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Railroad Employees and Amtrak: The Free Ride May Continue

by Gary D. Allison

National R.R. Passenger Corp.

v.

AT & SF Ry. Co.

(Docket No. 83-1492)

AT & SF Ry. Co.

v.

National R.R. Passenger Corp.

(Docket No. 83-1633)

Argued January 15, 1985

In 1970, Congress enacted the Rail Passenger Service Act, which established the National Rail Passenger Service Corp. (AMTRAK) and relieved railroads of their obligations as common carriers of passengers by contracting with AMTRAK to take over their intercity rail passenger services. As part of the contracting process, the railroads, AMTRAK and the Secretary of Labor were to guarantee railroad employees certain statutory employment protections.

Originally, the employment protections did not include the free or reduced-rate travel privileges many of the contracting railroads had provided their employees, retirees and dependents. In 1972, in response to the complaints of many present and former railroad employees, and at the urging of the contracting railroads and concerned labor unions, Congress amended the employment protections to require AMTRAK to initiate free and reduced-rate travel privileges for certain employees of the contracting railroads and to require the railroads to reimburse AMTRAK for the travel benefits. Further congressional amendments to the employee travel provisions in 1979 and 1981 specified a reimbursement formula that requires the contracting railroads to pay AMTRAK rates in excess of its incremental costs of providing the statutory employee travel benefits.

ISSUE

This case questions the degree to which the original Rail Service Passenger Act, and the contracts entered by the railroads and AMTRAK under the authority of the

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Act, established constitutionally protected rights relieving the contracting railroads of all responsibility for providing free and reduced-rate travel benefits to certain of their employees, retirees and dependents.

FACTS

The original provisions of the Rail Passenger Service Act (Pub. L. 91-518, 84 Stat. 1327-42 (1970)) did not specify whether the venerable practice of providing railroad employees with free passenger service should continue, and if so, who would pay for it. However, pursuant to the Act, AMTRAK negotiated a "Basic Agreement" with each railroad involved here, specifying that:

1. "From and after May 1, 1971, railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service," and
2. "Transportation privileges, if any, with respect to business and personal travel of railroad personnel shall be as determined by [AMTRAK]."

Upon initiating its operations, AMTRAK significantly reduced the travel privileges of railroad employees, which provoked immediate protest from concerned rail unions. Strikes were threatened if the travel privileges were not restored. This labor unrest prompted the railroads to complain to AMTRAK, which in response, expanded its travel privileges, but not to the levels previously provided by the railroads.

Eventually, this controversy led to Congress enacting, over AMTRAK's protests, a new provision to the Rail Passenger Service Act [section 405(f)], requiring AMTRAK to restore the travel privileges railroad employees enjoyed as of April 30, 1971. Section 405(f) also required the railroads to reimburse AMTRAK for the costs associated with the employee travel privileges. Unable to agree on a cost formula, pursuant to its authority under section 405(f), the Interstate Commerce Commission set the reimbursement rate at .00079 cents per passenger mile and permitted these costs to be offset by revenues collected from railroad employees' paying half-fares.

Responding to AMTRAK's complaints that the existing travel privilege reimbursement rate was too low, in 1979, Congress amended section 405(f) to statutorily set the reimbursement rate at 25% of the AMTRAK's systemwide average monthly yield per revenue passenger mile for a two-year period ending on September 30,

1981. (AMTRAK Reorganization Act of 1979, Pub. L. 96-73, section 120, 93 Stat. 537, 547-48 (1979)) Congress subsequently amended section 405(f) to make the 25% yield reimbursement formula permanent. (AMTRAK Improvement Act of 1981, Pub. L. No. 97-35, section 1184, 95 Stat. 357, 697 (1981))

Contending that the 1972 and 1979 amendments to the Rail Passenger Services Act impaired their contractual rights under the original Rail Passenger Service Act and the "Basic Agreement" to be relieved of any financial responsibility for employee travel privileges, the railroad appellees filed suit in the United States District Court for the Northern District of Illinois. Summary judgment was entered in favor of AMTRAK in an unreported opinion. On appeal, the United States Court of Appeals for the Seventh Circuit reversed. The Seventh Circuit held that the railroads' contractual rights were not impaired by the statutory requirement that they reimburse AMTRAK for the costs of the employee travel privileges, but that the cost reimbursement method prescribed by Congress in its 1979 amendment to section 405(f) impermissibly impairs the railroad's contractual rights to be free from responsibility for intercity rail passenger service because it requires them to reimburse AMTRAK beyond the costs of the employee travel privileges. (*Atchison, Topeka and Santa Fe Ry. Co. v. National R.R. Passenger Corp.*, 723 F.2d 1298 (1983))

BACKGROUND AND SIGNIFICANCE

The social significance of this case is minimal and could literally disappear should Congress discontinue funding AMTRAK. In its present posture, the case is legally remarkable for elevating the concept of incremental costs to the level of constitutional prescription through the Seventh Circuit's conclusion that payments in excess of the incremental costs of the employee privileges subsidize AMTRAK's intercity passenger service operations. The Seventh Circuit's conclusions are consistent with precedent concerning impairment of contracts. However, the court's rationale for holding that the impairment here (section 405(f) impairs the railroad's rights under the Basic Agreement to be relieved of all responsibility for intercity rail passenger service) is constitutionally impermissible is highly suspect.

