

AMTRAK REFORM COUNCIL

THE COUNCIL

Gilbert E. Carmichael
Chairman

Paul M. Weyrich
Vice Chairman

Bruce Chapman

Nancy Rutledge Connery

James E. Coston

Wendell Cox

Christopher K. Gleason

S. Lee Kling

Charles Money Penny

Hon. John O. Norquist

Hon. Rodney Slater

Executive Director

Thomas A. Till

FOR PUBLIC INFORMATION AND DISCUSSION

December 4, 2000

A COUNCIL POLICY PAPER

EXECUTIVE SUMMARY ONLY

A SUMMARY OF CURRENT LEGISLATIVE PROVISIONS PRESCRIBING THE LEGAL AND REGULATORY FRAMEWORK GOVERNING THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

This Council policy paper is intended as a building block in the Council's program of research, education, and public policy development concerning Amtrak and rail passenger service in the United States. Its contents are designed to provide a summary of the legislative provisions that govern the structure and operations of the National Railroad Passenger Corporation, known as Amtrak. As such, the Council believes that it is important for this paper to be released for public information and discussion throughout the transportation community, both within and among governmental agencies at the federal and state levels, and in the private sector.

Amtrak Reform Council

JM-ARC, Room 7105
400 Seventh Street, SW

Washington, DC 20590

Phone: (202) 366-0591
Fax: (202) 493-2061

The ARC is an independent federal commission established under the Amtrak Reform and Accountability Act of 1997 (P. L. 105-134)

EXECUTIVE SUMMARY OF LAWS **AFFECTING AMTRAK**

I. THE RAIL PASSENGER SERVICE ACT OF 1970 (“RPSA”) (49 U.S.C. 24101 ET SEQ.) (AS SUBSEQUENTLY AMENDED BY THE AMTRAK REFORM AND ACCOUNTABILITY ACT OF 1997)(“ARAA”)

A. The RPSA Prior to Enactment of the ARAA

In 1970, the U.S. railroad industry was in a precarious financial condition. In response, Congress created the National Railroad Passenger Corporation (“Amtrak”) pursuant to the Rail Passenger Service Act of 1970 (Pub. L. 91-518 and subsequent amendments (“RPSA”)). Amtrak was created to relieve the freight railroads of the continued burden of deficit passenger operations and “to revitalize rail transportation service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking . . .” House Report No. 91-1580, reprinted in 1970 U.S. Code Cong. & Admin. News 4735, 4737, 4741. In creating Amtrak, Congress sought to establish a single, for-profit corporate entity that, with initial Federal assistance, and with infrastructure, financial and other contributions from the freight railroads, would be responsible for providing all intercity rail passenger service over a unified national system. Id.

Amtrak was created by the RPSA as a private, for-profit, District of Columbia Corporation (as amended in 1978, the RPSA requires that Amtrak “shall be operated and managed as a for-profit corporation.”). RPSA, sec. 301. Amtrak’s status was further statutorily defined as a “mixed ownership Government corporation” under the Government Corporation Control Act and “not . . . an agency or instrumentality of the United States Government.” RPSA, sec. 804. Under the RPSA (prior to the enactment of the Amtrak Reform and Accountability Act of 1997), the Amtrak Board consisted of 9 members (the Secretary of Transportation, the President of Amtrak, 5 members appointed by the President subject to Senate approval and 2 members elected by the holders of preferred stock. RPSA, sec. 303, as amended.

In return for contributions to Amtrak of cash and/or equipment equal to one-half of rail passenger deficits for 1969 (as well as the mandatory assumption of specified statutory obligations towards Amtrak), the RPSA relieved each participating freight rail carrier of its statutory obligation to continue to provide passenger service. Carriers that contributed to Amtrak were provided the option of receiving either Amtrak common stock or federal income tax credits. Over a short period, all freight carriers discontinued

intercity passenger service under the RPSA. Currently, there are four holders of Amtrak common stock (3 railroads and an insurance company, as successor to the Penn Central). The only preferred stockholder is the Secretary of Transportation (in the amount of approximately \$10.6 billion), who received the shares in exchange for past capital and future capital and operating grants made to Amtrak pursuant to 1981 legislation.

The RPSA granted Amtrak the right to use tracks, facilities and services of freight railroads in providing passenger services and to compensate the freight railroads at the incremental cost level. RPSA, sec.305. Amtrak was also granted preference over freight railroads in regard to track use. Except for 366 miles of track on the Northeast Corridor (NEC) and other small segments of track that Amtrak owns subject to a USG mortgage lien, Amtrak's passenger operations are conducted over tracks owned by freight carriers.

