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By Noah Vincent DeSimone

ABSTRACT

While the Trump Administration's "Infrastructure Week" initiative failed to address U.S. infrastructure needs, the Biden Administration's Bipartisan Infrastructure Deal sent a whopping $66 billion to Amtrak to address funding shortfalls. However, the Biden-era bill is 'weak' in not adequately addressing Amtrak train delays on the freight railroads on which nearly all Amtrak trains run. The delays violate a federal statute providing Amtrak trains preference over freight trains on freight railroads' tracks. The current scheme of addressing violations includes proceedings by the Surface Transportation Board and rare enforcement by the Department of Justice. A solution is to add a third option and allow Amtrak itself to sue the freight railroads in court to make them comply with the law.

The Bipartisan Infrastructure Deal attempts to solve the delay problem by commanding the STB to hire more employees to oversee proceedings between Amtrak and freight railroads. Still, the pace of other STB proceedings, the STB's structure, and judicial review of STB actions are all outmoded by Amtrak's self-interest in asserting its right in court. Moreover, entrusting the Department of Justice to bring suit on behalf of Amtrak could prove inconsistent depending on the presidential administration and politics of the Department of Justice at any given time. Other alternatives to this scheme are expensive, wasteful, and unrealistic, given the fight to secure the funding in the Bipartisan Infrastructure Deal.

Worldwide examples demonstrate how freight and passenger services can coexist, and given Amtrak services' importance to many Americans, as well as the environmental and economic benefits of Amtrak, allowing Amtrak to enforce its preference is both achievable and important. Considering the ongoing delay issues, it is also arguably necessary to ensure the incoming $66 billion is put to good use. Without enshrining Amtrak with the power to enforce its preference, the high-priced Bipartisan Infrastructure Deal finds itself 'missing the train.'

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INTRODUCTION

On November 5, 2021, the United States Senate passed its largest infrastructure spending bill in history.[1] President Joe Biden's first major agenda victory, the Infrastructure Investment and Jobs Act—coined the "Bipartisan Infrastructure Deal"—secured $66 billion for Amtrak and was "the largest investment in passenger rail since the creation of Amtrak" fifty years ago.[2] During a speech on the bill's passage, Biden made a dig at his predecessor's failed "Infrastructure Week" initiative,[3] exclaiming, "Finally, Infrastructure Week!"[4] But Biden's bill, while providing funds for Amtrak to add new train routes[5] to reverse years of low funding,[6] has a flaw that might make it 'weak.' The Bipartisan Infrastructure Deal does not adequately address a problem that Amtrak has dealt with for its entire existence, a problem which will be exacerbated by the dozens of new routes Amtrak plans on adopting[7] in response to the Bipartisan Infrastructure Deal's $66 billion in

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[1] Josh Fisher, *Biggest Infrastructure Spending Bill in History Heads to President's Desk*, BULK TRANSPORTER (Nov. 10, 2021), https://www.bulktransporter.com/news/article/21180908/biggest-infrastructure-spending-bill-in-history-heads-to-presidents-desk.

[2] Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 22101 (2021); *Fact Sheet: Historic Bipartisan Infrastructure Deal*, THE WHITE HOUSE (July 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/28/fact-sheet-historic-bipartisan-infrastructure-deal/.

[3] Alexander Nazaryan, *"Infrastructure Week" Symbol of Trump's Many Problems*, NEWSWEEK (June 9, 2017), https://www.newsweek.com/infrastructure-week-symbol-all-ails-trump-623584.

[4] Xander Landen, *'Finally, Infrastructure Week': Biden Takes Jab at Trump After House Approves Bipartisan Bill*, NEWSWEEK (Nov. 6, 2021), https://www.newsweek.com/finally-infrastructure-week-biden-takes-jab-trump-after-house-approves-bipartisan-bill-1646697.

[5] Luz Lazo, *The Infrastructure Package Puts $66 Billion Into Rail. It Could Power the Biggest Expansion in Amtrak's 50-Year History*, WASH. POST (Nov. 8, 2021, 7:13 PM), https://www.washingtonpost.com/transportation/2021/11/08/amtrak-infrastructure-bill-funding/.

[6] *See infra* Part I.

[7] *Maps—Amtrak Connects US*, NAT'L R.R. PASSENGER CORP. (2021), https://www.amtrakconnectsus.com/maps/; *see also* NAT'L R.R. PASSENGER CORP., MORE TRAINS. MORE CITIES. BETTER SERVICE. AMTRAK'S VISION FOR IMPROVING TRANSPORTATION ACROSS AMERICA , 33–

funding.[8] Amtrak, which by design runs its trains almost exclusively on other private freight railroads' tracks,[9] has no way of enforcing its right to statutory preference codified into law at 49 U.S.C. § 24308(c).[10] As written in § 24308(c), "[e]xcept in an emergency . . . Amtrak has preference over freight transportation,"[11] meaning freight trains should yield to Amtrak passenger trains when the latter uses the former's tracks.[12]

Since its founding, Amtrak remains impotent in forcing freight railroads' trains to yield to its own trains. On the one hand, Amtrak is at the mercy of the Department of Justice ("DOJ"), the only body that may sue on behalf of Amtrak to enforce § 24308(c).[13] The DOJ has only sued a noncomplying railroad once, obtaining a consent order in a day's time for a private freight railroad to instruct its employees to yield to Amtrak trains and report delays of more than ten minutes to

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72 (2021), https://www.amtrakconnectsus.com/wp-content/uploads/2021/06/Amtrak-2021-Corridor-Vision_2021-06-01_web-HR-maps-2.pdf.

[8] *Id.See* Sally French, *How Amtrak Train Travel Could Grow Under Infrastructure Bill*, YAHOO (Nov. 8, 2021), https://www.yahoo.com/now/amtrak-train-travel-could-grow-234314672.html.

[9] Ernie Smith, *The Consequences of Amtrak Not Owning Its Own Tracks*, ATLAS OBSCURA (May 2, 2017), https://www.atlasobscura.com/articles/amtrak-tracks-late-trains.

[10] Madeleine Ngo, *An Obstacle to Amtrak Expansion That Money Won't Solve*, N.Y. TIMES (Aug. 6, 2021), https://www.nytimes.com/2021/08/06/us/politics/amtrak-expansion-freight.html.

[11] 49 U.S.C. § 24308(c); NAT'L R.R. PASSENGER CORP., AMTRAK AND FREIGHT RAILROADS: THE PUBLIC BARGAIN 5 nn.20–24, https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/position-papers/white-paper-amtrak-and-frieght-railroads.pdf.

[12] *See* Meredith Martin Richards, *Federal Rail Policy: On-Time Performance and the Failure of the "Preference Provision" for Amtrak Trains*, VA. RAIL POL'Y INST., http://varpi.org/node/61 (last visited Mar. 3, 2022).

[13] *See Southern Pacific Agrees to Amtrak Demand for Passenger Train Priority*, N.Y. TIMES (Dec. 22, 1979), https://www.nytimes.com/1979/12/22/archives/southern-pacific-agrees-to-amtrak-demand-for-passenger-train.html [hereinafter *Southern Pacific Agrees to Amtrak Demand*]; NAT'L R.R. PASSENGER CORP., MYTHBUSTERS: THE TRUTH ABOUT AMTRAK'S LEGAL RIGHT TO PREFERENCE, https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/HostRailroad Reports/mythbusters-enforcing-amtraks-legal-right-to-preference.pdf (noting the DOJ retains preference enforcement powers).

Amtrak.[14] On the other hand, Congress's latest attempt in solving Amtrak's delay problem—the Passenger Rail Improvement and Investment Act of 2008 ("PRIIA") and the resulting Federal Railroad Administration ("FRA") and Amtrak "Metrics and Standards" rulemaking that charges the Surface Transportation Board ("STB") with addressing Amtrak's delays—has been remiss in solving Amtrak's delay problem.[15] The Bipartisan Infrastructure Deal does command that the STB hire more personnel to adjudicate Amtrak's delays.[16] However, not allowing Amtrak to enforce its own preference, and instead giving that power to the DOJ and the STB, threatens the smooth operation of Amtrak's planned new trains. These trains will run mostly on the tracks of private freight railroads, railroads that should require their trains to yield to Amtrak under § 24308(c).

Considering Amtrak's history as an organization conceived to take over these once-ailing railroads' passenger equipment and operations in exchange for using their infrastructure, Amtrak itself, i.e., its own general counsel's office, must be able to sue to enforce its own statutory preference right over freight.[17] STB proceedings under the Metrics and Standards threaten the

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[14] *See* N.Y. TIMES, *supra* note 13; NAT'L R.R. PASSENGER CORP., *supra* note 13.

[15] *See Delayed by Freight: Why America Needs the Rail Passenger Fairness Act*, NAT'L R.R. PASSENGER CORP. (2022), https://www.amtrak.com/about-amtrak/on-time-performance.html (noting on-time performance of several trains was below 50% in May 2021, with one train—the *Silver Star*—arriving on-time a paltry 18% of the time).

[16] *See* Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 22309 (2021); *Senator Cantwell Shares Local Funding From $550 Billion Infrastructure Bill*, KXRO NEWS RADIO (Nov. 16, 2021, 7:22 AM), https://www.kxro.com/senator-cantwell-shares-local-funding-ffrom-550-billion-infrastructure-bill/ ("The bill also requires the Surface Transportation Board to hire additional staff to enforce Amtrak's preference rights to ensure freight railroads allow Amtrak trains to run on time.").

[17] *See infra* Section III.A; *see also* David Konarske Jr., *The Failure of Passenger Preference and the Politics of Non-Enforcement*, 53 LOY. U. CHI. L.J. 583, 606 (2022) (arguing that Amtrak should be granted "litigating authority" to enforce its preference rights). This article endorses and expands upon Konarske's contribution by specifically detailing both Amtrak's preference in the context of the railroad's history, as well as the weakness of the Bipartisan Infrastructure Deal in not addressing Amtrak's preference enforcement problem.

success of Amtrak's service expansion in light of the proceedings' glacial pace, the STB's eye towards freight railroads, and the reviewability of agency actions like those by the STB. Additionally, the DOJ's lax enforcement history of Amtrak's preference rights makes it ill-suited to enforce preference.[18] Without allowing Amtrak to enforce its preference, the new routes the railroad proposes will suffer from delays caused by insubordinate freight railroads. Considering the $66 billion already sent Amtrak's way via the Bipartisan Infrastructure Deal, there is no more cost-effective option to expand Amtrak's service other than by allowing Amtrak to rightfully assert the preference it is owed by freight railroads under existing law.

I. HOW WE GOT HERE: THE HISTORY OF AMTRAK

This Part chronicles American passenger rail from its heyday of titanic infrastructure investment to its crumbling into crisis. Amtrak was formed to solve the crisis and save passenger rail, but it has suffered delays and tight budgets since its beginnings. While the Bipartisan Infrastructure Deal addresses Amtrak's funding shortfalls, it—as well as its predecessor, the PRIIA—has not adequately addressed Amtrak's delays.

A. THE GOLDEN AGE OF AMERICAN PASSENGER RAIL

For the latter half of the nineteenth century and the former half of the twentieth, the domestic railroad system was responsible for a majority of citizens' intercity travel.[19] Like today's airlines, railroads were private enterprises that transported passengers using their own equipment. Similar to aircrafts for airlines, railroads had "rolling stock," meaning train locomotives and cars.[20]

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[18] *See infra* Section III.B.

[19] *American Railroads in the 20th Century*, SMITHSONIAN NAT'L MUSEUM OF AM. HIST., https://americanhistory.si.edu/america-on-the-move/essays/american-railroads (last visited Mar. 3, 2022).

[20] *What Items Are Covered by the Term "Rolling Stock"?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/epcra/what-items-are-covered-term-rolling-stock (last visited Mar. 4, 2022) ("The

But unlike today's private airlines, or bus operators, private railroads maintained their own vast infrastructure network.[21] These networks not only included the rails, ties, spikes, and ballast that trains ran on,[22] but they also included stations—the largest of which were in city centers surrounded by desirable real estate[23]—as well as storage yards often square miles wide,[24] baggage claim facilities,[25] railroad police,[26] and signaling systems.[27] Moreover, railroads maintained the

term 'rolling stock' is a generic term that is used in the railroad industry to denote anything on rail wheels. The term includes locomotives, freight cars, flat cars, and other vehicles that use steel wheels on railroad tracks."); *National Railways*, ENCYC. BRITANNICA (Feb. 9, 2010), https://www.britannica.com/topic/national-railway; Kevin Bonsor, *How Airlines Work*, HOWSTUFFWORKS, https://science.howstuffworks.com/transport/flight/modern/airline1.htm (last visited Mar. 3, 2022).

21 Jeff Davis, *Amtrak at 50: The Rail Passenger Service Act of 1970*, ENO CTR. FOR TRANSP. (Oct. 30, 2020), https://www.enotrans.org/article/amtrak-at-50-the-rail-passenger-service-act-of-1970/.

22 Justin Hayward, *Airport Infrastructure—Everything You Need to Know*, SIMPLE FLYING (Jan. 11, 2021), https://simpleflying.com/airport-infrastructure/.

23 *See, e.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (doctrinal property case often assigned to first-year law students for teaching regulatory takings law). In *Penn Central*, the insolvent Penn Central Transportation Company sued the City of New York for obstructing its ability to sell its valuable air rights to a developer to build a skyscraper atop Manhattan's Grand Central Terminal. *Id.*

24 *See, e.g.*, Daniel Terdiman, *Trains for Miles! Inside the World's Largest Rail Yard (Pictures)*, CNET (July 27, 2013, 4:00 AM), https://www.cnet.com/pictures/trains-for-miles-inside-the-worlds-largest-rail-yard-pictures/. Bailey Yard—which is 2,850 acres in area, or more than four square miles—is far larger than the largest aircraft hangar in the United States, or even some of the largest passenger aircraft hangars. *See, e.g.*, *The World's 7 Largest Aircraft Hangars*, ALASKA STRUCTURES (June 6, 2016), https://alaskastructures.com/aviation/worlds-largest-aircraft-hangars/; JT Genter, *Inside North America's Only Airbus A380 Hangar*, THE POINTS GUY (Oct. 18, 2019), https://thepointsguy.com/news/lax-qantas-airbus-a380-hangar/.

25 *See, e.g.*, KURT C. SCHLICHTING, GRAND CENTRAL TERMINAL: RAILROADS, ARCHITECTURE AND ENGINEERING IN NEW YORK 60–63 (2001) (describing how the Pan Am Building, now the MetLife Building, was built on the former site of New York Central Railroad's Grand Central Terminal baggage facilities).

