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COMPTROLLER GENERAL OF THE UNITED STATES
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B-175155(1)

JUL 26 1976

The Honorable Vance Hartke, Chairman
Subcommittee on Surface Transportation
Committee on Commerce
United States Senate

Dear Mr. Chairman:

This is in reply to your letter of March 30, 1976, submitted jointly with Senator Warren G. Magnuson, Chairman, Committee on Commerce, requesting our review of the purchase of the "Northeast Corridor" on April 1, 1976, by the National Railroad Passenger Corporation (Amtrak) from the Consolidated Rail Corporation (ConRail). The Federal Railroad Administration, Department of Transportation (DOT), has taken the position that the Antideficiency Act, 31 U.S.C. § 665, infra, prohibits it from providing grant funds to Amtrak to directly or indirectly finance the purchase. For reasons to be discussed below, we believe that the purchase was not legally objectionable and that the withholding of grant funds was not justified.

Since our consideration of the issues involves the complex interrelationship of several statutes, we will outline the pertinent statutory provisions before proceeding to discuss the issues.

STATUTORY BACKGROUND

Faced with the potentially massive disruption of rail services in certain areas of the country due to the insolvency of several railroads, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236 (January 2, 1974), 87 Stat. 985, 45 U.S.C. §§ 701 et seq. The Act presented a scheme for the reorganization and consolidation of the bankrupt railroads, with the ultimate goal of providing adequate and efficient rail services. Congress recognized that a major element of any such reorganization was the revitalization of rail transportation in the "Northeast Corridor," the densely populated and heavily urbanized strip from Boston to Washington. Congress further recognized that Amtrak must play a major role in the reorganization of rail passenger service in the Northeast Corridor.

45 USC 711 (Supp. IV, 1974)

Title II of the Act established the United States Railway Association (USRA), a nonprofit government corporation of the District of Columbia, and charged it with the reorganization's central planning function. USRA was directed to prepare a Preliminary System Plan and a Final System Plan, the latter of which was to go into effect after approval by Congress and review

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by the three-judge Special Court provided for in section 209 of the Act established ConRail as a "for-profit corporation established under the laws of a State" and specified that it "shall not be an agency or instrumentality of the Federal Government." 45 U.S.C. § 741(b) (Supp. IV, 1974). ConRail was directed to acquire properties from the bankrupt railroads and to reconvey such properties and/or operate rail services thereon as provided in the Final System Plan.

The Act expressly recognized the desirability of the acquisition of certain rail properties by Amtrak. Thus, section 206(c)(1)(C), 45 U.S.C. § 716(c)(1)(C) (Supp. IV, 1974), directed that the Final System Plan designate which rail properties--

> "shall be purchased, leased, or otherwise acquired from [ConRail] by the National Railroad Passenger Corporation in accordance with the exercise of its option under section 601(d) of this Act for improvement to achieve the goal set forth in subsection (a)(3) of this section."

The goal referred to [section 206(a)(3)] was--

> "the establishment of improved high-speed rail passenger service, consonant with the recommendations of the Secretary in his report of September 1971, entitled 'Recommendations for Northeast Corridor Transportation.'"

Section 601(d)(1), 87 Stat. 1021, provided as follows:

> "Rail properties designated in accordance with section 206(c)(1)(C) of this Act shall be leased or may (at its option) be purchased or otherwise acquired by the National Railroad Passenger Corporation. The Corporation [ConRail] shall negotiate an appropriate sale or lease agreement with the National Railroad Passenger Corporation as provided in the final system plan."

USRA issued the Final System Plan on July 26, 1975. The Plan defined the Northeast Corridor as--

> "such properties presently used in passenger operations on the [Penn Central Transportation Co.] main line route between Boston and Washington, D.C. via New London and the Hell Gate Bridge, including all main line tracks, structures, power and control systems, stations, platforms, passenger yards and shops."

United States Railway Association, Final System Plan for Restructuring Railroads in the Northeast and Midwest Region Pursuant to the Regional Rail Reorganization Act of 1973, Vol. I, p. 42 (July 26, 1975). The plan for the ownership of resources was based in part on the principle that "/w/here freight and passenger operations both use a facility, the dominant user should own the facility and bear all the costs of that facility except those which could be avoided if the minority user were not present." Id., at 41. The designations required by section 206(c)(1)(C) of Pub. L. No. 93-236 are contained in volume I of the Plan, Part II, Appendix Section C, pages 323-326.

