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BY HAND

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

Re: *In Re Southeastern Pennsylvania Transportation Authority*
STB Docket No. FD 36281

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find the Petition for Relief under 49 U.S.C. § 24903 filed by Southeastern Pennsylvania Transportation Authority on March 11, 2019.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Paul A. Cunningham'.

Paul A. Cunningham
Counsel for Southeastern Pennsylvania
Transportation Authority

Enclosures

FILED
March 11, 2019
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
March 11, 2019
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36281

PETITION BY THE
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY
FOR RELIEF UNDER 49 U.S.C. § 24903



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BEFORE THE
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SEPTA'S PETITION FOR RELIEF UNDER 49 U.S.C. § 24903

The Southeastern Pennsylvania Transportation Authority ("SEPTA") petitions the Surface Transportation Board (the "Board"), under 49 U.S.C. § 24903(c)(2), to:

(1) Institute a proceeding, establish a procedural schedule, and, on the basis of that proceeding, enter an order prescribing the terms of an agreement to govern SEPTA's continued use of passenger rail stations to provide essential commuter rail transportation service on the Northeast Corridor ("NEC"),¹ including associated parking facilities (the "Stations"). The National Railroad Passenger Corporation ("Amtrak") has a property interest in the Stations and Amtrak and SEPTA cannot agree on the terms of SEPTA's use. The Board's order should limit SEPTA's costs for the Stations to the amount SEPTA pays directly to operate, maintain, and repair the Stations, thereby satisfying the NEC Cost Allocation Policy ("PRIIA Policy") adopted by the Northeast Corridor Commission under the Passenger Rail Investment and Improvement

¹ The Northeast Corridor is generally defined as "the main line between Boston, Massachusetts, and the District of Columbia, and the Northeast Corridor branch lines connecting to Harrisburg, Pennsylvania, Springfield, Massachusetts, and Spuyten Duyvil, New York, including the facilities and services used to operate and maintain those lines." *See* 49 U.S.C. § 24904(e). The portion of the NEC over which SEPTA's Regional Rail system operates is referred to herein as the "SEPTA Lines."

Act of 2008 Pub. L. No. 110-42, 122 Stat. 4922 (codified as amended at 49 U.S.C. § 24905) (“PRIIA”); and

(2) Issue, for the pendency of this proceeding, an interim service order under 49 U.S.C. § 24903(c)(2), effective March 29, 2019, requiring Amtrak to permit SEPTA to use the Stations under the terms and compensation prescribed by their now effective January 1, 1987 agreement, as amended and extended (the “Station Agreement”).²

SEPTA requests expedited consideration of this Petition because the Station Agreement expires on March 29, 2019, Amtrak has refused to extend the Station Agreement, and termination of, or material changes in, the Station Agreement would preclude or limit SEPTA’s provision of the commuter rail service it now offers on the NEC.

REASONS FOR THE PETITION

This Petition is necessary because Amtrak contends that SEPTA may not operate commuter rail service under the Station Agreement unless SEPTA agrees to pay \$1.5 million per year in so-called “rent” for continued use of the Stations and accepts certain limitations on its use of the Stations. SEPTA already pays Amtrak everything it owes under federal law: more than \$50 million as an annual operating fee calculated under the PRIIA Policy and the costs SEPTA incurs directly to operate and maintain the Stations, in addition to the over \$228 million that SEPTA has invested and continues to invest in capital improvements to the Stations over the last fifteen years. Amtrak’s demand for “rent” and other new terms is contrary to PRIIA and other

² While labeled a “Lease Agreement” between SEPTA and Amtrak, and in past documents labeled a “License Agreement” between the parties, we refer to this document as the “Station Agreement” because it reflects an allocation of responsibilities for the maintenance and expenses of the Stations. Some of the Stations originally covered by the Station Agreement have since been closed and others have been added by amendment.

law. SEPTA and Amtrak cannot agree and SEPTA invokes the Board's jurisdiction under 49 U.S.C. § 24903(c)(2) to resolve the dispute.

