



KAPLAN KIRSCH ROCKWELL

242281

ENTERED
Office of Proceedings
December 19, 2016
Part of
Public Record

December 19, 2016

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Dispute Resolution Procedures Under the Fixing America's Surface Transportation Act of 2015*, STB Docket No. EP-734 (Service Date Nov. 29, 2016).

Dear Ms. Brown:

I am enclosing for filing in the above-captioned proceeding the Capitol Corridor Joint Powers Authority's Petition for Reconsideration of the final rules adopted by the Surface Transportation Board pursuant to 49 C.F.R. § 1110.10.

Thank you very much for your assistance in this matter.

Sincerely,

Charles A. Spitulnik

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP-734

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

**PETITION OF THE CAPITOL CORRIDOR JOINT POWERS AUTHORITY
FOR RECONSIDERATION OF THE FINAL RULES IMPLEMENTING DISPUTE
RESOLUTION PROCEDURES UNDER THE FIXING AMERICA'S SURFACE
TRANSPORTATION ACT OF 2015**

CHARLES A. SPITULNIK
ALLISON I. FULTZ
STEVEN L. OSIT
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 955-5600
Email: cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com
sosit@kaplankirsch.com

*Counsel for the Capitol Corridor
Joint Powers Authority*

Dated: December 19, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. EP-734

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

**PETITION OF THE CAPITOL CORRIDOR JOINT POWERS AUTHORITY
FOR RECONSIDERATION OF THE FINAL RULES IMPLEMENTING DISPUTE
RESOLUTION PROCEDURES UNDER THE FIXING AMERICA’S SURFACE
TRANSPORTATION ACT OF 2015**

In plain and unambiguous terms, Section 11204 of the Fixing America’s Surface Transportation (FAST) Act, Pub. L. No. 114-94 (Dec. 4, 2015) (codified at 49 U.S.C. § 24712)¹ directed the Surface Transportation Board (Board) to establish procedures for conducting binding dispute resolution for certain matters arising under Section 209 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA)² and the activities of the State-Supported Route Committee³. However, the final rule purporting to implement this mandate merely allows parties to request the Board’s “informal assistance in securing outside professional mediation services.” *Dispute Resolution Procedures under the Fixing America’s Surface Transportation Act of 2015*, STB Docket No. EP-734, *slip op.* at 9 (Service Date Nov. 29, 2016) (Final Rule). Because the Final Rule is contrary to clearly expressed congressional intent, and because the Board has not squarely addressed the arguments presented by the Capitol Corridor Joint Powers

¹ For ease of reference, all citations herein will refer to the codified provisions of Section 11204 of the FAST Act.

² Pub. L. No. 11-432, div. B (Oct. 16, 2008).

³ The State-Supported Route Committee was also established by Section 11204 of the FAST Act to, *inter alia*, oversee further amendments to the cost allocation methodology approved under Section 209 of PRIIA and develop the form, frequency, and content of invoices and financial performance reports that Amtrak must provide to State sponsors.

Authority (CCJPA)⁴ and other “California Entities,”⁵ the CCJPA petitions the Board for reconsideration of the Final Rule pursuant to 49 C.F.R. § 1110.10 and respectfully requests that it promptly commence supplementary rulemaking⁶ to establish binding dispute resolution procedures as Congress intended.

A. The Board’s Final Rule is Plainly at Odds with the Clear Language of the Statute

The pertinent statutory text is straightforward. Subsection (c) of Section 24712 (Subsection (c)) provides, “If a dispute arises with respect to [certain enumerated matters], either Amtrak or the State may request that *the Surface Transportation Board* conduct dispute resolution under this subsection.” 49 U.S.C. § 24712(c)(1) (emphasis added). Congress directed the Board to “establish procedures for resolution of disputes brought before it under this subsection, which *may include* provision of professional mediation services.” *Id.* § 24712(c)(2) (emphasis added). And, in a separate paragraph titled “Binding Effect,” Congress required that “[a] decision of *the Surface Transportation Board* under this subsection shall be binding on the parties to the dispute.” *Id.* § 24712(c)(3) (emphasis added).