26 *See, e.g.*, *Union Pacific Special Agents*, UNION PAC., https://www.up.com/aboutup/community/safety/special_agents/index.htm (last visited Mar. 3, 2022).

27 *See, e.g.*, Sehvilla Mann, *What's That Signal by the Tracks*, WMUK (Oct. 8, 2015, 6:11 PM), https://www.wmuk.org/post/whats-signal-tracks#stream/0.

tunnels,[28] bridges,[29] cuts,[30] level crossings,[31] causeways,[32] and car ferries[33] that their trains ran on. Many railroads even owned their own hotels[34] and resorts.[35] Most airlines, on the other hand, did not and do not pay for airspace, airports, gates, terminals, runways, fuel tanker trucks, underground refueling systems, baggage claim conveyor systems,[36] airport security,[37] air traffic control,[38] or parking garages.[39]

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[28] *See, e.g.*, *The Shifting Tunnels*, PBS, https://www.pbs.org/wgbh/americanexperience/features/the-rise-and-fall-of-penn-station-shifting-tunnels/ (last visited Mar. 3, 2022).

[29] *See, e.g.*, Marjorie Hopkins, *Tulip Trestle a Giant Among Railroad Bridges*, TRIB.-STAR (Aug. 6, 2014), https://www.tribstar.com/news/lifestyles/tulip-trestle-a-giant-among-railroad-bridges/article_208d4501-2374-5b4e-9363-9a30fb667666.html.

[30] *See, e.g.*, *History*, BERGEN ARCHES PRES. COAL., https://www.bergenarches.com/history (last visited Mar. 3, 2022).

[31] *See, e.g.*, *Railroad Crossings in our Communities*, UNION PAC., https://www.up.com/aboutup/community/safety/railroadcrossings/index.htm (last visited Mar. 3, 2022).

[32] *See, e.g.*, Shundana Yusaf & Lisa Benham, *Lucin Cutoff*, SOC'Y OF ARCHITECTURAL HISTORIANS ARCHIPEDIA, https://sah-archipedia.org/buildings/UT-01-057-0074 (last visited Mar. 3, 2022).

[33] *See, e.g.*, Kirk Moore, *Return of the Railroad Barge*, WORKBOAT (Nov. 13, 2017), https://www.workboat.com/viewpoints/return-rail-car-float.

[34] *See, e.g.*, Christopher Bonanos, *So Long to the Hotel Pennsylvania*, CURBED (Apr. 14, 2021), https://www.curbed.com/2021/04/so-long-to-the-hotel-pennsylvania.html; Carter B. Horsley, *The Hotel Pennsylvania: Wheret are the Preservations?*, THE CITY REVIEW, https://www.thecityreview.com/hotelpenn.html.

[35] *See, e.g.*, *History*, THE GREENBRIER, https://www.greenbrier.com/About-Us/History.aspx (last visited Mar. 3, 2022).

[36] Hayward, *supra* note 22.

[37] *Transportation Security Administration*, ENCYC. BRITANNICA (Nov. 15, 2016), https://www.britannica.com/topic/Transportation-Security-Administration.

[38] Craig Freudenrich, *How Airlines Work*, HOWSTUFFWORKS (May 12, 2021), https://science.howstuffworks.com/transport/flight/modern/air-traffic-control.htm.

[39] Hayward, *supra* note 22.

Similarly, bus operators and motorists generally did not build expressways, many of which were constructed by cutting through highly-developed areas and cities to provide the shortest and fastest routes, paid for in the billions by the federal government.[40] Most transportation infrastructure is paid for by some combination of local, state, or federal taxes,[41] taxes that railroads paid,[42] often through the property taxes on the land that their infrastructure sat upon.[43] Despite this expense, railroads completed engineering feats[44] and ensured their trains used the cleanest fuels,[45] running overhead wires to power electric trains for hundreds of miles.[46] Railroads competed for

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[40] Marcia Wendorf, *The Complex History of the U.S. Interstate Highway System*, INTERESTING ENG'G (Sep. 15, 2019), https://interestingengineering.com/the-complex-history-of-the-us-interstate-highway-system. *See generally* ROBERT CARO, THE POWER BROKER (1974) (showing the extent to which one politician Robert Moses wielded his power and the weight of federal highway funding to displace thousands of people in order to shave minutes off travel times).

[41] Davis, *supra* note 21.

[42] *Financing*, BATIC INST.: AN AASHTO CTR. FOR EXCELLENCE, http://www.financingtransportation.org/funding_financing/financing/ (last visited Mar. 3, 2022).

[43] *Id.*

[44] *See, e.g.*, *The Lackawanna Cutoff*, WORLDWIDERAILS, https:// https://worldwiderails.com/the-lackawanna-cutoff/ (last visited Nov. 25, 2022). ("The [Lackawanna Cutoff's] Paulinskill Viaduct stretched 1,100 feet and provided . . . a passage over the Paulinskill River and Interstate 80, and at the time of its construction in 1910, this viaduct was the largest structure in the world that utilized reinforced concrete.")

[45] *See* Train Lover, *The Story of Phoebe Snow*, STREAMLINER MEMORIES (May 20, 2015), http://streamlinermemories.info/?p=7542.

[46] *See The Milwaukee Road's Pacific Extension*, ABANDONED RAILS, https://www.abandonedrails.com/pacific-extension (last visited Mar. 3, 2022).

the fastest and most direct routes,[47] tunneling under rivers[48] and mountains[49] while building bridges over oceans.[50]

During their infrastructure-building peak in the early twentieth century, railroads would do anything to shave time off their routes to get passengers to their destinations as quickly as possible.[51] These mammoth infrastructure investments were well worth it for railroads when trains were king. During World War II, ridership peaked at about 650 intercity rail miles per capita,[52] meaning that the average distance traveled on passenger trains per person during 1944 was 650 miles.[53]

B. AMERICAN PASSENGER RAIL SLIPS INTO CRISIS

Before they shared the market with the Interstate Highway System[54] or mass air travel via jetliners,[55]which competed heavily with and ultimately supplanted railroad travel by the 1950s, railroads could easily finance their infrastructure. But by 1954, railroad ridership dropped to an

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47 *See, e.g.*, WORLDWIDERAILS, *supra* note 44.

48 PBS, *supra* note 28.

49 *See, e.g.*, Jordan Hanssen, *The Great Cascade Tunnel*, FILSON J. (Mar. 25, 2020), https://www.filson.com/blog/field-notes/the-great-cascade-tunnel/.

50 *The Flagler Railroad*, FLA. STATE PARKS, https://www.floridastateparks.org/learn/flagler-railroad (last visited Mar. 4, 2022).

51 *See, e.g.*, WORLDWIDERAILS, *supra* note 44.

52 RANDAL O'TOOLE, CATO INST., STOPPING THE RUNAWAY TRAIN: THE CASE FOR PRIVATIZING AMTRAK 11 (2012), https://www.cato.org/sites/cato.org/files/pubs/pdf/PA712.pdf.

53 *Id.*

54 Wendorf, *supra* note 40; CARO, *supra* note 40.

55 *See How Air Travel has Changed in Every Decade from the 1920s to Today*, LOVE EXPLORING (Sep. 2, 2021), https://www.loveexploring.com/gallerylist/86315/how-air-travel-has-changed-in-every-decade-from-the-1920s-to-today.

estimated 150 intercity rail miles per capita, and by 1964, dipped below 100 intercity rail miles per capita.[56] As people moved from city centers to car-focused suburbs,[57] and automobile and airplane travel increased,[58] railroads sold their assets—like stations[59] and the air rights above them[60]—and abandoned hundreds of miles of tracks.[61] Railroads also owned a plethora of derelict and often inoperable pieces of rolling stock.[62]

While railroads paid to maintain costly infrastructure, they also adhered to union-mandated work rules providing a full day of pay for distances of 100 miles. This became an unsustainable burden when trains could cover that distance in an hour or two.[63] Further, the Interstate Commerce Commission ("ICC") regulated routes and deemed many as necessary, thus, preventing railroads

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[56] O'Toole, *supra* note 52.

[57] *The Past and Future of U.S. Passenger Rail Service*, CONG. BUDGET OFF. 5 (Sept. 2003), https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/09-26-passengerrail.pdf.

[58] *See* LOVE EXPLORING, *supra* note 55; Richard F. Weingroff, *Moving the Goods: As the Interstate Era Begins*, FED. HIGHWAY ADMIN. (Sept. 28, 2017), https://www.fhwa.dot.gov/interstate/freight.cfm.

[59] Michael Kimmelman, *When the Old Penn Station Was Demolished, New York Lost its Faith*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/nyregion/old-penn-station-pictures-new-york.html.

[60] *See Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

[61] Jonathan Walters, *States Reinvest in Once-Abandoned Freight Lines*, GOVERNING (Jan. 23, 2014), https://www.governing.com/archive/gov-states-reinvest-in-rail.html ("Thousands of miles of lines were abandoned by major railroads, including Penn Central in the East to the Rock Island Railroad in the Midwest during the 1970s and 1980s, with rights of way either rotting away or reverting piecemeal to abutting landowners.")

[62] Steve Lubetkin, *Penn Central 1974—Movie Used to Get Federal Funding*, YOUTUBE (Dec. 31, 2010), https://www.youtube.com/watch?v=GHmyYqfNYnc&ab_channel=SteveLubetkin.

[63] *See* David Morgan, *Who Shot the Passenger Train?*, STRAINS (Apr. 29, 1959) (noting that unions mandated such labor mandates, for example, such as maintaining a 1919 rule insisting railroads compensate crew members for a full days for every 100 miles worked (and overtime for additional miles), a rule still enforced in 1959 despite the average train speed doubling).

from cutting costs.[64] Railroads were hemorrhaging money.[65] While some railroads cut passenger routes as the ICC allowed, not all railroads were able to do so, particularly in regions of the country where passengers depended on rail passenger services guarded by the hand of the ICC.[66]

By 1968, the Pennsylvania Railroad, the New York Central Railroad, and the New York and New Haven Railroad—which combined to control most railroad infrastructure of the Northeastern U.S.—merged in a last-ditch and ill-fated effort to save themselves, forming the largest railroad in American history.[67] The product of this precarious merger, Penn Central, teetered on the brink of bankruptcy since its beginnings[68] and eventually went under in 1970.[69] Railroads like Penn Central were plagued with more poor infrastructure than they knew what to do with, including failing rolling stock[70] and tracks.[71]

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[64] Davis, *supra* note 21 ("Every year, fewer passengers wanted to ride, but the railroads were prohibited by law from abandoning unprofitable passenger service without permission from either a state public service commission or the federal Interstate Commerce Commission (ICC).")

[65] *Id.* ("[T]he nation's railroads had lost over $7 billion providing passenger service over the 1946-1957 period, and that the 'passenger deficit' had been $723 million in 1957.")

[66] *See* THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 32 (Feb. 1, 1983); CRAIG SANDERS, AMTRAK IN THE HEARTLAND 3 (2006).

[67] *See* Davis, *supra* note 21.

[68] *Id.*

[69] Wayne Duggan, *This Day in Market History: Penn Central Bankruptcy*, YAHOO NEWS (June 21, 2018), https://www.yahoo.com/news/day-market-history-penn-central-180215022.html.

[70] *See* Lubetkin, *supra* note 62.

[71] *See Freight Railroads & The Staggers Rail Act of 1980*, ASS'N OF AM. R.RS., https://www.aar.org/article/freight-railroads-the-staggers-act-of-1980/ ("Railroads lacked the funds to properly maintain their tracks.") (last visited Mar. 4, 2022). "By 1976, more than 47,000 miles of track had to be operated at reduced speeds because of unsafe conditions." *Id.* Moreover, "[d]eferred maintenance—maintenance that needed to be done but railroads could not afford—was in the billions of dollars. The term 'standing derailment'—when stationary railcars simply fell off poorly maintained track—was often heard." *Id.*

C. AMTRAK AS THE CRISIS RESPONSE

Those at the United States Department of Transportation, Congress, and trade organizations like the National Association of Railroad Passengers ("NARP") [72] recognized the unsustainable nature of mergers like Penn Central, and that railroads could not afford to run unprofitable passenger trains on top of the burdens they still held. They thus proposed various solutions to the passenger rail problem.[73] The deputy assistant to the Secretary of Transportation remarked in a 1968 speech that a quasi-public corporation should be formed to manage passenger rail.[74] NARP proposed nationalizing passenger railroad rolling stock through a "national passenger equipment pool" that would take the task of maintenance from railroads' hands.[75] Meanwhile, the trade association for private railroads, the Association of American Railroads ("AAR"), sought federal funding for railroad passenger services[76] as well as the same national equipment pool NARP proposed.[77] Congress signed a resolution advocating for either federal subsidies or a public corporation to manage ailing passenger rail travel,[78] proposed a bailout to pay for new railroad

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[72] *Id.*

[73] SANDERS, *supra* note 66, at 1-2.

[74] *Id.* at 1.

[75] *Id.* at 2.

[76] *Id.*

[77] *Id.*

[78] *Id.*

passenger equipment[79] and further regulation by the ICC,[80] and even suggested complete federal funding for railroad passenger services.[81]

Finally, the FRA proposed "Railpax," a quasi-public corporation that would operate passenger trains and relieve railroads of their ICC-imposed passenger operation duties[82] in exchange for a funding contribution.[83] After Penn Central announced plans to discontinue thirty-four intercity passenger routes,[84] the Senate voted on a bill implementing the FRA's Railpax plan[85] and sent it to the House, where the bill became the Rail Passenger Service Act of 1970 five months later.[86] The upcoming midterm elections pressure 'scared' President Richard Nixon into signing the bill into law the day before Halloween 1970.[87] Railpax, the quasi-public corporation tasked with operating the nation's passenger trains, planned to start operation on May 1, 1971.[88]

The Railpax name was swapped for Amtrak on April 19, 1970, and on May 1, Amtrak[89] began operating 184 of 366 passenger existing trains run by private railroads, including a mix of

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[79] *Id.* at 2–3.

[80] *Id.* at 3.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 4.

[87] Davis, *supra* note 21 (noting that the Nixon Administration "accomplished their two short-term political objectives [in greenlighting Amtrak]: needing to be seen 'doing something' about the passenger train problem, and preventing the issue from blowing up three days before the midterm elections"); SANDERS, *supra* note 67.

[88] SANDERS, *supra* note 66.

