
IN THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 16-3307

UNION PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

SURFACE TRANSPORTATION BOARD;
UNITED STATES OF AMERICA, *Respondents*.

No: 16-3504

ASSOCIATION OF AMERICAN RAILROADS, *Petitioner*

V.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA, *Respondents*

No. 16-3512

CSX TRANSPORTATION, INC., *Petitioner*,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF
AMERICA, *Respondents*.

No. 16-3513

NORFOLK SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, *Respondents*.

No. 16-3514

CANADIAN NATIONAL RAILWAY COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; GRAND TRUNK WESTERN RAILROAD COMPANY, *Petitioners*,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, *Respondents*.

UNOPPOSED MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

Pursuant to 28 U.S.C. § 2323 and Federal Rule of Appellate Procedure 15(d), the National Association of Railroad Passengers, All Aboard Indiana, All Aboard Ohio, All Aboard Wisconsin, Friends of the Cardinal, the Environmental Law and Policy Center (“ELPC”), Michigan Association of Rail Passengers, Inc., Midwest High Speed Rail Association, the Southern Rail Commission, and Virginians for High Speed Rail (“Movants”) hereby move to intervene as a matter of right in support of Respondents the Surface Transportation Board (“STB”) and the United States of America in the above-captioned petitions for review of STB’s final rule entitled “On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008” (the “OTP Rule”). 81 Fed. Reg. 51,343 (Aug. 4, 2016)(to be codified at 48 C.F.R. Part 1040). Petitioners in cases 16-3307, 16-3504, 16-3512, 16-3513 and 16-3514, have authorized Movants to state that they do not oppose this motion. Respondents and Respondents-Intervener National Passenger Rail Corporation each consent to this motion.

INTRODUCTION

This case involves a final rule promulgated by the STB pursuant Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), 49 U.S.C. § 24308(f)(the “Final OTP Rule”). The Final OTP Rule defines what “on time” means for intercity passenger trains that operate on freight railroad tracks and also specifies a formula for calculating “on-time performance” for those trains. The STB will use the Final OTP Rule to determine whether the “less than 80 percent” threshold Congress set for initiating an on-time performance complaint under PRIIA Section 213 has been met. 81 Fed. Reg. at 51,343.

The Union Pacific Railroad (“UP”) No. 16-3307, CSX Transportation Inc., (“CSX”) No. 16-3512, Norfolk Southern Railway Company (“NS”) No. 16-3513, Canadian National Railway Company, Illinois Central Railroad Company and the Grand Trunk Western Railroad Company (“CN”) No. 16-3514 and the Association of American Railroads (“AAR”) No. 16-3504, have petitioned for review of the Final OTP Rule. Movants now seek to intervene in this consolidated proceeding in support of Respondents the STB and the United States.

BACKGROUND

I. Movant Passenger Rail Organizations

Movants are national and regional not-for-profit organizations representing thousands of members sharing a common goal of advancing the development and operation of intercity passenger rail service in the United States. All of the Movant organizations have members who regularly ride Amtrak trains and have directly experienced the on-time performance of those trains. *See* Declaration of James Mathews ¶¶4, 5 (“Mathews Decl.”).

Movants also advocate for reliable, safe and on-time intercity passenger rail service in the United States before Congress, the U.S. Department of Transportation, Amtrak and the Surface Transportation Board. Mathews Decl. ¶4.

II. The Final OTP Rule

From approximately 1950 to 1970, the private railroads, which at that time operated both passenger and freight services, faced mounting financial problems. In 1970, Congress created Amtrak “to avert the threatened extinction of passenger train in the United States.” *See* Rail Passenger Service Act of 1970 (RPSA) Pub. L. No. 91-518, § 101, 84 Stat. 1328 (creating the National Railroad Passenger Corporation, now known as Amtrak). RPSA expressly provided that Congress considers passenger rail service to be a “public convenience and necessity” and that continuing and improving passenger rail service in the United States is a national goal. RPSA, Pub. L. No. 91-518, § 101, 84 Stat. 1328.

As a condition of relieving railroads of their intercity passenger rail service obligations, Congress required, among other things, that the private railroads allow Amtrak to operate passenger trains on their tracks and facilities. *See* 49 U.S.C. 24308(a); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 410 (1992); *Atchinson, Topeka & Santa Fe Ry.*, 470 U.S. at 455.

In 1973, in response to poor on-time performance (“OTP”) of passenger trains, Congress investigated concerns that some of the railroads were continually impeding the movement of Amtrak trains and instituting slow orders. Subsequently, Congress enacted what is now 49 U.S.C. § 24308(c), requiring freight railroads to give Amtrak trains

preference when using their tracks and facilities. *See* Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10(2), 87 Stat. 548, 552.

