

THE PERSPECTIVE OF THE FREIGHT RAILROADS ON RAIL PASSENGER ISSUES

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As transportation policymakers are well aware, Amtrak faces many crucial issues as it seeks to survive. In addition to the various financial and operational issues associated with rail passenger service that must be considered, the perspective of the freight railroads must be included in any examination of the viability of continued rail passenger service. Amtrak operates over 23,750 route miles owned by the freight railroads and 750 miles that it owns. Given Amtrak's extensive operations using the freight railroads' facilities, and the statutory conditions established for that use, the freight railroad industry has a major stake in ongoing deliberations about the future of intercity passenger rail service in the United States.

HISTORICAL BACKGROUND

Before discussing the current situation, it is important to place today's debate in historic context. The Rail Passenger Service Act of 1970 enabled railroads to exit from unprofitable intercity passenger operations, but this relief came at a price. Specifically, the freight railroads capitalized Amtrak with an initial infusion of \$865 million (stated in 1997 dollars) in assets and funds. Further, Congress mandated that Amtrak pay only the incremental costs to the freight railroads for the use of their rights-of-way and other facilities.

Given the railroads' bleak financial situation and underutilized capacity in the 1970s, it is not surprising that the railroads accepted these terms. Had Amtrak not been created, the railroads, eventually, would have exited intercity passenger service. This would have been a time-consuming process, however, during which the railroads would have continued to incur large financial losses associated with passenger operations. By contrast, the Rail Passenger Service Act offered immediate relief from the financial drain of passenger operations, enabling the railroads to turn their attention fully to freight service.

The situation has changed dramatically since the early 1970's. At that time, pervasive economic regulation prevented the industry from competing effectively with other modes for freight shipments, and the industry's infrastructure was greatly underutilized. Today, the railroads have serious capacity problems on major freight corridors. Amtrak trains occupy prized corridor slots, and they secure access at less than market rate levels, which results in a substantial financial

subsidy from freight to passenger service. In fact, one freight railroad has estimated that it subsidizes Amtrak service at over \$50 million annually.

The freight railroads are not asking Congress to allow them to raise the rates Amtrak now pays to the freight railroads to market levels. That would be impracticable. It is important, however, that Congress and policymakers bear in mind the existing subsidy when considering the sources from which future contributions should be made.

CURRENT CONCERNS

In recent years, Amtrak has undertaken a number of initiatives that have enabled it to begin to reduce its costs and address its revenue shortfalls. Clearly, significant changes are needed if nationwide rail passenger service is to survive. Congress must enact fundamental reforms if it wants to preserve any form of intercity rail passenger service. These reforms are essential to enable Amtrak to operate in a more businesslike manner. These include:

- Liability reforms to ensure that the allocation of liability agreed to by both the freight railroads and Amtrak is enacted by Congress, and to provide a level of protection against excessive punitive damages similar to that which is enjoyed by the federal government and most commuter authorities;
- Operational reforms, including an evaluation of the Amtrak route system to eliminate unprofitable routes; and Labor reforms—for example, an examination of the six-year mandatory labor protection currently in place for Amtrak employees and Amtrak's ability to contract out for certain functions.

Congress also must provide Amtrak with a continuing and stable source of funds. Experience has shown that intercity passenger rail service on a broad scale simply is not profitable in this country or in any other major nation without continued, substantial public subsidy. Amtrak is the creation and the responsibility of the federal government, not the freight railroads. It would not be fair to require the freight railroads to increase the amount of the subsidy they already provide to Amtrak.

AMTRAK RESTRUCTURING LEGISLATION

There are a number of Congressional initiatives underway

dealing with the issue of Amtrak restructuring, each of which addresses critical issues associated with Amtrak's future. Two initiatives are particularly noteworthy.⁽³⁾ The first is S. 738, the "Amtrak Reform and Accountability Act of 1997," which was introduced on May 14, 1997 by Senator Kay Bailey Hutchison, Chairwoman of the Subcommittee on Surface Transportation and Merchant Marine of the Senate Committee on Commerce, Science, and Transportation. As introduced, the legislation requires Amtrak to bargain with its unions in the absence of a six-year government-mandated labor protection requirement, eliminates the prohibition on Amtrak's ability to contract out for services, caps punitive damages at the greater of two times compensatory damages or \$250,000, ensures enforceability of indemnification agreements between the freight railroads and Amtrak, requires an independent audit of Amtrak, and creates an Amtrak Reform Council.⁽⁴⁾ Second, on March 20, 1997, the leadership of the House Committee on Transportation and Infrastructure created a bipartisan blue-ribbon Working Group on Inter-City Passenger Rail to study the future of passenger rail transportation.

There are four major elements that the freight railroads believe are crucial in any Amtrak restructuring legislation.

