

AMTRAK AND FORCED ARBITRATION: SAVING MONEY ON THE BACKS OF THEIR OWN INJURED PASSENGERS

In January 2019, Amtrak “quietly added to its ticket purchases” a new provision that forces passengers in any kind of dispute with Amtrak – even mass casualty victims – into arbitration “with no right to go before a judge or jury”¹ or band together with similarly injured passengers to pursue claims as a class.

Amtrak’s stated reasons for forcing customers to accept such terms, preventing them from boarding trains unless they do, are twofold: 1. Forced arbitration is efficient and better for victims; 2. Forced arbitration saves Amtrak money.²

AMTRAK’S TWO REASONS FOR ITS FORCED ARBITRATION PROVISIONS ARE BOTH FALSE AND MORALLY DESPICABLE.

- The main impact of forced arbitration on victims is not a more “efficient” resolution of disputes or better outcomes for victims. Indeed, it is the opposite.

In disputes resolved through forced arbitration, Amtrak gets to select the arbitration company, the process operates secretly, and there is no right to appeal. In other industries that have been studied, it is clear that only a small number of harmed people ever pursue arbitration instead of just dropping their claims and giving up.³ And as to the small number of customers that do pursue forced arbitration, they are less likely to win, receive smaller awards, and are otherwise severely disadvantaged. As the Economic Policy Institute (EPI) found, “consumers only win relief in 9 percent of disputes.” Even worse, what is far more typical is that companies fight consumers in arbitration with claims or counterclaims. In those situations, arbitrators grant companies relief 93 percent of the time, and then often order the consumer to pay the company. So considering “both sides of this equation,” in arbitration, the average consumer is actually paying \$7,725 to the company.⁴

- Those most harmed by this provision are mass casualty victims. Amtrak apparently wants to prevent them from hiring their own attorneys and going to court, arguing that victims do not benefit from access to the courts. On December 10, 2019, 18 individuals and

family members who were able to obtain compensation following the tragic 2015 Philadelphia Amtrak derailment, strongly denounced this view, stating:⁵

We strongly believe that the only reason we received some measure of justice – since nothing can bring back our loved ones or make up for the devastating impacts to our lives – is because we had the right to hold Amtrak accountable in a court of law. ...Forced arbitration will take away any incentive for Amtrak to remedy their wrongs, knowing that the secrecy of forced arbitration acts as a shield from accountability and public scrutiny.

CONSIDERING THE FREQUENCY OF MASS CASUALTY ACCIDENTS AND AMTRAK'S FAILURE TO TIMELY RESOLVE PROBLEMS, THIS DEVELOPMENT RAISES TROUBLING QUESTIONS ABOUT AMTRAK'S CONCERN FOR ITS OWN PASSENGERS.

- Amtrak is our nation's only high-speed intercity passenger rail provider, operating in 46 states and the District of Columbia. Moving at speeds of up to 150 miles an hour, crashing Amtrak trains can be deadly.⁶
- In an effort to stop mass casualty accidents, Congress passed the Rail Safety Improvement Act (RSIA) in 2008, setting a deadline of December 31, 2015 for the implementation of positive train control technology (PTC) on 30 commuter lines, Amtrak and other railroads.⁷ The National Transportation Safety Board (NTSB) had been recommending PTC since 1990.⁸
- The rail industry "bridled" at Congress' mandate to implement PTC,⁹ failed to act quickly, and as a result, preventable crashes continued. For example, the May 12, 2015 Amtrak train derailment that killed eight passengers and injured hundreds more¹⁰ could have been avoided with PTC.¹¹
- As of the end of 2015 neared, Amtrak was nowhere close to PTC compliance. It was granted a new deadline of December 31, 2018.¹² The crashes continued.
 - On December 18, 2017, an Amtrak train with 77 passengers derailed from a bridge near DuPont, WA, where several passenger cars "fell onto Interstate 5 and hit multiple highway vehicles."¹³ Three passengers were killed and 57 passengers and crewmembers were injured, plus eight people in highway vehicles were also hurt. PTC controls would have prevented the crash.¹⁴
 - Less than two months later, an Amtrak passenger train traveling at 57 mph unexpectedly entered a siding and collided with a stationary CSX freight train near Cayce, SC, killing the engineer and conductor and injuring at least 92 passengers and crew.¹⁵
- By September 2018, railroads were still far from meeting the December PTC deadline. As of now, Amtrak may fail to meet a new 2020 deadline.¹⁶

- Beyond PTC-noncompliance, there are other troubling safety issues that risk Amtrak passenger safety today, including:¹⁷ poor safety culture and management;¹⁸ ineffective training of crewmembers;¹⁹ an aging fleet and unsafe repairs;²⁰ and continued use of passenger rail cars that fail to meet new crashworthiness standards.²¹

CONGRESS HAS ALREADY SPOKEN TWICE WHEN IT COMES TO PROTECTING AMTRAK'S SOLVENCY FOLLOWING MASS CASUALTY ACCIDENTS; IT NEVER CONTEMPLATED KEEPING VICTIMS OUT OF COURT.