"long-distance trains" and those in "high-density corridors."[90] The Rail Passenger Service Act designated that private railroads would contract for Amtrak to use their tracks,[91] with roughly twenty of twenty-six eligible railroads paying a buy-in fee to Amtrak to avoid the ICC requirement of operating unprofitable passenger rail services.[92] In other words, prior to Amtrak, the ICC would not let private railroad companies stop operating necessary but unprofitable rail lines, but after Amtrak's formation, freight railroads contracted with Amtrak to operate those lines.

Railroads paid their buy-in fee in cash, equipment, or obligations to provide service.[93] Many railroads opted to provide Amtrak with equipment to cover the buy-in fee which resulted in a day one Amtrak equipment pool of "nearly 300 locomotives and 1[,]200 cars."[94] Amtrak also leased equipment, such as cars and locomotives, from private railroads[95] and paid those very same

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89 *See id.* at 7. The official name of Amtrak is the "National Railroad Passenger Corporation. *See About Amtrak*, NAT'L R.R. PASSENGER CORP., https://www.amtrak.com/about-amtrak (last visited Mar. 4, 2022).

90 SANDERS, *supra* note 66, at 5–6.

91 Rail Passenger Service Act, H.R. 17849, 91st Cong. §§ 401–02 (1970).

92 SANDERS, *supra* note 66, at 7.

93 *Id.* at 8.

94 *Amtrak's Beginnings*, CLASSIC TRAINS (Jun. 5, 2001), https://www.trains.com/ctr/railroads/railroad-operations/amtraks-beginnings/.

95 Jerry Britton, *Amtrak*, THE PENNSY MODELER, https://jbritton.pennsyrr.com/index.php/tpm/latest-articles-blog/459-amtrak-information (last visited Mar. 5, 2022).

> When Amtrak took over intercity passenger rail service on May 1, 1971, it inherited a collection of rolling stock from twenty different railroads, each with its own distinct colors and logos . . . . Amtrak was able to pick the 1,200 best passenger cars to lease from the 3,000 that the private railroads had owned. This equipment was haphazardly mixed to form consists, resulting in trains with the mismatched colors of several predecessor railroads.

Id. This buying and leasing resulted in a colorful mix of rolling stock which historians have coined the "Rainbow Era," which refers to the arrangement of hand-me-down engines, coaches, and sleepers from the various railroads that formed the colorful consists of early Amtrak trains. *Id.*; SANDERS, *supra* note 66, at 8.

railroads to operate Amtrak passenger trains.[96] In time, Amtrak bought much of its leased passenger equipment from railroads,[97] and by 1975, purchased its own rolling stock.[98] Along with equipment, Amtrak inherited large train stations big enough to accommodate the robust train traffic of yesteryear.[99] However, the railroad did not inherit any actual railroad tracks[100] until at least 1976.[101]

D. AMTRAK'S DELAY PROBLEMS START EARLY

Since Amtrak operated entirely on other railroads' tracks, the on-time percentages of Amtrak trains plummeted from 70% in 1972 to 32% in 1973.[102] This prompted Congress to pass the Amtrak Improvement Act of 1973, which amended the Rail Passenger Service Act to require

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[96] *See* SANDERS, *supra* note 66, at 8 ("Railroads could pay their buy-in fee [with] obligations to provide service.")

[97] CLASSIC TRAINS, *supra* note 94 (recounting that Amtrak "began purchasing some of the equipment it had leased [from the private railroads], including 286 second-hand [diesel-powered locomotives], [thirty] electric locomotives, and [1,290] passenger cars, and continued leasing even more motive power.")

[98] *Id.*

[99] *See New Buffalo Station*, AMTRAK NEWS (Nat'l R.R. Passenger Corp., Washington, D.C.), Nov. 1979, at 6.

> Amtrak trains serving up-state New York began making stops at a new Buffalo suburban station . . . . Buffalo's Central Station . . . . was closed [because] [e]xpenses there were unduly high and, if Amtrak were to remain there, large sums of money would have been required to repair the facility. Heating bills alone amounted to over $150,000 per winter.

Id.; KEVIN J. HOLLAND, CLASSIC AMERICAN RAILROAD TERMINALS 51 (2001). (discussing Amtrak's closure of Cincinnati Union Terminal).

[100] *See* Sanders, *supra* note 66, at 8 (noting that while "[t]he railroads demanded [from Amtrak] some returns on their capital investments . . . [they instead] gave Amtrak a [twenty-five]-year right of access to their tracks.")

[101] CONG. BUDGET OFF., *supra* note 57, at 9.

[102] *See* Richards, *supra* note 12.

freight railroads to yield to Amtrak trains on their tracks.[103] The act stated that,"[e]xcept in an emergency . . . Amtrak has preference over freight transportation."[104] This is the preference language that Congress codified at 49 U.S.C. § 24308(c)[105] and which, inexplicably, the DOJ has only enforced once, in 1979.[106] This will be discussed at end later in this article.[107]

E. AMTRAK GETS A SIBLING—CONRAIL—AND SOME TRACKS

While most private railroads continued to operate after Amtrak relieved their passenger service burden, Penn Central and other Northeast U.S. railroads faced mounting financial losses even after discontinuing passenger service: competition from interstate trucking,[108] the increasing unpopularity of shipping coal,[109] and infrastructure costs in general[110] led many railroads to file for bankruptcy.[111] As these railroads filed for bankruptcy, Congress passed the Regional Rail Reorganization Act of 1973 ("The 3R Act"), which formed another quasi-public railroad like

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103 Amtrak Improvement Act, S. 2016, 93rd Cong. (1973); *see* Richards, *supra* note 12.

104 NAT'L R.R. PASSENGER CORP., *supra* note 11.

105 49 U.S.C. § 24308(c).

106 Carole Shifrin, *Amtrak Suit Says Southern Pacific Runs Trains Late*, WASH. POST (Dec. 21, 1979), https://www.washingtonpost.com/archive/business/1979/12/21/amtrak-suit-says-southern-pacific-runs-trains-late/3026abb1-1e78-4c16-b5f2-87ea7a07f762/.

107 *See infra* Section II.E.

108 *Consolidated Rail Corporation History*, FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/consolidated-rail-corporation-history/ (last visited Mar. 5, 2022).

109 *Brief History of Consolidated Rail Corporation*, CONRAIL, https://conrail.com/about-conrail/history/ (last visited Mar. 5, 2022).

110 Lubetkin, *supra* note 62.

111 *See* William C. Vantuono, *Conrail at 40: An Experiment That Worked*, RY. AGE (Apr. 5, 2016), https://www.railwayage.com/freight/class-i/conrail-at-40-the-experiment-still-works/ ("[Conrail] [was] cobbled together from six bankrupt Northeastern [railroads]: Penn Central, Erie-Lackawanna, Jersey Central, Lehigh Valley, Reading, and Lehigh & Hudson River.")

Amtrak, named "Conrail."[112] Conrail took over six bankrupt railroads' infrastructure and freight operations in the Northeast, including Penn Central.[113] In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976 ("The 4R Act"), beginning the transfer of some infrastructure and railroad properties in the Northeast U.S. from Conrail to Amtrak.[114] This gave Amtrak its first—and to this day, some of its only[115]—tracks.[116]

Today, these rail lines—the New York, New Haven, and Hartford Railroad line from Boston to New York, and the Pennsylvania Railroad line from New York to Washington, D.C.—now comprise Amtrak's "Northeast Corridor."[117] Amtrak's Northeast Regional and Acela services, as well as other routes, run on today's Northeast Corridor.[118] The Amtrak-owned Northeast Corridor is home to some of the highest on-time percentages of any of Amtrak's

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112 Regional Rail Reorganization Act, H.R. 9142, 93rd Cong. (1973); *see* Vantuono, *supra* note 111.

113 *See* Vantuono, *supra* note 111.

114 Railroad Revitalization and Regulatory Reform Act, S. 2718, 94th Cong. (1976); CONG. BUDGET OFF., *supra* note 57, at 9.

115 *Why Are Amtrak Trains Delayed by Freight Trains*, NAT'L R.R. PASSENGER CORP., http://blog.amtrak.com/2019/05/why-are-amtrak-trains-delayed-by-freight-trains/ (last visited Mar. 3, 2015) ("Amtrak owns only 3% of the 21,400 route-miles traveled by Amtrak trains, primarily on the Northeast Corridor. The rest are mostly owned by freight railroads.")

116 CONG. BUDGET OFF., *supra* note 57, at 9. The Amtrak Improvement Act of 1976 completed the turnover of the Northeast Corridor from Conrail to Amtrak. *See id*.

117 *See* CONG. BUDGET OFF., *supra* note 57, at 9, n.17.

118 *See About the NEC: Present*, NAT'L R.R. PASSENGER CORP., https://nec.amtrak.com/about-the-nec/.

routes,[119] supporting the greatest volume of trains[120] and greatest overall ridership on the Amtrak system.[121] Conrail, meanwhile, is no more:

> In 1997, . . . Norfolk Southern and CSX agreed to acquire Conrail through a joint stock purchase. CSX and NS split most of the company's assets, CSX acquiring 42% and NS acquiring 58%. The split was structured generally along the lines of the two railroads that merged in 1968 to form Penn Central—the New York Central (CSX) and the Pennsylvania Railroad (NS).[122]

F. FREIGHT SOARS WHILE AMTRAK SINKS FROM DELAYS AND LOW FUNDING

The remainder of the 1970s into the 1980s cemented the perception that Amtrak was a supposedly private corporation perennially in need of subsidy. Congress continued to unsuccessfully attempt to address Amtrak's delays where Amtrak shared freight railroads' tracks, while private freight railroads ascended in volume and profitability.

While U.S. Secretary of Transportation John Volpe envisioned Amtrak to become quickly profitable,[123] it did not, and never has turned a profit.[124] Lawmakers amended the Rail Passenger

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[119] *Amtrak On-Time Performance Trends and Hours of Delay by Cause*, BUREAU OF TRANSP. STAT., https://www.bts.gov/content/amtrak-time-performance-trends-and-hours-delay-cause (last visited Mar. 5, 2022).

[120] *The Northeast Corridor*, NAT'L R.R. PASSENGER CORP., https://nec.amtrak.com/ (last visited Mar. 5, 2022) ("Carrying over 2,200 daily trains, including Amtrak, commuter and freight trains, the Northeast Corridor is the nation's most congested rail corridor and is among the highest volume rail corridors in the world.")

[121] Matt Johnson, *The Northeast Corridor Carries More Rail Passengers Than Anywhere Else in the Country. What Could It Look Like in 2040?*, GREATER GREATER WASH. (Nov. 24, 2015), https://ggwash.org/view/40042/the-northeast-corridor-carries-more-rail-passengers-than-anywhere-else-in-the-country-what-could-it-look-like-in-2040.

[122] Vantuono, *supra* note 111.

[123] *See, e.g.*, SANDERS, *supra* note 66, at 13 ("Secretary of Transportation Volpe . . . said Amtrak expected to lose $110 million in its first year but be profitable by its third year.").

[124] *But see* Jeremy Hobson & Allison Hagan, *Amtrak Could Turn a Profit in 2020 for the 1st Time Ever*, WBUR (Nov. 15, 2019), https://www.wbur.org/hereandnow/2019/11/15/87mtrak-profit-train-ceo-richard-

Service Act to reflect this lost goal, passing the Amtrak Improvement Act of 1978.[125] It changed language in the Rail Passenger Service Act, which stated Amtrak "'shall be a for-profit corporation,'" to language stating Amtrak shall be "'operated and managed as a for-profit corporation.'"[126] The law also "required the Secretary of Transportation . . . to compute . . . 'the costs in loss or profit per passenger mile' and 'an estimate of operating and capital appropriations required to operate the system for fiscal years 1980 through 1984,'" indicating Congress was expecting to continually apportion subsidies for a decidedly not-for-profit Amtrak.[127]

Congress also recognized Amtrak's delays in 1979 by passing the Amtrak Reorganization Act, which established goals for Amtrak such as "improving on-time performance" and "implementing schedules that would provide a systemwide average speed of at least 55 miles per hour."[128] And in 1980, Congress passed the Staggers Rail Act, which greatly deregulated the railroad industry by reducing the ICC's stranglehold on railroads' pricing schemes, routes, and types of goods shipped, resulting in increased freight railroad volume.[129] Lastly, Congress passed

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anderson (observing that Amtrak was on-track in 2019—before the COVID-19 pandemic—to turn a profit for the first time in its history).

[125] Amtrak Improvement Act, S. 3040, 95th Cong. (1978); CONG. BUDGET OFF., *supra* note 57, at 10.

[126] CONG. BUDGET OFF., *supra* note 57, at 10.

[127] *Id.*

[128] Amtrak Reorganization Act, H.R. 3996, 96th Cong. (1979); CONG. BUDGET OFF., *supra* note 57, at 10.

[129] Staggers Rail Act, S. 1946, 96th Cong. (1980); *see* ASS'N OF AM. R.RS., FREIGHT RAILROADS UNDER BALANCED ECONOMIC REGULATION 2 (2021), https://www.aar.org/wp-content/uploads/2020/08/AAR-Railroads-Under-Balanced-Economic-Regulation-Fact-Sheet.pdf. Deregulation of railroads, coupled with their handoff of unprofitable passenger service to Amtrak, resulted in an explosion of freight railroad profitability from the 1980s onward. *See* Lee Pinkowitz & Rohan Williamson, *The Staggers Act and Firm Performance: Long-Run Evidence*, 49 REV. OF INDUS. ORG. 161, 161 (2016). Government-owned Conrail became so profitable that Congress even spun it off into an entirely private corporation via the Conrail Privatization Act of 1985. Conrail Privatization Act, S. 2833, 99th Cong. (1985); *see* Vantuono, *supra* note 111.

the Amtrak Improvement Act, part of the Omnibus Budget Reconciliation Act of 1981, which transferred Amtrak stock to the federal government in exchange for "large federal subsidies [that] would be needed for improvements along the Northeast Corridor as well as for operations throughout Amtrak's system."[130]

As late as 1997, officials still recognized Amtrak's dependence on federal money and that "'there should be no expectation that Amtrak can be viable with a one-time, [multi]-year infusion of capital . . . . The capital commitment must be stable and ongoing.'"[131] While Congress passed the Amtrak Accountability and Reform Act in 1997 to allow Amtrak to freely cut unprofitable routes, contract out services, and escape paying employees for six years after the discontinuation of train routes,[132] Amtrak executives shied away from cutting services, instead endorsing increasing revenues to minimize the corporation's growing debt.[133] Congress bailed out Amtrak in 2002 to avoid bankruptcy due to debt,[134] but otherwise Amtrak saw ridership expand up through

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[130] Omnibus Budget Reconciliation Act, H.R. 3982, 97th Cong. (1981); CONG. BUDGET OFF., *supra* note 57, at 11. This "gave the federal government an ownership stake in Amtrak for the first time," as before Amtrak was no more than a private corporation chartered by an act of Congress. CONG. BUDGET OFF., *supra* note 57, at 11.

