

WHEN IS A “RAILROAD” NOT A RAILROAD?

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Overview

- [Very] Brief History of State-Supported IPR
 - Rail Passenger Service Act of 1970 through the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”)
- Bellwethers – NCDOT & INDOT
- FRA Guidance to State Sponsors of IPR
- System Safety Program (SSP) Rule
- Summary and Status of Litigation

A LONG TIME AGO IN A GOVERNMENT FAR, FAR AWAY...

Rail Passenger Service Act of 1970,
Pub. L. No. 91-518 (Oct. 30, 1970) (“RPSA”)

- “Basic System” Designated by the US DOT
- Section 403(b) Routes – At the request of a state agency willing to “reimburse [Amtrak] for a reasonable portion of any losses associated with such services”



PRIIA Modifies IPR Funding

- Section 403(b) repealed in 1997
 - States/Amtrak individually negotiate
 - Growing disparities between funding arrangements
 - Congressional interest in reducing Amtrak spend
- Passenger Rail Investment and Improvement Act, Pub L. No. 11-432, div. B (Oct. 16, 2008)
 - Shifts financial responsibility for all intercity passenger rail routes less than 750 miles (outside the NEC) operated by Amtrak to the States
 - Provides “menu approach” to service delivery

NCDOT v. FRA

- Carolinian and Piedmont Service
 - Charlotte – Raleigh – New York (CSX Track)
 - Operated by Amtrak
 - Herzog provides MOE on Piedmont Line
 - NCDOT owns Capital Yard
- FRA Chief Counsel Letter (July 2008)
 - “NCDOT is a railroad carrier for purposes of FRA jurisdiction . . . because it provides the rail operations by contracting out”
- Petition for Review dismissed by D.C. Circuit

INDOT's Hoosier State Service

- INDOT sought to transition service from Amtrak to an independent contractor, later altered plans to transition only MOE
- FRA asserts that the multiple entities providing IPR are all doing so on behalf of INDOT, so INDOT is the “principal entity of record responsible for the safety of [its] planned passenger service”

The INDOT Solution

- INDOT Commissioner: commitment of resources, assumption of liability, and uncertainty over employment practices would result in termination of service
- FRA/INDOT execute letter agreement reviewing and approving contractual allocation of regulatory responsibility between Amtrak and contractor

The INDOT Model?

- States for Passenger Rail Coalition engages FRA
 - “It is essential that FRA provide IPR service sponsors with technical assistance, clear guidance and model contract language regarding the safety requirements which must be met by IPR service providers, railroads and railroad contractors.”
 - “IPR service sponsors accept responsibility for developing and implementing program oversight to verify that compliance is being achieved by its service providers and railroad contractors [but] are not directly responsible for meeting compliance requirements.”
- FRA announces plan to develop policy statement and circulate to all stakeholders

Draft Guidance

- Circulated to SPRC in February 2016
- Acknowledges that FRA generally looked to Amtrak with respect to compliance and enforcement, but suggests that PRIIA changed the nature of relationships
- “If you enter into a contract with a service provider to perform a safety-related function, you are ultimately responsible for the safety of that service, even if you simply provide funding for passenger rail service under the contract.”

SPRC Response

- Placing “ultimate responsibility” with State sponsors imposes significant financial and regulatory burdens; doesn’t improve safety



System Safety Program Rule

- Defines “railroad” as a “person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person.”
- Requires consultation with “directly affected employees,” including (for the first time in the final rule) those of contractors.

81 Fed. Reg. 53,849 (Aug. 12, 2016) (14 C.F.R. Part 270)

Guidance to Sponsors of IPR

- Treats sponsors differently depending on whether they contract with Amtrak for T&E and MOE Services, or whether they exercise “menu approach” under PRIIA.
- Requires *only non-integrated* routes to prepare a System Safety Plan and assume liability for FRA Safety Rules.

Petition(s) for Reconsideration

Regulatory Docket No. FRA-2011-0060

- Filed by:
 - Capital Corridor Joint Powers Authority
 - North Carolina Department of Transportation
 - Indiana Department of Transportation
 - San Joaquin Joint Powers Authority
 - Northern New England Passenger Rail Authority
 - Vermont Agency of Transportation
- Generally challenge (1) definition of “railroad” as including non-operating state financial sponsors of intercity passenger rail; and (2) requirement to consult with employees of contractors.

Petition(s) for Judicial Review

No. 16-1352, 16-1355 (D.C. Cir.)

- Filed (and consolidated) by Capitol Corridor Joint Powers Authority and North Carolina Department of Transportation
- Argues that the FRA was required to issue the Guidance through notice and comment rulemaking, because it constitutes a new legislative rule

Status

- FRA has stayed the SSP Final Rule until December 4, 2018.
- Litigation regarding Guidance stayed pending resolution of Petitions for Consideration of the SSP Rule

RSAC Meeting & Proposal

- October 30, 2017 RSAC Meeting
- FRA “Straw Man” Proposal
 - Allows a “railroad” to designate another responsible for compliance with SSP Rule, if the “railroad contracts to another person *all activities* related to its passenger service.”
 - Does not relieve “railroad” of legal responsibility for compliance

Thank You!

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