

Memorandum

To: Mark B. Kenny, General Chairman
From: Thomas A. Pontolillo
Date: April 15, 2005
Subject: Administration Bill

Do you remember those “belly bomb” smoked sausage/hot dogs at the Union Station YMCA that Willie the Horse used to eat by the handful 30 years ago? You could taste them several more times on the trip back to New York. This Memorandum addresses the Administration’s 2005 version of the Passenger Rail Investment Reform Act (“PRIRA”), which I forwarded to you earlier today. After reviewing the bill, and the accompanying transmittal letter and sectional analysis, the gas pains of 2003 have returned.

Mineta’s transmittal letter readily concedes that this PRIRA is “nearly identical” to the 2003 proposal, which explains my gastric dilemma. In fact, the most significant difference I could discern was a bouquet to the ultra-right gang in Washington who won’t be satisfied until the culture of the 1950s and the economy of the 1920s are restored. Using the same lame blame game that has become the hallmark of the intellectually dishonest right, Mineta describes Amtrak as “a virtually unchanged creation of the 1960’s,” and then proceeds to trash the concept, with the benefit of three and a half decades of hindsight.

In sum, the bill provides exactly the sort of three-way split up — service operator, infrastructure maintainer, and undertaker for the national rail passenger system — envisioned by the ARC, followed by

privatization of service operator and infrastructure maintainer functions and the inevitable “bidding” process. Service would be protected in the following order: NEC, off-Corridor commuter, other service that is not long-distance, and long-distance service. The system and service levels would remain intact throughout Year One;¹ then the screws would begin to turn.

Operating subsidies for long-distance trains will drop to forty cents per passenger mile in Year Two, and be completely eliminated beginning in Year Five. To the extent the bill provides for other operating subsidies, they would be provided only in the form of grants, requiring pre-approval by the Secretary of Transportation and being subject to the monthly reporting requirements with which Amtrak currently must comply. In fact, it does not appear that any operating subsidies will be provided for other than long-distance trains, except that all non-long-distance service will be fully subsidized in Year Two.

As we suspected, long-distance service and Amtrak’s “other short-distance service” will be the first casualties, beginning early in Year Two (October 1, 2006, if the Administration has its way). However, given that PRIRA would bring about the extinction of the current national “consensus” on Amtrak — albeit political in nature — disposal of the Northeast Corridor, the Springfield, Albany and Harrisburg lines, and Union Station in Chicago will put severe pressure on all States, except perhaps California, to

¹ “Year One” is defined as “the next Federal fiscal year to begin after the date of enactment of this Act, except that the term means the current Federal fiscal year if the date of enactment of the Act is within 60 days of the first day of the current fiscal year.” PRIRA §2(b)(1). The law would become effective on “the first day of Year One.” *Id.* at §107(d).

maintain current service levels over the long-term. This will be exacerbated when the States along the Northeast Corridor will have to pony up 50% of capital costs after Year Four.

The labor protection contained in the bill appears to be standard. However, appearances can be deceiving. The division of the workforce among Amtrak and its successor operating and infrastructure companies will not be accomplished at the bargaining table; it will be performed by assignment of the new Amtrak Board. *See* §102. Moreover, it remains to be seen just what the “right of first refusal to accept a substantially similar position” will mean if the privatized successor corporation loses a bid down the road. *See* §103. Even worse, I think it is inevitable that some enterprising hack carrier attorney will try to create a loophole to exclude the unborn if future rounds of bidding produce a second, third, and subsequent contractor.

The rumors that you are hearing that Amtrak is “OK for this year” (i.e., FY06) are not necessarily false. However, all the Administration is committed to authorizing for now is Amtrak’s funeral ... they’ve just postponed the wake for another 17½ months. Since this essentially is the same overall plan as proposed two years ago, the job loss numbers set forth in Memorandum from earlier today are on the button. That much said, here’s a section-by-section overview of the bill.²

² I will create a timeline and a simplified explanation, from our point of view, when time permits.

Section 101 (“Board of Directors of Amtrak”) provides that the present Amtrak Reform Board would be replaced by an 11-member “Transition Board” consisting of the Secretary of Transportation or his designee (“SOT”), and ten (10) others appointed by the President, with the advice and consent of the Senate, with current Board members continuing to serve if their term has not yet expired. Under PRIRA’s definition of “quorum,” a small fraction of the Board could act if Presidential appointees are tied up in the confirmation process. Amtrak’s President would be an *ex officio*, non-voting member of the Board. No Board position would be compensated, and the term of office is for the duration of the restructuring.