[131] *See* CONG. BUDGET OFF., *supra* note 57, at 12 (omission in original).

[132] Amtrak Accountability and Reform Act, S. 738, 105th Cong. (1997); CONG. BUDGET OFF., *supra* note 57, at 12–14.

[133] *See* CONG. BUDGET OFF., *supra* note 57, at 13–14.

[134] *See id.* at 14–15; Graham Rapier, *The Rise and Fall of Amtrak, Which Has Been Losing Money Since 1971*, BUS. INSIDER (May 20, 2019, 10:12 AM), https://www.businessinsider.com/history-of-amtrak-train-railroad-photos-2019-5#by-2002-amtrak-was-on-the-brink-of-bankruptcy-11 ("By 2002, Amtrak was on the brink of bankruptcy.")

the 2008 global financial crisis.[135] Despite good fortunes for ridership, by 2008 Amtrak still had a debt problem[136] and the unresolved issue of delayed trains.[137]

G. CONGRESS PASSES PRIIA AND CREATES THE METRICS AND STANDARDS

To help solve Amtrak's delay and funding woes, in 2008, Congress passed the PRIIA.[138] While the Amtrak of 2008 did own some tracks, it incurred debt from new equipment purchases and improvements made to the Northeast Corridor.[139] 97% of Amtrak trains run on non-Amtrak tracks, i.e., those owned by private railroads.[140] This meant that Amtrak was not only indebted, but freight traffic spurred by Staggers Act growth also impeded Amtrak's services:

> [A]fter the regulatory reforms of the Staggers Rail Act of 1980 made it easier to cut uneconomic service, the freight railroads streamlined their route structures and capital investment to a size that more closely matched the demand for service. With business growing in recent years, some freight railroads have experienced congestion on their tracks . . . .[141]

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[135] William C. Vantuono, *For Amtrak, Another Record-Ridership Year*, RY. AGE (Oct. 14, 2013), https://www.railwayage.com/passenger/intercity/for-amtrak-another-record-ridership-year/ (depicting growth in ridership from 2002 to 2008).

[136] AMTRAK OFF. OF INSPECTOR GEN., PASSENGER RAIL INVESTMENT AND IMPROVEMENT ACT OF 2008: AMTRAK HAS MADE GOOD PROGRESS, BUT CONTINUED COMMITMENT NEEDED TO FULLY ADDRESS PROVISIONS 6–9 (2011), https://amtrakoig.gov/sites/default/files/reports/priia_final_1026.pdf.

[137] New York Times Editorial Board, *A Little Hope for Amtrak*, N.Y. TIMES (Nov. 1, 2007), https://www.nytimes.com/2007/11/01/opinion/01thu4.html.

[138] *See* Passenger Rail Investment and Improvement Act, H.R. 6003, 110th Cong. §§ 101, 102, 203, 207, 213, 205, 222 (2008).

[139] *See* CONG. BUDGET OFF., *supra* note 57, at 13.

[140] *See* Smith, *supra* note 7 ("How much [track] does Amtrak not own? Fully 97[%] of its route miles are run on tracks owned by someone else . . . .").

[141] *See* CONG. BUDGET OFF., *supra* note 57, at 39.

In 2006, Amtrak's long distance trains—"[r]outes over 750 miles in length"—were on time a mere 29.9%, with "on time" being considered as late as twenty minutes to a given stop.[142] In 2007, all Amtrak trains were on time only 68.6% of the time,[143] while long distance trains marginally improved to being on time 39.5%.[144] So, while PRIIA enabled Amtrak to restructure its debt and create a financial plan to get out of its debt hole[145] by providing federal funding for infrastructure and state and private partnerships for funding routes,[146] PRIIA also directed that Amtrak deal with the delay problems.[147]

PRIIA prescribed that the regulatory body taxed with overseeing railroads, the FRA, as well as Amtrak jointly develop a series of minimum Metrics and Standards to evaluate on-time performance of Amtrak trains.[148] PRIIA commanded that the FRA and Amtrak develop these Metrics and Standards in consultation with the STB, "an independent federal agency that is charged with the economic regulation of . . . primarily freight rail,"[149] that would investigate delays under the Metrics and Standards, as well as with the comment of freight railroads and trade and

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142 BUREAU OF TRANSP. STAT., *supra* note 119.

143 *Id.*

144 *Id.*

145 *See* Passenger Rail Investment and Improvement Act, H.R. 6003, 110th Cong. §§ 101, 102, 203, 205 (2008).

146 *Id.* § 207.

147 *See id.* §§ 207, 213, 222.

148 *See id.* § 207; FED. R.R. ADMIN., FEDERAL RAILROAD ADMINISTRATION OVERVIEW, HIGHLIGHTS AND SUMMARY OF THE PASSENGER RAIL INVESTMENT AND IMPROVEMENT ACT OF 2008 (PRIIA) 2 (2009), https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1333/PRIIA%20Overview%20031009.pdf.

149 *About STB*, SURFACE TRANSP. BD., https://www.stb.gov/about-stb/ (last visited Mar. 5, 2022).

labor organizations.[150] The result was a protracted legal battle involving freight railroads and their trade organization, the AAR.[151]

At one point, litigation made it all the way up to the Supreme Court in U.S. Department of Transportation v. Association of American Railroads, where the AAR challenged the creation of FRA and Amtrak's Metrics and Standards.[152] The AAR suggested that Amtrak was a private entity and that Congress cannot delegate regulatory authority to a private entity under the Constitution.[153] The AAR argued this even thoughthe U.S. Secretary of Transportation owns Amtrak's preferred stock, and that the President chooses the board of directors which the Senate confirms.[154] The Supreme Court ultimately held that "in [Amtrak's] joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions."[155] Finally, after over ten years of litigation,[156] the FRA in 2020 promulgated a rule in accordance with PRIIA's Metrics and Standards directive.[157]

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[150] *See* H.R. 6003, § 207 (2008); FED. R.R. ADMIN., *supra* note 148.

[151] *See* Paul Lewis, *11-year Saga Over Amtrak's On-Time Performance Metrics Comes to an End*, ENO CTR. FOR TRANSP. (Dec. 4, 2020), https://www.enotrans.org/article/11-year-saga-over-amtraks-on-time-performance-metrics-comes-to-an-end/.

[152] *U.S. Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 45–46 (2015).

[153] *Id.* at 45.

[154] *Id.* at 51.

[155] *Id.* at 53–54.

[156] *See* Lewis, *supra* note 151.

[157] *Id.*

These Metrics and Standards allow the STB to evaluate whether a railroad is providing Amtrak with "preference."[158] However, the process to obtain relief under the Metrics and Standards rulemaking can be lengthy[159] and the on-time performance of many of Amtrak's longer-distance trains has remained abysmal.[160] The ensuing delays led President Biden to sign an executive order in July 2021 directing the STB "to require railroad track owners to provide rights of way to passenger rail and to strengthen their obligations to treat other freight companies fairly."[161] However, "[a]s for what the [executive] order [would] do about [the delay problem], Biden . . . [merely] encourag[ed]"the aforementioned changes through his order.[162]

The House of Representatives' version of Bipartisan Infrastructure Deal[163] would have allowed Amtrak to sue an offending railroad in violation of 49 U.S.C. § 24308(c) before an investigation is underway by the STB under the Metrics and Standards rulemaking.[164] The version of the bill signed by President Biden does not contain language granting Amtrak the ability to

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[158] *See* Aaron Gordon, *Biden's Executive Order Acknowledges Passenger Rail's Biggest Problem*, VICE (July 9, 2021, 10:51 AM), https://www.vice.com/en/article/epn5y7/bidens-executive-order-acknowledges-passenger-rails-biggest-problem.

[159] *See* Lewis, *supra* note 151.

[160] *See* NAT'L R.R. PASSENGER CORP., *supra* note 15.

[161] *See* Gordon, *supra* note 158 (citing Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021)).

[162] *See id.*

[163] *See* Emily Cochrane, *Senate Passes $1 Trillion Infrastructure Bill, Handing Biden a Bipartisan Win*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/2021/08/10/us/politics/infrastructure-bill-passes.html.

[164] Ngo, *supra* note 10; H.R. 3684, 117th Cong. § 9204 (as passed by House, July 1, 2021); *see also* Jeff Davis, *Durbin Introduces Bill to Allow Amtrak to Sue Freight Railroads for Delays*, ENO. CTR. FOR TRANSP. (Nov. 22, 2019), https://www.enotrans.org/article/durbin-introduces-bill-to-allow-amtrak-to-sue-freight-railroads-for-delays/ (reporting on a 2019 Senate bill "introduced . . . at the behest of Amtrak to allow the nationwide passenger railroad to sue freight railroads in federal court to enforce Amtrak's statutory right for its trains to take preference over freight trains when operating on freight railroad tracks").

enforce its own preference.[165] The signed version of the bill does, however, provide for more STB staff to engage in investigations of delays in accordance with the Metrics and Standards.[166]

II. AMTRAK'S PREFERENCE OVER FREIGHT UNDER 49 U.S.C. § 24308(C)

This Part details how PRIIA commands the FRA and Amtrak to pass a series of Metrics and Standards to solve Amtrak's delays. The STB enforces these Metrics and Standards. While these Metrics and Standards constitute one way of enforcing Amtrak's preference granted under 49 U.S.C. § 24308(c), another way is via the DOJ suing freight railroads who violate § 24308(c).

A. HOW THE METRICS AND STANDARDS WORK

PRIIA directs the STB to inspect low performance of Amtrak trains under the Metrics and Standards promulgated by the FRA and Amtrak. The STB retains the power to award damages to Amtrak if the STB determines, after an investigation, "that delays or failures to achieve minimum standards . . . are attributable to a [private railroad's] failure to provide preference to Amtrak over freight transportation" under 49 U.S.C. § 24308(c).[167] PRIIA amended the language of § 24308(c) to declare that "rail passenger transportation provided by or for Amtrak has preference over freight transportation . . . unless the [Surface Transportation] Board orders otherwise under this subsection," enabling the STB to ensure—or decline—statutory preference rights for Amtrak

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[165] Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 22101 (2021).

[166] *Id.* § 22309; KXRO NEWS RADIO, *supra* note 16.

[167] *See* FED. R.R. ADMIN., *supra* note 148; Passenger Rail Investment and Improvement Act, H.R. 6003, 110th Cong. § 222 (2008); On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 81 C.F.R. § 51343 (2016) ("PRIIA also transferred . . . to the [STB] the administration and enforcement of Amtrak's preference rights.")

trains via its damages award and its investigations.[168] This supplements the DOJ's ability to enforce § 24308(c) discussed herein.[169]

Section 207 of PRIIA directs the FRA to promulgate these Metrics and Standards by which the STB evaluates freight railroads during investigations.[170] The Metrics and Standards are varied and include measures beyond just delays: they "include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route [and] ridership per train mile operated."[171] Moreover, "[f]or long-distance routes," the Metrics and Standards must also include "measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of public transportation."[172] Moreover, PRIIA also instructs that "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards . . . into their access and service agreements," which are the agreements that Amtrak makes with freight railroads to utilize their tracks.[173] Thus, PRIIA even weaves the Metrics and Standards directly into the contractual obligations of freights to Amtrak.

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[168] 81 C.F.R. § 51343 (emphasis added). As discussed *supra* Section I.D, the Department of Justice retains the ability to sue freight railroads violative of 49 U.S.C. § 24308(c). *See* NAT'L R.R. PASSENGER CORP., *supra* note 13.

[169] *See infra* Section II.E.

[170] *See* FED. R.R. ADMIN., *supra* note 1482.

[171] H.R. 6003, § 207(a).

[172] *Id.* This language also shows Congress' affirmation that Amtrak's long-distance routes—frequently the subject of potential service reductions for the railroad—are here to stay. *See id.*; *e.g.*, Frank N. Wilner, *A "Sully" Moment for Amtrak's Anderson*, RY. AGE (Mar. 22, 2020), https://www.railwayage.com/passenger/intercity/a-sully-moment-for-amtraks-anderson/.

[173] H.R. 6003, § 207(c).

When it comes to Amtrak's delay folly, on-time performance is the most consequential metric, i.e., "measures of on-time performance and delays incurred by [Amtrak] trains on the rail lines of each [freight railroad]."[174] These Metrics and Standards are discussed later in this Part.[175] In addition to the Metrics and Standards under Section 207 that the STB uses to evaluate freight railroads during its investigations, Section 213 provides for when the STB may, on its own accord, use these parameters to investigate Amtrak delays in the first place.[176]

> If the on-time performance of any intercity passenger train averages less than 80[%] for any [two] consecutive calendar quarters, or the service quality of intercity passenger train operations . . . fails to meet [PRIIA's metrics and] standards for [two] consecutive calendar quarters, the Surface Transportation Board . . . may initiate an investigation.[177]

In addition, "upon the filing of a complaint by Amtrak . . . the Board shall [also] initiate such an investigation."[178]

In the event that the STB "determines that delays or failures to achieve [the] minimum [Metrics and] [S]tandards . . . are attributable to a rail[road]'s failure to provide preference to Amtrak over freight transportation as required under [§ 24308](c)," the STB can award damages to Amtrak and "prescrib[e] such other relief to Amtrak as [the STB] determines to be reasonable and appropriate."[179] Damages are evaluated by "the extent to which Amtrak suffers financial loss as a result of host rail[road]delays or failure to achieve [the] minimum [Metrics and] [S]tandards,"

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[174] *Id.* § 207(a).

[175] *See infra* Section II.B.

[176] H.R. 6003, § 213 ("As part of its investigation, the Board has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays.")

[177] *Id.* § 213(a).

