

BEHIND THE FINE PRINT

A PUBLICATION OF THE AMTRAK LAW DEPARTMENT
CONSERVE RESOURCES: PRINT ONLY IN BLACK/WHITE AND RECYCLE

INTRODUCTION

Welcome to the first edition of Behind the Fine Print, the Amtrak Law Department's newsletter. We hope you find the articles interesting and informative. Behind the Fine Print strives to enhance your understanding of legal issues and laws that impact Amtrak and its business operations. We encourage you to contact us with your thoughts and suggestions for future editions by way of Richard Kim at: Richard.Kim@amtrak.com.

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THE UNIQUE LEGAL NATURE OF AMTRAK

Cameron Lyons, Law Clerk

When you tell people where you work, do you sometimes hear "Oh, you work for the federal government?" It's a misconception that Amtrak is part of the government. In fact, Amtrak is not a federal agency; rather, it is a D.C. corporation. However, unlike most D.C. corporations, Amtrak was created by Congress. And, unlike most corporations, Amtrak has the same rights and obligations as the federal government in certain limited situations.

Amtrak was established as a D.C. corporation by the Rail Passenger Service Act of 1970. Before this Act was passed, railroads were mandated to provide passenger rail services in addition to freight service, but the railroads were consistently losing money on passenger rail. The Act allowed railroads to opt out of their passenger rail duties, and transfer responsibility for passenger rail to the newly formed National Railroad Passenger Corporation, commonly known as Amtrak. Amtrak has been running the vast majority of the nation's intercity passenger rail services ever since.

What makes Amtrak so different from other corporations? Most corporations are owned by their shareholders, who elect the board of directors, and the board of directors sets corporate policy and manages the corporation. In contrast, the majority of Amtrak's board of directors is appointed by the President of the United States. Moreover, while most for-profit corporations derive all their funding from operating revenues, Amtrak receives funds through an annual federal grant to supplement its operating

revenues. Grant funds are subject to government oversight, and the funds are drawn quarterly from two accounts earmarked for operating and capital expenses which are monitored by the Federal Railroad Administration, an agency in the Department of Transportation.

Clearly, the government plays a large role in monitoring Amtrak, but Amtrak's statute states that Amtrak is not a government agency and must be run as a for-profit corporation. Thus, Amtrak exists in a unique legal state; it's a private corporation and not a government agency, but its legal rights and obligations are different from those of other private corporations. Amtrak's governing statute grants Amtrak some exceptional rights that normal corporations do not have. On the other hand, due to the substantial government involvement in Amtrak's operations, in limited circumstances, it is subject to certain obligations which apply only to government entities.

Among the rights granted to Amtrak by its governing statute is eminent domain power. Eminent domain is the power to take private property and convert it to public use as long as just compensation is provided to the private property owner. Thus, Amtrak can use the power to take private land to accommodate its rail lines as long as Amtrak pays just compensation to the private owners. However, just compensation is often prohibitively expensive, and so Amtrak's eminent domain power is constrained by limited available funds.

Another right granted to Amtrak by its governing statute is exemption from most state and local taxes. Indeed, in *National Railroad Passenger Corporation v. City of New York*, a court determined that Amtrak's statute granted it exemption from state and local taxes to the same extent as the United States government. Congress decided to grant this exemption to Amtrak because it provides

a public service, and because it would be illogical to have Amtrak pay state and local taxes with federal appropriations that were a product of federal taxes.

While these substantial legal rights are necessary for Amtrak to successfully run intercity passenger rail service, Amtrak's status as a government supported, private corporation also comes with legal obligations. For example, Amtrak is subject to the First Amendment of the Constitution, which only applies to government entities. In the landmark decision *Lebron v. National Railroad Passenger Corp.*, an artist claimed Amtrak violated his First Amendment right to free speech after Amtrak rejected his lease of billboard space in the Amtrak-owned New York Penn Station because his display was too political. The Supreme Court found that because of the government's role in establishing and partially controlling Amtrak, Amtrak is subject to the First Amendment, and the artist's political display on Amtrak property was protected by the First Amendment right to free speech.

Another example of an obligation placed on Amtrak that other private corporations do not face is compliance with the Freedom of Information Act, which requires public disclosure of certain documents and information. Subjecting Amtrak to the Freedom of Information Act provides public transparency regarding many of Amtrak's policy decisions, which helps provide oversight of the public funding the federal government provides Amtrak.