- When there is a crash, Amtrak's liability is capped at \$295 million. This is a "per incident" cap. In other words, it applies no matter how many are killed or injured, the seriousness of their harms, or the degree of Amtrak's malfeasance.²²
- This cap was first enacted in 1997, when it was made part of Congress' Amtrak Reform and Accountability Act,²³ which helped bail out Amtrak. The cap was originally set at \$200 million. After the May 12, 2015 Philadelphia Amtrak train derailment that killed eight and injured over 200 others, Congress raised the cap to \$295 million in December 2015.²⁴

THERE IS STRONG OPPOSITION TO AMTRAK'S FORCED ARBITRATION CLAUSE.

- On December 10, 2019, more than 30 organizations urged Amtrak to end this practice, as did the 18 individuals and family members (mentioned earlier) who were able to obtain compensation following the tragic 2015 Philadelphia Amtrak derailment.²⁵
- Several lawmakers have strongly objected to this policy.²⁶
 - Fourteen U.S. senators demanded in a November 26, 2019, letter to Amtrak President & CEO Richard Anderson that "Amtrak immediately eliminate this anti-consumer arbitration and class action policy," since "[a]s our national railroad, Amtrak has a responsibility to ensure the traveling public – including victims of crashes – have their day in court."²⁷
 - And at a November 2019 U.S. House subcommittee hearing on Amtrak's reauthorization,²⁸ U.S. Rep. Stephen Lynch (D-Mass.) observed that the rail line's broad arbitration provision even blocks claims when someone is grossly disfigured in a crash or killed. He also noted that forcing cases into secret, rigged arbitration following crashes creates disincentives for safety, doing a "disservice to the passengers we care about and reflects a downward spiral."
- Jack Dinsdale, National VP of the Transportation Communications Union, told the subcommittee that forcing people to resolve cases in company-controlled secret systems will "make passengers question whether they want to board the train." It is "telling me right away you don't have my safety as a concern."²⁹

NOTES

¹ Sam Mintz, “Amtrak’s new ticket rules won’t let passengers sue in a crash,” *Politico*, November 8, 2019, https://www.politico.com/news/2019/11/08/amtrak-crash-sue-068175?fbclid=IwAR1Q4C6YUrS0LUiP34i82YFBW_WCm_WoqBox00AA8mK6Zo43hs09coOFBoQ

² See letter to Members of Congress to Amtrak President and CEO Richard H. Anderson, dated November 25, 2019. (“First, Amtrak’s arbitration program provides a much quicker resolution of claims and much faster compensation to injured parties than court litigation, while retaining most important aspects and protections of the civil litigation system: convenient venues throughout the country; legal representation; an independent decisionmaker; authorization for appropriate discovery; and the ability of a prevailing claimant to be awarded damages and all other relief available under applicable law. The major difference is that arbitration provides a resolution in less time – generally well within a year of filing – by avoiding unnecessary discovery and other time-consuming proceedings, and the often years-long wait for a trial date on overcrowded court dockets. “Agreements to arbitrate are desirable precisely because they trade the procedures of the federal courts for the simplicity, informality, and expedition of arbitration.” *Shelton v. The Ritz Carlton Hotel Co., LLC*, 550 F. Supp. 2d 74, 81 (D.D.C. 2008) (internal citation omitted). Second, in its oversight of Amtrak, Congress has directed Amtrak to “use its best business judgment in acting to minimize United States Government subsidies.” Arbitration achieves that aim by streamlining the scope, and thus the expense, of the traditional civil litigation proceeding. The only beneficiaries of protracted and extraordinarily expensive court litigation are the lawyers, whose fee agreements can consume up to 40 percent of a successful claimant’s award.”)

³ Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a), available at, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

⁴ Correcting the record, <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/>

⁵ Sam Mintz, “Consumer groups, victims of Philadelphia crash criticize Amtrak’s arbitration policy,” *Politico*, December 10, 2019.