[178] *Id.*

[179] *Id.*

as well as by "what reasonable measures would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved."[180] The STB can order, "as it deems appropriate," the offending railroad to "remit" damages to Amtrak, which can "be used [by Amtrak] for capital or operating expenditures on the routes over which delays or failures to achieve minimum [Metrics and] [S]tandards were the result of [the freight railroad's] failure to provide preference to Amtrak over freight transportation."[181]

In 2009, the FRA and Amtrak published for comment its first notice of the series of Metrics and Standards.[182] Commenting parties were varied and included commuter railroads operated by regional public transportation authorities, state departments of transportation and other state agencies, several labor and trade organizations, and, chiefly, private freight railroads.[183] The most controversial part of these Metrics and Standards was Amtrak's On-time Performance Metrics and Standards discussed infra Section II.B .[184]

B. The On-time Performance Metrics and Standards

Under the On-time Performance ("OTP") Metrics and Standards, Amtrak routes outside the Northeast Corridor must be on time at least 80% of the time, while after five years all long-

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[180] *Id.*

[181] *Id.*

[182] Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of Public Law 110–432, 74 Fed. Reg. 10983 (proposed Mar. 13, 2009).

[183] Metrics and Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, 75 Fed. Reg. 26839 (May 12, 2010), https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1511/Section_207_Metrics_and_Standards_2010-05-05_Final.pdf.

[184] *See U.S. Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 49 (2015) ("Of most importance for this case, the metrics and standards also address Amtrak's on-time performance and train delays caused by host railroads. . . . [T]he on-time performance metrics require on-time performance by Amtrak trains at least 80% to 95% of the time for each route . . . .").

distance routes and "[a]ll other corridors" must be on time 85% and 90% of the time, respectively.[185] While the AAR litigated, it also submitted a petition to the FRA to define the term "on-time" in "on-time performance,"[186] which the FRA then clarified in 2016 to mean "a train's arrival at, or departure from, a given station . . . if it occurs no later than [fifteen] minutes after its scheduled time."[187]

Moreover, the FRA desired that OTP be calculated based on every station along an Amtrak route, rather than using the alternative approach of calculating departures and arrivals using each Amtrak route's two termini.[188] "[V]irtually all commenters urge[d] the [Surface Transportation] Board" to adopt the former, "[e]xcept for the freight railroad industry," which advocated the latter.[189] This definition's implications may not be immediately apparent to the railroad novice, but a calculation of OTP based on every station along a given route means that a train would need to timely arrive to every station along a route, not just at the beginning or end of a route.[190] Calculating OTP based on a route's endpoints benefits freight railroads because it allows delayed Amtrak trains to "catch up" and resolve the delays by simply arriving to the final station on time.

Ultimately, the FRA adopted the final Metrics and Standards in 2020, which included "total minutes of delay for all Amtrak-responsible delays [and private-railroad]-responsible delays," the

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[185] Metrics and Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, 75 Fed. Reg. at 26839.

[186] On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 80 Fed. Reg. 28928 (May 20, 2015).

[187] On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 81 Fed. Reg. 51343 (Aug. 27, 2016) (to be codified at 49 C.F.R. pt. 1040).

[188] *Id.*

[189] *Id.*

[190] *Id.*

"number of detraining passengers, . . . late passengers, and . . . average minutes late that late customers arrive at their detraining stations, . . . the average actual running time and median actual running time compared to the [Amtrak trains'] schedule[d] running time," and "minutes of delay per 10,000 train miles for all Amtrak-responsible and [private-railroad]-responsible delays."[191] The final rule adopted part of the 2009 minimum OTP Metrics and Standards—requiring a train to be on time "80[% of the time] for any [two] consecutive calendar quarters"[192]—as well as the 2016 FRA definition of OTP.[193] The STB investigates freight railroads that violate these final Metrics and Standards to recover damages for Amtrak.[194]

C. THE CERTIFIED SCHEDULE METRIC

The possibility of an STB investigation is designed to encourage Amtrak and freight railroads to work together on schedules to avoid STB intervention.[195] Known as the "certified schedule metric," this "requires Amtrak to report [all proposed, in-negotiation, and final] schedules, by train, by route, and by host railroad," keeping the STB in the loop regarding Amtrak

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[191] *See* Lewis, *supra* note 151.

[192] Metrics and Minimum Standards for Intercity Passenger Train Operations, 49 C.F.R. § 273 (2020); Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. 72971 (Nov. 16, 2020) (to be codified at 49 C.F.R. pt. 273).

[193] 49 C.F.R. § 273 ("The customer OTP metric is calculated as follows: The total number of customers on an intercity passenger rail train who arrive at their detraining point no later than 15 minutes after their published scheduled arrival time, divided by the total number of customers on the intercity passenger rail train.")

[194] *See* Lewis, *supra* note 151.

[195] *See* Amanda Barbour, William Byrne & Jameson Rice, *Biden's "Second Great Railroad Revolution": PTC, Fossil Fuels and Amtrak "Preference,"* J.D. SUPRA (Jan. 11, 2021), https://www.jdsupra.com/legalnews/biden-s-second-great-railroad-5379408/; *FRA Publishes Final Rule Setting Amtrak Performance Standards for Host Railroads (Updated)*, TRAINS (Nov. 16, 2020), https://www.trains.com/trn/news-reviews/news-wire/fra-publishes-final-rule-setting-amtrak-performance-standards-for-host-railroads-updated/ ("The final rule establishes a scheduling metric, provides . . . time for Amtrak and railroads to negotiate, and creates a dispute resolution process to address disagreements.").

and freight railroads' attempts to avoid preference disputes through cooperative scheduling.[196] Schedules are either certified, meaning that they are satisfactory to both Amtrak and the given freight railroad as "consistent with [PRIIA] [S]ection 207's direction to measure on-time performance,"[197] or disputed, meaning Amtrak and the given freight railroad entered non-binding arbitration to help resolve the preference dispute.[198] A schedule that is neither certified nor disputed is uncertified.[199]

"[I]f a train schedule is reported as a disputed schedule during the first six months"—meaning Amtrak and a freight railroad chose to engage in non-binding arbitration— "then the customer OTP standard does not apply until the second full calendar quarter following those six months," giving Amtrak and its host freight railroads time to negotiate a final, "certified" schedule without being subject to STB investigation.[200] The final Metrics and Standards also "incorporated a grace period for host railroads to renegotiate schedules with Amtrak before the new standards can be enforced,"[201] meaning:

> [I]f Amtrak and a host railroad do not agree on a new train schedule and the schedule is reported as a disputed schedule on or before May 17, 2021, then the . . . OTP standard for the disputed schedule shall apply beginning on the second full calendar quarter after May 17, 2021.[202]

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[196] 49 C.F.R. § 273; Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. at 72,971 ("This information is reported monthly for six months, at [twelve] months, and yearly thereafter.").

[197] *Id.* at 72,971, n.20.

[198] *Id.* at 72,971.

[199] *Id.*

[200] *Id.*

[201] BEN GOLDMAN, CONG. RSCH. SERV., R45942, ISSUES IN THE REAUTHORIZATION OF AMTRAK 18 (2021), https://sgp.fas.org/crs/misc/R45942.pdf.

The Metrics and Standards do not require certified schedules, which, like uncertified schedules, are subject to STB investigations.[203] However, "STB investigations may include STB review of the extent to which scheduling contributed to delay," suggesting that certified schedules may be perceived favorably in such investigations.[204] Moreover, "the certified schedule metric . . . encourages [Amtrak and freight railroads] to certify schedules by requiring Amtrak and a host railroad to transmit monthly letters signed by their chief executive officers to Congress (and others) when they have an uncertified schedule after six months."[205]

D. IMPLEMENTING THE METRICS AND STANDARDS

In response to the final Metrics and Standards, the STB implemented a working group to carry out its duty to evaluate freight railroads against the 2020 Metrics and Standards.[206] The "STB is [now] authorized to investigate a failure to meet the on-time performance standard, either on its own initiative or upon complaint by Amtrak or another eligible complainant, to determine whether and to what extent that failure is due to causes that could be reasonably addressed by a rail carrier" whose tracks Amtrak uses.[207] And "[t]he board may also award damages and prescribe other relief

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[202] 49 C.F.R. § 273; Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. at 72,971; *see also* GOLDMAN, *supra* note 201.

[203] *See* 49 C.F.R. § 273; Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. at 72,971.

[204] 49 C.F.R. § 273; Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. at 72,971.

[205] *Id.*

[206] *STB Forms Working Group to Enforce On-time Passenger-rail Standards*, PROGRESSIVE RAILROADING (Apr. 16, 2021), https://www.progressiverailroading.com/federal_legislation_regulation/news/STB-forms-working-group-to-enforce-on-time-passenger-rail-standards--63239.

[207] *Id.*

should it determine that failure to meet the on-time performance standard was attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation."[208]

The STB has discretion in pursuing investigations, so it will not pursue every available violation by railroads against Amtrak.[209] This leaves Amtrak to initiate its own investigations upon complaint to the STB, tying Amtrak's hands and leaving the fate of its own congressionally authorized preference to the lengthy and complex investigative proceedings which PRIIA commands. Additionally, the STB must conduct these proceedings while being fair to the freight railroads Amtrak uses.[210] Regardless, the Bipartisan Infrastructure Deal instructs the STB to hire staff tasked with mediating disputes between Amtrak and private railroads regarding Amtrak's statutory rights:[211] "[t]he Surface Transportation Board shall . . . establish a passenger rail program with primary responsibility for carrying out the Board's passenger rail responsibilities; and . . . hire up to [ten] additional full-time employees to assist in [establishing the aforementioned passenger rail program]."[212]

E. ENFORCEMENT BY THE DEPARTMENT OF JUSTICE

Before PRIIA and its resultant Metrics and Standards, Amtrak's only option in ensuring that freight railroads adhered to its statutory preference was through the DOJ bringing a case

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[208] *Id.*

[209] *See id.*

[210] *See* Gordon, *supra* note 158 (observing that, while freight railroads' gravitation towards more precise train scheduling may make accommodating Amtrak passenger trains more possible, the Surface Transportation Board's implementation of Amtrak's statutory preference over freight trains faces "industry pressure . . . because it would hurt the bottom line.")

[211] KXRO NEWS RADIO, *supra* note 16.

[212] Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 22309 (2021).

against an offending railroad.[213] This happened only one time, on December 20, 1979, when the Attorney General filed suit in the U.S. District Court for the District of Columbia against the Southern Pacific Railroad for causing railroad delays to Amtrak's Sunset Limited.[214] The case, United States v. Southern Pacific Transportation Co., ultimately settled outside of court, but within a day after Amtrak's filing, Amtrak obtained a consent order for Southern Pacific to instruct its employees to yield to Amtrak trains and to report all delays of more than ten minutes to Amtrak.[215] The option to enforce Amtrak's statutory preference via the DOJ remains alongside potential enforcement by the STB.[216]

The Sunset Limited is a long-distance train that Amtrak runs which operated on-time only 21% of the time in May 2021.[217] Back in 1979, the Sunset still "routinely ran seven, eight, or nine hours late"[218] and "[n]ot once was . . . on time from July to October" of that year.[219] The then-president of Amtrak, Alan S. Boyd, remarked that "[i]t's really sort of pitiful" that "people call up and ask what day the Sunset Limited gets in, not what hour."[220] Unfortunately, not much has

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[213] Shifrin, *supra* note 106.

[214] *Id.*

[215] *See id.* (noting Amtrak filed suit on December 20, 1979); N.Y. TIMES, *supra* note 13 (remarking on the consent order obtained against the Southern Pacific Railroad on December 21, 1979).

[216] *See* NAT'L R.R. PASSENGER CORP., *supra* note 13.

[217] NAT'L R.R. PASSENGER CORP., *supra* note 15.

[218] Shifrin, *supra* note 106.

[219] N.Y. TIMES, *supra* note 13.

[220] *Id.*

changed since 1979—delay-wise, the Sunset remains one of the lowest performing long-distance routes in the Amtrak system.[221]

III. Why the Current Preference Scheme is Insufficient

Amtrak was formed with "The Public Bargain" in mind, an understanding whereby freight railroads assented to Amtrak's creation—and yielded to Amtrak's operation on their tracks—in exchange for release from their requirement to operate private passenger railroad service. The current enforcement scheme literally sidelines Amtrak trains and does a poor job of living up to "The Public Bargain" between Amtrak and freight.

A. The Guiding Philosophy of Preference: "The Public Bargain"

Historically, Amtrak set its own schedules without any regard for freight railroads.[222] This comes from the idea that freight railroads should schedule their trains around Amtrak's own, as 49 U.S.C. § 24308(c) affords Amtrak preference over freight[223] and makes freight trains yield to Amtrak passenger trains running on private freight tracks.[224] "In practical terms, this policy, when followed correctly, means that, when a passenger train is making its scheduled run on a railroad line, in order to keep the passenger train on schedule, freight trains are supposed to wait or move onto sidings to let the passenger train pass unimpeded."[225] In fact, when Congress created Amtrak,

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221 Nat'l R.R. Passenger Corp., *supra* note 15.

222 Barbour, Byrne & Rice, *supra* note 195 ("Traditionally, Amtrak unilaterally set its schedules, largely without regard to the impact of its operations on freight traffic. In adopting the new metrics and standards, FRA strongly admonished the parties that Amtrak's schedules should be negotiated and agreed upon so as to be reasonably achievable.")

223 49 U.S.C. § 24308(c)

224 Richards, *supra* note 12.

225 *Id.*

"[t]he president of one railroad testified [before the House] that his railroad 'traditionally has given passenger train operations preference over freight service and would continue to afford Amtrak trains priority.'"[226] Furthermore, Amtrak doesfreights a favor by operating the passenger services that freights would otherwise be required to run without Amtrak, and yet Amtrak operates under the false assumption that freight railroads will schedule around its passenger trains.

Former Amtrak CEO William Flynn cited preference as indispensable to "the essential bargain,"[227] or what Amtrak internally calls "The Public Bargain."[228] These are two names for the same thing: in exchange for relieving private railroads of the need to run passenger service, Amtrak takes over these services, and railroads "provide Amtrak the right to access the tracks and . . . preference to Amtrak trains over freight trains."[229] But, as former CEO Flynn affirmed, freight railroads are "not really living up to [their] end of the bargain."[230]

B. The Current Scheme Does Not Effectuate the Public Bargain

The current scheme leaves enforcement of Amtrak's right to statutory preference up to two external bodies—the STB and the DOJ[231]—neither of which have Amtrak's best interests in mind. The DOJ, a political body within the executive branch, exercises prosecutorial discretion in enforcing federal law, and one could easily follow the money with a freight-railroad-bankrolled

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[226] NAT'L R.R. PASSENGER CORP., *supra* note 11, at 5.

[227] Henry Grabar, *The CEO of Amtrak Thinks Americans Are Ready for Trains Again*, SLATE (Mar. 15, 2021, 3:28 PM), https://slate.com/business/2021/03/amtrak-ceo-interview-trains-coronavirus.html.