Additionally, Amtrak is statutorily obligated to comply with "Buy America" requirements. "Buy America" generally requires that, when procuring certain goods or materials, Amtrak purchase only goods or materials manufactured in the United States from materials that were substantially produced or mined in the United States. The goal of

"Buy America" provisions is to support domestic suppliers and companies and to encourage the development of a domestic market in the rail sector.

So, while Amtrak enjoys substantial legal rights that many private corporations do not, it also faces obligations that come with government assistance. Regardless of Amtrak's unique set of legal rights and obligations, Amtrak remains a private corporation, so next time you're asked if you work for the government, you can confidently reply "No, but I do work for a unique company."

DID YOU KNOW?

A U.S. Supreme Court Justice does not have to be a lawyer or a law school graduate, but all Justices have been trained in the law. Many of the 18th and 19th century Justices studied law under a mentor because there were few law schools in the country. The last Justice to be appointed who did not attend law school was James F. Byrnes (1941-1942). He did not graduate from high school and taught himself law, passing the bar at the age of 23!

CHEERS TO OUR
CUSTOMERS

Daniel Deacon, Law Clerk



Savoring the bouquet of a fine wine or relaxing with a cold beer, an Amtrak passenger is unlikely to be thinking about the labyrinth of alcohol laws. However, the Amtrak service attendant is not

only aware of those laws but meticulously complying with them. The serving of alcohol is governed by state law and each state law differs. So, in addition to being adept at customer service, the service attendant must also be proficient in the laws of serving alcohol. Not an easy task when one is in constant movement from one state to another.

For example, in Virginia, beer, wine, and liquor can be sold until 2 a.m. throughout the entire week. However, cross over the border into West Virginia and the rules change - beer and wine can still be sold until then but liquor can be sold only until midnight. And that is only during weekdays. On the weekends, the hours for the sale of beer and wine change and liquor can't be sold at all on a Sunday.

In addition to the many state laws governing alcohol sales, alcohol sales are governed by federal law as well. The distinct history of the Prohibition, repealed by the Twenty-First Amendment to the U.S. Constitution, gave rise to the particular complexity between federal and state law governing alcohol. Absent any specific regulation, alcohol is treated like all other forms of personal property. The general rights of property are subject to the so-called "police powers" of the federal, state and local governments. However, the police powers of the federal government are limited to regulating matters that are connected with one of the powers expressly granted to the government by the U.S. Constitution, and which do not infringe on the police powers of the states. This means that the federal government lacks the power to regulate alcohol sales by one citizen to another within the territorial limits of a given state, or to proscribe liquor-related business within any state. Because of the commerce clause, however, the federal government can regulate the importation and interstate transportation of intoxicating liquors under the Federal Alcohol Administration Act of 1935 (27 U.S.C. §§ 201 et seq.),

and it also has the power to regulate alcohol sales in the District of Columbia. In all other situations, the states' police powers control the sale of alcoholic beverages.

The question of whether state alcohol laws apply to Amtrak was answered in 1973, shortly after the passage of the Rail Passenger Service Act of 1970 ("RPSA"). Under Section 24301 of the RPSA, Amtrak is not subject to state laws related to "rates, routes, or service" in connection with rail passenger transportation. While one could argue that providing food and beverage on Amtrak trains is considered a "service", this argument was explicitly struck down in *National Railroad Passenger Corp. v. Miller*, 358 F. Supp. 1321 (D. Kan. 1973), *aff'd* 414 U.S. 948 (1973). In that case, an Amtrak train left from Chicago, Illinois on its regular run to Los Angeles, California. Agents from the Alcohol Beverage Control of Kansas boarded the train and arrested the conductor and a lounge car attendant on criminal charges for violating the Kansas Liquor Control Act. Amtrak argued that the Kansas liquor laws were an unconstitutional interference with interstate commerce, an unreasonable exercise of police power under the Fourteenth Amendment, and preempted by the supremacy clause under the RPSA. The supremacy clause is the clause in the U.S. Constitution stating that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power.

