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SERVICE DATE – JULY 28, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 734

DISPUTE RESOLUTION PROCEDURES UNDER THE FIXING AMERICA'S SURFACE
TRANSPORTATION ACT OF 2015

Decided: July 26, 2016

Digest:¹ The Board proposes regulations to implement passenger rail-related dispute resolution provisions of the Fixing America's Surface Transportation Act of 2015.

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (Board) proposes regulations to implement passenger rail-related dispute resolution provisions of the Fixing America's Surface Transportation Act of 2015.²

DATES: Comments on this proposal are due by August 31, 2016; reply comments are due by September 30, 2016.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 734, 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written comments received by the Board will be posted to the Board's website at <http://www.stb.dot.gov> and will be available for viewing and self-copying in the Board's

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Fixing America's Surface Transportation Act of 2015, Pub. L. No. 114-94 (signed Dec. 4, 2015).

Public Docket Room, Suite 131, 395 E Street, S.W., Washington, DC. Copies of the comments will also be available (for a fee) by contacting the Board's Chief Records Officer at (202) 245-0235 or 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman, (202) 245-0386. Assistance for the hearing impaired is available through Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Title XI of the Fixing America's Surface Transportation Act of 2015 (FAST Act), entitled "Passenger Rail Reform and Investment Act of 2015," adds to the Board's existing passenger rail adjudicatory responsibilities related to the National Railroad Passenger Corporation (Amtrak). Among other things, Title XI includes new provisions involving cost recovery by Amtrak for Amtrak's operation of "state-supported routes" and for the costs allocated to states (including state entities) using the Northeast Corridor rail facilities for their commuter rail operations. As relevant here, Title XI gives the Board jurisdiction to resolve cost allocation and access disputes between Amtrak, the states, and potential non-Amtrak operators of intercity passenger rail service.³ In this notice, the Board is proposing a set of procedural rules for the mediation of passenger rail matters arising under Title XI of the FAST Act. Because the Board does not presently have in place a general set of procedural rules to govern the presentation and conduct of proceedings before the Board involving passenger rail matters entrusted to the Board under 49 U.S.C. §§ 24101-24910,⁴ which would include contested matters arising under Title XI of the FAST Act, parties seeking to bring contested matters before the Board should be guided by the Board's existing Rules of Practice, as applicable.

FAST Act provisions

The State-Supported Route Committee. Section 11204 of the FAST Act adds a new section to the United States Code: 49 U.S.C. § 24712, "State supported routes operated by Amtrak." State-supported routes are intercity rail passenger routes for which operating and capital costs are established and allocated among the states and Amtrak under Section 209 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA).⁵ Under these agreements,

³ Currently, Amtrak is the only operator of regularly scheduled, common carrier intercity passenger rail service in the United States. Certain statutory provisions contemplate the possibility, in the future, of other such intercity passenger rail operators. See, e.g., 49 U.S.C. § 24711 & 49 U.S.C. § 24308(f).

⁴ See 49 C.F.R. § 1100.1 (limiting the scope of the Rules of Practice to matters under title 49, subtitle IV of the United States Code, 49 U.S.C. § 10101 et seq.).

⁵ Public Law 110-432, Section 209; 49 U.S.C. § 24101 note.

Amtrak currently receives funding from states and state-related entities to operate routes under 750 miles in length. New § 24712 establishes a State-Supported Route Committee comprising Amtrak, the U.S. Department of Transportation/Federal Railroad Administration, and states that subsidize state-supported routes, to implement the cost-allocation methodology previously developed under § 209 of PRIIA through negotiation between Amtrak and the affected states and approved by the Board. See Amtrak’s Pet. for Determination of PRIIA Sec. 209 Cost Methodology, FD 35571 (STB served Mar. 15, 2012). The Committee may also amend that cost-allocation methodology. Section 24712(c)(1) gives the Board jurisdiction to “conduct dispute resolution” pertaining to (1) the Committee’s rules and procedures, (2) the invoices to be produced by Amtrak or reports to be produced by Amtrak or the states as described in § 24712(b), and (3) the implementation of or compliance with the cost allocation methodology. Section 24712(c)(2) requires the Board to establish procedures for resolving such disputes, which procedures “may include provision of professional mediation services.”