The Board’s Final Rule fails to satisfy a single one of the above mandates. The statute allows Amtrak and the States to “request that the Surface Transportation Board conduct dispute resolution under this subsection.” 49 U.S.C. § 24712(c)(1). But the Final Rule merely allows

⁴ The CCJPA is the State-sponsor of the Capitol Corridor intercity passenger rail service under Section 209 of PRIIA, and therefore has an interest in ensuring that the Board implements the dispute resolution procedures directed under Section 11204 of the FAST Act according to Congress’ clearly expressed intent

⁵ The California Department of Transportation (Caltrans), Los Angeles – San Diego – San Luis Obispo Rail Corridor Agency (LOSSAN), and the San Joaquin Joint Powers Authority (SJJPJA) also filed comments in this proceeding requesting that the Board develop binding dispute resolution procedures as Congress intended.

⁶ As stated in its initial comments, the CCJPA does not object to the Board providing informal assistance to parties seeking professional mediation services, provided that the Board amends the Final Rule to fulfill its congressional mandate to develop binding dispute resolution procedures.

Amtrak and the States to “request that the Board informally assist in securing outside professional mediation services” Final Rule at 9. Contrary to Congress’ express mandate, the “Surface Transportation Board” does not conduct any dispute resolution at all under the Final Rule.

The statute also requires the Board to “establish procedures for resolution of disputes brought before it under this subsection” § 24712(c)(2). But the Final Rule eschews this requirement in favor of “provid[ing] guidance for informal requests,” expressly leaving it the parties to a dispute to develop appropriate procedures “in the first instance.” Final Rule at 5–6 (emphasis in original). Indeed, the only “procedures” established by the Final Rule are the statement of an address to which a request for the Board’s informal assistance should be sent and a deadline for the Board’s response thereto. Final Rule at 9–10.

Moreover, the statute directs that “[a] decision of the Surface Transportation Board under this subsection *shall be binding* on the parties to the dispute,” § 24712(c)(3) (emphasis added). Nevertheless, the Final Rule does not even provide for a “decision of the Surface Transportation Board,” let alone one that is binding. Rather, without so much as acknowledging the clear statutory language to the contrary,⁷ the Board summarily “[dis]agree[d] with the California Entities that § 11204 of the FAST Act authorizes or requires the Board to resolve PRIIA Section 209 disputes through binding arbitration.” Final Rule at 5.

The Board’s Final Rule “is thus at odds with one of the most basic interpretive canons, that ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant’” *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Indeed, the Final Rule completely

⁷ Despite quoting nearly every other provision of Subsection 24712(c), *see* Final Rule at 3, the Final Rule seems to pretend as though paragraph (3), “Binding Effect,” does not exist.

ignores the requirement that there (1) be a “decision of the Surface Transportation Board under this subsection” and (2) that that decision be binding. *See* § 24712(c)(3).

The Board’s departure from the plain language of Subsection (c) is brought into sharp relief by its virtually identical implementation of the dispute resolution mechanism mandated under Section 11305 of the FAST Act. While Section 11305 also requires the Board to “establish procedures for resolution of disputes brought before it under this paragraph, which may include the provision of professional mediation services,” it does *not* contain a requirement that any decision issued thereunder be binding. *See* 49 U.S.C. § 24905(c)(4). “‘Where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’” *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). But the Board’s Final Rule does not acknowledge this difference, and establishes a dispute resolution procedure under Subsection (c) that gives no effect to the clear mandate of the provisions Congress included in the statute.