Amtrak's demand would upend the basic relationship that has existed between the two carriers since SEPTA began using the Stations in 1983. In that year, SEPTA assumed Conrail's responsibility to provide commuter rail service in the greater-Philadelphia area and was granted the operating rights required to meet that responsibility over the NEC – including the concomitant right to use the rail stations, platforms, and parking facilities – under the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.*, (“3R Act”), the United States Railway Association's Final System Plan adopted under that statute, and the Northeast Rail Services Act of 1981, 45 U.S.C. § 1101 *et seq.* (“NERSA”). Those rights included rail property referred to as a “Commuter Passenger Service Easement,” that Conrail transferred to SEPTA under NERSA to guarantee SEPTA's right to continue operating commuter rail service along the NEC.³

Most of the thirty-five-year Amtrak-SEPTA relationship has been covered by two agreements. The “Northeast Corridor Access and Services Agreement” (the “Access Agreement”) governs the allocated costs for operating and maintaining the NEC.⁴ SEPTA pays

³ Amtrak has sued SEPTA in the United States District Court for the District of Columbia (Docket No. 1:19-cv-00537-TNM) seeking a declaratory judgment that SEPTA does not have an easement right to access portions of the NEC and the Stations. SEPTA disputes that contention and will show that it has statutory and property rights to access the Stations and conduct commuter operations on the NEC.

The issue of SEPTA's property rights to use the NEC and the Stations is distinct but related to the compensation questions presented in this Petition. The Board could decide the matters raised in the instant Petition without awaiting disposition of the District Court action. SEPTA, however, would not object if the Board maintained the status quo as required under 49 U.S.C. § 24903(c)(2) but stayed further proceedings pending disposition of the District Court action.

⁴ 30th Street Station, which is used by both Amtrak and SEPTA, is subject to a separate agreement, which is not addressed directly in this Petition.

Amtrak annual operating and capital costs, calculated in accordance with the PRIIA Policy, which was \$50.9 million for Fiscal Year 2019 and escalates each year. Amtrak is expected to dispatch trains and maintain and make state-of-good repair improvements to the right-of-way infrastructure, including track, communications, signals, and catenary on the NEC to benefit Amtrak and the commuter operators. SEPTA, however, which operates both on and off the NEC, is experiencing its worst on-time commuter rail performance on the Amtrak-controlled NEC.

The Station Agreement requires SEPTA to pay Amtrak the nominal fee of \$1.00 per year, and bear all costs of upkeep, utilities, maintenance, and repairs at the Stations. Those costs amount to roughly \$4 million per year. SEPTA also annually makes millions of dollars of capital investments in the Stations that are not required by the Station Agreement. SEPTA and Amtrak started negotiating a new station agreement more than three years ago. Amtrak, however, has made unreasonable demands as a condition to extend the Station Agreement.

Amtrak's most egregious demand is that SEPTA pay "rent" for the Stations over and above the amounts SEPTA pays under the Station Agreement and Access Agreement. Amtrak first demanded that SEPTA pay "fair market value" "rent" to use the Stations. It then sought "fair market value" "rent" for: (1) any Station SEPTA may desire to "commercially develop" and (2) any Station parking facilities that SEPTA desires to preserve for commuter passengers where Amtrak pursues commercial development of Station areas. Most recently, Amtrak demanded \$1.5 million in "annual fair market rent", with an annual escalation rate of 2%.

Amtrak's "rent" demand is unrelated to any cost imposed on Amtrak by SEPTA's commuter rail operations. It is predicated solely on the fallacious assumption that Amtrak can charge SEPTA fair market rent in addition to the operating and capital costs recoverable pursuant

to PRIIA and that SEPTA can be displaced for other tenants willing to pay a higher market value.

Accordingly, Amtrak's demand is contrary to federal law. Ejecting SEPTA from the Stations, limiting SEPTA's use of the Stations, reducing or eliminating commuter parking at the Stations, or requiring SEPTA to pay "rent" in excess of the costs SEPTA incurs to operate the Stations would violate the governing law, including PRIIA, and impose unjustified burdens on SEPTA, its customers, governmental funding sources, and the taxpayers.