The Northeast Corridor Commission. Section 11305 of the FAST Act, which amends 49 U.S.C. § 24905, involves the powers and obligations of the Northeast Corridor Commission (NEC Commission), created by Congress in 2008 as part of PRIIA.⁶ The NEC Commission, composed of voting representatives from Amtrak, the U.S. Department of Transportation, and the states comprising the Northeast Corridor (including the District of Columbia), is responsible for developing and implementing a standardized policy for determining and allocating costs, revenues, and compensation between Amtrak and the providers of commuter rail passenger transportation on the Northeast Corridor. 49 U.S.C. § 24905(c).

The FAST Act amends 49 U.S.C. § 24905 with respect to the Board’s role in resolving disputes between Amtrak and the states in determining compensation for use of the Northeast Corridor by applying the policy approved by the NEC Commission. Under § 24903(c), formerly § 24904(c), Congress gave Amtrak the authority to allow freight and commuter rail passenger operations over Amtrak’s Northeast Corridor and laid out the standard for the Board to determine compensation if the parties did not reach agreement. The FAST Act creates a new subsection, § 24905(c)(4), that permits the NEC Commission, Amtrak, or public authorities providing commuter rail passenger transportation on the Northeast Corridor to request that the Board conduct dispute resolution if a dispute arises over implementation of, or compliance with, the NEC Commission’s cost allocation policy. The new subsection requires the Board to establish procedures for resolving such disputes and provides that those procedures “may include the provision of professional mediation services.”⁷

⁶ The NEC Commission was originally established as the Northeast Corridor Infrastructure and Operations Advisory Commission. See 49 U.S.C. § 24905.

⁷ Section 11307 of the FAST Act, “Competition,” adds a new section to the United States Code, 49 U.S.C. § 24711, establishing a pilot program for winning bidders to operate no more than three long-distance routes currently operated by Amtrak. Section 24711 gives the

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The Proposed Rules

The proposed rules would add to the Board's current mediation rules at 49 C.F.R. Part 1109 a new section 1109.5 that includes provisions specific to the State-Sponsored Route Committee and the Northeast Corridor Committee, to implement the FAST Act's directive that procedures for resolving certain disputes arising from those committees "may include provision of professional mediation services." In the proposed regulations, parties to a dispute under § 24712 and § 24905 would be permitted to request, by letter submitted to the Board's Office of Public Assistance, Governmental Affairs, and Compliance, the Board's informal assistance in securing outside professional mediation services in order to resolve certain disputes as set forth in the FAST Act, without the necessity of a formal complaint being filed with Board.⁸

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Board jurisdiction over disputes between Amtrak and the pilot operator over the price and other terms and conditions of access to Amtrak facilities and services that the pilot operator claims are required to support the transferred routes, and over whether Amtrak's other services would be unreasonably impaired by providing such access. If the Board determines that access is necessary and would not unreasonably impair Amtrak's other services, then the Board is required to determine reasonable compensation to be paid to Amtrak and other terms of use and must order Amtrak to provide access based on those terms and conditions. 49 U.S.C. § 24711(g). Section 11307, however, does not include a provision like those discussed above requiring the Board to establish procedures for resolving such disputes and providing that those procedures "may include the provision of professional mediation services."

⁸ The proposed mediation procedures originated in the events leading up to the FAST Act's creation of the State-Sponsored Route Committee. Following the enactment of PRIIA in 2008, and pursuant to PRIIA § 209, Amtrak developed a single, nationwide standardized methodology for establishing and allocating operating and capital costs among the states and Amtrak for all State-subsidized intercity passenger rail services. Lacking the unanimous concurrence of the concerned states, the methodology underwent mandatory review by the Board, which found it to be in compliance with the PRIIA requirements. Amtrak's Pet. for Determination of PRIIA Sec. 209 Cost Methodology, FD 35571 (STB served Mar. 15, 2012). Thereafter, several issues emerged between Amtrak and the states that they were unable to resolve in the course of their good-faith efforts to implement § 209 and the cost allocation methodology. Therefore, in 2014 the Board engaged the Federal Mediation and Conciliation Service (FMCS) to organize and facilitate focused discussions involving Amtrak and the affected states in an effort to resolve outstanding issues informally. In June 2015, the parties, with the assistance of the Board-sponsored FMCS facilitation team, reached agreement on the creation of a committee structure including Amtrak, the Federal Railroad Administration, and the affected states, to negotiate and resolve ongoing cost allocation issues. That committee was the

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The Board invites public comment on any aspect of the procedural rules proposed here.