In 2008, Amtrak's OTP for long-distance trains was still hovering at 40%. Congress enacted PRIIA, in part, because it recognized that OTP was critical to the success of achieving viable national intercity passenger rail service in the United States. Section 213 of PRIIA, (49 U.S.C. § 24308(f)), was added to address Amtrak's inability to achieve reliable OTP due to host railroads failing to honor Amtrak's right to preference. *See* PRIIA, Pub. L. No. 110-432, Div. B, § 213, 122 Stat. 4907, 4925-4927 (2008); S. Rep. No. 110-67, at 25-26 (2007).

Under Section 213(a) of PRIIA, 49 U.S.C. § 24308(f)(1), if the OTP of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the STB may initiate an investigation, or upon complaint by Amtrak or another eligible complainant, the Board "shall" do so. The purpose of such an investigation is to determine whether and to what extent delays are due to causes that could reasonably be addressed by the passenger rail operator or the host railroad. Following the investigation, should the Board determine that Amtrak's substandard performance is "attributable to" the rail carrier's "failure to provide preference to Amtrak over freight transportation as required" by 49 U.S.C. § 24308(c), the Board may "award damages" or other appropriate relief from a host railroad to Amtrak. 49 U.S.C. § 24308(f)(2).

In 2012, four years after passing PRIIA, Amtrak achieved its highest ever on-time performance level of 88.7% system-wide, and 81.2% for long distance trains. Ridership also increased from 16 million passengers in 1972 to 31 million passengers.

However, in 2013, a decision issued by the District of Columbia Court of Appeals in an action brought by AAR invalidated the Federal Rail Administration's and Amtrak's metrics and standards regulations that included OTP under another Section of PRIIA, Section 207, *Ass'n of Am. R.Rs. v. Dep't Transp.*, 721 F.3d 666 (D.C. Cir. 2013). The Court of Appeals decision, which was later unanimously overturned two years later by the U.S. Supreme Court, *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015), had an almost immediate negative impact on Amtrak's on-time performance. The resulting delays of Amtrak trains were protracted and chronic. Intercity rail passengers experienced terrible OTP on Amtrak's Capitol Limited, Empire Builder and Lake Shore Limited routes while waiting for freight railroad traffic to clear. Mathews Decl. ¶7.

In response to these massive delays, Amtrak exercised its right under Section 213 to initiate investigations involving multiple freight railroads. In January of 2012, Amtrak filed a complaint with the STB based on the "substandard performance of Amtrak passenger trains" on rail lines owned by the Canadian National Railway Company. *See* STB Decision, *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, at 1-2 (May 13, 2015).¹ Further, in November 2014, Amtrak filed a complaint initiating an investigation into the substandard performance of Amtrak passenger trains on rail lines owned by CSX Transportation, Inc. and Norfolk Southern Railway Company. *Id.* at 3.

In connection with these Section 213 proceedings, the AAR petitioned the STB to initiate a formal rulemaking to determine the meaning of "on-time performance" under

¹ Amtrak filed an Amended Complaint in this proceeding in August 2014. *See* Amtrak Amended Complaint

Section 213. Amtrak's Section 213 complaints were held in abeyance until the resolution of the underlying STB rulemaking proceeding and they are still pending. *See* 81 Fed. Reg. 51,343, 51,344 n.1 (Aug. 4, 2016).

On May 15, 2015, STB instituted the OTP rulemaking proceeding. *See On-Time Performance Under Sec. 213 of the Passenger Rail Inv. & Improvement Act of 2008, EP 726 (STB served May 15, 2015)*. More than six months later, on December 28, 2015, the STB issued a Notice of Proposed Rulemaking (NPRM).

All of the Movants actively participated in the STB proceeding by filing comments. *See* ELPC, All Aboard Indiana, All Aboard Ohio, All Aboard Wisconsin, Midwest High Speed Rail Association and Virginians for High Speed Rail, Initial Comments on Proposed OTP Rule, No. 239871 (Feb. 8, 2016); Friends of the Cardinal, No. 239871 (January 12, 2016); Michigan Association of Rail Passengers, Inc., No. 240099 (February 11, 2016); the Southern Rail Commission, No. 240016 (February 5, 2016) and, National Association of Railroad Passengers, No. 240039 (February 8, 2016).

On July 28, 2016, the STB issued the final OTP rule determining that a passenger train would be deemed "on-time" if it either arrives or departs from a given station no later than 15 minutes after the scheduled time. Further, the rule includes all stations along the route in calculating OTP, not just the terminus stations. Movants support the "all stations" approach.

Movants have a direct and concrete interest in the OTP Rule's definition of "on time" and the calculation of "on-time performance" for the intercity passenger trains its members travel on, and STB's authority under Section 213 to investigate the causes of delays depends on the meaning of those terms.

III. Industry Petitioners' Challenges to the Final Rule

Beginning on August 5, 2016, UP, CSX, CN, NS and AAR filed separate petitions for review of the Final OTP Rule. All of the petitioners, except for AAR (which is the freight rail industry's national association), are freight railroads that own tracks upon which Amtrak passenger trains operate. Amtrak long distance trains typically once daily in each direction on a particular route.

Petitioners now seek to have this Court overturn and vacate the Final OTP Rule.