On February 5, 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31. Section 701(b) of Pub. L. No. 94-210, 90 Stat. 120, provides as follows:

45 USC

"TRANSFER OF RAIL PROPERTIES.--The Corporation /ConRail/, on the date of conveyance pursuant to section 303(b)(1) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743), shall, by purchase or lease, transfer to the National Railroad Passenger Corporation all rail properties designated pursuant to section 206(c)(1)(C) and 601(d) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 716(c)(1)(C) and 791(d)), and it shall, within 180 days after the date of enactment of this title, execute agreements providing for the National Railroad Passenger Corporation to assume (1) all operational responsibility for intercity rail passenger services with respect to such properties, and (2) control and maintenance of the properties transferred. Such parties may agree to retaining or transferring, in whole or in part, operational responsibility for rail freight or commuter rail services in the area specified."

45 USC 601

Section 704(a)(3)(B), 90 Stat. 123, authorized the appropriation to the Secretary of Transportation, for payment to Amtrak, of "$85,182,956 to acquire the properties of the Northeast Corridor." Section 705(b), designated as a "conforming amendment," amended section 601(d)(1) of Pub. L. No. 93-236, supra, to read as follows:

"Rail properties designated in accordance with section 206(c)(1)(C) of this Act shall be purchased or leased by the National Railroad Passenger Corporation. The Corporation shall negotiate an appropriate sale or lease agreement with the National Railroad Passenger Corporation for the properties designated for transfer pursuant to section 206(c)(1)(C) of this Act (45 U.S.C. 716(c)(1)(C)), which shall take effect on the date of conveyance of such properties to the Corporation."

section 706(b) of S. 2718, the derivative source of section 705(b), had directed Amtrak to purchase the Northeast Corridor properties. The section was revised in conference, at the suggestion of DOT, to give Amtrak the authority to lease as well as purchase. H.R. Rep. No. 94-768 180 (1975).

AMTRAK FUNDING: AUTHORIZATION AND APPROPRIATIONS

Amtrak was established pursuant to the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501 et seq. It is a for-profit corporation whose purpose is to "provide intercity rail passenger service" and, like ConRail, is not an "agency or establishment of the United States Government." 45 U.S.C. § 541 (1970). In 31 U.S.C. § 856(6) (Supp. IV, 1974) it is (as is ConRail) designated as a mixed-ownership Government corporation.

Government financial assistance to Amtrak has taken two forms--grants and loan guarantees, authorized by 45 U.S.C. §§ 601 and 602 respectively. In 1972, Congress limited the application of funds obtained under guaranteed loans to capital expenditures. Pub. L. No. 92-316 (June 22, 1972), § 9, 86 Stat. 227, 231. See our decisions at B-175155, September 29, 1972; B-175155(2), April 22, 1975. Sections 601 and 602 were most recently amended by the Amtrak Improvement Act of 1975, Pub. L. No. 94-25 (May 26, 1975), §§ 10 and 11, 89 Stat. 90, 92. Pertinent portions of the current version of sections 601 and 602 are set forth below:

"§ 601. Authorization of appropriations

"(a) There are authorized to be appropriated to the Secretary for the benefit of the Corporation in fiscal year 1971, $40,000,000, and in subsequent fiscal years through June 30, 1975, a total of $597,300,000. There are authorized to be appropriated to the Secretary for the benefit of the Corporation (1) for the payment of operating expenses for the basic system, and for operating and capital expenses of intercity rail passenger service provided pursuant to section 563(b) of this title, $350,000,000 for fiscal year 1976, $105,000,000 for the transition period of July 1, 1976, through September 30, 1976 (hereafter in this section referred to as the 'transition period') and $355,000,000 for fiscal year 1977; and (2) for the payment of capital expenditures of the basic system, $110,000,000 for fiscal year 1976; $25,000,000 for the transition period; and $110,000,000 for fiscal year 1977. Of the amounts authorized by clause (1) of the preceding sentence, not more than $25,000,000 for fiscal year 1976, $7,000,000 for the transition period, and $30,000,000 for fiscal year 1977 shall be available for payment of operating and capital expenses of intercity rail passenger service provided pursuant to section 563(b) of this title. Funds appropriated pursuant to such authorization shall be made available to the Secretary

during the fiscal year for which appropriated and shall remain available until expended. Such sums shall be paid by the Secretary to the Corporation for expenditure by it in accordance with spending plans approved by Congress at the time of appropriation and general guidelines established annually by the Secretary. Payments by the Secretary to the Corporation of appropriated funds shall be made no more frequently than every 90 days, unless the Corporation, for good cause, requests more frequent payment before the expiration of any 90-day period."

