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MEMORANDUM IN SUPPORT OF BANNING FORCED ARBITRATION CLAUSES IN AMTRAK PASSENGER TICKETS

Introduction

In January 2019, Amtrak added an arbitration clause provision to its passenger tickets forcing riders with any kind of dispute with Amtrak – even in the case of mass casualty accidents - to give up their right to sue in court.¹ This policy was added following two derailments of Amtrak trains in 2015 and 2017. Both crashes resulted in mass casualties and injuries.²

Members of Congress expressed immediate concern with this provision. For example, on November 26, 2019, several members of the Senate wrote to then Amtrak President and CEO Richard H. Anderson saying that the policy was “gravely imperiling traveling Americans’ access to justice and public accountability.”³

In the 116th Congress, several bills were introduced to address this injustice,⁴ and one passed the House. Specifically, the 2020 House infrastructure bill, the Moving Forward Act (MFA or H.R. 2), passed the House in June 2020.⁵ This bill contained a provision to ban forced arbitration clauses in Amtrak tickets. While this bill died in this Senate, Congress is once again poised to consider infrastructure legislation. We urge Congress to include a provision to ban use of forced arbitration by Amtrak.

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 Luz Lazo, “Lawmakers want to end Amtrak’s forced arbitration policy, calling it ‘anti-consumer’ and ‘unfair’,” *The Washington Post*, March 5, 2020, <https://www.washingtonpost.com/nation/2020/03/05/lawmakers-want-end-amtraks-forced-arbitration-policy-calling-it-anti-consumer-unfair/>

³ 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>

⁴ On March 5, 2020, the House and Senate introduced the Ending Passenger Rail Forced Arbitration Act. See H.R. 6101, <https://www.congress.gov/116/bills/hr6101/BILLS-116hr6101ih.pdf>; and S. 3400, <https://www.congress.gov/116/bills/s3400/BILLS-116s3400is.pdf>.

⁵ H.R. 2, June 11, 2020, <https://www.congress.gov/bill/116th-congress/house-bill/2/text?r=5>

Background

In 1970, President Richard Nixon signed Public Law 91-518, better known as the Rail Passenger Service Act. The act would form the National Railroad Passenger Corporation (Amtrak).⁶ Amtrak is a for-profit organization with the federal government being its majority stockholder. The corporation currently operates in 46 states and the District of Columbia with more than 500 destinations.⁷

As stated above, beginning in January 2019, Amtrak implemented policy forcing its ticket holders into arbitration should they or family members become injured, or even killed, while onboard Amtrak's trains. The arbitration provision is exceedingly broad applying to both individuals purchasing tickets and others whom the ticket was purchased for including "family members, minor passengers, colleagues and companions."⁸ Explicitly, Amtrak admits their intentions by stating in the provision itself that the agreement is "intended to be as broad as legally possible."⁹

The impact of this clause is disturbing. In 2015, an Amtrak train derailed in Philadelphia resulting in a crash called "the deadliest in decades."¹⁰ The crash killed 8 and injured hundreds.¹¹ If Amtrak's current arbitration policy were in place in 2015, the victims of the 2015 Philadelphia derailment would have been barred from seeking any recovery in court. On December 10, 2019, 18 individuals and family members who were able to obtain compensation following this crash urged Congress to reverse Amtrak's arbitration policy, stating:¹²

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.

It should be noted that compensation available to mass casualty victims is already limited by a liability cap. In 1997, Congress enacted a \$200,000,000 limit on what could be awarded to plaintiffs injured or killed due to the negligence Amtrak.¹³ In 2015, Congress increased the cap to \$295,000,000.¹⁴ But Congress has never contemplated keeping victims out of court, forcing

⁶ Jeff Davis, "Amtrak at 50: The Rail Passenger Service Act of 1970," *Eno Center for Transportation*, October 30, 2020, <https://www.enotrans.org/article/amtrak-at-50-the-rail-passenger-service-act-of-1970/>

⁷ Amtrak, *FY 2018 Company Profile*, http://media.amtrak.com/wp-content/uploads/2019/03/Amtrak-Corporate-Profile_FY2018_Pub-March-1-2019.pdf

⁸ Arbitration Agreement available at <https://www.amtrak.com/terms-and-conditions.html#arbitrationAgreement>

⁹ *Id.*

¹⁰ Sam Mintz, "Amtrak's new ticket rules won't let passengers sue in a crash," *Politico*, November 8, 2019.