However, the Supreme Court affirmed the decision of the District Court of Kansas – holding that Amtrak is subject to state alcohol laws. The district court explained that Amtrak's governing statute did not preempt state alcohol laws because Amtrak is not exempt from the constraints of the Constitution. Construing the "rates, routes, or service" provision of Amtrak's governing statute to forbid or prevent the

enforcement of a state's liquor laws under the guise of classifying the use and sale of alcohol as a "service," would amount to a circumvention of the clear provision of the Twenty-First Amendment. State liquor laws are not constrained by the commerce clause either. The commerce clause is the provision of the U.S. Constitution that gives Congress exclusive power over trade activities among the states. Since the passage of the Webb-Kenyon Act, a state is not restrained by traditional commerce clause limitations when it restricts the importation, sale, and use of alcohol. Moreover, state alcohol laws are a valid exercise of the state's police powers since they do not infringe on any right, privilege, or immunity secured by the Constitution.

Failure to comply with state alcohol laws can have severe consequences. Most states have established alcohol enforcement agencies. Violators of state alcohol laws can be subject to both criminal prosecution and hefty administrative fines for violations. Moreover, violations may result in a business being precluded from serving alcohol temporarily or permanently. The potentially severe consequences of a violation serve as a staunch reminder to comply with each individual state's alcohol laws accordingly.

Although offering this amenity has its regulatory challenges, it is one our customers clearly enjoy. With the diligence of the Amtrak service attendants in complying with such laws, the serving of alcohol is one amenity that Amtrak can continue to offer – enabling our riders to sit back and relax with a glass of wine or a cold beer as they take in the sights along one of our many beautiful scenic routes.

Training by the Law Department

Beginning in early 2015, Amtrak's Law Department will host a series of training sessions presenting various legal topics and issues that may be of interest to you. Please see the Amtrak Law Department Intranet page at <http://epmoweb20p/sites/LDI/SitePages/Homepage2.aspx> for dates and times for the presentations. We hope these sessions will better assist you in your daily work functions, and introduce you to different ways in which the Law Department is here to serve you.

AUTHORITY OF AMTRAK POLICE

David J. Domzalski,
Senior Associate General Counsel



These employees are visible to us in stations, on platforms and trains and you may see them patrolling on the NEC Right of Way. They can be in dark blue uniforms, wear battle dress fatigues, work in civilian clothes and even have a dog for a partner. They are the men and women (and canine) of the Amtrak Police Department (APD). These sworn police officers protect passengers, patrons, employees and members of the public each day. But, have you ever stopped and thought – what legal authority do they really possess? Well, the answer may surprise you.

State Law Authority and Jurisdiction

The cornerstone of an Amtrak police officer's legal authority (and any railroad police officer for that matter) is rooted in state law. Most states have a specific statute that authorizes railroad corporations to hire and appoint police officers. A

railroad police commission is issued by a state agency, usually by the state police, but commissions are often issued directly from the Governor's office. The state law or regulations require the police officers to wear a badge and take an oath of office and require that the railroad corporation bear all liability for the acts of these employees. The legal authority of an Amtrak police officer is very similar to the typical police powers of any state or local law enforcement officer, including the power of arrest for felonies, misdemeanors or violations, the service of warrants, and the carrying of firearms. Amtrak police officers receive the same basic training as state and local law enforcement at state police academies or at the Federal Law Enforcement Training Center in Glynco, GA.

Depending upon the state, the geographical jurisdiction of Amtrak police officers can vary, sometimes substantially. However, in many states, the authority is limited to the corporation's passengers, employees, equipment, on or about Amtrak's property, or in pursuit of Amtrak business. There are unique exceptions. In Maryland, railroad police agencies can enter into mutual aid agreements with the chief county executive or law enforcement official for enforcement of railroad related criminal acts throughout the county. Pennsylvania case law narrowly construes "off the property" jurisdiction and requires a "closer connection between the interests of the transportation system and the encounters in which police powers are exercised than mere 'on duty' status of transportation system police in the observations of offenses." On the other hand, states like Delaware, New Jersey, and North Carolina have laws with flexible language that can provide railroad police authority and jurisdiction throughout the state.