[228] NAT'L R.R. PASSENGER CORP., *supra* note 11, at 2.

[229] Grabar, *supra* note 227.

[230] *Id.*

[231] *See supra* Sections II.D, II.E.

administration that is unsympathetic towards Amtrak and chooses not to enforce statutory preference.[232] The STB habitually moves leisurely in proceedings involving Amtrak and freight railroads,[233] and the Metrics and Standards it enforces are designed to mediate between freight railroads and Amtrak, not encourage adversarial behavior.[234] Moreover, the STB's members are appointed by the President and confirmed by the Senate,[235] and its rules allow three of five members to be from the same political party.[236] The STB's term-staggering means that, at most, a

[232] Lobbying efforts to elect the president could influence the president's cabinet—the Attorney General included. This could thus influence the kinds of cases that the DOJ chooses to prosecute. Consider the effect on the marijuana growing industry that the Trump Administration DOJ had, coupled with that industry's political weight. *See, e.g.*, James Higdon, *Did Jeff Sessions Just Increase the Odds Congress Will Make Marijuana Legal?*, POLITICO MAGAZINE (Jan. 6, 2018), https://www.politico.com/magazine/story/2018/01/06/jeff-sessions-marijuana-legalization-congress-216251/ (describing how Trump-era Attorney General Jeff Sessions' decision to restart marijuana crimes prosecution angered marijuana industry leaders and caused a 5% dip in Scotts Miracle-Gro's stock prices). *See also* Chris Katje, *Scotts Miracle Gro: Picks And Shovels Play For Joe Biden Win, Marijuana Legislation*, YAHOO (Nov. 3, 2020), https://www.yahoo.com/video/scotts-miracle-gro-picks-shovels-153207606.html (discussing Scott Miracle-Gro's positioning to earn big after a Biden election victory); Paul Best, *Scotts Miracle-Gro is main financial supporter of push to legalize weed in New Jersey: report*, FOX BUS. (Oct. 15, 2020, 1:50 PM EDT), https://www.foxbusiness.com/economy/scotts-miracle-gro-main-financial-supporter-of-push-to-legalize-weed-new-jersey (discussing Scott Miracle-Gro's political action committee donations in its push for marijuana legalization); Cloe Pippin, *Merrick Garland Signals New Stance on Marijuana Policy if Confirmed as Attorney General*, CANNABIS AND THE LAW (Mar. 3, 2021), https://www.cannabisandthelaw.com/2021/03/03/merrick-garland-signals-new-stance-on-marijuana-policy-if-confirmed-as-attorney-general/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (noting Biden administration Attorney General Merrick Garland's hesitation to committing "resources towards enforcement of federal marijuana laws").

[233] *See, e.g.*, Stephan Bisaha, *Will The Gulf Coast Amtrak Line Ever Leave The Station?*, WBHM(May 12, 2021), https://wbhm.org/2021/will-the-gulf-coast-amtrak-line-ever-leave-the-station/ (noting Amtrak's plans to open service along the coast of the Gulf of Mexico could be delayed by STB proceedings). *See also* Lewis, *supra* note 152.

[234] *See* Barbour, Byrne & Rice, *supra* note 195 ("In adopting the new metrics and standards, FRA strongly admonished the parties that Amtrak's schedules should be negotiated and agreed upon so as to be reasonably achievable.").

[235] *Board Members*, SURFACE TRANSP. BD., https://www.stb.gov/about-stb/board-members/ (last visited Mar. 25, 2022).

[236] Jeff Davis, *Trump Moves to Fill Two New STB Positions*, ENO CTR. FOR TRANSP. (Mar. 5, 2018), https://www.enotrans.org/article/trump-moves-fill-two-new-stb-positions/.

one-term presidential administration could appoint up to four of five seats on the STB: four Trump Administration appointees make up the current board.[237]

Amtrak's general counsel does not consist of appointees like the Attorney General or STB members, but instead hires internally.[238] Therefore, Amtrak's general counsel will intrinsically advocate for its own interests and dissociates from the political process.[239] The Bipartisan Infrastructure Deal indeed commands the STB to hire "up to 10 additional full-time employees" to focus on passenger rail issues.[240] But this fickle command does not apportion funding and is insufficient to enforce Amtrak's preference and overcome the complex administrative hurdles that constitute the Metrics and Standards.[241] Lastly, since STB[242] and FRA[243] actions are reviewable in federal courts, it is foreseeable that trade organizations, like the AAR, will pursue litigation to thwart the Metrics and Standards further.

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[237] *See Board Members*, *supra* note 235. In the wake of *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), agencies like the STB may become even more beholden to presidents as presidential removal power may see further expansion. 140 S. Ct. at 2183.

[238] *See, e.g.*, *All Aboard: Amtrak Hires Deputy GC*, LAW.COM (May 2, 2007, 12:00 AM), https://www.law.com/corpcounsel/almID/900005480182/?slreturn=20220123215032 (describing how *Amtrak* has *hired* new general counsel, and not how an elected official "appoints" Amtrak general counsel) (emphasis added).

[239] *See id.*

[240] Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 22309(2) (2021) (emphasis added).

[241] *Id.*

[242] *See* 5 U.S.C. § 706 (setting forth judicial review under the Administrative Procedure Act); 28 U.S.C. §§ 2342(5), 2321.

[243] *See* 5 U.S.C. § 706; 28 U.S.C. § 2342(7); 49 U.S.C. §§ 20101–68, 20301–06, 20501–05, 20701–03, 20901–03, 21101–09, 21301–11 (authorizing judicial review of a number of final agency actions issued by the FRA); 49 U.S.C.§ 20114(c) (setting forth a catchall extending judicial review to all "final action[s] of the Secretary of Transportation . . . applicable to railroad safety").

Allowing Amtrak to enforce its statutory preference would sidestep the STB's tedious proceedings under the Metrics and Standards and embolden Amtrak to threaten non-compliant railroads with suits to hold up their end of the "The Public Bargain." In fact, giving Amtrak the power to sue freight railroads would be similar to the lone enforcement action and corresponding speedy consent order obtained by the DOJ in 1979, the only difference being that such suits would likely happen more than just once if Amtrak is given the right to enforce its own preference.[244] A consent order from a district court, or eventually achieving settlement through an adversarial process, could reign freights in quicker than the STB with its rigid § 24308(c) investigation proceedings.

IV. Five Misled Alternatives to Amtrak Enforcing Preference

Several alternatives to allowing Amtrak to enforce its own statutory preference under 49 U.S.C. § 24308(c) have been proposed. This Part addresses and rebuts each proposal in turn.

A. A 'Neo-ICC': A New, Potentially Stronger Regulatory Agency

One hypothetical proposal that would allow Amtrak to enforce its own preference is to bring back a strong, independent federal agency akin to the ICC, or an agency even stronger than the ICC.[245] This neo-ICC would schedule Amtrak and freight railroads in a way that avoids conflict between the two, akin to a federal 'air traffic control' system for rail, instead of maintaining the

[244] *See* Shifrin, *supra* note 106; N.Y. Times, *supra* note 13. This article does not address whether Amtrak has standing to sue railroads which have violated 49 U.S.C. § 24308(c). Rather, this article assumes Amtrak would have this standing. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–62 (1992) (outlining that to sue in federal court, a plaintiff must have suffered injury of a legally protected interest, there must be a causal connection between the injury and the conduct brought before the court, and the court will rectify the injury).

[245] *See, e.g.*, Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure*, 95 Marq. L. Rev. 1151, 1160–71 (2012).

STB's province of mediating between Amtrak and freights.[246] The now-dissolved ICC, while originally founded in 1887 to prevent price collusion for rates among railroads,[247] morphed over the years into a much more powerful and entrusted entity[248] that at its height regulated rail carriers' entry and exit routes.[249] This culminated in the Transportation Act of 1920, or the Esch-Cummins Act, which charged the ICC with regulating railroads' services, a practice that continued into the twilight of private railroad passenger service and Amtrak's inception.[250]

"In granting either entry or exit" of railroad common carriers into a given market territory the STB "would issue a[n] [operating] certificate,"[251] and "service offerings were . . . regulated in a manner in which carriers were under a common carrier obligation to provide adequate service in the territories described by [those] operating certificates."[252] "The ICC prescribed what routes could be served, designating which applicants would be allowed to serve proposed city-pairs or territories. Once a carrier served a market, it ordinarily could not cease service unless it received governmental approval to exit."[253] Although today's STB "adjudicat[es] and mediat[es] rate, service and access disputes between railroads and their customers,"[254] the pre-Staggers-Act ICC's

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246 *See supra* Section II.D.

247 Dempsey, *supra* note 245, at 1160–61.

248 *Id.* at 1174–75 (discussing the ICC's growth from a tiny agency with a few clerks to the largest employer of administrative law judges).

249 *Id.* at 1165.

250 *See* Davis, *supra* note 21.

251 Dempsey, *supra* note 245, at 1171.

252 *Id.*

253 *Id.*

254 *Freight Rail Economic Regulation 101*, ASS'N OF AM. R.RS., https://www.aar.org/campaigns/economic-regulation-101/ (last visited Mar. 25, 2022).

regulatory environment is no more. Freight railroads now use a streamlined process "to discontinue offering service on unprofitable routes," and today's railroads are no longer "force[d] . . . to carry freight between virtually any two points on its system" under a now discontinued practice known as "open routing."[255]

Congress, in an eleventh hour vote, terminated the ICC on December 31, 1995, and much of the ICC's railroad-related duties transferred to a newly-minted STB immediately after.[256] While entry and exit regulation of rail service providers may have made sense at the time, as discussed supra Section I.B, 1970s ICC regulation was largely to blame for railroads' inflexibility to changing industry conditions through the inability to cut services to preserve profitability.[257] And while current neo-ICC proponents may point to freight railroads' record profitability[258] as evidence that the regulation pendulum should swing back to allow the government to oversee freight services, this logic threatens the environment where freight railroads thrive, which isan environment where freights set routes and services for themselves without government

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[255] Jerry Ellig, *Forty Years After Surface Freight Deregulation*, THE REGUL. REV. (Dec. 14, 2020), https://www.theregreview.org/2020/12/14/ellig-forty-years-after-surface-freight-deregulation/.

[256] *See* John C. Spychalski, *From ICC to STB: Continuing Vestiges of US Surface Transport Regulation*, 31 J. OF TRANSP. ECON. AND POL'Y 131, 131–32 (1997) (describing that the STB continued with ascertaining rate reasonableness , setting joint rates between railroads, mandating railroads open up their terminals to competitors, requiring railroads to construct connections between their tracks and shippers' private sidings, overseeing entry and exit into the market, maintaining railroads' common carrier obligations, and exempting certain railroads from regulation). *But see* Ellig, *supra* note 255 (discussing the limits of today's STB).

[257] Davis, *supra* note 21.

[258] *See, e.g.*, *UP produces 'record' quarterly results*, PROGRESSIVE RAILROADING, https://www.progressiverailroading.com/union_pacific/news/UP-produces-record-quarterly-results--64098.

intervention. Since the Staggers Act of 1980, "freight railroads have poured approximately $760 billion of their own funds back into their operations," such as back into their own infrastructure.[259]

Thus, a government agency that intrusively schedules freight railroads' own routes could reverse freight railroads' profitability,[260] thereby reducing freight railroads' infrastructure investments and impeding the Amtrak services, which necessarily run on private freight railroads' tracks. While the federal government could solve the preference problem addressed in this article by handling scheduling, it could also unfortunately denigrate the quality of Amtrak services by re-regulating railroads and reducing the revenue available to railroads to improve and maintain their infrastructure. If the ICC regulating entry and exit of routes was onerous enough to cue deregulation via the Staggers Act, regulation by federal rail traffic control agency could be even more onerous.[261]

B. SUBSIDIZING FREIGHT RAILROADS TO BUILD MORE TRACKS FOR AMTRAK

Another alternative to the "Public Bargain" scheme involves even more government involvement with Amtrak. If Amtrak will never be able to cooperate with freight railroads and

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[259] *See* FREIGHT RAILROADS UNDER BALANCED ECONOMIC REGULATION, *supra* note 129.

[260] *See* Uday Schultz, *Expanding American Rail Capacity*, HOME SIGNAL (Apr. 9, 2021), https://homesignalblog.wordpress.com/2021/04/09/expanding-american-rail-capacity/ ("Fully structured freight operations may cause freight railroads' operating costs to increase in the short run as their ability to make operating plan adjustments for demand is reduced, and as their trains are forced to follow stricter performance guidelines."). Moreover, "[a] shift to timetabled operations would also require the development of new network planning competencies among American railroads," i.e., meaning more resources and potentially more costs for the railroads. *Id.*

[261] *Id*. *But see* Richard Webner, *In 'rail renaissance,' railroads reap in record profits despite decline in traffic*, FLA. TIMES-UNION (Feb. 8, 2015, 7:56 AM ET), https://www.jacksonville.com/story/business/2015/02/08/rail-renaissance-railroads-reap-record-profits-despite-decline-traffic/15650289007/ (remarking that freight railroads experienced record profits, and the industry has largely consolidated into an oligopoly). These 'good times' for freight railroads suggest that today's private railroads could weather the regulation that railroads of the era immediately prior to the Staggers Act could not. *Id.*

share freight tracks to achieve frequent and fast service, then freight railroads should instead be provided with federal subsidies to expand their infrastructure to accommodate Amtrak trains.[262] With more tracks, there is less need for freight railroads to coordinate their own schedules with Amtrak's trains, and some freight railroads even advocate that federal subsidies will allow them to construct sidings[263] for freight trains to pull into to yield to Amtrak trains.[264] Instead of giving Amtrak another legal avenue to enforce its preference, Amtrak could instead use this subsidized infrastructure.

However, this plan creates the phenomenon of "induced demand."[265] Commonplace in transportation planning, particularly in the context of expressways, "induced demand" occurs when an increase in traffic lanes causes an increase in the available roadway supply for drivers, which in turn causes more drivers to use a given roadway.[266] This leads to a newly expanded roadway that is crowded with cars and once again in need of expansion.[267]

Freight railroads that receive subsidies for track expansion create induced demand. "For example, between 2011 and 2017, the federal government invested $197.4 million on the 33-mile

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[262] *See* Stephen Gardner, *Amtrak's Preference Rights Are Not New—Or Reason For Alarm*, RY. AGE (Dec. 16, 2019), https://www.railwayage.com/passenger/intercity/amtraks-preference-rights-are-not-new-or-reason-for-alarm/.