The Board will form an Asset Transition Committee, comprised of the SOT and two other members (if there are two other members), which must approve any Board or management action involving changes in the use or status of: access to lines of other railroads; Amtrak secured debt; NEC real property and assets; and rolling stock. After restructuring, the Amtrak Board will consist of the Secretary of Transportation, the Federal Railroad Administrator or someone designated by the Secretary, and the Federal Transit Administrator or someone designated by the Secretary. The other Transition Board members will become members of the Boards of Directors of the successor corporations that are spun off from Amtrak.

Section 102 (“Passenger Rail Service Restructuring”) provides that, within six months after Year One begins, the Transition Board shall prepare and submit to the appropriate Congressional committees a plan to restructure “Amtrak management, personnel, assets, operations and other activities and relationships,” including the creation of two, new and separate successor corporations: a Passenger

Rail Service Provider (“PRSP”) and a Passenger Rail Infrastructure Manager (“PRIM”). The small fraction of Amtrak remaining would be limited to overall supervision of restructuring and subsequent management of residual responsibilities, specifically including Amtrak’s legal right of access to other railroads. PRSP would handle “rail operating services nationwide, including operation of the reservation centers and ownership and management of existing rolling stock and its maintenance.” PRIM’s responsibilities would be those indicated by its name.

The Board’s plan also must provide for the assignment of all Amtrak personnel, by name, to one of the three entities “with no loss of pay or benefits, except that an employee who elects employment with [the Amtrak shell that remains] shall become an employee of the corporation, only with such rights regarding pay and benefits as the corporation shall determine.” It also must provide for the “division of accounting, finance, budget, assets, and personnel to provide for the operation and funding of each entity independently.” The restructuring must be completed by the end of Year One.

PRSP shall have exclusive rights to provide Amtrak service only until the end of Year Three, but must operate under a contract following Year One. PRSP also must “provide interline reservations services to any other provider of intercity passenger rail services on the same basis and rates as services are provided to the operational entities that provide service within Amtrak on the date of enactment.” PRIM shall have exclusive rights to provide dispatching, maintenance and infrastructure services only until the end of Year Six, but must operate under a contract following Year One. PRIM also must “carry out the multi-year infrastructure plan prepared by Amtrak, to the extent funds are made available.” Neither successor

corporation is “a department, agency, or instrumentality of the United States Government nor are they Government corporations.”

Neither PRSP nor PRIM will be under the jurisdiction of the Surface Transportation Board. “However, laws and regulations governing safety, employee representation for collective bargaining purposes, the handling of disputes between carriers and employees, employment retirement, annuity, and unemployment systems, and other dealings with employees that apply to a rail carrier providing transportation subject to” the Board’s jurisdiction will apply to both. The “Sectional Analysis” provided by the White House claims that these rights must be maintained “for a minimum of four years from date of transfer.” In addition, certain other exemptions from state tax, route, pay period, and other laws currently applicable to Amtrak are passed on to the successor corporations. Also, the Amtrak shell will continue to fall under the Railroad Retirement and Railroad Unemployment Insurance Acts.

PRIRA requires that the President of Amtrak on the date of enactment must be offered the position of Chief Executive Officer of PRSP, subject to “further action by the Board of Directors.” Contractual rights of PRSP and PRIM may not extend beyond the exclusivity dates specified above without a “competitive bid” having been conducted. PRSP must, within 18 months after enactment, provide the SOT with “recommendations on the feasibility, advantages, and disadvantages of separation of the reservations centers into a free-standing entity that can become an element of an intermodal reservations service.”

If PRSP is replaced as the operator of any intercity route, it must “make available to any replacement operator the legacy equipment that is associated with the service on the route ... on such terms as Amtrak determines are fair, reasonable, and in the public interest.”³ Amtrak is required to “ensure that the implementation of the restructuring prescribed ... gives due consideration to the needs of freight and commuter rail operations” in the NEC. However, a commuter service that is headquartered in any State or Commonwealth that is not a member of the Northeast Corridor Compact by the end of Year Two must pay fully allocated costs for “access to and use of” the Corridor.

Amtrak will no longer have a preferential right of access to lines owned by other carriers. Access for new routes or frequencies “shall be determined by negotiation and mutual agreement ... with no preferential right of access.” Any existing right of access not utilized by Amtrak may be assigned to no more than one intercity operator, except as Amtrak, the host road and the operator may otherwise agree.