⁶ Amtrak, *FY 2018 Company Profile*, http://media.amtrak.com/wp-content/uploads/2019/03/Amtrak-Corporate-Profile_FY2018_Pub-March-1-2019.pdf

⁷ Statement of Susan Fleming, Director, Physical Infrastructure, U.S. Government Accountability Office before U.S. Senate Committee on Commerce, Science, and Transportation hearing on “Positive Train Control: As Implementation Progresses, Focus Turns to the Complexities of Achieving System Interoperability,” July 31, 2019, <https://www.commerce.senate.gov/services/files/44D14684-7047-4AFD-99C5-BAF2EE2C87DE>

⁸ Federal Communications Commission, “Positive Train Control (PTC),” <https://www.fcc.gov/general/positive-train-control-ptc> (updated March 20, 2017). See also, U.S. Department of Transportation, “Background: Positive Train Control Enforcement and Implementation Act of 2015,” <https://www.transportation.gov/briefing-room/background-positive-train-control-enforcement-and-implementation-act-2015> (updated January 2, 2018); Ashley Halsey III, “Untangling the train wrecks: Congress holds yet another hearing on its mandate to end what’s causing most of them,” *Washington Post*, September 13, 2018, <https://www.washingtonpost.com/transportation/2018/09/13/untangling-train-wrecks-congress-holds-yet-another-hearing-its-mandate-end-whats-causing-most-them/>

⁹ Ashley Halsey III, “Untangling the train wrecks: Congress holds yet another hearing on its mandate to end what’s causing most of them,” *Washington Post*, September 13, 2018, <https://www.washingtonpost.com/transportation/2018/09/13/untangling-train-wrecks-congress-holds-yet-another-hearing-its-mandate-end-whats-causing-most-them/>

¹⁰ Kathryn A. Wolfe and Nick Gass, “Derailed Amtrak was likely traveling at twice recommended speed,” *Politico*, May 12, 2015, <https://www.politico.com/story/2015/05/amtrak-crash-in-philly-comes-on-eve-of-budget-cutting-markup-117885>

¹¹ National Transportation Safety Board, “Derailment of Amtrak Passenger Train 188,” May 17, 2016, <https://www.ntsb.gov/investigations/AccidentReports/Pages/RAR1602.aspx>; Merrit Kennedy, “Amtrak Reaches \$265 Million Settlement Over Deadly Philadelphia Crash,” *NPR’s The Two-Way*, October 27, 2016, <https://www.npr.org/sections/thetwo-way/2016/10/27/499592760/amtrak-reaches-265-million-settlement-over-deadly-philadelphia-crash>

¹² Public Law No. 114-73, <https://www.congress.gov/bill/114th-congress/house-bill/3819>. See also, U.S. Senate Commerce, Science and Transportation Committee, “Fact Sheet: Positive Train Control Extension,” January 12,

2016, <https://www.commerce.senate.gov/2016/1/railroads-shippers-labor-and-retailers-agree-that-the-positive-train-control-deadline-needs-an-extension-here-s-why>; Ashley Halsey III, “Untangling the train wrecks: Congress holds yet another hearing on its mandate to end what’s causing most of them,” *Washington Post*, September 13, 2018, <https://www.washingtonpost.com/transportation/2018/09/13/untangling-train-wrecks-congress-holds-yet-another-hearing-its-mandate-end-whats-causing-most-them/>. See also, Ashley Halsey III, “Deadline for train safety technology undercut by industry lobbying,” *Washington Post*, October 25, 2015, https://www.washingtonpost.com/local/trafficandcommuting/deadline-for-train-safety-technology-undercut-by-industry-lobbying/2015/10/25/f893446a-2720-11e5-b77f-eb13a215f593_story.html

¹³ National Transportation Safety Board, “Amtrak Passenger Train 501 Derailment,” May 21, 2019, <https://www.nts.gov/investigations/AccidentReports/Pages/RAR1901.aspx>

¹⁴ Testimony of Robert L. Sumwalt III, Chairman, National Transportation Safety Board before U.S. House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines and Hazardous Materials hearing on “The State of Positive Train Control Implementation in the United States,” September 13, 2018, <https://docs.house.gov/meetings/PW/PW14/20180913/108675/HHRG-115-PW14-Wstate-SumwaltR-20180913.pdf>

¹⁵ Ibid.

¹⁶ Statement of Susan Fleming, Director, Physical Infrastructure, “POSITIVE TRAIN CONTROL, As Implementation Progresses, Focus Turns to the Complexities of Achieving System Interoperability,” Government Accountability Office, July 31, 2019, <https://www.gao.gov/assets/710/700676.pdf>

¹⁷ Testimony of Jennifer Homendy, National Transportation Safety Board Member before U.S. Senate Committee on Commerce, Science and Transportation hearing on “Amtrak: Next Steps for Passenger Rail,” June 26, 2019, <https://www.nts.gov/news/speeches/JHomendy/Pages/homendy-20190626.aspx>

¹⁸ Ibid. (Each railroad has failed to “develop and implement a railroad safety risk reduction program that systematically evaluates railroad safety risks on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities.” In addition, Amtrak should “develop a comprehensive [safety management system] that vitalizes safety goals and programs with executive management accountability; incorporates risk management controls for all operations affecting employees, contractors, and the traveling public; improves continually through safety data monitoring and feedback; and is promoted at all levels of the company.”)