¹¹ *Id.*

¹² Sam Mintz, "Consumer groups, victims of Philadelphia crash criticize Amtrak's arbitration policy," *Politico*, December 10, 2019.

¹³ 49 U.S.C.S. § 28103.

¹⁴ 114 P.L. 94, 129 Stat. 1312, 2015 Enacted H.R. 22, 114 Enacted H.R. 22.

them into private, rigged arbitration systems where they are severely disadvantaged.¹⁵ Such a policy also raises safety concerns. As explained by Rep. Stephen Lynch (D-Mass.) at a November 2019 House subcommittee hearing, forcing cases into secret claims resolution creates disincentives for passenger safety.¹⁶

What We Support

We support legislation that would bar Amtrak from forcing its passengers into arbitration if they are harmed due to Amtrak's negligence. Specifically, we support the language found in Section 9206 of H.R.2, which stated:¹⁷

Amtrak may not impose a choice-of-forum clause that attempts to preclude a passenger, or a person who purchases a ticket for rail transportation on behalf of a passenger, from bringing a claim against Amtrak in any court of competent jurisdiction, including a court within the jurisdiction of the residence of such passenger in the United States.

Under this subsection, a court of competent jurisdiction may not include an arbitration forum.

This legislation would not only protect the individual rider, but also the family members of those killed in a mass casualty situation like the 2015 derailment in Philadelphia. Additionally, we believe that elimination of Amtrak's arbitration clause would promote safety and increase ridership onboard Amtrak's trains.

Why Opponents Are Wrong?

Opponents of such legislation argue that Amtrak's arbitration clause allows victims to resolve their claims in a quicker and more efficient manner.¹⁸ This is untrue. Many have studied the impact of forced arbitration clauses and have found that claimants are severely disadvantaged in comparison to companies using such arbitration clauses in their contracts. For example, a 2015 study conducted by the Consumer Financial Protection Bureau¹⁹ revealed that "companies prevailed more frequently on their claims than their consumers and that companies were almost always represented by attorneys (90 percent of the claims analyzed) while consumers were represented significantly less (60 percent)."²⁰

¹⁵ 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>

¹⁶ 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>

¹⁷ H.R. 2, June 11, 2020.

¹⁸ Jessica Wehrman, "House transport bill would end Amtrak's forced arbitration," *Roll Call*, June 16, 2020.

¹⁹ Bureau of Consumer Fin. Prot., "Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)," (2015).

²⁰ Arbitration Agreements, 82 FR 33210 at 146-147 (July 19, 2017).

Additionally, opponents previously argued that forced arbitration policies would save Amtrak money.²¹ The solution to this problem is for Congress to authorize more money for Amtrak, not to strip away the rights of passengers. Moreover, following the pandemic, transportation providers like Amtrak need increased ridership. As others noted in prior years, Amtrak’s arbitration policy could scare passengers away resulting in further economic loss to the rail provider. This belief was expressed by Jack Dinsdale, National Vice President of the Transportation Communications Union, who said during a 2019 House hearing that forcing passengers into arbitration would “make passengers question whether they want to board the train.”²²

Expected Supporters

We expect widespread support from consumer rights advocates including the Rail Passengers Association, civil justice groups like the American Association for Justice, and non-profit consumer groups like Public Citizen. Furthermore, we expect union support in addition to the support of Amtrak crash victims.

