

SERVICE DATE – OCTOBER 3, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36048

PETITION OF THE NATIONAL RAILROAD PASSENGER CORPORATION FOR RELIEF  
PURSUANT TO 49 U.S.C. § 24905

Digest:<sup>1</sup> The Board holds this proceeding in abeyance pending litigation regarding the validity of 49 U.S.C. § 24905.

Decided: September 29, 2016

On June 24, 2016, the National Railroad Passenger Corporation (Amtrak) filed a petition under 49 U.S.C. § 24905 (Petition) seeking an order determining the appropriate compensation amounts between Amtrak and the Massachusetts Bay Transportation Authority (MBTA) in accordance with the Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy (the Policy), which was developed by the Northeast Corridor Commission (NECC).

On August 2, 2016, MBTA moved to hold this proceeding in abeyance pending resolution of MBTA's ongoing lawsuit in federal district court<sup>2</sup> challenging the constitutionality of the NECC itself and the procedures used to develop the Policy. Amtrak replied in opposition to MBTA's motion on August 19, 2016. MBTA has moved for leave to respond to Amtrak's reply, which Amtrak opposes. Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, we will grant MBTA's request and will accept its August 25, 2016 reply into the record.

BACKGROUND

In Section 212 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), as amended by the Passenger Rail Reform and Investment Act of 2015, codified as 49 U.S.C. § 24905, Congress established the NECC to promote mutual cooperation and planning pertaining to rail operations in the Northeast Corridor. The NECC is composed of voting representatives from Amtrak, the U.S. Department of Transportation, and the states comprising the Northeast Corridor (including the District of Columbia). 49 U.S.C. § 24905(a)(1). The state members are appointed by their respective state chief executive officers and serve at their pleasure. 49 U.S.C.

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<sup>1</sup> 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).

<sup>2</sup> Mass. Bay Transp. Auth. v. Nat. R.R. Passenger Corp., No. 16-10120 (D. Mass.).

§ 24905(a)(1)(C). Congress charged the NECC with developing and implementing a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation. 49 U.S.C. § 24905(c)(1). Amtrak and the public authorities that provide commuter rail transportation on the Northeast Corridor are required to implement the Policy in their agreements. 49 U.S.C. § 24905(c)(2). If the parties fail to enter into new agreements or otherwise fail to comply with the Policy, then the Board, upon complaint, “shall determine the appropriate compensation . . . after taking into consideration the [Policy], as applicable.” Id.

While Amtrak owns most of the mainline rail infrastructure in the Northeast Corridor, MBTA owns the line approximately from the Massachusetts-Rhode Island border to Boston’s South Station (known as the Attleboro Line). MBTA had a preexisting agreement with Amtrak under which MBTA granted Amtrak the right to operate Amtrak trains over the Attleboro Line without making cash payments to MBTA, and Amtrak agreed to maintain and dispatch the Attleboro Line without cost to MBTA. The Policy, which NECC adopted over Massachusetts’ objection, would supersede the Attleboro Line agreement and require MBTA to make payments to Amtrak for Northeast Corridor operating, maintenance and capital costs. In its Petition, Amtrak claims that, pursuant to the Policy, MBTA owes it nearly \$29 million for 2016.

In support of its motion to hold this Board proceeding in abeyance, MBTA explains that it has filed a lawsuit in federal district court in which it has asserted three bases on which § 24905 should be found unconstitutional and argues that its district court constitutional challenge would, if successful, invalidate § 24905. Specifically, MBTA claims that the NECC violates the Constitution’s Appointments Clause and the separation of powers principle because the NECC exercises rulemaking authority but the state members are not appointed by the president, the head of an executive department, or a federal court and are not removable by a federal official. The lawsuit also claims that the NECC’s decision-making process violates the Due Process Clause and that the Policy is an unlawful rule issued without complying with the Administrative Procedure Act (APA). MBTA states that the Board typically does not address constitutional issues, instead leaving those issues to the courts. MBTA argues that the Board should hold this proceeding in abeyance because the Board’s and parties’ resources would be wasted if § 24905 were found to be unconstitutional, noting that § 24905 provides the Board’s only authority to make an award in this proceeding.

Amtrak opposes MBTA’s request for an abeyance, arguing that the district court litigation and the Board proceeding can take place concurrently. Amtrak claims that the Board’s determination would assist the court in resolving the constitutional issues by providing the Board’s interpretation of § 24905. Amtrak also argues that delaying the Board proceeding would be harmful because it or another entity would have to bear MBTA’s share of the operating and capital costs of the Northeast Corridor during the delay and that delay would create uncertainty regarding Northeast Corridor funding.