¹⁹ Ibid. (Amtrak needs to “improve training for crewmembers to ensure proficiency on the physical characteristics of a territory and operating characteristics of locomotives, including through the use of simulators” and “conduct training that specifies and reinforces how each crewmember, including those who have not received their certifications or qualifications, may be used as a resource to assist in establishing and maintaining safe train operations.”)

²⁰ Testimony of Jim Mathews, President and Chief Executive Officer, Rail Passengers Association before U.S. House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines and Hazardous Materials hearing on “Amtrak: Now and Into the Future,” November 13, 2019, <https://transportation.house.gov/imo/media/doc/Mathews%20Testimony1.pdf> (“Amtrak’s fleet averages nearly 33 years of age and its diesel locomotives average nearly 21 years of age. The picture on the National Network is even more stark: as of last year, the railroad’s 461 Amfleet Is ranged from 41 to 44 years old, with the 145 Amfleet IIs averaging 38 years of age. What does that mean in practice? ...[An] experience as akin to traveling on a rolling museum,” where “citizens of the richest nation on earth are forced to bring shims and duct tape to jury-rig repairs to their interstate transportation systems.”)

²¹ Testimony of Jennifer Homendy, National Transportation Safety Board Member before U.S. Senate Committee on Commerce, Science and Transportation hearing on “Amtrak: Next Steps for Passenger Rail,” June 26, 2019, <https://www.nts.gov/news/speeches/JHomendy/Pages/homendy-20190626.aspx> (Amtrak has passenger rail cars in service that it knows don’t meet new, stronger equipment safety standards. The result: a disaster like the DuPont, WA derailment, where the rail cars “did not provide adequate occupant protection, resulting in complex uncontrolled movements and secondary collisions with the surrounding environment which led to damage so severe to the railcar body structure, that it caused passenger ejections. The failure of the railcars directly resulted in three fatalities and two partially ejected passengers.”)

²² Andrew Cohen. “The Real Victims of ‘Tort Reform,’” *Atlantic*, July 18, 2011,

<https://www.theatlantic.com/national/archive/2011/07/the-real-victims-of-tort-reform/242030/>

²³ P.L. 105–134, December 2, 1997, <https://www.congress.gov/105/plaws/publ134/PLAW-105publ134.pdf>

49 U.S.C § 28103, <https://www.law.cornell.edu/uscode/text/49/28103>; Pub. L. 114-94, div. A, title XI, § 11415, <https://www.govinfo.gov/content/pkg/PLAW-114publ94/html/PLAW-114publ94.htm>

²⁴ P.L. 114-94, §11415, <https://www.congress.gov/bill/114th-congress/house-bill/22>. See also, “Adjustment to Rail Passenger Transportation Liability Cap,” 81 FR 1289, January 11, 2016,

<https://www.federalregister.gov/documents/2016/01/11/2016-00301/adjustment-to-rail-passenger-transportation-liability-cap>

²⁵ Sam Mintz, “Consumer groups, victims of Philadelphia crash criticize Amtrak’s arbitration policy,” *Politico*, December 10, 2019.

²⁶ See Ana Radelat, “Blumenthal leads effort to end Amtrak’s shield from lawsuits,” *CT Mirror*, December 3, 2019, <https://ctmirror.org/2019/12/03/blumenthal-leads-effort-to-end-amtraks-shield-from-lawsuits/>; U.S. House Transportation Committee, Railroads, Pipelines and Hazardous Materials Subcommittee hearing on “Amtrak Now and Into the Future,” November 13, 2019, <https://transportation.house.gov/committee-activity/hearings/amtrak-now-and-into-the-future>

²⁷ Letter from U.S. Senator Richard Blumenthal et al. to Amtrak President and CEO Richard H. Anderson, dated November 26, 2019, <https://www.blumenthal.senate.gov/imo/media/doc/11.26.19%20-%20Amtrak%20-%20Arbitration.pdf>

²⁸ U.S. House Transportation Committee, Railroads, Pipelines and Hazardous Materials Subcommittee hearing on “Amtrak Now and Into the Future,” November 13, 2019, <https://transportation.house.gov/committee-activity/hearings/amtrak-now-and-into-the-future>

²⁹ Ibid.