"Federal Authority" and Jurisdiction

Originally, when Amtrak was created under the Rail Passenger Service Act of 1970, the statute was unique at the time as it gave Amtrak "rail police" **interstate** police powers unlike any other freight railroad police. In other words, if they had a railroad commission in New York, they could also work in California. It was not until the Omnibus Crime Control Act of 1990, P.L. 101-647, was passed that this interstate authority was given to all railroad police officers. This law allows all railroad police officers to enforce laws of any jurisdiction in which the rail carrier owns property to the extent of the authority of a police officer certified or commissioned under the laws of that jurisdiction to protect employees, passengers or patrons; property, equipment and facilities owned, leased operated or maintained; property moving in interstate or foreign commerce; and personnel, equipment and material moving by rail vital to the national defense.

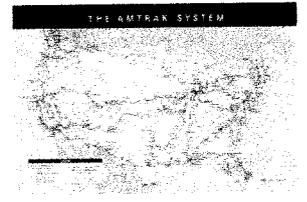
Federal regulations were promulgated pursuant to this federal law and describe in more detail this broad ranging interstate authority. So, when Amtrak and other railroad police officers are in a state different from the one where they received their railroad police commission, their police authority is the same as that of railroad police officers commissioned under the laws for the state in which they are present. The federal regulations say that this police authority shall apply only on railroad property, except: 1) a railroad police officer may pursue someone off railroad property if that person is suspected of violating law on railroad property, and 2) a railroad police officer may engage in off-railroad property law enforcement activities, including investigation and arrest, if permissible under state law. As you can see, there is the clear "relation back" to the cornerstone police authority of the state railroad police statute and commission found even in the federal regulations.

Amtrak police officers use this "nationwide" police authority to carry out the APD's mission of "Protecting America's Railroad". The APD consists of over 500 sworn and civilian personnel that are assigned in thirty reporting locations throughout the Amtrak intercity system and operate in forty-six states. The APD is a "CALEA accredited" police department and conducts a range of behind-the-scenes and front line security measures to ensure Amtrak employee, passenger and infrastructure safety and security. It works closely with the Transportation Security Administration and other federal, state and local law enforcement agencies to share intelligence and conduct joint security exercises to protect all rail travelers and the railroad, and collaborates with counterparts across the globe to share best practices and other vital information. In short, it is truly a "nationwide" police agency by duty, responsibility and legal authority.

Passenger Rail Investment and Improvement Act

Michael Stern,

Managing Deputy General Counsel



The Passenger Rail Investment and Improvement Act (PRIIA) made some significant changes for Amtrak. Among the most notable portions of the new law are Sections 209 and 212. These two sections are fundamentally changing the ways that states pay for Amtrak services, and the way that those services are planned and governed. At base, through PRIIA the federal government has told the states that they will be paying a larger and more consistent share of the costs of intercity service, and for the opportunity to run their commuter services on the Northeast Corridor (NEC).

Before PRIIA, our state-supported services were planned and funded under a wide variety of agreements. The cost sharing ran the gamut from the states paying for most of the costs of the services (e.g., the California services such as the *Surfliner* and *Capitol Corridor*), to paying for about half the costs of the services (e.g., the *Keystone Corridor*), to paying nothing (e.g., the *Springfield Shuttles*) and everything in between. Section 209 of PRIIA required the states and Amtrak to come to agreement on a consistent accounting, costing and billing policy that would be implemented for all Amtrak services that are not part of the Long Distance network and not on the NEC. It took an enormous effort on our part but, with the states, we were able to develop the 209 cost policy in time, and implement that policy with new agreements for all of the state-supported services. We are now in the process of renewing those initial 209 agreements, using the hard-won experience of the past year as a guide. New challenges include the states' desire to include performance metrics for the Amtrak services in the new round of agreements.

Implementation of Section 212 is somewhat more complex. As with the state-supported services, the commuter agencies that use the NEC operate under a wide variety of agreements with Amtrak. Many of these agreements were written decades ago and have never been updated. Some are much newer and reflect a more modern division of cost. As a result, the allocation of costs between Amtrak and the commuter agencies varies widely from state to state. Unlike the Section 209 services (where Amtrak is almost always using freight rail infrastructure), services on the NEC require Amtrak as the owner to make significant investments in the infrastructure. Most commuter agencies do not pay much towards such costs. As with Section 209,

Section 212 of PRIIA seeks to put all users of the NEC on an equal footing.