Until amended by the ARAA, the RPSA defined a "basic system" national route network over which Amtrak was required to provide passenger service. The service could only be discontinued (subject to Congressionally imposed moratoriums) if it met with certain Congressionally-approved criteria. RPSA, §§ 201, 202. The Act also made provision for Amtrak service beyond the "basic system" at state, local or regional request subject to minimum financial assistance requirements ("Section 403(b) service."). The Act also provided for authority for Amtrak to provide mail and express and auto-train service on passenger trains and to operate commuter services under contract with state, local or regional authorities. See RPSA, § 305, 49 U.S.C. 24306. Until amended by the ARAA, the RPSA provided Amtrak a monopoly over intercity rail passenger transportation over any route over which Amtrak provided scheduled service pursuant to a contract with a freight railroad. See former 49 U.S.C.24701.

Until amended by the ARAA, the RPSA provided that Amtrak employees who are discharged or displaced as a result of a route discontinuance or reduction of train frequency below three round trips per week were entitled to up to six years of full pay and benefits ("labor protection payments"). See RPSA, § 405; 49 U.S.C. §24706(c). The RPSA, until amended by the ARAA, also prohibited Amtrak from contracting out operations (except food service operations) where the result would be the layoff of an Amtrak employee. See RPSA § 405; former 49 U.S.C. 24312.

Although the RPSA was amended numerous times since 1970 in an effort to improve Amtrak's operations and financial status, Amtrak's performance under the provisions of the RPSA did not meet with Congressional expectations. Instead of becoming commercially profitable or operationally self sufficient as Congress had hoped, Amtrak has required federal capital and operating subsidies totaling over \$23 billion since inception of operations in 1971. As of 1997, Amtrak's losses and capital needs were growing, and the prospect of an Amtrak bankruptcy in the absence of a massive infusion of Federal financial assistance was a strong probability.

B. The RPSA as Amended by the ARAA

Congress accordingly overhauled the provisions of the RPSA in 1997 by enactment of the ARAA. The ARAA:

1. Put in place a new Board of Directors, called the Amtrak Reform Board, to oversee the corporation's operations. The Reform Board consists of seven voting members appointed by the President and confirmed by the Senate (except for the DOT Secretary); the President of Amtrak serves as an ex officio, non-voting member. 49 U.S.C. 24302.
2. Required Amtrak, over the five fiscal years from FY1998 through FY2002, to wean itself from the need for federal operating grant funds and provided that after December 2, 2002 "Amtrak shall operate without Federal operating grant funds appropriated for its benefit". Sec. 24101(d).
3. Required Amtrak to redeem its outstanding common stock, owned by private shareholders, by the end of FY2002 at fair market value, and eliminated the liquidation preference and voting rights of the US-government-owned preferred stock. ARAA Sec. 415 (b) and (c).
4. Ended Amtrak's legal monopoly over intercity passenger service by rail, but retained Amtrak's special statutory access to the track of the private railroads at incremental cost and with the historical passenger service operating priority. ARAA Sec.101(a).
5. Repealed Amtrak's obligation to provide rail passenger service within the "basic system" defined by statute and provided Amtrak with complete flexibility to determine its national system of routes and services in response to the marketplace. ARAA Sec. 101(a).
6. Repealed the specific statutory requirements for labor protection payments and placed the disposition of this issue on the management-labor collective bargaining table. ARAA Secs. 141 and 142. (Amtrak and its unions opted to arbitrate the issue of labor protection. In a decision issued November 1999, the arbitration panel modified the previous labor protection requirements by, among other things, reducing the maximum duration of benefits from six years to five years and by adopting a sliding scale of service requirements before maximum benefits could be reached.)
7. Repealed the statutory prohibition against contracting out and placed the disposition of this issue on the labor-management collective bargaining table no later than November 1, 1999. ARAA sec.121. Amtrak served notice on its employee representatives on June 12, 2000 placing the contracting out issue on the bargaining table. Under the Railway Labor Act, the pre-existing ban on contracting out (which was deemed incorporated in Amtrak collective bargaining agreements under the provisions of the ARAA) remains in force until changed by negotiation or self-help.
8. Put in place limitations on rail passenger transportation liability and allowed Amtrak to enter into contracts with other railroads, states, and commuter authorities to allocate financial responsibility for claims. 49 U.S.C. 28103.