CCJPA’s position finds support not only in the clear language of the statute, but also in Subsection (c)’s legislative history, which confirms that the Board’s Final Rule misses the mark. Much of the language for the Rail title of the FAST Act originated in the Passenger Rail Reform and Investment Act of 2015, H.R. 749, 114th Cong. § 203 (2015) (H.R. 749).⁸ Using nearly identical language to Subsection (c), H.R. 749 would have directed “The Surface Transportation Board [to] establish procedures for expedited resolution of disputes brought before it under this subsection,” and that “the decision of the Surface Transportation Board under this subsection shall be binding on the parties to the dispute.” *Id.* Explaining these provisions, the committee

⁸ H.R. Rep. No. 114-357, at 520, 522 (2015) (Conference Report).

report accompanying H.R. 764 unambiguously states that they establish “an expedited dispute resolution process *with the Surface Transportation Board functioning as the final arbiter.*” H.R. Rep. No. 114-30, at 14 (2015). While Subsection (c) eliminated the word “expedited,” and authorized the Board to *also* provide for “professional mediation services,” the operative language – that “the decision of the Surface Transportation Board under this subsection shall be binding” – remains the same. The Final Rule does not establish the Board’s role as “final arbiter.” Indeed, it establishes hardly any role for the Board at all.

B. The Board has Not Explained its Departure from the Statutory Text

Although the CCJPA and other California Entities explicitly raised these issues before the Board in their initial comments, the Board’s Final Rule largely mischaracterizes the CCJPA’s arguments or proffers counterpoints which do not hold water.

The Board largely sets aside the comments of CCJPA and the other California Entities as merely “suggesting” that binding dispute resolution would more “efficiently resolve disputes.” Final Rule at 4. While CCJPA certainly believes that to be true, the essence of its argument was that binding dispute resolution was in fact *required* by the express language of the statute. The Board, of course, may disagree with the CCJPA’s opinion as to the most efficient method of resolving disputes. However, it may not disregard Congress’ determination that, whichever form the Board’s dispute resolution procedures “under this subsection” take, they be “binding on the parties to the dispute.” *See* § 24712(c)(3).

To the extent that the Board asserts that it lacks authority to establish rules for binding resolution under Subsection (c), it is mistaken. Congress has spoken clearly, directing the Board to “establish procedures for resolution of disputes brought before [the Board] under this subsection,” and adding a requirement that “a decision of the [Board] under this subsection shall

be binding on the parties to the dispute.” See § 24712(c)(2)–(3).⁹ The fact that the “FAST Act specifically mentions professional mediation services, [but] does not state or otherwise suggest the use of arbitration as a potential dispute resolution procedure,” Final Rule at 5, is a distinction without a difference. The FAST Act provides that the dispute resolution procedures developed by the Board “*may include*” professional mediation services. This is a permissive directive, not a limiting one. It implies that the procedures do not necessarily have to include professional mediation services¹⁰ and that, if they do, such services are not – and, in fact, *cannot* under the clear statutory directive – be the exclusive means of dispute resolution. The Board was incorrect to read the FAST Act as authorizing *only* professional mediation services.

Moreover, the Board’s existing regulations demonstrate that explicit authorization is unnecessary. Part 1108 of the Board’s regulations, which provides for binding arbitration of certain disputes between shippers and rail carriers, was promulgated “pursuant to the authority of the STB to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate.” *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, STB Ex Parte No. 560 (Service Date Mar. 26, 1997). The Board did not then cite to any express authority to establish Part 1108. Thus, even assuming that the language of Section 11402 did not confer on the Board express authority to adopt a process for binding arbitration, the Board has not explained why it must be able to do so here.

⁹ The Board appears to confuse CCJPA’s argument that binding dispute resolution is required with the CCJPA’s suggestion that binding arbitration is the best method of fulfilling that requirement. While technically true that the FAST Act does not expressly “authorize or require the Board to resolve . . . disputes through binding *arbitration*,” see Final Rule at 5, there can be no doubt that this Section authorizes and requires the Board to provide for some form of binding dispute resolution.