"§ 602. Guarantee of loans

"(a) The Secretary is authorized, on such terms and conditions as he may prescribe, and with the approval of the Secretary of the Treasury, to guarantee any lender or lessor against loss of principal and interest or other contractual commitments, including rentals, on securities, obligations, leases, or loans (including refinancing thereof) issued to finance the upgrading of roadbeds, and the purchase or lease by the Corporation or an agency of new rolling stock, rehabilitation of existing rolling stock, reservation systems, switch and signal systems, and other capital equipment and facilities necessary for the improvement of rail passenger service. The maturity date or term of such securities, obligations, leases, or loans, including all extensions and renewals thereof, shall not be later than 20 years from their date of issuance."

Pub. L. No. 94-25 did not provide any additional loan authority, the ceiling remaining at $90,000,000 /45 U.S.C. § 602(d)/, and, for the first time, provided specific authorization for capital grants under section 601. H.R. Rep. No. 94-119, 7 (1975).

The basic appropriation for grants to Amtrak for the current fiscal year is contained in title I, Department of Transportation and Related Agencies Appropriation Act, 1976, and the period ending September 30, 1976, Pub. L. No. 94-134 (November 24, 1975), 89 Stat. 695, 704:

"GRANTS TO THE NATIONAL RAILROAD PASSENGER CORPORATION

"To enable the Secretary of Transportation to make grants to the National Railroad Passenger Corporation, $440,000,000, to remain available until expended, of which not more than $328,800,000 shall be available for operating losses incurred by the Corporation, and of which $1,500,000 shall be available for a rail passenger terminal and facilities at Baltimore-Washington International Airport.

"For 'Grants to the National Railroad Passenger Corporation' for the period July 1, 1976, through September 30, 1976, $124,700,000, to remain available until expended, of which not more than $99,700,000 shall be available for operating losses incurred by the Corporation."

These amounts include the amounts authorized by Pub. L. No. 94-25 for capital grants. H.R. Rep. No. 94-331, 32 (1975).

In addition, Congress made supplemental railroad appropriations on March 30, 1976, by Pub. L. No. 94-252, 90 Stat. 293, providing for additional grants to Amtrak as follows:

"For additional amounts for 'Grants to the National Railroad Passenger Corporation', $36,500,000 to remain available until expended: Provided, That not to exceed $21,200,000 in fiscal year 1976 and $5,300,000 in the period July 1, 1976, through September 30, 1976, shall be available for additional operating expenses for the Corporation in connection with the Corporation's additional operating responsibilities over the rail properties of the Northeast Corridor; non-recurring costs related to the initial assumption of control and responsibility for maintaining rail operations on the Northeast Corridor, $10,000,000."

The Amtrak appropriations were added by the Senate and originally included $85,182,956 as the "cost specified in the final system plan * * * for the purchase of the Northeast Corridor." S. Rep. No. 94-637, 3 (1976). As noted previously, this amount had been authorized by Pub. L. No. 94-210. The conference committee deleted this item, commenting as follows:

"The issue of lease or purchase of the Northeast Corridor is to be resolved by the parties involved. However, in the event an agreement is reached pursuant to which Amtrak will purchase the Northeast Corridor properties, the conferees do not intend that either ConRail or Amtrak should be required to pay any funds or properties to the present owners of the Northeast Corridor rail properties for acquisition of such properties."

H.R. Rep. No. 94-941, 6 (1976). The debate on the conference report on the Senate floor contained the following explanatory comments:

"Mr. PASTORE. * * *

* * * * *

"Mr. President, the Senate version of this resolution contained $85.2 million which would have allowed Amtrak to purchase the Northeast Corridor mainline from ConRail on April 1. We felt very strongly that Amtrak should have ownership of the track over which it had primary operating responsibility and where they will have control over the improvement program. The House conferees were adamant in their feeling that this bill should not contain that 'unbudgeted' amendment since it would cause the resolution to be some $100 million over the budget. After long hours of debate over this amendment in conference, it became clear that the only way to complete it was to delete the funding for this purchase but to include language in the report making it clear that the parties involved, ConRail and Amtrak, still have the option of working out either a purchase or a lease of this track. I understand they are about to complete negotiations on a purchase over time, which requires no appropriations at this time, but will cause Amtrak to incur future increased costs which must be funded. However, should a reporgramming of fiscal 1976 Amtrak appropriations be necessary to fulfill a purchase agreement, the committee has no objection to such action.