ARGUMENT

Movants should be permitted to intervene in these proceedings in support of STB's Final OTP Rule. As discussed below, Movants meet the requirements for intervention. Fed. R. App. P. 15(d). This motion is timely filed in accordance with this Court's Order of September 6, 2016, enlarging the time for filing motions to intervene to September 20, 2016 and is unopposed.

I. Movants Meet the Standard for Intervention

Movants seek intervention to oppose attempts to overturn and nullify on-time performance of intercity passenger rail an issue that concerns the interests of Movants' members. As a result, and as shown by the attached declaration, Movants satisfy the grounds for intervention.

A. Movants Have Organizational Interests in Ensuring the On-Time Performance of Intercity Passenger Trains Under PRIIA Section 213.

In addition to the time requirement, a motion to intervene must also "contain a concise statement of the interest of the moving party and the grounds for intervention."

Fed. R. App. P. 15(d). As noted above, Movants participated fully in the STB proceeding. Thus, Movants should be permitted to intervene as a matter of right as a

“party ... in interest to the proceeding before the Board.” 28 U.S.C. § 2323; *cf.* *Alexander Sprunt & Sun v. United States*, 281 U.S. 249, 255 (1930) (once a party intervened in the agency proceeding, “they became entitled under section [2323] to intervene, as of right, in any suit ‘wherein is involved the validity’ of the order entered by the Commission”). Movants’ significant engagement in the proceeding to develop an OTP standard under Section 213 reflects Movants’ strong interest in the on-time performance of intercity passenger rail service as well as the enforcement of the PRIIA standards ensured by the Final OTP Rule.

In addition, Movants have substantial institutional interests in defending the on-time performance of intercity passenger trains. Movants’ members share a common goal of advancing the development and operation of intercity passenger rail service in the United States. Each organization has members who regularly ride Amtrak trains and have directly experienced the on-time performance of those trains. Mathews Decl. ¶5.

Moreover, Movants have long advocated for on-time performance of intercity passenger trains and have appeared in related intercity passenger rail litigation as *amicus curie*. Mathews Decl. ¶6.

Because Movants members regularly ride Amtrak trains and have directly experienced the on-time performance of those trains, Movants bring a distinctive perspective to the issues at stake in this case. Movants are independent nonprofit organizations committed to the national goal set by Congress of continuing and improving passenger rail service in the United States.

B. Movants’ Members’ Interests Will Be Harmed if the Court Sets Aside the Final OTP Rule.

Movants’ members have experienced terrible on-time performance with

protracted and chronic delays on Amtrak’s Capitol Limited, Empire Builder and Lake Shore Limited routes, while waiting for freight railroad traffic to clear. The steep decline in OTP had numerous adverse impacts on intercity rail passengers in terms of costs, time and threats to safety. Mathews Decl. ¶¶7,8.

In October of 2014, Movants filed more than 1,300 passenger reports with the STB from their collective members detailing the poor on-time performance of Amtrak trains. The reports documented the lost costs and time of Amtrak passengers, including more specifically, the missed weddings and funerals, the delayed medical patient transports, and the abbreviated or cancelled home visits of deployed military service-members. Mathews Decl. ¶9.

Movants represent thousands of members who will directly benefit from the Final OTP Rule. Among other things, Movants’ members travel on intercity passenger trains for numerous reasons that include business, pleasure, medical, public convenience and necessity.

These benefits and concerns establish Movants’ “interest” under Rule 15(d), and as well as their standing to sue under Article III of the U.S. Constitution, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Federal Election Comm’n v. Akins*, 524 U.S. 11 (1998), assuming such standing were required of parties who, as here, seek to intervene in support of respondents.²

² *See Bond v. United States*, 131 S. Ct. 2355, 2361-62 (2011) (Article III requirements apply to those “who seek[] to initiate or continue proceedings in federal court,” not to those who *defend* against such proceedings); *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (holding that where the position of the respondent- interveners is identical to that of the agency and the agency’s standing is unquestionable, no separate inquiry regarding intervener standing is necessary), *overruled on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

Further, the disposition of this case ““may as a practical matter impair or impede [Movants’] ability to protect [their] interest[s].”” *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)). Petitioners seek to overturn the Final OTP Rule. Movants and their members have a substantial interest, and have expended significant efforts supporting the Final OTP Rule. Moreover, as Congress has long recognized, on-time performance is critical to the success of achieving viable national intercity passenger rail service in the United States. Thus, the disposition of these petitions may, as a practical matter, materially impair the interests of Movants and their members. Should the Final OTP Rule be overturned, no federal agency would have the authority to set and/or enforce OTP standards for intercity passenger rail trains that operate on freight railroads as Congress required. Consequently, national intercity passenger rail service in the United States would erode to a point where it would no longer be a viable transportation mode.

CONCLUSION

For all the foregoing reasons, Movants should be granted leave to intervene in support of Respondents.

DATED: September 19, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I electronically filed the foregoing UNOPPOSED MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Karen E. Torrent,
Karen E. Torrent