Amtrak's demands have led to an impasse in negotiations for a new Station Agreement that requires the Board's to exercise its jurisdiction under 49 U.S.C. § 24903(c)(2).

FACTUAL BACKGROUND

A. SEPTA's Commuter Rail Operations.

The SEPTA Regional Rail Division – the nation's fifth busiest commuter operator – handles daily over 100,000 passengers. It provides commuter rail service on thirteen lines to over 150 active stations in and around Philadelphia, Pennsylvania. Amtrak has a property interest in the three lines that are part of the Northeast Corridor ("NEC"):

- (1) SEPTA's Paoli/Thorndale Line, between Philadelphia and Thorndale (near the western edge of Chester County), uses Amtrak's Harrisburg Line (which runs from Philadelphia to Harrisburg);
- (2) SEPTA's Trenton Line, between Philadelphia and Trenton, NJ, uses Amtrak's NEC mainline (which runs from Washington, D.C. to Boston, MA); and
- (3) SEPTA's Wilmington/Newark Line, between Philadelphia and Wilmington, DE, also uses Amtrak's NEC mainline.

Each weekday, over these lines, SEPTA stops at 46 stations, runs 207 trains, and serves 11,000 customers while providing 12 million passenger rides annually. Along the same portion, Amtrak operates just fourteen trains, transporting approximately 300,000 annual customers.

SEPTA is thus the primary user of the NEC within the greater Philadelphia area. SEPTA's commuter rail operations carry over 94% of the riders served at the Stations by Amtrak and SEPTA. Amtrak's intercity service stops at only six Stations – Ardmore, Paoli, Downingtown, Exton, North Philadelphia, and Cornwells Heights. In addition to serving those six Stations jointly with Amtrak, SEPTA alone serves passengers at an additional thirty-nine Stations.

Since passage of the 4R Act, Amtrak has had the authority to contract with commuter rail operators to govern commuter rail service on the NEC lines in which Amtrak has a property interest. Amtrak may:

make agreements with other carriers and commuter authorities to grant, acquire, or make arrangements for rail freight or commuter rail passenger transportation over, rights of way and facilities acquired under the [3R Act] and the [4R Act].

49 U.S.C. § 24903(a)(6).⁵ SEPTA's statutory right to operate commuter rail service over the NEC requires that Amtrak and SEPTA have an arrangement allocating responsibilities and expenses and govern service along those lines.

An agreement under 49 U.S.C. § 24903(a)(6) “shall provide for reasonable reimbursement of costs *but may not cross-subsidize intercity rail passenger, commuter rail passenger, and rail freight transportation.*” *Id.* at § 24903(c)(1) (emphasis supplied). Beginning in December 1982, Amtrak and SEPTA entered agreements regarding SEPTA's continued use of, the Stations, specifically including the “public

⁵ This provision was added by Sections 701(a)(6) and 705 of the 4R Act. 90 Stat. 31, 119, 123. The original language provided for an “agreement to be on such terms and conditions as are necessary to reimbursement of costs on an equitable and fair basis, except that cross subsidization among intercity, commuter, or rail freight services is prohibited.” 90 Stat. 119. Thus, while the language of the initial provision has been amended over time, the key principles that agreements between Amtrak and a commuter agency would provide only for the reasonable reimbursement of costs and prohibit cross-subsidization among intercity and commuter passenger services have existed since the very beginning.

parking areas.” Under these agreements, SEPTA paid no additional compensation for the right to access the Stations – a right Congress granted to SEPTA in the 3R Act and subsequently confirmed in NERSA – but bore the cost of keeping the Stations clean and in good working order, improving the Stations, and paying all utilities.

B. The Station Agreement.

On January 1, 1987, Amtrak and SEPTA entered into the Station Agreement. The Station Agreement had a thirty-year term, and was scheduled to expire on December 31, 2016. It has since been extended by the parties until March 29, 2019.