[263] *3 Questions About Railroad Siding Warehouses Answered*, QUALITY WAREHOUSE & DISTRIB. CO. INC. (Sept. 20, 2021), https://www.qualitywarehouse.com/3-questions-about-railroad-siding-warehouses-answered/ ("[A] railroad siding is a small stretch of railroad track that is used to store rolling stock or enable trains to pass through on the same line.")

[264] Gardner, *supra* note 262.

[265] Adam Mann, *What's Up With That: Building Bigger Roads Actually Makes Traffic Worse*, WIRED (June 17, 2014, 6:30 AM), https://www.wired.com/2014/06/wuwt-traffic-induced-demand/.

[266] *Id.*

[267] *Id.*

line between Porter, Indiana and Chicago for new sidings and a mile-long flyover to improve the reliability of Amtrak service."[268] However, "rather than declining, delays to Amtrak trains on that line due to freight train interference [] got[] much worse: 63% higher [in 2018] than in 2011."[269] This led to 66% of Amtrak trains passengers headed from Chicago, Illinois, to Detroit, Michigan, and Pontiac, Michigan, to arrive late to their destination in 2018.[270]

Moreover, North Carolina taxpayers paid more than $500 million in state subsidies to improve the freight tracks that Amtrak's Piedmont service runs on,[271] yet freight "railroad delays actually increased in the year after completion of the project, up to twice the level they were prior to the investment."[272] In other words, subsidies to expand freight railroad tracks incentivize freight railroads to run more trains, rather than make room for Amtrak.[273]

C. BUILDING AMTRAK ITS OWN SEPARATE TRACKS

Regardless, creating more Amtrak infrastructure is wasteful considering many Amtrak trains run less than daily.[274] In fact, "Amtrak accounts for only about 4% of train-miles on Class I

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[268] Gardner, *supra* note 262.

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Examining the Surface Transportation Board's Role in Ensuring a Robust Passenger Rail System: Hearing Before the Subcomm. on R.Rs., Pipelines, and Hazardous Materials of the H. Comm. on Transp. & Infrastructure*, 116th Cong. 22–37 (2021) (statement of Stephen J. Gardner, Senior Executive Vice President, Chief Operating and Commercial Officer, National Railroad Passenger Corporation).

[273] Gardner, *supra* note 262.

[274] *See, e.g.*, *Cardinal Train*, AMTRAK GUIDE, https://amtrakguide.com/routes/cardinal/ (last visited Mar. 25, 2022) ("The *Cardinal* Amtrak route travels between New York and Chicago (through DC) three times each week.")

railroads,"[275] so it is illogical to construct dedicated rails for Amtrak. Even if Amtrak received subsidies to build its own infrastructure, instead of providing those funds to freight railroads to expand their tracks to accommodate Amtrak services, the cost-to-service-frequency ratio is lopsided.

Consider the costs incurred by attempts to build entirely new railroad infrastructure, like those encountered by the California High-Speed Rail Authority's high-speed rail project.[276] While the multibillion-dollar rail infrastructure built for the California project is likely more expensive than many freight-grade rails that Amtrak runs its trains over, similar engineering done during the California project, such as "building bridges, viaducts, trenches and overpasses," "moving underground utilities and . . . buying all of the land along the right of way," would apply when constructing new Amtrak infrastructure.[277] Simply put, the great feats of the predecessors to today's freight railroads[278] would have to be recreated for Amtrak to get its own tracks, which seems unnecessary given how infrequent Amtrak services are and given their minimal use of freight railroad right of way.

Those who suggest that Amtrak passenger trains cannot share tracks with private railroad freight trains should consider Brightline, a private, intercity train service in Florida which shares its tracks with freight trains.[279] Brightline is one of the only intercity train services in the country

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[275] Gardner, *supra* note 262.

[276] Ralph Vartabedian, *Cost overruns hit California bullet train again amid a new financial crunch*, YAHOO (Oct. 8, 2021), https://www.yahoo.com/now/cost-overruns-hit-california-bullet-120053240.html.

[277] *Id.*

[278] *See supra* Section I.A.

[279] *See* Katherine Kokal, *Expect delays at 17 railroad crossings from West Palm to Jupiter as Brightline activates new track*, PALM BEACH POST (Sept. 14, 2021, 5:13 PM ET), https://www.palmbeachpost.com/story/news/local/jupiter/2021/09/14/brightline-trains-activate-second-railroad-track/8330879002/.

not operated by Amtrak.[280] Brightline's trains run along the Florida East Coast Railway, a private railroad that also operates freight services.[281] Unlike infrequent Amtrak services, Brightline's services are frequent and run seventeen times per day in both directions[282] with minimal stops.[283] Brightline services exceed ridership expectations,[284] and the railroad is expected to expand its services "aggressive[ly]" over the next several years.[285]

Shared use between freight and passenger rail is thus doable in the states, and critics should look to other countries where passenger and freight trains share tracks without a problem.[286] For instance, the German rail system, the Deutsche Bahn, practices a system of nachtsprung, whereby

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[280] *See Brightline Florida: a model for fast, successful trains*, HIGH SPEED RAIL ALL., https://hsrail.org/florida-high-speed-rail (last visited Mar. 25, 2022) ("Launched in 2018, [Brightline is] the first privately-held intercity passenger railroad in the U.S. in nearly 40 years.")

[281] *See* Gardner, *supra* note 262 ("Florida East Coast, renowned for its ability to attract short haul intermodal traffic, accommodates 34 intercity Virgin Trains passenger trains a day on its Miami-to-West Palm Beach main line."); Susan Mehiel, *Brightline's many at-grade crossings are a safety risk for the Treasure Coast*, TC PALM (Jan. 20, 2022, 4:00 AM ET), https://www.tcpalm.com/story/opinion/2022/01/20/letters-editor-jan-20-2022/6574560001/.

[282] *Brightline Florida: a model for fast, successful trains*, *supra* note 280.

[283] *Id.* ("[Florida's new Brightline is a model for train service in the U.S.] [f]eaturing frequent, comfortable, modern trains, this entirely new service has already carried 1.5 million passengers in its first two years – with just three initial stations.")

[284] Debora Lima, *Brightline president: 'Train ridership is three times what we expected,'* S. FLA. BUS. J. (Mar. 7, 2018), https://www.bizjournals.com/southflorida/news/2018/03/07/brightline-president-train-ridership-3x-expected.html.

[285] *See Brightline Florida: a model for fast, successful trains*, *supra* note 280; Cashara Quinn, *Brightline rail system expanding to Orlando*, FOX 4, (Sept. 29, 2021), https://www.fox4now.com/news/state/brightline-rail-system-expanding-to-orlando.

[286] *See, e.g.*, Michael Minn, Sylvia Brady, Julie Cidell, Keith Ratner & Andrew Goetz, *Shared-use rail corridors: a comparison of institutional perspectives in the United States and the European Union*, 42 TRANSP. REVS. 384 (2021).

passenger trains run during the day and freight trains run at night.[287] This system allows freight and passenger trains to run without conflict.[288] While American freight volumes are higher than their European counterparts,[289] "there is no correlation between freight volumes and freight train interference delays on most [American] rail lines, which means dispatching decisions unrelated to the level of freight traffic drive Amtrak on time performance."[290]

Passenger trains delayed by freight railroads remain a uniquely American problem.[291] Because American freight trains are some of the longest in the world, often stretching for miles,[292] Amtrak trains are forced to ride behind the freight trains at slow speeds or wait on sidings for exorbitant amounts of time.[293] For instance, "passengers on Amtrak Cascades and Missouri River Runner trains have been forced to follow freight trains for miles, at a slower speed, because the freight train ahead could not fit into a siding to allow the Amtrak train to pass."[294] "Passengers have also been stuck on trains for hours while freight trains experience mechanical issues, inherent

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[287] *Nachtsprung*, HERMES BLOGGT, https://blog.myhermes.de/hermesabc/nachtsprung/ (last visited Mar. 25, 2022).

[288] *Id.*

[289] *See, e.g.*, Amber Pariona, *Highest Railway Cargo Traffic In The World*, WORLDATLAS (Apr. 25, 2017), https://www.worldatlas.com/articles/highest-railway-cargo-traffic-in-the-world.html.

[290] *Examining the Surface Transportation Board's Role in Ensuring a Robust Passenger Rail System: Hearing Before the h. Transportation and Infrastructure Comm.,* 116th Cong. 98–106 (2020) (statement of Stephen J. Gardner, Senior Executive Vice President, Chief Operating and Commercial Officer, National Railroad Passenger Corporation (Amtrak).

[291] *See, e.g.*, Meredith Martin Richards, *Fueling the Renaissance: Public Policy and Intercity Passenger Rail in Virginia*, 94 VA. NEWSL. 1, 4 (2018) ("European, British, and Japanese passenger trains are famous for their punctual arrivals and departures. . . ."); JONGPIL NAM, HOW RAILWAY SYSTEMS WORK 154 (2014) (noting that 90% of passenger trains in the UK arrive within ten minutes of their scheduled arrival time).

[292] Gardner, *supra* note 262 (citing the adverse safety effects of freight trains longer than 7,500 feet).

[293] *Id.*

[294] *Id.*

to the operation of extremely long and heavy freight trains."[295] This is because long freight trains save freight railroads money[296] and time.[297] If the STB gave Amtrak the right to sue behemoth freights, Amtrak could seek an order to halt freight obstruction rather than wait for the STB to investigate, making the need for more infrastructure moot.

Lastly, there is evidence that better coordination between Amtrak and freight railroads, achieved through threatening litigation to enforce preference, comes from freight railroads that lead their industry in service quality. Consider one observation from Amtrak's former Senior Executive Vice President:

> Indeed, the railroads that are most successful . . . are, not coincidentally, at the head of the class when it comes to on-time passenger train operations. For example, BNSF was second among the six Class I[] [railroads] in the most recent host railroad "report card" Amtrak publishes on its website. Florida East Coast, renowned for its ability to attract short haul intermodal traffic, accommodates 34 intercity Virgin Trains passenger trains a day on its Miami-to-West Palm Beach main line, more than Amtrak operates on any freight railroad-owned line. Well-run railroads operate their priority trains–including Amtrak trains–on time.[298]

Thus, freight railroads that heed Amtrak's demand for preference have the know-how to coordinate their operations efficiently.[299]

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[295] *Id.*

[296] Bill Stephens, *What does it mean for service when long trains get even longer?*, TRAINS (Feb. 23, 2021), https://cs.trains.com/trn/b/observation-tower/archive/2021/02/23/long-trains-will-only-get-longer-this-year.aspx ("To see why the [longer] 14,000-foot[] [train] is all the rage, just glance at the cost savings from running longer trains. [Freight railroad] Union Pacific saved $268 million in operating expenses last year by boosting train length.")

[297] *Id.* (detailing that longer freight trains allow for faster freight train travel by, inter alia, reducing congestion on freight rail networks, consolidating trains, and reducing the number of stops needed at local yards along routes).

[298] Gardner, *supra* note 262.

[299] *See id.*

D. BUILDING HIGH-SPEED RAIL IN PLACE OF AMTRAK

This article does not argue for construction of a large, high-speed rail system in the United States akin to those found in East Asia and Europe.[300] While those systems have innumerable benefits—including stimulating the economy,[301] resolving environmental destruction,[302] running faster than existing Amtrak passenger rail services,[303] and benefitting intercity travelers whose only option is Amtrak services for rail travel[304]—the mounting costs associated with high-speed rail construction suggest that transforming the Amtrak system is unrealistic and better left to the nation's transportation planners' fantasies.

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300 *See, e.g.*, *Which Countries Have High Speed Rail?* WORLDWIDE RAILS, https://worldwiderails.com/which-countries-have-high-speed-rail/ (last visited Mar. 25, 2022).

301 *High Speed Rail: Benefits, Costs, and Challenges*, ENV'T AND ENERGY STUDY INST. (May 4, 2010), https://www.eesi.org/briefings/view/high-speed-rail-benefits-costs-and-challenges ("High speed rail . . . can activate economic development potential in numerous ways: saving time and money; expanding labor markets for employers and expanding employment opportunities for labor force; enhancing 'clusters' of economic activity across regions; and creating a focal point for future development.")

302 Eric Jaffe, *How Green Is High-Speed Rail?* BLOOMBERG (Nov. 15, 2011, 6:28 AM PST), https://www.bloomberg.com/news/articles/2011-11-15/how-green-is-high-speed-rail ("[I]t seems entirely reasonable to conclude that the California [high-speed rail project] . . . will eventually offset the environmental damage caused by its construction, and then some.")

303 *See Build fast and affordable rail service in the Northeast Corridor*, FOURTH REG'L PLAN, http://fourthplan.org/action/northeast-rail (last visited Mar. 25, 2022) ("[Upgraded high-speed] Amtrak service from New York City to Washington, D.C. . . . could . . . reduc[e] travel time in half. . . . From New York to Boston, two additional tracks . . . and rerouted service . . . would . . . cut[] trip times by almost one hour.")

304 Rick Geddes, *Reform Amtrak to get the biggest value*, THE HILL (Dec. 2, 2021, 7:00 AM ET), https://thehill.com/opinion/finance/583506-reform-amtrak-to-get-the-biggest-value ("Despite its current de facto operational monopoly, Amtrak does not have an exclusive right to intercity passenger service. However, any new passenger rail company must contract with the owner of the tracks for 'trackage rights.'")

An investment in high-speed rail is comparable to the Interstate Highway System's construction; if high-speed rail were completed, it would cost more than $500 billion.[305] Amtrak's proponents endured much stress to obtain $66 billion in the Bipartisan Infrastructure Deal,[306] but preference enforcement is a comparatively low-cost and affordable solution for Amtrak to ameliorate these delays. Congress has proposed bills to grant Amtrak its right to enforce preference, displaying that Congress is close to concluding the preference issue,[307] even if the recent Bipartisan Infrastructure Plan did not adequately address preference.

E. DISSOLVING AMTRAK AND LEAVING PASSENGER RAIL TO THE FREE MARKET

Another solution to the Amtrak preference problem is eliminating Amtrak and leaving passenger rail to the free market so private companies can contract with freight railroads to use their tracks for passenger service. Why figure out coordination between Amtrak and freight railroads when Amtrak can be dissolved, and passenger rail can be left entirely up to the free market, with private companies contracting with freight railroads to use their tracks for passenger service? Naysayers suggest ending Amtrak and leaving intercity passenger rail service in the United States to private industry.[308] The problem with this approach is simple: intercity passenger

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[305] Alex Planes, *The Best $500 Billion the United States Has Ever Spent*, MOTLEY FOOL (June 29, 2013, 9:00 AM), https://www.fool.com/investing/general/2013/06/29/the-best-500-billion-the-united-states-has-ever-sp.aspx.