To accomplish this, Section 212 requires the formation of a new interstate commission: the Northeast Corridor Infrastructure and Operations Advisory Commission. The Commission is comprised of voting members from all of the states on the NEC, the Federal Railroad Administration, and Amtrak. Non-voting members include states that have Amtrak services that directly connect to NEC, as well as the various commuter rail agencies and freight railroads that operate on the NEC. Due to administrative difficulties, the formation of the Commission was significantly delayed, leading to a time crunch in accomplishing the Commission's task of developing a uniform system of cost allocation by October of 2014. Various subcommittees of the Commission have been hard at work, but the task is daunting. The NEC has a multi-billion dollar backlog of State of Good Repair investment that is necessary, and the Commission is struggling with the question of who must fund those costs. Nevertheless, the Commission is currently planning on adopting a cost allocation policy by the statutory deadline. This should lead to a new infusion of funding for Amtrak to assist in maintaining and improving the NEC. It should also be noted that Amtrak will have to pay the other owners of the NEC (Connecticut and Massachusetts) for Amtrak's use of their portions of the NEC under the same set of rules.

Both Sections 209 and 212 of PRIIA have changed the basic rules of intercity service and NEC governance. In return for paying more to Amtrak, the states and commuter agencies are demanding more accountability from Amtrak for the quality of the service we provide, as well as a bigger say in how those services are provided.

Tort or Torte?

A tort is a legal term meaning a wrongful act that unfairly causes someone else to suffer loss or harm resulting in legal liability for the person who commits the (tortious) act, called a tortfeasor. Not to be confused with a torte, which is a rich, usually multilayered, cake that is filled with whipped cream, buttercreams, mousses, jams, or fruit.

Your Law Department at Work

The Law Department provides legal guidance and representation to Amtrak in support of its efforts to achieve business and financial success. We handle more than a thousand legal matters each year – from simple legal questions that arise in day-to-day operations to complex matters pending in court. To provide you with a better understanding of who we are, below is a brief summary of our various practices areas.

Office of the Corporate Secretary

The Office of the Corporate Secretary serves as the liaison between Amtrak's management and the Board of Directors. It assists the Board of Directors on a wide range of issues including corporate governance, including: (a) scheduling and coordinating all Board-related activities; (b) preparing Board and Committee materials for meetings; (c) following up on Board and Committee actions; and (d) assuring timely response by management to Board directions and inquiries. The Office of the Corporate Secretary also maintains official Amtrak documentation, including: (a) corporate records; (b) official minutes of all Board and Committee meetings; (c) records of Amtrak's

preferred and common stocks; (d) current Board Statement of Policy; and (e) corporation bylaws.

Corporate Affairs Group

The Corporate Affairs group advises on commercial and regulatory issues. It is divided into two teams: the Commercial Transactions team and the Railroad Operations Support team. The Commercial Transactions team handles a vast array of legal issues. They assist in the negotiation of procurements, the leasing of Amtrak's real property and the licensing of Amtrak's intellectual property. They provide legal guidance to secure funding for Amtrak operations and to maximize revenues through sales and joint ventures. The Railroad Operations Support team negotiates and counsels on contracts and operating agreements with freight and commuter railroads and with local communities and states. They provide guidance to ensure that infrastructure improvements and engineering design and construction projects are carried out in compliance with federal and state laws.

General Litigation Group

The General Litigation group handles any legal proceeding in which Amtrak is involved – from simple small claims to complex matters that involve constitutional issues or class-action lawsuits. The group also counsels Amtrak leadership on litigation risks as it makes decisions on a variety of issues.

Within the Litigation group is the Labor and Employment Law practice. Labor and Employment attorneys handle a variety of employment related issues, including requests for accommodations under the Americans with Disabilities Act, human resource policies, and discrimination complaints. The Labor and Employment attorneys also handle legal issues stemming from Amtrak's pension plans, 401(k) plans, and compensation and benefits packages.

Working closely with the Labor and Employment attorneys are the Equal Employment Opportunity ("EEO") Compliance Officers. The EEO Compliance Officers investigate and respond to complaints from employees – either of discrimination or about other matters. The EEO Compliance Officers also train Amtrak employees to avoid discrimination and to properly address internal complaints.