II. THE ARAA: PROVISIONS GOVERNING AMTRAK FISCAL ACCOUNTABILITY

The ARAA not only amended the RPSA, but also adopted specific provisions governing Amtrak fiscal accountability and oversight. In addition to establishing the Reform Board, the ARAA:

1. Required an independent assessment of Amtrak's financial requirements through FY2002 under oversight of the DOT Inspector General. The first Report was submitted to Congress on November 23, 1998. Follow-up reports are required for any fiscal year in which Amtrak requests federal financial assistance. ARAA secs. 202, 409.
2. Established the Amtrak Reform Council (ARC) as an independent, bi-partisan commission of 11-members. The duties of ARC are to (A) evaluate Amtrak's performance; (B) make recommendations to Amtrak for achieving further cost containment and productivity improvements and financial reforms; and (C) identify Amtrak routes which are candidates for closure or realignment. If, after January 1, 1997 Amtrak enters into an agreement involving work-rules intended to achieve savings with Amtrak employee labor unions, Amtrak must report quarterly to ARC the savings realized and how those savings are allocated. ARC must submit an annual report to Congress that includes an assessment of: (1) Amtrak's progress on the resolution of productivity issues; (2) the status of those productivity issues; (3) Amtrak routes which are candidates for closure or realignment, and (4) recommendations for improvements and for any changes in law it believes necessary or appropriate. ARAA sec. 203.
3. Provided for an Amtrak "sunset trigger." If at any time more than two years after December 2, 1997 ARC finds that Amtrak's business performance will prevent it from meeting the financial goals of the ARAA or that Amtrak will require operating grant funds after December 2, 2002, ARC shall immediately notify the President and Congress. In making such a finding, ARC shall take into account Amtrak's performance; the findings of the independent assessment under sec. 202; the level of Federal funds made available for carrying out the financial plan referred to in 49 U.S.C. 24101(d); and acts of God, national emergencies and events beyond the reasonable control of Amtrak. Within 90 days of making a finding, (1) ARC shall develop and submit to Congress an action plan for a restructured and rationalized national intercity rail passenger system; and (2) Amtrak shall submit a liquidation plan. The ARAA provides for Senate procedures for considering the ARC restructuring and Amtrak liquidation plans. ARAA secs. 204, 205.
4. Required ARC to report quarterly to Congress on the use of amounts received by Amtrak under section 977 of the Taxpayer Relief Act of 1997 (TRA). See discussion below.

III. THE TAXPAYER RELIEF ACT OF 1997 (TRA)

Under the TRA, Amtrak was treated as entitled to apply its tax carrybacks against the income tax paid by its railroad predecessors of approximately \$2.3 billion and to claim the \$2.3 billion as a tax refund. TRA funds can only be used by Amtrak for certain statutorily defined “qualified expenses” and payments to non-Amtrak states. ARAA sec. 209. Congress requested the General Accounting Office to conduct an initial review of Amtrak’s TRA expenditures. The GAO Report was issued in February 2000.

IV. THE RAILROAD RETIREMENT ACT OF 1974 (“RRA”) (45 U.S.C. 231 ET SEQ.)

Rail carriers who engage in the interstate transportation of freight or passengers, such as Amtrak, are covered under the provisions of the RRA, rather than the Social Security Act (“SSA”) for retirement benefits. Tax costs to railroad employers for an employee making the same wages in other industries is nearly three times higher than for employers under SSA.

The RRA has two components with respect to benefits and taxes: a social security equivalent benefit component (Tier I) and a pension component (Tier II). The Railroad Retirement system is funded on an industry-wide “pay as you go” basis with employer and employee taxes pooled and used to fund the benefits payable to all eligible industry employees or retirees. The pooling system has given rise to special federal appropriations to Amtrak (“mandatory payments”) that by law have not been considered a “government subsidy of Amtrak.” See 49 U.S.C. § 24104. These “mandatory payments” represent Railroad Retirement tax liabilities to Amtrak that are used to pay Tier II benefits of non-Amtrak beneficiaries (so-called “excess payments”).

V. THE RAILROAD UNEMPLOYMENT INSURANCE ACT (“RUIA”) (45 U.S.C. 351 ET SEQ.)

The railroad industry, including Amtrak, is subject to RUIA, rather than state unemployment insurance statutory regimes with respect to unemployment benefits and taxes. Because unemployment payments under RUIA are experience-based and vary by employer, the ARAA does not include RUIA taxes and benefits as an “excess payments” issue requiring federal funding.