* * * * *

"Mr. MAGNUSON. * * *

* * * * *

"Furthermore, the conferees recognized that Amtrak and ConRail are executing an agreement that will provide for the transfer of title to the Northeast Corridor on conveyance date in exchange for an adjustment in the moneys that ConRail would otherwise owe to Amtrak as a result of ConRail's need for trackage rights over the corridor properties for freight operations. This is an arrangement that the conferees view with favor, and feel that it provides a good middle ground between the need for Amtrak to own the properties as of conveyance date and the administration's desire not to fund any substantial improvements in rail passenger service. While I would have personally favored an appropriation of the full amount to purchase these properties right now, I feel that the essential goal of Amtrak owning the properties it will be operating and improving in conjunction with the Federal Railroad Administration can be fulfilled adequately under this arrangement.

"The conferees recognized that the parties--ConRail and Amtrak--were negotiating a purchase agreement for the corridor properties, and recognize that this agreement contemplates an adjustment in the trackage rights compensation ConRail would owe Amtrak for freight operations on the corridor in exchange for conveyance of title to the properties, in accordance with the requirements of title VII of the Railroad Revitalization and Regulatory Reform Act of 1976. This matter was discussed at length by the conferees, and it was agreed that this agreement should be negotiated by the parties--ConRail and Amtrak. Any use of Amtrak funds that have been appropriated for the purpose is dependent on the agreement negotiated, and the conferees agree that a reprogramming of Amtrak capital funds may be necessary. The so-called anti-deficiency statute (31 U.S.C. 665) would not apply to any such reprogramming." (Emphasis added.)

Cong. Rec., March 25, 1976 (daily ed.), S4331-32. See also the remarks of Representative McFall during the House debate on the conference report, id., at H2385-86, in which he expressed misgivings concerning an immediate purchase but recognized the possibility of purchase on an installment payment basis:

"The issue of Amtrak's control over the Northeast corridor was the most troublesome issue faced by the conference committee. The Senate conferees were of the opinion that Amtrak should buy this corridor as well as 293 miles of other railroad track located off the corridor. The Senate included over $105 million for this purpose. A majority of the House conferees felt that these properties should not be purchased at this time. Some of my friends on the authorizing committee indicated a strong desire to examine the issue of Amtrak ownership of these rail properties. Such an examination is clearly needed before these properties are purchased by Amtrak.

"* * * With regard to the proposed purchase of the Northeast corridor, I stated during the conference deliberations my personal conviction that such a purchase would be unwise. The conference committee did agree to delete the funds contained in the Senate amendment for the acquisition of the corridor. However, it may be possible for Amtrak to purchase the corridor on an installment payment basis. It is my understanding that any such agreement for the purchase of the corridor must be approved by the authorizing and appropriation panels of both the House and Senate."

TERMS OF THE ACQUISITION

During the course of negotiations, Amtrak had taken the position that it would purchase the Northeast Corridor properties as recommended in the Final System Plan, and that it would not accept a lease. DOT strongly opposed purchase but favored a lease with purchase option. As indicated above, Congress deleted funds for outright purchase. ConRail and Amtrak then negotiated an alternative arrangement whereby none of the purchase price would be due in the current fiscal year. The following summary is taken from a letter from ConRail to Amtrak dated March 23, 1976:

(1) The purchase price is to be paid--

> "* * * by Amtrak to ConRail over a period of eight years in equal annual installments beginning October 1, 1976 and annually thereafter, together with interest payable on the principal payment date on the unpaid balance of the purchase price at a rate of interest per annum which shall not be less than seven and one-half percent, which shall be calculated at a rate equal to one-half of one percent (1/2%) above the average monthly yield on triple A rated corporate bonds for the previous month as reported in Moody's Bond Survey, provided that such rate of interest shall not exceed ten (10%) percent per annum."