Section 103 (“North East Corridor Compact”) provides that eligibility for participation is predicated upon enumeration in the list of States (and the District of Columbia) that constitute the Northeast Corridor, as defined in 49 U.S.C. §24102. The Compact will be submitted to the Congress for its consent. A 5-member Commission would be created, comprised of two members selected by the SOT, two members selected by the Governors of NEC States and the Mayor of DC, and one member selected by the other four Commission members. The Commission will be responsible for drafting the Compact, which

³ “Legacy equipment” is defined as “the rolling stock required to provide intercity passenger rail service owned or leased by the National Railroad Passenger Corporation on the date of enactment.”

must include provisions covering: 1) full authority for 99 years to succeed to Amtrak's responsibility to operate the NEC, subject to the provisions of a lease with DOT; 2) execution of a 99-year lease for the NEC, including protection for the lessor's interests, among them reversion "in the event the lessee fails to meet its financial obligations or otherwise assume financial responsibility for" NEC functions; 3) responsibility for NEC maintenance and improvement; 4) operation of intercity service on the NEC; 5) arrangements for operation of freight and commuter service on the NEC; 6) assumption of financial responsibility for NEC functions; 7) authority to make use of the NEC for non-rail purposes; 8) participation by DOT as the non-voting representative of the United States. The final compact proposal must be submitted by the end of Year One, and the Commission's life will end on the 180th day after it transmits its final compact proposal.

If the NEC Compact decides to replace PRSP and/or PRIM, the compact proposal must contain employee provisions that provide, at a minimum, "[p]ayment of any labor protection payments owed and not paid by the successor corporations" and, for someone "employed by [Amtrak] on the date of enactment ... and who accepts employment by a successor corporation, a right of first refusal to accept a substantially similar position with the replacement operator when the successor corporation is replaced." Any debt issued "may be secured only by revenues to the compact and may not be a debt of the member States or of the Federal Government." Such debt "shall under no circumstances be backed by the full faith and credit of the United States," and any grantee must expressly acknowledge that the debt does not constitute an obligation of the United States.

Adoption of the final compact agreement shall occur not later than the end of Year Two, and “turnover” from the successor corporations shall occur not later than eight months following adoption. In the absence of an agreement, the SOT steps in and has Congress legislate monetary contributions by the NEC states and DC to provide continued intercity service. Authorization for this section is in an amount “as may be necessary to carry out the purposes” thereof.

Section 104 (“Assistance to Address Capital Needs”) contains the following conditions for authorizing “such sums as may be necessary” for capital expenditures, beginning in Year Three: 1) the program carries through Year Six; 2) capital expenditures must be arranged through grants or cooperative agreements; 3) capital funds cannot go to NEC until the Compact is established; 4) the funds are “solely authorized for the purpose of funding deferred maintenance, safety and security projects” at a rate of 100%; 5) these funds cannot be used for capacity expansion; and 6) the SOT must find that the route for which capital funds are sought will have a “useful life” of at least five years.

Section 105 (“Employee Transition Assistance; Authorization”) provides that the SOT may develop a discretionary program to “provide grants for financial incentives to be provided to [Amtrak] employees ... who voluntarily terminate their employment with the Corporation or the successor corporations and relinquish any legal rights to receive termination-related payments under any contractual agreement.” Amtrak, or the successor, must certify that: 1) the net reduction in the number of employees will equal the number receiving the incentive; 2) the net reduction in total employment expense is equivalent to the employment expense associated with the group receiving the incentive; and 3) the number eligible

for the incentive will not be increased without the express written consent of the SOT. The top payment would be \$50,000.00 per employee. Authorization of appropriations continues “until four years from the first day of Year One,” although the White House sectional analysis indicates that offers will be made only during Years One and Two.

Section 106 (“Limit on Operating Assistance for Long-Distance Routes”) provides that, after Year One, operating assistance for long-distance routes⁴ and “corridor feeder routes” will come in the form of grants, with losses being documented on a quarterly basis. A “corridor feeder route” is defined as “a portion of a long distance train or route that provides services between regional corridors by connecting to endpoints of the corridors.” Reimbursements are limited to the operating losses on the route, and cannot constitute a reimbursement per passenger-mile greater than: \$0.40 during Year Two; \$0.20 during Year Three; \$0.10 during Year Four; and \$0.00 for each year thereafter. Authorization is for “such sums as may be necessary.” It is important that we try to obtain data on operating losses per passenger-mile by train/route. The “per rider” figures calculated by Tom Roth are somewhat helpful, but they will not enable us to project the life span of any particular route with a great degree of certainty.

