



# **Eighth Circuit Strikes Down STB Authority to Investigate and Adjudicate Poor OTP of Amtrak Intercity Trains**

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**APTA Legal Affairs Seminar**

# Overview

- Issue
  - Poor On-Time Performance of Passenger Trains
  - Congress Attempts to Address through PRIIA
  - 8<sup>th</sup> Circuit Court of Appeals Strikes Down
- Historical Context
- Key Takeaways
  - What's next for Amtrak's Statutory Preference Rights
  - The 8<sup>th</sup> Circuit's Statutory Interpretation

# Amtrak CEO Says Passenger Railroad Faces Three Threats

- Funding Cuts
- U.S. Passenger Railroading is Underfunded
- Extensive Delays on Host Railroads
  - Amtrak CEO Richard Anderson comments to Trains Magazine.
  - <http://trn.trains.com/news/news-wire/2017/11/03-anderson-speaks>

# Poor On-Time Performance Example

- Sunset Limited On-Time Performance
  - Hosted by at least 4 railroads with UPRR being the primary host
  - According to Amtrak's website:
    - Endpoint performance for September 2017 = 73%
    - Train interference delays: 40.6%
      - 95.9% UPRR
    - Operational delays: 19.8%
      - 99.7% UPRR
    - Track and signals delays: 19.3%
      - 81.4% UPRR

# The Death of the Passenger Train and the Creation of Amtrak

- In 1929 approximately 20,000 passenger trains operated in the United States.
- 1946: nine thousand of those passenger trains had been discontinued.
- By 1970, only 500 intercity passenger trains offered service and of those, over 100 were subject to a discontinuance proceeding before the Interstate Commerce Commission.
- 1970: Congress creates Amtrak.

# Looking For A Solution to the Preference Problem

- Adequacy – Passenger Service – Southern Pacific Company between California and Louisiana, 35 ICC 415, 434 (Decided Sept. 10, 1969).
- ICC: “...passenger trains should not be relegated to a second-class service by comparison with routine freight traffic. Certainly, they should not be shunted onto a siding as a matter of operating policy, to permit the priority passage of freight trains.”

# Looking For A Solution to the Preference Problem

- Rail Passenger Service Act of 1970, P.L. 91-518, 84 Stat. 1339 (Oct. 30, 1970)(Sec. 801 Adequacy of Service)(“RPSA”)
  - Authorized the ICC to prescribe adequacy of service regulations.
  - But, Congress did not include the preference provision in the RPSA.

# Looking For A Solution to the Preference Problem

- ICC Adequacy of Service Regulations – EP 277 (Sub – No. 1)
- “Schedules shall be designed so as to provide expeditious service and the sidetracking of passenger trains for freight trains shall not be permitted except in emergency.”



# Railroads Pledge to Give Amtrak Priority

- 1971 Congressional Hearing: Railroad president's pledge to give Amtrak priority.
  - Seaboard Coast Line
  - Southern Pacific
  - Penn Central
  - Santa Fe

# Preference Codified - 1973

- Amtrak Improvement Act of 1973, P.L. 93-146, 87 Stat. 552 (Nov. 3, 1973).
- **(c)** Preference over freight transportation. 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 Board orders otherwise under this subsection.

# DOJ Has Not Exercised Its Preference Enforcement Authority

- §307(a) of the RPSA (49 USC §24103)
  - Grants U.S. Department of Justice authority to enforce the preference provision before a District Court judge.
- DOJ has not utilized its authority.
  - In 1979, DOJ initiated an action against the Southern Pacific. But, the case did not go to trial.

# Passenger Rail Investment and Improvement Act of 2008

- §207: Authorizes Amtrak and FRA to issue metrics and standards for on-time performance of Amtrak trains operating on host railroad lines.
- § 213: Authorizes the STB investigate causes of poor on-time performance.

# STB Claims Authority Under Section 213

If the OTP “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,”

the STB “may initiate an investigation, or upon the filing of a complaint by Amtrak, ... the Board shall initiate such an investigation...”

# STB Claims Authority Section 213

- July 2016 – STB issued a decision in EP 726, defining “on-time” for the purposes of initiating an investigation.
- On-Time – A train is on time if it arrives at a given station no later than 15 minutes after its scheduled time.
- Performance is measured at all stations.

# Challenge to All-Stations OTP

- Class I Railroads Challenge STB All-Stations OTP Rulemaking in the Eighth Circuit.
- The Controversy Originates with the STB's Interpretation of Section 213 in PRIIA.

# Railroad's Appeal to 8th Circuit

- The STB Lacked Statutory Authority to Issue OTP Rule.
- The STB Failed to Consider the Impact on Freight Traffic.
- The STB Adoption of All-Stations Was Arbitrary and Capricious.



# STB Argument: Gap Filling Authority

- 8<sup>th</sup> Circuit rejects STB's argument that invalidation of §207 created a vacuum that it had the implicit authority to fill.
- 8<sup>th</sup> Circuit holds that the STB did not have rule-making authority delegated by Congress.