(2) ConRail will hold a purchase money mortgage as security for payment of the full purchase price.

(3) ConRail will retain certain exclusively freight-related facilities and trackage rights for freight and commuter services.

(4) The parties will determine trackage rights fees payable by ConRail to Amtrak based on "ConRail's fair and equitable share of the cost to Amtrak of operating the Northeast Corridor occasioned by ConRail's exercise of its trackage rights."

(5) Trackage fees will be set off against purchase price installments as follows:

> "The sums determined to be due as trackage rights fees shall be payable by ConRail to Amtrak monthly beginning April 1, 1976. Each such payment which otherwise would be due and payable from ConRail to Amtrak for such trackage fees shall be retained by ConRail and credited instead toward the payment of the next annual principal installment . . . and interest due thereon until such credits equal the total thereof. Any further trackage

rights payments falling due thereafter shall also be retained by ConRail and applied as a prepayment to the unpaid balance of the purchase price up to the amount of the annual payment installment. Any surplus trackage rights payments falling due thereafter shall be paid to Amtrak on regular monthly due dates until October 1 of the following year when accumulation toward the next installment payment shall resume. Any such annual accumulations shall continue until the purchase price for the properties is paid in full. Amtrak shall have the right to make prepayments against the unpaid balance of the purchase price on the October 1, 1977 principal payment date or any subsequent payment date but not in excess of the amount credited by ConRail against the balance of the purchase price in the preceding year."

DISCUSSION AND CONCLUSIONS

Subsection (a) of the Antideficiency Act, 31 U.S.C. § 665(a)(1970), provides:

"No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law."

Also relevant is 31 U.S.C. § 628(1970), which provides that:

"Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

DOT states that the purchase arrangement as described above--

"* * * would result in an increase in Amtrak's assistance needs in each year by at least the increment cost of purchase over the cost of the lease. Moreover, to the extent ConRail offsets its trackage rights payments against the mortgage payment, there will be a corresponding increase in /Amtrak's/ operating assistance needs."

Noting the refusal by Congress in Pub. L. No. 94-252/ to appropriate funds for direct purchase of the Corridor, DOT argues that the Antideficiency Act

prohibits it (DOT) from providing funds to Amtrak to finance the purchase, either directly or indirectly through increased operating subsidies. DOT further points out that Congress has not approved a "spending plan" including purchase of the Corridor, as provided in 45 U.S.C. § 601, supra, and that therefore the use of funds authorized by section 601 to finance the acquisition would amount to using those funds for other than their intended purpose.

However, we do not believe that these objections go th the legality of the purchase as such. The purchase arrangement as summarized above purports to be a binding agreement for the payment of funds by Amtrak in subsequent fiscal years. Such an agreement could not be entered into by a Government agency without proper authority. Amtrak and ConRail, however, are not Government agencies. 45 U.S.C. §§ 541 and 741(b), supra. Also, the agreement does not--nor could it--obligate DOT to provide appropriated funds. Thus, the purchase agreement itself--viewed apart from any funding that may subsequently be provided by DOT--does not violate the Antideficiency Act. It remains to consider whether indirect financing of the acquisition through the payment by DOT of increased operating subsidies could be deemed, in the circumstances presented, an expenditure in excess or in advance of appropriations, or a use of funds for other than their intended purpose.

It is important to note that "acquisition" of the Corridor by Amtrak was not merely authorized but directed by the Regional Rail Reorganization Act of 1973 and the Railroad Revitalization and Regulatory Reform Act of 1976. See Pub. L. No. 93-236, § 206(c)(1)(C), and Pub. L. No. 94-210, §§ 701(b) and 705(b), quoted supra. The deletion of direct purchase funds in Pub. L. No. 94-252, viewed in light of the previously cited legislative history, while limiting one financing alternative, did not extinguish this mandate. Thus the legal effect seems to be as stated in the conference report on Pub. L. No. 94-252--H.R. Rep. No. 94-941, cited above--i.e., the determination of whether to lease or purchase the Corridor was to be made by Amtrak and ConRail.

As we understand it, DOT does not challenge the legality of the purchase agreement as such. Rather, it views the financing arrangement as, in effect, diverting operating expense grant funds to a capital purpose without provision therefor in congressionally approved spending plans under 45 U.S.C. § 601, supra. From this perspective, DOT apparently contends that it (DOT) would violate 31 U.S.C. §§ 628 and 665, supra, by making operating grant payments to Amtrak for purposes of implementing the agreement.