¹⁰ The Board’s mere option to include professional mediation services is made clear by the language of the statute. “Congress’ use of the permissive ‘may’ . . . contrasts with the legislators’ use of a mandatory ‘shall’ in the very same [paragraph].” *Lopez v. Davis*, 531 U.S. 230, 241 (2001).

Finally, the Board claims that it does not need to take a “more significant role,” despite the statute’s direction that “the *Surface Transportation Board* conduct dispute resolution,” because “parties may bring contested matters under [§ 11204] . . . before the Board, guided by the Board’s existing Rules of Practice,” after a formal complaint has been filed. *See* Final Rule at 5. This argument is not persuasive for two reasons. First, the Board’s reliance on existing post-complaint procedures is inconsistent with Congress’ repeated use of the phrase “under this subsection” in Subsection (c), clearly intending that the dispute resolution procedure established thereunder would (1) be conducted by the Board and (2) be binding on the parties to the dispute. Congress knows how to instruct the Board to use existing procedures when that is its intent. *See* 49 U.S.C. § 28502 (“The Board shall conduct the nonbinding mediation [of trackage use requests by public transportation authorities] in accordance with the mediation process of section 1109.4 of title 49, Code of Federal Regulations, as in effect on the date of enactment of this section.”); *cf. Whitfield v. United States*, 543 U.S. 209, 216 (2005) (“Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so.”). Here, Congress required the Board to develop a streamlined dispute resolution process, but the Board did not.

Second, as the CCJPA explained in its initial comments, only disputes arising from the implementation of the cost allocation methodology approved under PRIIA Section 209 appear capable of formal adjudication by the Board. *See* PRIIA § 209(b). By contrast, the dispute resolution procedures mandated by Subsection (c) appear to be the only means of resolving disputes related to the rules and procedures of the State-Supported Route Committee or the invoices and reports required under 49 U.S.C. § 24712(b). Because the Board’s existing Rules of Practice provide for dispute resolution by the Board only *after* a formal complaint is

commenced, the Board's argument effectively forecloses all opportunities for binding dispute resolution of such issues. This result appears to be directly contrary to the Congressional directive in the statute.

C. Conclusion

The plain language of 49 U.S.C. § 24712(c) requires the Board to establish binding dispute resolution procedures to resolve certain matters arising under Section 209 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) and the activities of the State-Supported Route Committee. Because the Board's Final Rule fails to do so, the CCJPA respectfully requests that the Board grant this petition for reconsideration and commence supplementary rulemaking to establish binding procedures as Congress intended.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", with a long horizontal flourish extending to the right.

CHARLES A. SPITULNIK
ALLISON I. FULTZ
STEVEN L. OSIT
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW, Suite 800
Washington, DC 20036
(202) 955-5600

*Counsel for the Capitol Corridor
Joint Powers Authority*

Dated: December 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December 2016, I have caused a copy of the foregoing Petition of the Capitol Corridor Joint Powers Authority for Reconsideration of the Final Rules Implementing Dispute Resolution Procedures under the Fixing America's Surface Transportation Act Of 2015 to be served upon the following individuals via first class mail, postage prepaid:

William H. Herrmann
VP and Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Christopher S. Perry
Senior Trial Attorney
U.S. Department of Transportation
1200 New Jersey Avenue S.E.
Washington, D.C. 20590

Bruce Roberts
Chief, Div. of Rail and Mass Transportation
California Department of Transportation
P.O. Box 942873, MS-74
Sacramento, CA 94274-0001

Brian Schmidt
Director of Operations
San Joaquin Joint Powers Authority
949 East Channel Street
Stockton, VA 95202

Jennifer L. Bergener
Managing Director
LOSSAN
550 South Main Street
P.O. Box 14184
Orange, CA 92863-1584

A handwritten signature in dark ink, appearing to read "Charles A. Spitulnik", with a long, sweeping horizontal line extending to the right.

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com

Dated: December 19, 2016