⁴ As was the case with the 2003 PRIRA, this bill defines seventeen (17) long-distance trains/routes as follows: “the Silver Star, the Three Rivers, the Cardinal, the Silver Meteor, the Empire Builder, the Capitol Limited, the California Zephyr, the Southwest Chief, the City of New Orleans, the Texas Eagle, the Sunset Limited, the Coast Starlight, the Lake Shore Limited, the Palmetto, the Crescent, the Pennsylvanian, and the Auto Train.” Amtrak’s reporting protocols combine the *Silver Star*, *Silver Meteor* and *Palmetto* into a category named “Silver Services.” Amtrak also reports on the *Three Rivers* and the *Pennsylvanian* as a single line item and, since neither train provides service west of Pittsburgh, now includes these trains in its “other short distance” category.

Section 107 (“Repeal of Obsolete and Executed Provisions of Law”) would accomplish several things. There would be repeal of statutory requirements pertaining to (a) Amtrak’s operation of the basic system, (b) the 180-day discontinuance notice requirement, (c) NECIP, and (d) direct Amtrak operation and control of service it provides. Abrogated would be the requirement that Amtrak have “a systematic preventive maintenance program” for equipment. Watered-down would be the current statutory “buy American” requirement for Amtrak, limiting the requirement in the future to those “items acquired with funds provided by the Federal Government.”

Section 201 (“Limitations on Availability of Grants”) specifies that grants made between the first day of Year One and the commencement of operations by PRSP and PRIM are limited as follows: 1) a grant request must be approved for each specific train route; 2) a detailed financial analysis and revenue projection justifying support must be provided; and 3) a sufficient reserve must be maintained from the total appropriation to ensure satisfaction of contractual obligations to provide commuter and intrastate service. This section contains numerous other restrictions and qualifications, and continues the current requirement that Amtrak provide a “Monthly Performance Report.” Amtrak is prohibited from using “any of its funds for actual expansion or planning for expansion of rail service, including high speed rail service,” without written approval from DOT. Lastly, Amtrak must “certif[y], as part of the grant agreement that it ... has negotiated with its employees *substantial operating cost reductions* needed to make its operations competitive with private-sector service providers.” (emphasis added)

Similar requirements are imposed upon PRSP and PRIM, but there are two notable exceptions. First, with respect to using the grant for purposes other than those for which it was approved:

- 1) transparency of financial controls and accounting must be maintained to the SOT's satisfaction;
- 2) financial performance reports and details must be made available to DOT on the same basis that they are made available internally; and 3) the funds may be expended only on "existing plants and services."

The other difference is that neither successor corporation is required to make any certification with regard to negotiating substantial operating cost reductions as part of the grant agreement process.

Section 202 ("Spending Plans for Capital Backlog Reduction") provides that, within six months after Year One begins, Amtrak must prepare an annual capital spending plan for Years One through Six, and submit it to the SOT for review and approval. The plan is to be broken down into:

- 1) NEC capital assets;
- 2) capital assets on long-distance routes other than NEC; and
- 3) capital assets on short-distance routes other than NEC.

The plan must be updated annually. This duty flows to the NEC Compact, for NEC capital needs, upon its creation.

Section 203 ("Redemption of Common Stock") requires that a valuation of all Amtrak assets and liabilities shall be performed by the Secretary of the Treasury, "or by a contractor selected by" him, and shall be completed with six months after Year One begins. Within nine months after Year One begins, all common stock shall be redeemed at the book value, without priority over holders of indebtedness or other stock. Any shares remaining outstanding after nine months shall be acquired by Amtrak through eminent domain, with compensation based on the valuation, which is "deemed to constitute just

compensation except to the extent that the owners of the common stock demonstrate that the valuation is less than the constitutional minimum of the stock.” Thereafter, “the one share of the preferred stock ... retained under Section 204 of this Act [shall be converted to] ten shares of common stock.” Amtrak is prohibited from issuing any other common stock “without the express written consent of” the SOT.

Section 204 (“Retirement of Preferred Stock; Transfer of Assets”) provides that, thirty days after the §203 redemption/acquisition, the SOT shall receive title to: 1) the NEC,⁵ including the Albany, Harrisburg, and Springfield Lines; 2) Chicago Union Station and rail-related assets in Chicago; and 3) “[a]ll other track and right-of-way, stations, repair facilities and other real property owned or leased by” Amtrak. If the title to any of the assets is encumbered, title still passes, although Amtrak remains liable for the debt secured by the asset. Amtrak’s obligation “to repay in full any indebtedness to the United States incurred since January 1, 1990, is not affected by this Act or an amendment made by this Act.”