We do not agree that DOT's legal objections are dispositive at the present time. First, we note that the major impact of the purchase agreement will occur in fiscal year 1977 and future fiscal years, so that the

Congress will be able to adopt spending plans to address this impact in connection with consideration of future appropriation requests for grants to Amtrak. For example, the House Appropriations Committee report on the Department of Transportation and related agencies appropriation bill for fiscal year 1977 observes with respect to grants for Amtrak:

> "* * * The Committee believes that the amount recommended will enable the Corporation to operate the entire Amtrak system for fiscal year 1977, except for the incremental amounts necessary for the operation of passenger services in the Northeast Corridor. The Committee will consider these latter costs when the agreements between ConRail and Amtrak concerning ownership and operation of the corridor have been finally consummated and a budget request has been submitted by the Administration."
> H.R. Rep. No. 94-1221, 33-34 (1976)(Emphasis supplied.)

Accordingly, any objections to grant payments for implementation of the purchase agreement from future appropriations are now premature.

The issue thus becomes whether any consequences of the purchase agreement prior to October 1, 1976, affect DOT's legal authority to make grant payments to Amtrak from current appropriations. In this regard, it is our understanding that, pursuant to the purchase agreement, ConRail has since April 1, 1976, retained and credited against the purchase price trackage fees which would otherwise be payable to Amtrak for ConRail's use of the Northeast Corridor. DOT maintains that Amtrak's nonreceipt of these trackage fees has created a corresponding increase in its operating assistance needs. We understand that, for this reason, DOT has withheld from operating grant payments to Amtrak amounts equivalent to the trackage fees retained by ConRail. However, even assuming that DOT would be justified in refusing to make grant payments for the purpose of implementing the purchase, we fail to see how the instant withholding can be justified on this basis.

In the first place, it appears to us that the trackage fees withheld from Amtrak by ConRail would to some extent compare with the trackage fees Amtrak would have had to pay to ConRail for its own use of the line had the purchase not been consummated. Thus we question whether there really was a "corresponding" increase in Amtrak's operating assistance needs.

Second, our review of the budget justification materials, other hearing documents, committee reports, and floor debates on the 1976 and transition quarter appropriations made for grants to Amtrak in Pub. L. No. 94-134, supra, does not disclose spending plans concerning Amtrak's acquisition of the Northeast Corridor either by lease or purchase, rather it appears that the appropriations made therein were based on considerationof Amtrak's

anticipated operating deficit irrespective of a Northeast Corridor acquisition in either form. See, e.g., H.R. Rep. No. 94-331, 31-32 (1975); S. Rep. No. 94-291, 28 (1975). In Pub. L. No. 94-252, supra, Congress appropriated an additional amount for grants to Amtrak which was designed to cover its expenses for Northeast Corridor operations. However, this amount was needed whether Amtrak bought or leased the Corridor. Cong. Rec., March 25, 1976 (daily ed.), H2385 (remarks of Congressman McFall). While the Senate-added amount for purchase of the Corridor was ultimately deleted, this action did not legally preclude the purchase. It is also noted that the amount appropriated did not include funds for the cost of a leasing arrangement, which DOT had advocated, or any other means of effecting the acquisition mandated for April 1, 1976.

In view of the foregoing, the terms of any spending plans for the existing appropriations seem to be essentially neutral factors with respect to acquisition of the Corridor. Pub. L. No. 94-134 appropriated a total of $428.5 million for Amtrak's operating losses, and Pub. L. No. 94-252 appropriated an additional $26.5 million for Amtrak's operating expenses incident to the Northeast Corridor. In no event can DOT make operating expense grants to Amtrak in excess of these amounts for the period ending September 30, 1976. To the extent that Amtrak's operations would require these total amounts, irrespective of any impact from the purchase agreement, it appears that the full grant amounts could be paid consistent with existing spending plans. Moreover, this would seem to be the likely result since, as discussed above, assistance needs envisioned under these appropriations do not relate to Corridor acquisition costs.

In this regard, DOT's withholding of grant payments based on constructive Amtrak revenues (i.e., ConRail's trackage fees) seems particularly anomalous. Apart from the fact that such revenues apparently were not anticipated under the current appropriations, had Amtrak followed DOT's suggestion and leased the Corridor on April 1, 1976, it would presumably have incurred leasing costs likewise unanticipated under the current appropriations.