## DISCUSSION AND CONCLUSIONS

The Board has broad discretion to determine whether to hold a proceeding in abeyance, and its decision “to do so in any particular situation is highly dependent on the facts and circumstances of the case.” E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125 et al., slip op. at 4 (STB served Nov. 29, 2012). Based on the circumstances presented here, the Board will hold this proceeding in abeyance.

Amtrak argues that the Board should hear and decide Amtrak’s petition for compensation from MBTA under § 24905 either before, or concurrently with, the district court litigation. However, as MBTA notes, the district court litigation could invalidate § 24905. If that were to happen, the Board and party resources required to litigate this proceeding would be wasted. Although Amtrak claims that there would be little waste of resources because the Board could reach a decision on compensation fairly easily (a point that MBTA disputes), the proceeding would still likely involve extensive discovery by the parties (and related discovery motions filed before the Board) prior to briefing and review of a large record.

Although Amtrak relies on Pennsylvania Railroad—Merger—New York Central Railroad, FD 21989 (Sub No. 4) (STB served Sept. 29, 2009), that decision does not support Amtrak’s argument that abeyance is not warranted here. There, the Board declined to hold a proceeding in abeyance pending resolution of a motion filed in a district court to “confirm” an arbitration decision because it was clear the Board had exclusive authority to review the arbitration decision and thus would have to rule on the matter, despite the district court challenge. Here, by contrast, it is clear that the Board would not have to rule on the compensation issue if the district court rules in MBTA’s favor on whether the NECC and the Policy are unconstitutional.<sup>3</sup>

Amtrak also argues that the Board should proceed because its interpretation of § 24905 would aid the district court by showing that the Board has discretion in its application of the Policy when making a compensation determination. But Amtrak does not explain how Board application of the Policy to the compensation dispute between the MBTA and Amtrak would

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<sup>3</sup> The Board is aware that the NECC has filed a motion to dismiss or stay the district court case on the ground that the district court does not have subject matter jurisdiction over MBTA’s claims. The NECC asserts in the district court that the constitutional and statutory issues concerning the validity of the NECC and the Policy can only be raised in the context of Amtrak’s petition to the Board for compensation from MBTA. However, although Amtrak states to the Board that the constitutional issues could be raised on appeal from the Board’s decision, the Board does not accept the argument that Congress intended a cost allocation proceeding before this agency to be the only forum to decide constitutional and statutory issues involving another federal agency over which the Board lacks jurisdiction. Therefore, the Board is holding its consideration of the compensation issues in this proceeding in abeyance, for the reasons stated in this decision.

materially assist the district court in resolving MBTA's constitutional and other claims. The claims pending before the district court call into question the validity and constitutionality of the NECC under § 24905, but Amtrak's petition before the Board involves application of § 24905. Amtrak provides no explanation of how the merits of the cost-allocation dispute at issue here could affect the court's resolution of the constitutionality and legality of the statutory basis for that dispute. Accordingly, it would not be an efficient allocation of resources for the Board to go through the resource-intensive exercise of applying the statute and making a compensation determination in this proceeding until the issues before the district court are resolved.

Finally, Amtrak does not show that it or any other entity would be materially harmed by holding this proceeding in abeyance. Although Amtrak claims that MBTA's share of costs would be passed on to Amtrak or "other entities," MBTA explains that Amtrak provides most maintenance and operational services under the existing agreement between Amtrak and MBTA. After that agreement terminates in February 2017, MBTA would provide those services (or hire a provider) as the owner of the line at issue. Therefore, those costs would not be passed on to Amtrak or other entities. Amtrak has also not identified or explained how other entities could be required to pay for capital expenditures on the Attleboro Line, or even that capital needs on that Line exist at this time. Amtrak also claims that Congress intended to alleviate uncertainty regarding Northeast Corridor funding by enacting changes to § 24905 in PRIIA (including establishment of a procedural schedule under which the Board would quickly resolve cost disputes) and that holding this proceeding in abeyance would frustrate that intent. However, the primary source of uncertainty is now the constitutional questions MBTA has raised in the district court regarding the validity of § 24905. The resource-intensive proceeding that would be needed here for the Board to resolve the merits of the cost dispute would not, and could not, answer those questions, and any cost allocation order the Board were to issue before the constitutional litigation is complete could be rendered invalid depending on the outcome of that constitutional litigation.

For the reasons discussed above, it is appropriate to grant MBTA's motion and hold this proceeding in abeyance until further order of the Board.

It is ordered:

1. MBTA's August 25, 2016 reply is accepted into the record.
2. MBTA's motion to hold this case in abeyance is granted. This proceeding shall be held in abeyance pending further order of the Board.
3. The parties shall inform the Board of the resolution of the NECC motion to dismiss currently pending in the district court. The parties' filing should include a copy of the court's decision on that motion. The parties should make similar filings with the Board for any other dispositive motions (such as motions for summary judgment or motions to dismiss) filed in the district court litigation.

4. This decision is effective on its service date.

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