For more information, please contact student Joseph Bias, Joseph.Bias@law.nyls.edu, or Executive Director of the Center for Justice & Democracy at New York Law School, Joanne Doroshow, joanned@centerjd.org.

²¹ See letter to Members of Congress from Amtrak President and CEO Richard H. Anderson, dated November 25, 2019; Also, 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>

²² *Id.*

APPENDIX: VICTIM STORIES

Eli Kulp

Eli Kulp, a renowned and award-winning chef in the Philadelphia area, was one of the many victims injured on May 12, 2015 when Amtrak's train derailed at a speed of 106 mph. Kulp, a husband and father, was paralyzed due the accident and now will spend the rest of his life in a wheelchair.²³ On January 21, 2018, Kulp wrote about the crash that would change his life forever stating:²⁴

The train I was riding turned a corner too quickly and flipped on its side. I went airborne and smacked my neck on a luggage rack. It felt like it happened in slow motion, but it all happened in a matter of two or three seconds. That's all it took. I didn't have a scratch on my body; I didn't lose consciousness, but I couldn't move. I was face down near a window, buried under luggage that had gone flying in the air. It took about 30 or 40 minutes for me to be rescued. I thought I was dying, not too many people experience that in their life. A lot of people who get into an accident say: "I don't remember anything." I wish that were the case.

According to Kulp, he had to "learn to live again" after returning home after a six-month long hospital admission.²⁵ Like many on the train that day, Eli Kulp was able to reach a settlement after filing a lawsuit for his horrific injuries.

Donnell Linton

Mr. Linton was one the many passengers who were injured in an Amtrak crash in DuPont, Washington in 2017. Linton was traveling to Oregon to visit his newborn grandchild when the train derailed. With him was his adolescent son, Quincy.²⁶ Both Linton and his son were ejected from the train when impact was made soaring to the pavement below the rail. Quincy suffered multiple facial fractures as a result of the crash. Mr. Linton suffered even more substantial injuries due to the crash. He would be hospitalized for several weeks with his jaw wired shut and require a major facial reconstructive surgery. Nearly every bone in Mr. Linton's face was shattered and he needed tracheotomy to provide an airway to breathe.²⁷ A jury of Mr. Linton's peers awarded him damages following a trial in the U.S. District Court in Tacoma, Washington.

²³ Ali Gorman, "Chef Eli Kulp finds new normal after 2015 train derailment," *ABC, WPVI*, May 13, 2019.

²⁴ Eli Kulp, "An Amtrak Crash Left Chef Eli Kulp Confined to a Wheelchair—But It Hasn't Kept Him from Running 4 Restaurants," *bon appetit*, January 31, 2018.

²⁵ *Id.*

²⁶ Alexis Krell, "Jury awards \$10 million to man injured in deadly Amtrak derailment," *The Tacoma News Tribune*, February 13, 2020.

²⁷ Cheryl Reid-Simons, "'I'm a miracle': Father who survived Amtrak derailment shares story," *Multicare.org*, June 19, 2018.

Madeline “Maddie” Garza

Then 18-year-old college student, Maddie Garza was on the 2017 Amtrak train that derailed in DuPont, Washington. Garza suffered multiple injuries including fracturing her spine and breaking her pelvis when the train crashed onto the freeway sitting below the train rails.²⁸ Additionally, Garza sustained a lacerated liver and permanent nerve damage from the crash.²⁹ Garza, who was awarded by a federal jury for past and future pain and suffering, stated:³⁰

I am so grateful for the jury's powerful decision today. This is not just about justice for myself, but to also send a clear message to Amtrak about changing their practices. I hope that this compels Amtrak to improve safety measures on their trains so that accidents like the one I lived through don't happen ever again.

²⁸ “Jury awards \$4.5 million to victim of DuPont Amtrak derailment,” *King 5 News*, November 13, 2019.

²⁹ “Woman awarded \$4.5 million in Amtrak train derailment lawsuit,” *Kiro 7 News*, November 13, 2019.

³⁰ *Id.*