Finally, even if the purchase agreement could somehow be considered to affect Amtrak's compensable operating costs, we know of no "spending plan" under the 1976 and transition appropriations which would be violated. The requirement in 45 U.S.C. § 601 that grant funds be paid by DOT to Amtrak "in accordance with spending plans approved by Congress at the time of appropriation" was added by the Amtrak Improvement Act of 1973, approved November 3, 1973, Pub. L. No. 93-146, § 12, 87 Stat. 548, 553. There was no statutory definition of the term "spending plan" nor does the legislative history of the section indicate that any specific document was intended to constitute the "plan." On the contrary, it appears that the "spending plans" referred to could be found in an amalgam of materials, such as statements and instructions in committee reports, and other indicia of congressional intent, developed during the appropriations process. The

fundamental purpose of the section 601 provision was to give Amtrak greater flexibility in applying grant funds, particularly, vis-a-vis the Department of Transportation. Thus the Senate Commerce Committee report on the legislation enacted as Pub. L. No. 93-146 observes, S. Rep. No. 93-226, 5 (1973): 46 USC 1132 note

> "This subsection specifically provides that the sums shall be paid to the Corporation by the Secretary for expenditure 'in accordance with spending plans approved by Congress at the time of appropriation.' The intent of this provision is to give the Corporation more freedom in using funds appropriated by Congress, and at the same time make the Corporation more responsible to Congress. It is the intent of this Committee that the Corporation have the maximum freedom possible to use such funds as are appropriated to provide quality intercity rail service. In the past, agreements between the Department and the Corporation may not have allowed the Corporation sufficient latitude for corporate flexibility in the use of funds authorized and appropriated by the Congress and may have caused needless bureaucratic maneuvering to the detriment of improved rail passenger service."

Similarly, the conference report, H.R. Rep. No. 93-587, 20-21 (1973) states:

> "The conference substitute also assures that appropriated funds will remain available until expended. It also prohibits the use of grant agreements to manage the disposition of funds between the Secretary of Transportation and Amtrak. Amtrak would expend such sums in accordance with spending plans approved by Congress at the time of appropriation and with general guidelines established annually by the Secretary. The committee of conference believes that the elimination of grant agreements will permit Amtrak to operate more freely of Government control so as to test the for-profit concept in the provision of intercity rail passenger service. This provision will also enable the Congress to carry out more effectively its oversight functions by pinpointing responsibility for successes or failures in the provision of rail passenger service."

In any event, in our opinion, the statutory requirement in section 601 that expenditures by the Corporation be in accordance with spending plans approved by the Congress at the time of the appropriation may be considered to have been met. This conclusion is based on the fact that the Congress at the time it enacted a supplemental appropriation for fiscal year 1976--providing grant funds for Amtrak--was aware that the Final System Plan,

had been submitted and approved as required by statute, and contained the required designation of the Northeast Corridor properties to be purchased, leased, or otherwise acquired by Amtrak. The Conference report, on the supplemental railroad appropriations, discussed supra, specifically acknowledged that the parties involved--Amtrak and ConRail--were to resolve the question of lease or purchase themselves stipulating only that in the event of a purchase, neither party "should be required to pay any funds or properties to the present owners of the Northeast Corridor rail properties for acquisition of such properties."

Finally, we would again point out that while DOT apparently would have accepted a leasing arrangement for the Corridor, there is, to our knowledge, no more specific authorization in existing spending plans for lease payments by Amtrak to ConRail than there is for the purchase. Consequently, DOT's reliance on the absence of specific spending plans to preclude a purchase but not a lease seems somewhat inconsistent. We also note that 45 U.S.C. § 601 makes grant payments subject to "general guidelines established annually by the Secretary /of Transportation/." However, it is clear that the Secretary's guidelines are subordinate to congressionally approved spending plans.

In sum, we conclude that the arrangement between Amtrak and ConRail for purchase of the Northeast Corridor is not legally objectionable. We further conclude that, subject to our understanding of the factual situation as described herein, neither the Antideficiency Act nor any other statutory provision provides a legal basis for DOT to deny or withhold operating grant payments to Amtrak because of the purchase agreement.

Sincerely yours,

SIGNED ELMER B. STAATS

Comptroller General
of the United States

properties