Congress ultimately mandated a reimbursement rate above AMTRAK's incremental costs of service—a rate the Seventh Circuit held requires the railroads to help pay for intercity rail passenger service in breach of their rights under the Basic Agreement to be relieved of all responsibility for intercity rail passenger service. It is important to consider other cost concepts that are often used in establishing rates for regulated services. Often rates are established on the basis of fully allocated costs—where the company's total costs of service are allocated to each unit of output on a causally-related basis. A company's total costs include fixed as well as

incremental costs. Payments by one class of customer in excess of incremental costs reduce the fixed cost coverage responsibilities of other customers. Yet, it would be a startling proposition to hold that a fully allocated cost payment subsidizes other customers.

Whether a particular class of customer uses services that can be causally related to costs other than variable costs has become an important issue in fully allocated cost determinations. It has been argued that interruptible and non-peak services do not tax the capacity of the company to provide service, and therefore should not be charged with fixed cost coverage responsibilities. The space-available nature of the employee travel privileges would qualify employee travel as an interruptible or non-peak service. Still, the complete absolution of interruptible or non-peak customers from fixed cost responsibility has as yet not achieved universal acceptance among regulatory agencies authorized to engage in rate-making—especially in the case of industries such as the rail passenger industry that has for years experienced flagging demands for service during peak and non-peak times.

The congressionally-mandated reimbursement rate certainly exceeds AMTRAK's incremental costs of providing employee travel privileges. Assuming that it is rational to charge interruptible or non-peak customers a rate covering some fixed costs, the mandated reimbursement rate is probably below the fully allocated cost level, as is the full fares being charged other customers riding on AMTRAK. In adopting the reimbursement formula enacted in section 405(f), Congress apparently took into consideration a General Accounting Office study of how much AMTRAK should be reimbursed for the employee travel privileges it provides—a study that concluded that value of service should be taken into account in deciding what the reimbursement rate should be.

After determining that section 405(f) impairs the railroad appellees' rights under the Basic Agreement to be relieved from responsibility for intercity rail passenger service, the Seventh Circuit placed on AMTRAK and the United States the "burden to establish that, under the circumstances of this case, Congress' regulation of interstate commerce in this specific statute is, by virtue of the evidence before it or the courts, paramount to the rights of the railroads under the basic agreement. Assigning the burden of establishing the constitutionality of federal legislation that impairs a private contract on those defending the constitutionality of the legislation runs counter to case precedent.

If the railroads must shoulder this burden, it is unlikely that the Court will find that it is arbitrary and irrational for Congress to require parties receiving AMTRAK services to pay rates above AMTRAK's incremental costs of providing those services. It is especially unlikely that the railroads can meet this burden when the "contract" they rely on fails to allocate the cost re-

sponsibility of employee travel privileges between them and AMTRAK.

ARGUMENTS

For National Railroad Passenger Corporation [AMTRAK]
(Counsel of Record, Paul F. Mickey, Jr., 400 N. Capital Street, NW, Washington, DC 20001; telephone (202) 383-3967)

1. In fixing compensation for Railroad Employee Pass Privileges, Congress is not limited to incremental cost.
2. Even if the railroads had a contractual right to be free of all obligations associated with intercity rail passenger service, that right has not been impaired in a manner prescribed by the Constitution.

For Atchison, Topeka, and Santa Fe Railway Co. *(Counsel of Record, George A. Platz, One First National Plaza, Chicago, IL 60603; telephone (312) 853-7000)*

1. The release from all responsibility for intercity rail passenger service is a contractual obligation of the United States protected by the Fifth Amendment.
2. The payment requirement of section 405(f) impairs

the release from all responsibility for intercity rail passenger service because the release includes financial responsibility for employee pass privileges.

3. The payment requirement of section 405(f) impairs the release from all responsibility for intercity rail passenger service by compelling the railroads to subsidize AMTRAK's passenger services to the general public, and is in any event irrational.
4. The impairment of the railroad's contract is not excused by considerations of public policy, lack of reliance, or insubstantiality.
5. There is no need to reach the constitutional issues in this case because the Basic Agreement constitutes "another basis for compensation" within the meaning of section 405(f).

In Support of the National Railroad Passenger Corp.

The United States filed a brief emphasizing that section 405(f) of the Rail Passenger Service Act does not unconstitutionally impair any contractual right of the railroads.