Claims Group

The Claims group handles passenger claims, investigates all incidents, interviews the claimants and witnesses, and collects facts and evidence to support Amtrak's defenses. Claims representatives are available 24 hours a day, seven days a week. To support these efforts, the Claims group has 13 regional offices in Boston, New Haven, Albany, New York City, Philadelphia, Washington, D.C., Baltimore, Jacksonville, New Orleans, Beech Grove, Chicago, Los Angeles, and Oakland.

The Claims group also analyzes, evaluates, and negotiates settlements of these claims. For those cases that become lawsuits, the Claims group supports Amtrak's litigation defense efforts by advising Amtrak leadership and defense counsel and by assisting defense counsel in locating and securing information and materials in response to discovery requests; identifying and locating witnesses to testify; attending depositions, mediations, settlement conferences, and trials; and, when necessary, testifying. The team also counsels other departments on avoiding and managing risk.

Freedom of Information Office

Amtrak is subject to the Freedom of Information Act ("FOIA") even though it is not a federal agency. FOIA is a federal statute that allows any person to access any federal agency record, with narrow exceptions. The FOIA Office handles requests for records submitted under FOIA and

ensures that Amtrak meets the requirements set forth by Congress.

Records Information Management Group

The Records Information Management group oversees the maintenance of all Amtrak business records, sets policies, and develops and approves processes to ensure compliance with legal and regulatory directives while maintaining the integrity of the records management system. To do this, the group develops and administers programs that define, identify, analyze, preserve, and supervise the creation, use, and disposition of business records; implements processes and controls for securely destroying records at the end of their life cycle; oversees the activities of records-related service providers; and ensures adequate training so that each employee is comfortable with his or her role in protecting Amtrak's records.

Environmental and Sustainability Group

The Environmental and Sustainability group works to maintain environmental compliance and advance sustainability within Amtrak. The team maintains an Environmental and Sustainability Management System to reduce the environmental impact of Amtrak's daily operations; performs environmental compliance audits; implements the Sustainability Program; and manages environmental projects. The team also provides procedures, training, communications, guidance, facility support, and program management in environmental compliance and sustainability.

Public Health Group

The Public Health group upholds proper food safety and sanitation standards by providing guidance on complying with applicable state and federal laws and regulations, and integrating sound principles and practices into Amtrak's daily business decisions and operations. The team conducts more than 1,000 Amtrak food service car inspections per

year, audits every potable water point in the Amtrak system, and conducts quarterly commissary inspections. The team also investigates all alleged food-borne illnesses and serious communicable diseases reported within the Amtrak system.

Office of Disciplinary Investigations

The Office of Disciplinary Investigations is responsible for conducting all disciplinary investigations of agreement covered employees except employees covered by the Fraternal Order of Police. It is staffed by Hearing Officers and Administrative Assistants who perform functions very similar to a civil court or alternative dispute resolution system. The Hearing Officer conducts a formal discipline investigation in a manner that is fair, consistent and impartial for employees charged with violating Amtrak's Standards of Excellence, policies, procedures, rules and regulations, including some federal regulatory issues in accordance with collective bargaining agreements for the many unions at Amtrak which often have different set time limits for bringing discipline. They are responsible for determining if the charges are proven or not and

prepare a written decision letter of each violation listed in the charging document.

The summary above illustrates the roles of our practice groups. But all members of our department are integrated and work together closely. On any given matter, various Law Department members may assist you to ensure that our advice and representation reflects the best of our experience and expertise. Accordingly, you may contact any attorney if you have a legal issue and need help from the Law Department. We will all gladly help you and draw upon all the resources of the Department to provide you with the best service.

For more helpful information from and about the Law Department, visit the department's web page on Amtrak's intranet at:

<http://epmoweb20p/sites/LDI/SitePages/Homepage2.aspx>

Trivia

Answers appear throughout the articles and in answer key below.

1. Amtrak was established by the _____ of 1970.
2. In the matter of _____ the Supreme Court established that Amtrak is subject to the First Amendment of the U.S. Constitution.
3. Section 212 of the Passenger Rail Investment and Improvement Act established a new interstate commission. What is the name of this commission?

Answer Key:

3. Northeast Corridor Infrastructure and Operations 2. Lebron v. NRPC 1. Rail Passenger Service Act

This newsletter provides information on legal issues of interest to Amtrak and is not intended to provide legal advice. You should seek specific legal advice from the Amtrak Law Department before taking any action with respect to matters discussed herein.