1. Liability

Amtrak restructuring legislation needs to include liability reform. Legislation passed by the House of Representatives and the Senate Commerce Committee during the 104th Congress recognized the importance of liability reform in any restructuring of Amtrak.⁽⁵⁾

Since 1971, Amtrak and the freight railroads have used shared liability agreements to apportion risk. These agreements assign, on a contractual no-fault basis, risk of liability for Amtrak passenger operations between Amtrak and the freight railroads over which Amtrak trains travel. These agreements do not, however, dictate what the terms of the contract must be; Amtrak and the freight railroads have to negotiate under what circumstances they will allocate responsibility. Liability generally has been divided as follows: Amtrak assumes responsibility for its passengers, employees, damage to its property, and grade-crossing accidents involving Amtrak trains; the freight railroads assume liability for their employees and damage to their property. In the wake of an accident, Amtrak and the freight railroad can concentrate on defending the claims for which each is responsible, rather than spending time and effort determining who was at fault. In recent years, however, uncertainty has arisen as to the enforceability of the indemnification agreements.⁽⁶⁾ This legal uncertainty should be removed.

The possibility of the imposition of punitive damages is a particularly serious threat to Amtrak's survival. As the

only federally chartered passenger service, and as an entity which was created by Congress as a for-profit corporation, Amtrak faces the worst possible exposure for personal injury. Because it is federally chartered, many immunities under state laws applicable to state-chartered commuter authorities do not apply to Amtrak. Because it is a for-profit entity, and not a government agency, the immunity from punitive damages enjoyed by federal agencies does not apply.

Opponents of liability reforms have asserted that limitations on liability would hamper safety. There is no evidence to support such a claim. In fact, because Amtrak and the freight railroads share liability for accidents under existing agreements, both sides always have a strong incentive to operate safely (There is no evidence, for example, that immunity from punitive damages has ever contributed to State rail commuter authority accidents.). Enforcement of rail safety laws also promotes safe passenger operations.

2. Access

Part of the discussion about the future of passenger rail has included the concept of transferring major segments of Amtrak's franchise to others, particularly state or local authorities. If Congress determines that all or part of Amtrak's unique franchise should be transferred to other entities, it is essential that the terms of any such transfer(s) be agreed to in the context of negotiations between the other entity and the freight railroad providing the underlying facilities.

The conditions under which Amtrak operates, especially the legislated access to the freight railroads' facilities on an incremental cost basis, are unique to the participants in the original agreement—the federal government, Amtrak, and the freight railroads. If others are asked to provide services formerly operated by Amtrak, the freight railroads must retain the right to decline the use of their facilities until they have negotiated new terms and are satisfied that acceptable operating practices will be observed. Amtrak's unique franchise is not legally transferable to other parties without the approval of the underlying owners.

3. Railroad Retirement

The Railroad Retirement System is a unique retirement system—a combination of benefits conferred under Social Security (Tier I) and elements of private pension plans (Tier II). This system is a pooling in which all participants contribute an identical statutory amount per employee to fund the collective, standardized retirement costs of all rail industry employees.

Railroad Retirement covers all facets of the railroad

industry, including freight, passenger, and commuter railroads. The integrity of the system is based upon all participating entities contributing their apportioned share, in terms of the current number of active workers, of the industry's retirement expenses. Under such a system, certain firms will at some time pay more into the system than the cost of the benefits their current employees will receive, while other firms may pay less.

However, Amtrak cannot be relieved of its responsibilities to the Railroad Retirement System based on its current proportional retirement costs under the system. Such a selective deviation would undermine the basic structure of the system. If Congress chooses to relieve Amtrak of its statutory obligation to the Railroad Retirement System, however, Congress should continue to provide the necessary amounts directly to the Railroad Retirement Board.

4. Tax Support for Amtrak

The nation's freight railroads will continue to cooperate with Amtrak if Congress believes that intercity passenger service is in the public interest and is willing to make the commitment to save it. However, the freight railroad industry should not be required to support or subsidize Amtrak more than it already does. Subsidization of rail passenger service by rail freight service was not successful before Amtrak was created and it will not work now.

It is important to recognize that the freight railroads do not profit from Amtrak operations. As noted earlier, of all the suppliers from whom Amtrak buys goods or services, it is only the freight railroads to whom Amtrak does not pay a fair market value for the services and facilities Amtrak uses.

Compounding this problem is the fact that the railroad industry pays more in deficit reduction fuel taxes than its principal competitor—the trucking industry. The railroads currently pay 5.55 cents/gallon to the general fund for deficit reduction, while other transportation modes pay only 4.3 cents/gallon. There is no justification for railroads to pay deficit fuel taxes at a higher rate than their competitors.

