and a federal court." MBTA Pet. at 13-14. As to the first point, Amtrak agrees, and does not in any way ask the Board to make that determination.

Instead, it only asks the Board to do as the decision cited by the MBTA instructs and “interpret the law as it is enacted and enforce it as intended by Congress.” *Amtrak—Conveyance of B&M in Conn. River Line in VT & NH*, 4 I.C.C.2d 761, 771 (1988); MBTA Pet. at 13. Thus, there is no concern that the Board need in any way address questions of constitutional law.<sup>3</sup>

The reasoning in the opinion cited by the MBTA in support of its argument that “this is not a case where the pertinent issues...can be decided in parallel,” actually supports Amtrak’s position that the Board should determine compensation prior to the federal court action. MBTA Pet. at 14, citing *Dura Glob. Techs., LLC v. Magna Int’l Inc.*, No. 11-CV-10551-SFC-MKM, 2011 WL 5039883, at \*3 (E.D. Mich. Oct. 24, 2011) (involving parallel examination by a federal court and the U.S. Patent and Trademark Office). There, the federal court determined that it should stay the federal litigation until there was a determination by the agency, in part because the agency’s expertise and determinations would assist the court in its analysis. *Id.* That rationale weighs in favor of having these proceedings go first, so that the federal court, if it considers the MBTA’s constitutional claims, can benefit from the Board’s expertise in making these kinds of compensation determinations, and interpreting PRIIA.

Furthermore, the circumstances here are very different than those in *Dura*. Here, the cost allocation and compensation with respect to the Attleboro Line is not something the federal court

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<sup>3</sup> The MBTA cites *Ass’n of Amer. R.R. v. Dept. of Transp.*, 821 F.3d 19 (D.C. Cir. 2016) (MBTA Pet. at 1, 10), but does not cite the Board’s decision during that litigation. There, the Board denied a request to hold in abeyance an investigation into on-time performance issues under PRIIA, even though there was a concurrent constitutional challenge to the portion of the statute governing the investigation. *Nat’l R.R. Passenger Corp. Section 213 Investigation of Substandard Performance on R. Lines of Canadian Nat’l Railway Co.*, Docket No. NOR-42134 (STB served Dec. 19, 2014). The Board denied the requested abeyance because “[e]ven a Supreme Court decision upholding the constitutionality of Section 207 of PRIIA may not end the pending lawsuit, as the Court could remand the case to the D.C. Circuit for further proceedings on other unresolved challenges to the constitutionality of Section 207. Moreover, the Board believes that any further delay of the present proceeding would thwart Congress’s clear intent that the Board resolve disputes over Amtrak delays in an efficient manner.” *Id.* at 2.

is being asked to decide, and so unlike the patent reexamination situation presented in *Dura*, there is no risk that the Board's determination will be at odds with the federal court's. The Board and the federal court are faced with two very different questions. The Board is being asked how costs should be allocated along the Attleboro Line. In contrast, the federal court is being asked to decide whether the method for appointing members of the NECC was constitutional. There is no overlap between those analyses, and no reason that both bodies cannot reach conclusions at the same time. The MBTA offers no justification as to why they cannot, other than to repeat that constitutional challenges are not the purview of the Board.<sup>4</sup>

**D. The MBTA's First-to-File Argument Fails Because the Board and the Federal Court Are Not Being Asked to Decide the Same Legal Issue**

MBTA asserts that its federal court action should proceed first because it was "first filed." MBTA Pet. at 17. But the rationale supporting the first-filed rule is avoidance of inconsistent results on the same legal issue. *Shire U.S., Inc. v. Johnson Matthey, Inc.*, 543 F. Supp. 2d 404, 409 (E.D. Pa. 2008) (noting that "the substantive touchstone of the first-to-file inquiry is subject matter" and courts must stay a proceeding only when there is an "earlier-filed action regarding the exact same question"). Amtrak's STB Petition and the MBTA's complaint address the same factual circumstances, but require resolution of fundamentally separate legal issues. There is simply no concern that the Board will reach a conclusion on the MBTA's

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<sup>4</sup> MBTA also argues that the Supreme Court's *Winstar* decision prohibits the Board from issuing an order for payments prior to February 1, 2017, when the contract between the parties expires. But in the next sentence, MBTA admits that all that *Winstar* would do would be to provide MBTA with a breach of contract claim. Amtrak believes that MBTA's assertions about *Winstar* are incorrect, but for purposes of this motion they are irrelevant because any potential breach of contract claim is wholly outside Amtrak's Petition and the Board's expertise. Indeed, in making this argument it appears that MBTA is asking the Board to decide in its ruling on the abeyance Petition that MBTA would have a successful breach of contract claim, which the Board should not do.

constitutional or contractual claims that will invade the purview of the federal court's authority, because it will not address those issues at all.

## **II. THE MBTA'S ONLY PURPOSE IS TO DELAY ITS STATUTORY OBLIGATIONS FOR AS LONG AS POSSIBLE**

For the last four years, Amtrak, the U.S. Department of Transportation, and representatives from each of the states in the Northeast Corridor have engaged in multilateral negotiations to develop the Uniform Policy. Throughout all of this time, the MBTA could have raised the constitutional challenges it now raises in federal court, but it did not. It is only now, after many years of collaborative effort, that the MBTA raises its constitutional challenge because it does not like the outcome of a process in which Massachusetts participated willingly for many years. This is an obvious effort to avoid its obligations under the statute and to delay acknowledging its fair share of the costs that the Commission collectively determined.

In addition to causing harm to Amtrak, allowing the MBTA to delay its participation in the cost sharing methodology agreed upon by the NECC impacts every state commuter rail entity affected by the Uniform Policy. The underlying premise behind the cost-sharing methodology was that each state commuter rail entity would participate in contributing necessary funds for the NEC. In enacting PRIIA, Congress intended to ameliorate the constant uncertainty of funding for improvements and infrastructure in the NEC. The MBTA's requested abeyance would again create the very uncertainty that Congress sought to eliminate by enacting the statute and instructing the Board to resolve disputes thereunder quickly.<sup>5</sup> The MBTA has not provided

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<sup>5</sup> Congress signaled its intent that these disputes be resolved quickly by directing the Board to "determine the appropriate compensation ... in accordance with the procedures and procedural schedule applicable to a proceeding under section 24903(c)." 49 U.S.C. § 24905(c)(2). Section 24903(c)(2) states that the Board "shall determine compensation...not later than 120 days after the dispute is submitted." Therefore, under the guideline set by Congress, the Board has until October 21, 2016 to reach a determination.

justification for according it special status among the state commuter rail entities in the NEC, and therefore, good cause does not exist to stay these proceedings or to delay the Board's determination of the appropriate compensation from the MBTA.

**CONCLUSION**

For all the foregoing reasons, Amtrak respectfully requests that the Board deny the MBTA's Petition for an abeyance.

August 22, 2016

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day, August 22, 2016, caused to be sent by electronic mail, as agreed by the parties, a copy of Amtrak's Reply to MBTA's Petition to Hold Proceeding in Abeyance Pending Parallel District Court Litigation to:

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