WHITE PAPER

Amtrak and Freight Railroads: The Public Bargain

AMTRAK AND FREIGHT RAILROADS: THE PUBLIC BARGAIN

> *The [Rail Passenger Service] Act represents a public bargain that was struck with the nation's freight railroads, whereby the freight railroads were relieved of any duty to provide passenger service in exchange for making their tracks available to Amtrak at incremental costs.*
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> \- Interstate Commerce Commission (ICC), "Study of Interstate Commerce Commission Regulatory Responsibilities," October 25, 1994, p. 62.

Although Amtrak owns most of the Boston-to-Washington Northeast Corridor and a few other rail lines, about 95% of Amtrak's route network operates on lines owned and dispatched by other "host railroads." Most host railroads are privately-owned companies. While they are commonly called "freight railroads" today, they once provided intercity passenger rail service as well – until the public bargain that created Amtrak in 1970 enabled them to concentrate on their profitable freight business in return for agreeing to accommodate and facilitate Amtrak's operations.

The Freight Railroads and the Passenger Service Crisis

One of the major reasons Congress created Amtrak in 1970 was to relieve private railroads of their obligation as common carriers to provide unprofitable intercity passenger rail service.[1] By the late 1960s, "freight railroads were losing hundreds of millions of dollars per year on passenger service they were required to operate."[2] These losses totaled $200 million in 1969 ($1.4 billion in current dollars), the equivalent of 40% of the net operating income of the *entire* railroad industry.[3] As the President and CEO of the Association of American Railroads (AAR), the industry's trade association, later recalled:

> *The massive passenger losses, in combination within unrelenting competition for freight business . . . led to railroad bankruptcies. In 1970, the largest U.S. railroad, the Penn Central went into bankruptcy . . . Not coincidentally, the Penn Central was also the largest passenger railroad in the country.*[4]

The Rail Passenger Service Act

Congress enacted the Rail Passenger Service Act of 1970 (RPSA) to "relieve [the freight railroads] of further responsibility to provide passenger service" and "to preserve and promote intercity passenger rail service."[5] The RPSA shifted financial responsibility for providing intercity passenger rail service from the freight railroads to the federal government by creating Amtrak to operate a nationwide rail passenger network. The freight railroads, which had urged "speedy

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[1] For a discussion of the common carrier obligation, see Congressional Research Service, *Passenger Train Access to Freight Railroad Track* (May 2, 2012) (https://www.everycrsreport.com/files/20120502_R42512_f4b70271c4824b20cce53d174112e2d7ff4b8163.pdf), pp. 2-9.

[2] Association of American Railroads, *Passenger Service on Tracks Owned by Freight Railroads*, p. 3 (www.aar.org (accessed March 23, 2002) ("AAR 2002").

[3] *Rail Passenger Service Act of 1970*, House Report 91-580, Oct. 7, 1970 (1970 House Report), p. 3, reprinted in 1970 U.S. Code Congressional and Administrative News 4735.

[4] Statement of Edward R. Hamberger, President & CEO of the AAR, at *Hearing on Passenger Rail Financing*, Subcommittee on Surface Transportation and Merchant Marine of the U.S. Senate Committee on Science, Commerce, and Transportation, June 5, 2003 (AAR 2003 Testimony), p. 5.

[5] 1970 House Report, p. 1.

passage" of the RPSA,[6] "welcomed the opportunity to rid themselves of their hopelessly unprofitable passenger obligations."[7]

However, there was a quid pro quo for the enormous financial benefit the RPSA conveyed upon the freight railroad industry. In the words of the AAR:

> *When Congress created Amtrak, the freight railroads were allowed to exit the passenger business – providing relief from enormous and growing financial losses – in exchange for their acceptance of special non-compensatory terms covering Amtrak's future use of their tracks."*

In return for being relieved of their obligation to provide intercity passenger service, the railroads were required, according to the AAR's President and CEO, to:

- allow Amtrak "to operate wherever it wished" over their lines;
- "grant Amtrak trains preference over their own freight trains;" and
- allow the ICC (predecessor of the Surface Transportation Board) to determine compensation for Amtrak's operations if they could not reach agreement with Amtrak.[8]

The railroads accepted the bargain. Only three chose not to join Amtrak and retain their obligation to operate passenger trains. Those three railroads continued to incur large passenger train losses from for eight to twelve years until one went bankrupt and the others reached agreements for Amtrak to take over their passenger services.[9]

As the Federal Railroad Administration later noted:

> *The RPSA was the first in a series of laws enacted by Congress that ultimately resolved the so-called rail crisis and created conditions under which private sector railroads, now exclusively freight in orientation, have become one of the financially healthiest segments of this Nation's transportation industry.*[10]

The major freight railroads took advantage of their new freedom from most regulatory obligations by consolidating their freight traffic on a limited number of rail lines, and abandoning, selling or downgrading the rest. While this improved the freight railroads' financial performance, the resulting freight train congestion on some lines has been cited by freight railroads as a reason for Amtrak delays, objecting to additional Amtrak operations, or for operating existing Amtrak trains on slower schedules.