Paperwork Reduction Act. Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), the Board seeks comments regarding: (1) whether the revisions to the collections of information proposed here are necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden assessment; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burdens of the collections of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. The proposed revisions described in this notice are being submitted to OMB for review as required under the PRA, 5 U.S.C. § 3507(d) and OMB regulations at 5 C.F.R. § 1320.11. Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

Regulatory Flexibility Act Certification. The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities." § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The proposed regulations would specify procedures related to dispute resolution of certain passenger rail transportation matters by the Board and do not mandate or circumscribe the conduct of small entities. If a party wishing to utilize the proposed procedures files a complaint, petition, application, or request for dispute resolution, that entity will not encounter any additional burden. Rather, the procedures are being updated and clarified by the proposed regulations. Therefore, the Board certifies under 5 U.S.C. § 605(b) that this rule will not have a significant economic impact on a substantial number of small entities as defined by the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

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predecessor of, and model for, the State-Sponsored Route Committee established in the FAST Act and codified at 49 U.S.C. § 24712.

List of Subjects

49 C.F.R. Part 1109

Administrative practice and procedure, maritime carriers, motor carriers, railroads.

It is ordered:

1. Comments on this proposal are due by August 31, 2016; reply comments are due by September 30, 2016.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
3. Notice of this decision will be published in the Federal Register.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

APPENDIX

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1109 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1109—USE OF MEDIATION IN BOARD PROCEEDINGS

1. Revise the authority citation for part 1109 to read as follows:

Authority: 5 U.S.C. 571 et seq. and 49 U.S.C. 1321(a), 24712(c), and 24905(c).

2. Add 1109.5 as follows:

§ 1109.5 Resolution of certain disputes involving the State Sponsored Route Committee and the Northeast Corridor Commission.

(a) In addition to the mediation procedures under this Part 1109 that are available following the filing of a complaint in a proceeding before the Board, Amtrak or a State member of the State Supported Route Committee established under 49 U.S.C. 24712 may request that the Board informally assist in securing outside professional mediation services in order to resolve disputes arising from:

(1) implementation of, or compliance with, the cost allocation methodology for State-Supported Routes developed under section 209 of the Passenger Rail Investment and Improvement Act of 2008 or amended under 49 U.S.C. 24712(a)(6);

(2) invoices or reports provided under 49 U.S.C. 24712(b); or

(3) rules and procedures implemented by the State Supported Route Committee under 49 U.S.C. 24712(a)(4).

Such a request for informal assistance in securing outside professional mediation services may be submitted to the Board even in the absence of a complaint proceeding before the Board.

(b) In addition to the mediation procedures under this Part 1109 that are available following the filing of a complaint in a proceeding before the Board, the Northeast Corridor Commission established under 49 U.S.C. 24905, Amtrak, or public authorities providing commuter rail passenger transportation on the Northeast Corridor may request that the Board informally assist in securing outside professional mediation services in order to resolve disputes involving implementation of, or compliance with, the policy developed under 49 U.S.C. 24905(c)(1). Such a request for informal assistance in securing outside professional mediation services may be submitted to the Board even in the absence of a complaint proceeding before the Board.

(c) A request for informal Board assistance in securing outside professional mediation services under subsection (a) or (b) of this section shall be submitted by letter duly authorized to be submitted to the Board by the requesting party. The request letter shall be addressed to the Director of the Board's Office of Public Assistance, Governmental Affairs, and Compliance, and shall include a concise description of the issues for which outside professional mediation services are sought. The Office of Public Assistance, Governmental Affairs, and Compliance shall contact the requesting party in response to such request within 14 days of receipt of the request.