Under the Station Agreement, consistent with SEPTA’s rights and obligations under federal law, SEPTA pays Amtrak \$1 per year, plus “all costs, fees, interest, charges, expenses, reimbursements, and obligations of every kind and nature whatsoever relating to the [Stations].” The Station Agreement defines the premises covered by the agreement to include “parking spaces which are paved, marked, and designated for exclusive use of intercity and commuter rail passengers.” SEPTA pays directly the Stations’ utility costs, including utility costs where Amtrak or its tenants occupy part of a Station. The Station Agreement makes SEPTA responsible for maintaining the Stations in “constant good order,” for keeping sidewalks and platforms clear of snow and ice, for indemnifying Amtrak from all claims arising from or incidental to the stations, for complying with laws and ordinances, and for complying with environmental laws.

Under the Station Agreement, SEPTA pays more than its fair share of costs. Over the last three years, SEPTA has paid approximately \$4 million per year for the costs of operating and maintaining the Stations. Amtrak has paid nothing to use the six joint-use Stations; instead, SEPTA has paid all utilities and maintenance costs. SEPTA incurs annual costs of about \$320,000 at those joint-use Stations. Using the PRIIA Policy cost allocation methodology,

approximately \$65,000 would be Amtrak's proportional share if it contributed. Amtrak has also leased portions of certain joint-use Stations to third parties. While SEPTA has paid all expenses associated with the space occupied by those tenants, Amtrak has enjoyed all the tenant revenue.

Under the Station Agreement, SEPTA has invested, over and above what the Station Agreement requires, in capital improvements – \$228 million over the last fifteen years. Amtrak has paid nothing for those improvements; instead, it has charged SEPTA approximately \$30 million for support services such as engineering review of plans, flagging services, and inspections related to SEPTA's performance of the capital project work. SEPTA plans to spend hundreds of millions on Station capital improvements in the coming years.

C. Negotiations for a Renewed Agreement.

In the more than three years that SEPTA and Amtrak have been negotiating to extend the Station Agreement, Amtrak's position has evolved to include a demand for "rent" based on the Stations' market value for other commercial use.

On March 6, 2017, Amtrak proposed that SEPTA choose one of two scenarios: an "As Is/Where Is" scenario or a "Highest and Best Use" scenario." Under this scheme, Amtrak (or Amtrak and SEPTA jointly) would hire an appraisal firm to appraise the Stations and calculate a rental value as if SEPTA were a commercial tenant enjoying a non-rail use rather than a commuter authority with a legal right to use the Stations to provide commuter service.

Next, on May 7, 2018, Amtrak proposed a "Term Sheet" that would require SEPTA to pay "fair market value" for: (1) any of the Stations that SEPTA seeks to "commercially develop" (identified in the Term Sheet as "Development Properties"); and (2) any of the Station parking facilities that SEPTA seeks to maintain for the benefit of the commuting public (identified in the Term Sheet at "Parking Replacement Properties"). While SEPTA could access the Stations,

excluding the parking facilities, under the Term Sheet for \$1.00, SEPTA would pay fair-market “rent” for use of the parking facilities necessary to SEPTA’s commuter rail services.

Under Amtrak’s Term Sheet, unless SEPTA pays the commercial market value for the Station parking facilities, Amtrak can take them all for “commercial development,” leaving the commuters, some of whom are elderly or disabled, without parking.

On February 19, 2019, Amtrak declared the Station Agreement would terminate on March 29, 2019, and SEPTA could continue to use the Stations only if SEPTA paid “annual fair market rent” of \$1.5 million as a “hold-over tenant”, with an annual escalation rate of 2%. That “rent” would be over and above the amounts SEPTA already pays under the Access Agreement and the costs SEPTA incurs under the Station Agreement to maintain and operate the Stations. Amtrak claimed that the fair market value figure of \$1.5 million was based upon an independent fair market valuation of the parcels of land that SEPTA uses. When asked for the legal basis for this demand, Amtrak could provide no basis under PRIIA or other controlling law.