Additional and High-Speed Amtrak Service

When Congress enacted the RPSA in 1970, it anticipated that the creation of Amtrak would lead to expanded, high-speed passenger service on freight railroad-owned rail lines. The freight railroad industry assured Congress that this would not pose a problem.

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[6] Testimony by Thomas M. Goodfellow, President of the AAR, at *Passenger Train Service - Supplemental Hearings,* Subcommittee on Transportation and Aeronautics of the U.S. House of Representatives Committee on Interstate and Foreign Commerce (June 3, 1970) at 111. (AAR 1970 Testimony).

[7] AAR 2003 Testimony, p. 5.

[8] AAR 2003 Testimony, p. 6.

[9] Amtrak History Blog, *The Crescent Is Born*, March 25, 2014 (https://history.amtrak.com/blogs/blog/the-southern-crescent-joins-the-amtrak-family); Amtrak in the Heartland, *California Zephyr* (https://csanders429.wordpress.com/trains-and-routes/california-zephyr/) and *Rock Island's Rockets* (https://csanders429.wordpress.com/trains-and-routes/rock-islands-rockets/).

[10] Federal Railroad Administration, "Privatization of Intercity Rail Passenger Service in the United States," March 1998, p. 1.

In introducing the RPSA, Senator Mike Mansfield, its Senate sponsor, stated that the newly-created corporation "will be in a position to bring high speed, modern and frequent train service to . . . routes in every region of the country."[11] Section 201 of the RPSA required the Secretary of Transportation to "consider opportunities for provision of faster service" and for "service to more centers of population" in selecting Amtrak's initial routes."[12] Section 403(b) directed Amtrak to operate additional routes requested by states or agencies that agreed to share in their costs, while Section 602 authorized loan guarantees for upgrading of railroad roadbeds, all then owned by freight railroads.[13]

The president of the AAR testified that the freight railroads were willing and able to accommodate new high-speed Amtrak services on their tracks:

> *If the passenger trains run 150 miles an hour and we are still to run heavy coal trains over them, from my experience we will have a little problem of maintenance, but we can do it and the costs can be fairly shared.*[14]

In accord with the railroad industry's commitment to Congress, the RPSA requires railroads to accommodate additional Amtrak trains that will not "impair unreasonably" their freight rail operations and to allow Amtrak trains to operate at higher speeds unless that is "unsafe or impractical."[15] However, freight railroads have increasingly thwarted proposals by Amtrak and its state partners to operate Amtrak trains at higher speeds, or add additional Amtrak trains, by demanding excessive capital investments and refusing to accommodate changes in Amtrak operations or even to participate in studies.

Amtrak's Payments to the Freight Railroads

The creation of Amtrak relived the freight railroads from all the additional (incremental) costs they incurred from the operation of intercity passenger rail service. Not surprisingly, Congress reacted vociferously when the ICC ruled in 1973 that a railroad could charge Amtrak *more* than the incremental costs it incurred from Amtrak's operations, even though the railroad's performance was "below acceptable standards." Both houses of Congress swiftly enacted an amendment to the RPSA that clarified that incremental costs were to be the basis for Amtrak's payments to freight railroads, and that compensation, if any, in excess of incremental costs would have to be based upon quality of service.[16]

As a 1980 federal court decision explained, requiring Amtrak to pay more than incremental costs would defeat

> the very purpose of the Rail Passenger Service Act . . . Prior to passage of the Act [railroads] were suffering tremendous financial losses on the provision of passenger services . . . By subsidizing Amtrak, Congress shifted the loss from the railroads to the public.

[11] Congressional Record (May 1, 1970), p. S 6540.
[12] RPSA of 1970, Pub. Law No. 91-518 (Oct. 30, 1970), 84 Stat. 1327, 1329.
[13] RPSA of 1970, 84 Stat. 1327, 1336, 1338.
[14] AAR 1970 Testimony, pp. 114-115.
[15] 49 U.S.C. 24308(d) & (e).
[16] *Amtrak Improvement Act of 1973,* House Conference Report 93-587 (Oct. 12, 1973), reprinted in 1973 U.S. Code Congressional & Administrative News at 2331, 2336.