[306] Quill Robinson, *Infrastructure deal is proof that Congress can still do good, bipartisan work*, THE HILL (Nov. 20, 2021, 12:30 PM ET), https://thehill.com/opinion/energy-environment/582452-infrastructure-deal-is-proof-that-congress-can-still-do-good ("[A]fter months of bipartisan negotiations and difficult compromises, Republicans and Democrats came together to deliver a badly needed win for the American people this week—the bipartisan infrastructure bill.")

[307] *Durbin Talks Infrastructure With Champaign County First*, DICK DURBIN U.S. SEN. ILL. (Mar. 10, 2022), https://www.durbin.senate.gov/newsroom/press-releases/durbin-talks-infrastructure-with-champaign-county-first.

[308] *See, e.g.*, *Why It's the Perfect Time to Privatize Amtrak*, FOUND. FOR ECON. EDUC. (Feb. 28, 2019), https://fee.org/articles/why-its-the-perfect-time-to-privatize-amtrak/.

rail service does not always profit nor does it always need to. While Amtrak's Northeast Corridor services turn a profit,[309] Amtrak's longer-distance services that run through the rural United States[310] and many state-supported routes that provide necessary rail service to communities[311] do not turn a profit.[312]

> Consider the "Empire Builder", which runs from Chicago to Seattle, with plenty of seats empty as it runs through northern Montana and North Dakota. The route runs at an annual operating loss of over $10 million per year, as does the "Southwest Chief" from Chicago to Los Angeles, the "Sunset Limited" from New Orleans to Los Angeles, and the "California Zephyr" from Chicago to San Francisco, which loses over $30 million annually. Altogether, long distance routes account for about 15% of Amtrak passengers – and 41% of costs.[313]

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[309] Orion Donovan-Smith, *Amtrak loses money on long-distance routes like the Empire Builder, but passengers say they offer a service worth investing in*, THE SPOKESMAN-REV. (May 26, 2021, 3:34 PM), https://www.spokesman.com/stories/2021/may/26/amtrak-loses-money-on-long-distance-routes-like-th/ ("The Northeast Corridor – which connects Washington, D.C., New York City and Boston – is the only [Amtrak route] that operates at a profit, although it has a $31 billion backlog of repairs."). *See* Wall St. J., *Inside Amtrak's Dying Long-Distance Trains*, YOUTUBE (July 16, 2019), https://www.youtube.com/watch?v=q-jP4vh3z_A&ab_channel=WallStreetJournal.

[310] *How Do Long Distance Trains Perform Financially?*, AMTRAK, https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/position-papers/white-paper-amtrak-long-distance-financial-performance.pdf ("In [] 2018, long-distance routes generated revenues of $523.4 million, the vast majority of which were from ticket sales and food and beverages sold on trains. These revenues covered 49% of their operating costs, resulting in an operating loss of $543.2 million."). *See* Wall St. J., *supra* note 309.

[311] *See* UNDERSTANDING INTERCITY PASSENGER, COMMUTER & FREIGHT RAILROADS 1, ASSOCIATION OF AMERICAN RAILROADS (2022) ("Amtrak operates [twenty-eight] state-supported routes on behalf of [seventeen] states that are funded in partnership with [twenty] entities, including state departments of transportation and authorities specifically chartered to administer individual corridors. In [the 2019 fiscal year], state-supported routes carried 15.4 million riders, which was 47% of Amtrak's total ridership."); *How Do Long Distance Trains Perform Financially*?, *supra* note 310, at 3 (noting that state-supported routes cover only 90% of their costs).

[312] *Amtrak's Business Structure*, REAL TRANSIT, http://www.realtransit.org/nec8.php (last visited Mar. 25, 2022), ("Overall, 90% of Amtrak's routes lose money.")

[313] Will Kenney, *Amtrak: Losing Money for the Long Haul*, HARV. BUS. SCH. (Dec. 9, 2015), https://digital.hbs.edu/platform-rctom/submission/amtrak-losing-money-for-the-long-haul/.

V. WHY AMTRAK (AND SOLVING ITS PREFERENCE PROBLEM) MATTERS

Amtrak is a necessary public service that creates positive economic and environmental effects. Considering its needs and benefits, Amtrak's delay problem must be addressed by allowing Amtrak to enforce its own preference. This solution will solve the delay problem for those who rely on otherwise slow Amtrak services. This solution will also legitimize Amtrak services to the traveling public, popularize Amtrak's services, and strengthen Amtrak's benefits further.

A. AMERICANS DEPEND ON AMTRAK

Because Amtrak services operate as a necessary public service for communities not well-connected to the American transportation system, its services should not be based on profit.[314] Elderly Americans,[315] Americans with disabilities,[316] and religious groups such as the Amish,[317] cannot make long-distance drives or take flights,[318] so Amtrak remains an important service for these populations. To view Amtrak in terms of profit is to ignore the pricelessness of Amtrak's

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[314] *See, e.g.*, Wall St. J., *supra* note 309.

[315] Will McCarthy, *How Amtrak Trains Became One Retired Traveler's Sanctuary During the Pandemic*, TRAVEL + LEISURE (Oct. 11, 2021), https://www.travelandleisure.com/trip-ideas/senior-travel/how-amtrak-trains-became-one-retired-travelers-sanctuary-during-the-pandemic ("According to Amtrak data, seniors are major stakeholders in the long-distance rail network—they make up 24% of all people riding Amtrak's long-distance routes. In some corridors, such as Virginia to Florida, they make up more than 60%.")

[316] Emma Olson, *Infrastructure Bill Includes Accessibility Wins; Access Living Amtrak Advocacy Plays Role*, ACCESS LIVING (Nov. 17, 2021), https://www.accessliving.org/newsroom/press-releases-and-statements/infrastructure-bill-includes-accessibility-wins-access-living-amtrak-advocacy-plays-role/ (remarking that "Amtrak offers critical travel options for many people with disabilities").

[317] *Amishtrak*, AMISH AMERICA (Feb. 7, 2011), https://amishamerica.com/amishtrak/ (detailing the "Amishtrak" phenomenon whereby many Amtrak trains are patronized by Amish travelers averse to flying); *see also* WITNESS (Paramount Pictures 1985) (award-winning film dramatizing Amish patronage of Amtrak trains).

[318] *See, e.g.*, Wall St. J., *supra* note 309 (depicting a typical Amtrak rider in Georgia—elderly and unwilling to fly via air travel).

services for these groups. These routes will probably never be profitable,[319] so considering the importance of Amtrak as a public service, why demand that they be so?

B. AMTRAK IS GREEN AND MAKES GREEN FOR STATES AND COMMUNITIES

Amtrak's environmental benefits are numerous. "Amtrak is 46% more energy efficient than traveling by car and 34% more energy efficient than domestic air travel."[320] Train travel is "among the most efficient and lowest-emitting modes of transport[ation]."[321] Compared to train transport, "a typical train line can carry 50,000 people an hour, while a freeway lane can only handle 2,500 people an hour," and "[a] train uses up to 70% less energy and causes up to 85% less air pollution than a jet aircraft."[322] Naysayers should support Amtrak because it both makes green, and is green.

Amtrak also offers numerous economic benefits through its services. Communities along Amtrak routes reap what Amtrak sows. For example, for every federal dollar invested in Amtrak, local communities served by Amtrak receive three dollars.[323] Amtrak stations can act as focal points for communities—attracting land development, increasing economic activity, and

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[319] REAL TRANSIT, *supra* note 312 ("[M]any of the unprofitable routes that are responsible for Amtrak's largest operational losses are unable to make money even if they reached maximum capacity ridership.")

[320] *Travel Green with Amtrak,* NAT'L R. R. PASSENGER CORP., http://www.amtrak.com/travel green (last visited Mar. 25, 2022); *see* Orion Donovan-Smith, *Getting There: Biden Says Amtrak Is 'Environmentally, a Lifesaver.' But Just How Green is Rail Travel?*, THE SPOKESMAN-REV. (May 24, 2021).

[321] Benet J. Wilson, *How Train Travel Can Be Good for the Environment*, POINTS GUY (Aug. 19, 2021), https://thepointsguy.com/guide/trains-reduce-carbon footprint/.

[322] *Eco Travel by Train*, TRAIN CHARTERING, https://www.trainchartering.com/case-studies/rail-chartering-news/casestudies_environmental.html (last visited Mar. 25, 2022).

[323] Linda Loyd, *Amtrak, Nationally and in Region, Sets Ridership Records*, PHILA. INQUIRER (Oct. 14, 2013), https://www.inquirer.com/transportation/amtrak-nationally-region-sets-ridership-records-20131014.html.

improving quality of life in their immediate areas.[324] Amtrak directly and indirectly has created jobs for 100,000 people in nearly every state.[325] For every job Amtrak creates, six additional jobs are created in other industries.[326] Proposed Amtrak routes are often touted as having the potential to provide millions in economic benefits for communities along these lines.[327]

C. Americans are Sick and Tired of Amtrak Delays

Lastly, though Amtrak should continue to serve marginalized groups and provide economic and environmental benefits, it should also provide timely service. Why would anyone want to pay for Amtrak tickets, only to arrive hours or even days late to their destination? For Amtrak to be taken seriously by the traveling public, like bythose who are actually willing to drive or fly longer distances, its trains cannot run late. To remain relevant, Amtrak must shake its unpunctual and slow reputation. Consider these firsthand complaints from Amtrak patrons:

> I once showed up late for a 40 minute train ride late [sic] by about an hour and spent another hour in the station before the train arrived.[328]

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[324] Amtrak's Economic Contribution, Amtrak 1 (2014), https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/Amtrak-Economic-Contribution-Brochure-083016.pdf.

[325] *Id.* at 7.

[326] *Id.* at 2.

[327] *See, e.g.*, *Passenger Trains: Economic Engines for Growth*, Rail Passengers Ass'n, https://www.railpassengers.org/site/assets/files/7962/economic_benefits.pdf.

[328] C2u8n4t8, *r/AskAnAmerican*, Reddit (Oct. 16, 2021, 2:06 PM), https://www.reddit.com/r/AskAnAmerican/comments/q9dq3s/americans_have_any_of_you_taken_an_amtrak_train/.

> [I took Amtrak] [s]o many times between college and home. It ran late a lot. I would be [sic] supposed to arrive home at either 8 or 9 and often not make [it] until midnight.[329]
>
> 30 minutes late on a 40 minute trip. @Amtrak needs to do better![330]
>
> My train. . . was Delayed by over 9 hrs.!!!! Lost a whole day (Friday)Desperately need assistance[331]
>
> A solid Amtrak start to my trip as it's announced that the train will be departing an hour late.[332]

Those who ride Amtrak will agree that delays are typical. Delays hamper Amtrak services, and freight trains are frequently to blame.

CONCLUSION

The Bipartisan Infrastructure Deal represents a huge step forward for Amtrak. The Bill's $66 billion in funding, the largest amount given to Amtrak since its inception,[333] will be put toward new Amtrak services[334] and will help the railroad's longtime, financial woes.[335] But today's Amtrak faces delays from freight railroads that it runs passenger trains on[336] which threaten to

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[329] BloatedGlobe, *r/AskAnAmerican*, REDDIT (Oct. 16, 2021, 12:16 PM), https://www.reddit.com/r/AskAnAmerican/comments/q9dq3s/americans_have_any_of_you_taken_an_amtrak_train/.

[330] TJ Girsch (@tjgirschpa), TWITTER (Mar. 25, 2022, 4:30 PM), https://twitter.com/tjgirschrpa/status/1507454903828062212?s=25.

[331] @rmissyT1, TWITTER (Nov. 11, 2017, 4:39 AM), https://twitter.com/rsmissyt1/status/929327695695171584?s=20&t=GKGv0t6rrByoj5fWw-HlJQ.

[332] James Palmer (@BeijingPalmer), TWITTER (Mar. 23, 2022, 11:42 AM), https://twitter.com/beijingpalmer/status/1506657738171949058?s=25.

[333] THE WHITE HOUSE, *supra* note 2.

[334] *See* French, *supra* note 8.

[335] *See infra* Part I.

[336] *See* NAT'L R.R. PASSENGER CORP., *supra* note 15.

impede Amtrak expansion notwithstanding its new funding. Despite a decade of litigation[337] culminating in new Metrics and Standards,[338] Amtrak now advocates that Congress rewrite the law so it can enforce its preference under 49 U.S.C. § 24308(c).[339] The convoluted process available to Amtrak under the Metrics and Standards[340]—as well as the seldom-used DOJ practice of bringing suit against freight railroads on behalf of the United States[341]—does not allow Amtrak to effectuate "The Public Bargain," an agreement between itself and freight railroads whereby Amtrak relieves freight railroads' federally-imposed duty to run passenger services in exchange for Amtrak services' preference on freight tracks.[342]

The many alternatives that exist to expand Amtrak's statutory preference on freight tracks, such as instituting a stronger federal agency to schedule Amtrak and freight trains[343] or providing funding to build new railroad infrastructure,[344] are self-defeating and unfeasible. Instead, Congress

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[337] *See* Lewis, *supra* note 151; *U.S. Dep't of Transp. v. Ass'n of Am. R.Rs*., 575 U.S. 43, 53–54 (2015) (holding that "in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions").

[338] *See* Lewis, *supra* note 151.

[339] *See* NAT'L R.R. PASSENGER CORP., *supra* note 13.

[340] *See supra* Sections II.A, II.B, II.C, II.D.

[341] *See supra* Section II.E; N.Y. TIMES, *supra* note 13; NAT'L R.R. PASSENGER CORP., *supra* note 13.

[342] *See supra* Part III; NAT'L R.R. PASSENGER CORP., *supra* note 11, at 2; Grabar, *supra* note 227.

[343] *See supra* Section IV.A.

[344] *See supra* Sections IV.B, IV.C, IV.D.

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should focus on passing legislation that allows Amtrak to take freight railroads to court for not upholding their end of the bargain. Rewriting 49 U.S.C. § 24308(c) to incorporate preference enforcement will ensure that Bipartisan Infrastructure Deal funding is efficiently distributed. Simply put, as it exists now the Bipartisan Infrastructure Deal is 'missing the train.' The Biden Administration's Infrastructure Deal remains as weak as the Trump Administration's "Infrastructure Week" so long as freight railroads are unwilling to yield to Amtrak.