Proposals that would use a portion of deficit reduction taxes for Amtrak would further exacerbate the deficit reduction fuel tax problem. For example, diversion of 0.5 cent/gallon of the deficit reduction diesel fuel tax to an intercity passenger trust fund would increase the freight railroads' subsidization of Amtrak by an additional \$19 million annually (For example, S. 436, the "Intercity Passenger Rail Trust Fund Act of 1997" would divert 0.5 cent/gallon of the deficit reduction fuel taxes paid by transportation industries into a Passenger Rail Trust Fund. According to the legislation's chief sponsor, Senator Roth,.....note budget resolution). The freight railroads do not oppose creation of such an intercity passenger rail fund

per se; it would be inappropriate, however, to require freight railroads to contribute to this fund, because it is unfair to require shippers of rail freight to financially support passenger rail operations. In addition, freight railroads already subsidize Amtrak by receiving only incremental costs for mandatory access to their tracks.

POTENTIAL EXPANDED AMTRAK FREIGHT OPERATIONS

Lastly, Amtrak's proposal to expand its mail and express business as a means of generating additional revenues must be noted in the context of any policy discussion about the future of rail passenger transportation. The freight railroads have serious concerns about this proposal.

Historically, passenger trains carried U.S. mail and a limited amount of express business. Consequently, Congress authorized Amtrak to carry some mail and express cars incidental to its passenger business. The freight railroads assert that it clearly was not Congress' intent that Amtrak, an entity subsidized by the federal government and the freight railroads, be allowed to compete with the freight railroads for express freight, which is an important part of the freight railroads' existing and potential business base.

A quasi-governmental entity should not be permitted to use government powers to take business from private taxpaying companies to subsidize passenger trains.

Likewise, the freight railroads believe that Amtrak should not be allowed to force private railroads to carry its express/freight trains on a subsidized and prioritized basis. To impose such a burden on the nation's freight railroads would raise serious public policy questions with constitutional implications. Instead, Amtrak and the individual freight railroads need to agree on appropriate lines of demarcation for the express Amtrak seeks to carry, in a truly collaborative relationship.

CONCLUSIONS

Amtrak indeed is at a crossroads. Congress must decide soon whether it wants a national rail passenger system in the United States. If Congress wants to save the system, it is essential that fundamental reforms addressing liability, operational, and labor issues be enacted. It also is essential that the costs associated with saving the system be borne by the public—or at least by those who use intercity passenger transportation—not the freight railroads that already subsidize Amtrak.

ENDNOTES

- 1) This paper is based largely on AAR's testimony submitted to the Senate Committee on Commerce, Science and Transportation for the Subcommittee on Surface Transportation and Merchant Marine's Amtrak oversight hearing on March 13, 1997.
- 2) Union Pacific Railroad, *Union Pacific and Amtrak: "The Current Level of Subsidy,"* February 1997.
- 3) Other initiatives include H.R. 1666, the "Amtrak Privatization Act" and H.R. 1210, the "Amtrak Route Closure and Route Realignment Act of 1997. In addition, the Clinton Administration's FY 1998 budget includes \$423 million in capital assistance and \$344 million in operating assistance for Amtrak from the Highway Trust Fund.
- 4) The working group's members included: Tom Larson (Chairman), Pat Cleary, Nancy Rutledge Connery, James Florio, Christopher K. Gleason, D.T. Ignacio Jayanti, Paul A. Karas, Robert R. Kiley, Alan Landes, John G. Pinto, Phyllis F. Scheinberg, Carl E. Van Horn, Robin H. H. Wilson. Subsequent to this conference, on June 23, 1997, the Working Group on Inter-city Passenger Rail issued its report, *A New Vision for America's Passenger Rail*. A majority of the working group advocated a division of passenger rail infrastructure management and operations, together with a stable and permanent commitment by the Federal Government to fund intercity passenger rail infrastructure costs, the elimination of operating subsidies for passenger rail operators, and the introduction of competition among these operators.
- 5) H.R. 1788, as passed by the House of Representatives during the 104th Congress, would have limited punitive damages to the greater of three times economic damages or \$250,000, but would have limited non-economic damages—e.g., pain and suffering—to a maximum of \$250,000 over the economic loss. S. 1318, as passed by the Senate Committee on Commerce, Science, and Transportation during the 104th Congress, would have capped punitive damages for Amtrak accidents at the greater of two times compensatory damages or \$250,000. There was no cap on pain and suffering or economic damages.

Subsequent to this conference, the Senate Commerce Committee ordered reported S. 738 on June 26. Attempts in committee to repeal the limitations on liability and to prohibit Amtrak from indemnifying the freight railroads for gross negligence were defeated.

- 6) Following the Chase, MD accident in 1987 involving a collision between a Conrail locomotive and an Amtrak train, the United States District Court for the District of Columbia held that the indemnification was unenforceable because of the gross negligence of the Conrail engineer that caused the accident. The district court's opinion was vacated on procedural grounds, but Amtrak and Conrail settled their differences related to this accident before the indemnification issue could be judicially resolved; see letter from Edwin L. Harper, President and Chief Executive Officer, Association of American Railroads and Thomas M. Downs, Chairman and President, National Railroad Passenger Corporation, to Members of the United States Senate, March 14, 1996.