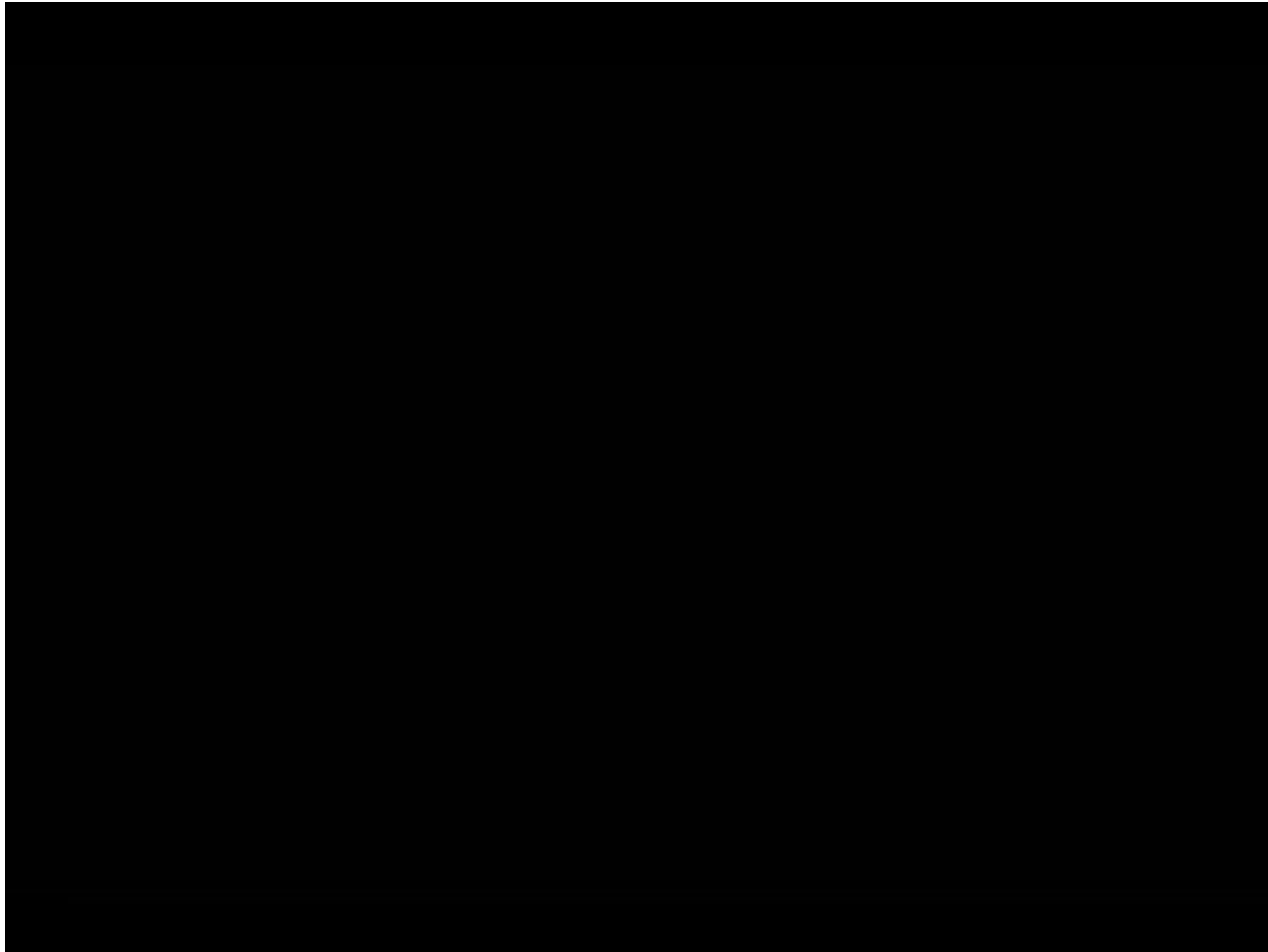
# STB Argument: Textual Authority

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# STB Argument: Textual Authority



# STB Argument: Textual

- 8<sup>th</sup> Circuit: In isolation, STB's argument is reasonable.
- In context, STB's interpretation "fades in the light of the full text and context."
  - The "only place in the PRIIA where on-time performance is described and given explicit source is §207(a)" which instructs Amtrak and FRA to establish metrics and standards.
  - Congress did not likely give FRA/Amtrak and the STB "separate authority to develop two potentially conflicting on-time performance rules."

# Breaking News

- February 20, 2018:
  - Supreme Court denies Amtrak's petition for cert. of 8<sup>th</sup> Circuit Decision.

# What's Next for Enforcing Preference?

- Back to Congress: In Amtrak's General and Legislative Annual Report & Fiscal Year 2019 Grant Request, Amtrak asks Congress to amend the preference provision to include a private right of action.
  - “Amtrak shall have the right to bring an action for equitable or other relief...to enforce preference rights under [24308(c)].”

# Hot Takes

- The future of preference?
  - Back to Congress?
  - Interest from DOJ?
  - DC District Court Salvages Portions of §207?
  - STB hears §213 cases and adjudicates definition of on-time performance?
- The textual statutory interpretation argument failed to persuade the 8<sup>th</sup> Circuit. The Court found context to be more persuasive than the STB's interpretation.

# Thank You



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