In consideration for the assets, the SOT shall deliver all but one share of Amtrak preferred stock held by him, forgive the obligation to pay any dividends, and release Amtrak from all mortgages and liens held by the SOT that were in existence on January 1, 1990. Amtrak and the SOT will enter into an agreement under which Amtrak will exercise care, custody and control of the assets on the SOT’s behalf. The agreement also “shall identify in detail the specific functions of [Amtrak’s] employees and equipment, and the specific numbers and locations of the employees and equipment associated with each function, that

⁵ Title shall include all “rail right-of-way, stations, track, signal equipment, electric traction facilities, bridges, [and] tunnels” as well as “any improvements made to these assets.”

would be needed for continuation of commuter and freight rail service in the event that the Corporation were to cease operation, and identify those actions that would be required to ensure that such functions can be continued on an interim basis to avoid any interruption in commuter or freight rail service on the Northeast Corridor.”

Also, the SOT may, for appropriate consideration: 1) transfer title to some or all of the Chicago facilities to METRA; 2) transfer the title to real estate properties on the Albany, Harrisburg, and Springfield Lines to the respective States in which the lines operate; and/or 3) transfer the assets in the “other” category to any entity he deems appropriate. All financial consideration flowing from such title transfers must be used exclusively to reduce Amtrak’s long-term debt existing on the date of enactment.

Section 205 (“Real Estate and Asset Sales; Other”) mandates that all property outside the NEC Main Line must be disposed of no later than the last day of Year Three, with the proceeds of this liquidation to be credited toward the Section 206 account (*see* below) that finances debt and interest payments and, otherwise, to remain available until expended.

Section 206 (“Management and Transfer of Secured Debt”) states that Amtrak may not take on any new debt secured by assets after enactment, except as approved by the SOT to refinance existing secured debt. This prohibition does not apply to unsecured lines of credit for working capital purposes. Upon the creation of the PRSP, the existing rolling stock and all debt secured thereby shall be transferred to, and become the sole liability of, that successor corporation. Upon the establishment of the NEC

Compact, the secured debt associated with fixed assets in the NEC shall be transferred to, and become the sole liability of, the Compact. Funds are authorized to the SOT, in “such sums as may be necessary,” for grants to PRSP to pay principal and interest on secured debt for Years Two through Six.

Section 207 (“Transition Assistance”) authorizes appropriations for grants as follows: 1) in Year One, “for operating and capital expenses such sums as may be necessary”; 2) in Year Two, a) “such sums as may be necessary” to PRSP for operating expenses of all services except long-distance trains and routes, and b) “such sums as may be necessary” to PRIM for capital expenses; 3) administrative expenses of interstate compacts in Years One through Three; and 4) administrative expenses of the Amtrak shell in Years Two through Six. Grants made after Year Two can be made to only States, regional compacts or other public entities, except those made to PRSP.

Section 301 (“Capital Assistance for Intercity Passenger Rail Service”) is claimed to be modeled on the current mass transit program, and becomes effective on the first day of Year Two. The project must be part of an approved corridor plan, and the SOT must find that the recipient will have the legal, financial and technical capacity to carry out the project and maintain it. The operator must be selected from a competitive bid, or there must be a satisfactory showing why the proposed operator “is the best” (the bill’s language, not mine). The grant cap, as applied to the project net capital cost for the year the grant is approved, is as follows: 100% in Year Two; 80% in Year Three; 60% in Year Four; and 50% in Year Five and thereafter. Authorization is provided in “such sums as may be necessary” for Years Two through Six.

Section 302 (“Final Regulations on Applications by States for Development Grants”)

requires FRA to issue “final regulations setting forth procedures for application and minimum requirements for the awards of grants.” Such regulations must be issued not later than June 1st of Year One, to take effect on the first day of Year Two.

Section 303 (“Authority for Interstate Compacts for Corridor Development”) provides for States to enter into compacts, similar to the NEC Compact, to retain existing service or commence new service from an operational and/or capital standpoint. There appear to be fewer restrictions on these compacts than will be imposed on the NEC Compact. Interestingly, the document ends at this point (page 37 of the bill and page 42 of the PDF document) with a comma in the middle of the page. Since the “Sectional Analysis” that follows the bill in the document also ends with this section, I presume that this is merely a typographical error.