SEPTA has a federally mandated right and duty to operate commuter service over Amtrak’s lines, including the right to use Stations and related parking facilities. It cannot accept Amtrak’s demand for unwarranted payments and service limitations. This negotiating impasse and the impending risk to SEPTA’s ability to continue commuter operations requires the Board to exercise its jurisdiction under 49 U.S.C. § 24903(c)(2) to resolve the dispute, assure continued commuter service, and set the terms of that service consistent with PRIIA.

THE BOARD SHOULD DETERMINE AND ENFORCE TERMS, AND ASSURE SEPTA’S CONTINUED ACCESS, AS REQUIRED BY THE GOVERNING LAW

If the parties cannot agree, 49 U.S.C. § 24903(c)(2) requires the Board to order that the transportation continue and to determine compensation for the transportation within 120 days

after the dispute is submitted. In setting the compensation, the Board is prohibited from allowing cross-subsidization between commuter rail passenger and intercity rail passenger and rail freight transportation. *Id.*

PRIIA established a Northeast Corridor Commission and provided for the Commission to create and adopt a PRIIA Policy, which was to be a “standardized formula for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation.” 49 U.S.C. § 24905(c)(1)(A). Once the formula was finalized, PRIIA required Amtrak and the commuter agencies to “implement new agreements for usage of facilities or services based on the formula.” *Id.* at § 24905(c)(2). The Commission adopted the final policy on September 17, 2015.

On December 4, 2015, the Fixing America’s Surface Transportation Act (“FAST Act”) was signed into law. The FAST Act requires the STB to determine compensation if the parties cannot agree on the new agreements contemplated by 24905(c)(2).⁶ In determining compensation under section 24905(c), the STB must “tak[e] into consideration the policy developed [by the Commission], as applicable.” 49 U.S.C. § 24905(c)(2).

While the Board determines the terms to govern SEPTA’s continued use of the Stations, it must require Amtrak to allow SEPTA to continue to use the Stations and other portions of the NEC for SEPTA’s commuter operations under the Stations Agreement. 49 U.S.C. § 24903(c)(2).

⁶ Prior to the FAST Act, PRIIA required the Commission to petition the STB if the relevant entities failed to implement new agreements with the policies. PRIIA §212(c)(2), 122 Stat. 4923. The FAST Act changed that provision, permitting the parties themselves to directly petition the STB.

PROCEDURAL SCHEDULE

SEPTA asks the Board to initiate a proceeding to prescribe the terms of an agreement for SEPTA's continued use of the Stations and parking facilities used by SEPTA for the provision of essential commuter rail transportation service. Section 24903(c)(2) requires that the Board decide the issues within 120 days after the dispute is submitted. SEPTA proposes that the Board's initial order adopt this procedural schedule, subject to revisions jointly proposed by Amtrak and SEPTA.

Petition Date + 14 days – Joint submission by SEPTA and Amtrak setting forth the issues; discovery begins

Petition Date + 45 days – Discovery closes

Petition Date + 60 days – SEPTA Opening Statement

Petition Date + 80 days – Amtrak Reply Statement

Petition Date + 90 days – SEPTA Rebuttal Statement

Petition Date + 120 days – Final STB Decision

CONCLUSION

The Board is authorized to prescribe the terms for SEPTA's continued use of the Stations and parking facilities used by SEPTA to provide commuter service. Negotiations between Amtrak and SEPTA have reached an impasse. SEPTA requests that the Board exercise that authority and: 1) commence a proceeding; 2) adopt SEPTA's proposed procedural schedule; and 3) issue an interim order requiring Amtrak to continue to provide SEPTA access to the Stations under the existing Station Agreement and compensation as required by the terms of 49 U.S.C. § 24903(c)(2) to prevent disruption of commuter rail passenger service.



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Counsel for Southeastern Pennsylvania Transportation Authority

March 11, 2019

VERIFICATION

I, Gino Benedetti, declare under penalty of perjury that the foregoing Petition by the Southeastern Pennsylvania Transportation Authority for Relief under 49 U.S.C. § 24903 is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on this 11th day of March, 2019.

A handwritten signature in black ink, appearing to read 'G. Benedetti', written over a horizontal line.

Gino Benedetti
General Counsel
Southeastern Pennsylvania Transportation Authority