VI. THE RAILWAY LABOR ACT (“RLA”) (45 U.S.C. 151 ET SEQ.)

Unlike other industries whose labor relations are governed by the National Labor Relations Act, the RLA governs labor relations in the railroad and airline industries. Amtrak is subject to the RLA pursuant to 49 U.S.C. § 24301. The basic purposes of the RLA are: (1) to avoid any interruption to interstate commerce; (2) to ensure the right of railroad employees to join a labor organization; (3) to provide for the complete independence of carriers and employees with respect to self-organization; (4) to provide

for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions (“major disputes”); and (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of interpretation or application of agreements (“minor disputes”). Under the RLA, either side must provide 30 days’ written notice (“Section 6 notice”) of any intended change in an agreement. Minor disputes are handled by negotiation “on property” or by compulsory arbitration (by the standing National Railroad Adjustment Board or public law boards on local properties). Major disputes that cannot be resolved through collective bargaining procedures are submitted to mediation by a 3-member National Mediation Board (“NMB”). If the NMB is unsuccessful and finds the controversy threatens substantially to interrupt interstate commerce, the NMB is required to notify the President. The President is empowered to appoint a neutral Presidential Emergency Board (PEB) to investigate and submit a report. If the parties cannot agree 30 days after the PEB report and recommendations, either side is free to resort to self-help measures (e.g., a strike or lockout). The President may also request emergency legislation, or Congress may act on its own, to resolve the dispute.

VII. THE FEDERAL EMPLOYERS LIABILITY ACT (“FELA”) (45 U.S.C. 51 ET SEQ.)

Unlike most American workers, railroad workers are not covered by state no-fault workers’ compensation insurance systems when they are injured on the job. Instead, injured railroad employees, including Amtrak employees, are covered under FELA. FELA was enacted in 1908, at a time when railroads were the nation’s largest employer and rail work was especially hazardous. Under FELA, an injured employee negotiates a settlement with the railroad employer. If the negotiations fail, the employee may file a lawsuit alleging negligence by the employer to recover losses. FELA allows workers to seek recovery for economic and non-economic damage (such as pain and suffering). Workers’ compensation systems, which do not require a showing of negligence, typically limit recovery to economic losses.

VIII. THE DISTRICT OF COLUMBIA BUSINESS CORPORATION ACT (“DCBCA”) (D.C. CODE § 29-301 ET SEQ.)

Amtrak is subject to the DCBCA to the extent that it is consistent with the provisions of the RPSA. RPSA § 24301(e). In the absence of overriding federal legislation, the DCBCA contains requirements that Amtrak must comply with in order to amend its charter and take other corporate actions.

IX. Subtitle V, PART A, of Title 49 U.S.C. (Rail Safety) (49 U.S.C. 20101 et seq.)

The Rail Safety provisions of Title 49, 49 U.S.C. 20101 et seq., are applicable to all railroad carriers, including Amtrak and commuter railroads. The Act

regulates all aspects of railroad safety, including equipment, facilities, rolling stock and operations.

**IX. SUBCHAPTER IV OF TITLE 11, UNITED STATES CODE
(RAILROAD REORGANIZATION) (11 U.S.C. 101 ET SEQ.)**

Chapter 11 of the Bankruptcy Code, which generally sets out procedures for railroad reorganization, would govern an Amtrak bankruptcy. Chapter 11 seeks to protect the public interest in continued rail service as well as the interests of railroads, creditors and stockholders. Amtrak may initiate bankruptcy proceedings by filing a voluntary bankruptcy petition that is authorized by its Board of Directors. Three or more creditors whose unsecured claims totaled at least \$10,000 could also file an involuntary petition. After a petition is filed, an appointed trustee, with court oversight, would make decisions about the railroad's operations and financial commitments (rather than Amtrak's Board of Directors).

The trustee would be responsible for developing a plan of reorganization. Amtrak's creditors and shareholders would vote on the plan. Because the United States is a shareholder and creditor of Amtrak, the Secretary of Treasury would accept or reject the plan on behalf of the United States. Additionally, the plan would have to be court approved. If a plan were not approved within five years, the court would have to order liquidation. The court could also order liquidation earlier if it determined liquidation to be in the public interest. Under such circumstances, the case would be handled as if the case were a liquidation case under Chapter 7 of the Bankruptcy Act.