Allowing the railroads to charge Amtrak more than the costs they had previously incurred to provide passenger services, the court concluded, would provide them with a financial windfall while "increasing the cost to Amtrak, and therefore the drain on the treasury."[17]

In accord with the RPSA, Amtrak pays its host railroads - the freight railroads and transportation authorities over which its trains operate - both the incremental costs attributable to its operations and additional amounts, referred to as incentive payments, that are based upon the on-time performance each railroad provides for Amtrak's trains. The incentive payment provisions in Amtrak's agreements with the six largest Class I railroads give them the opportunity to earn over $125 million annually for providing good on-time performance. However, they earned only 15% of these incentive payments in 2018.

In addition to Amtrak's payment of freight railroads' costs and on-time performance incentives, Amtrak, the federal government, states and regional transportation authorities have made billions of dollars in investments in freight railroad-owned lines used by Amtrak over the 48 years since Amtrak's creation. In particular, a large portion of the $10.1 billion in federal funding appropriated in 2009-10 for high speed and intercity passenger rail projects was used for investments on freight railroad-owned lines.[18] These investments have upgraded and added tracks on portions of nearly all of the routes that Amtrak operates over freight railroads, increasing track capacity and enabling trains to operate at higher speeds.

Prioritizing Passenger Trains Over Freight Trains

When freight railroads operated their own passenger trains before the creation of Amtrak, they recognized that prioritizing trains carrying passengers over slower freight trains carrying only cargo was essential to providing a viable passenger service. Indeed, when a railroad ceased giving priority to a passenger train it wished to discontinue in the late 1960s, the ICC found that the railroad had "unnecessarily depressed its passenger revenues" and rejected its application for discontinuance.[19]

When Amtrak was created, the freight railroads assured Congress that Amtrak's trains would receive priority over freight trains. The president of one railroad testified that his railroad "traditionally has given passenger train operations preference over freight service and would continue to afford Amtrak trains priority."[20] However, some railroads soon began to ignore this commitment: on-time performance of Amtrak's long-distance trains plummeted from 70% in 1972 to 35% in 1973.[21] This led Congress to enact a 1973 amendment to the RPSA specifically providing that "[e]xcept in an emergency . . . Amtrak has preference over freight transportation . . .."[22] While this provision allows railroads to seek relief from the STB if giving Amtrak trains preference "materially will lessen the quality of freight transportation provided to shippers," no railroad has ever sought such relief.

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[17] Seaboard Coast Line R.R. v. National Railroad Passenger Corporation, 489 F. Supp. 916, 920 (M.D. Fla. 1980), aff'd 645 F.2d 513 (5th Cir. 1981).

[18] See project descriptions at Federal Railroad Administration, *Passenger Rail–eLibrary* (https://www.fra.dot.gov/Page/P0247).

[19] Southern Pacific Co. Discontinuance of Trains No. 1 and 2 Between Los Angeles, CA and New Orleans, LA, 333 I.C.C. 783, 800 (1969).

[20] *Review and Refunding of Rail Passenger Service Act,* Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, House Report 92-54, pt. 2 at 670 (Dec. 7, 1971).

[21] *Hearings on H.R. 8351*, Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 93rd Congress, 1st Session, at 29-32 (June 12, 1973).

[22] 49 U.S.C. 24308(c).

What happens when passenger trains do not have preference is illustrated by the experience of Amtrak's Canadian counterpart, VIA Rail Canada, whose trains encounter extraordinary delays because they do not have legal priority over freight trains. In 2008, VIA added a half day to the schedule of its Toronto-Vancouver *Canadian* in hopes that longer schedules would improve its reliability. Instead, on-performance "continued to deteriorate": during the first quarter of 2018, the *Canadian* arrived at its destination an *average* of 18.5 hours late. Once again, VIA added time to the schedules: 8.25 hours westbound and 13 hours eastbound. However, despite its much lengthened schedule, "the *Canadian* continues to experience significant delays" and "is no longer a viable travel alternative" for anyone other than "less schedule sensitive tourist travelers."[23]

[23] VIA Rail Canada, "Summary of the 2018-2022 Corporate Plan and 2018 Operating and Capital Budgets" (https://www.viarail.ca/sites/all/files/media/pdfs/About_VIA/our-company/corporate-plan/ Corporate_ Plan2018.pdf), pp. 7-9 and "Annual Report 2018" (https://media.viarail.ca/sites/default/files/publications/2018_Annual%20Report_EN.pdf), p. 26.

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