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AMTRAK: RAIL RENAISSANCE OR REQUIEM?

WILLIAM E. THOMS*

I. DECLINE AND FALL

For one half-century, the American passenger train has been in an accelerating stage of decline. In the early twenties the river steamers had vanished, the bus had not emerged, automobiles were an urban luxury of questionable reliability, and the airplane was still an experimental novelty. Reliance on railroads for transport of passengers was as great as reliance on the private automobile today.

Transportation was carried out directly by private railroad corporations on a for-profit basis. The conditions of a free market never were perfectly apparent in these operations, since fares, schedules, and frequency of service were subject to the authority of various state regulatory bodies and of the Interstate Commerce Commission. But private ownership and comparative lack of subsidy were hallmarks of American rail passenger transportation, which distinguished it from the majority of Western nations. Elsewhere, government ownership was the rule, with some exceptions such as the privately-owned Canadian Pacific Railway.

Railroad corporations operated under charters received from the states, some of which required that the corporation must be organized under the laws of the jurisdictions through which it operated. These charters usually vested the railroad with a public mission and some public responsibility. Railroads were chartered to carry passengers and freight, for which they were incidentally permitted to charge fares.

Independent ownership and operation of railroad passenger trains continued until May 1, 1971, when most operations were taken over by the newly chartered National Rail Passenger Corporation, AMTRAK. Whether this new corporation will prove to be the beginning of the resurgence of rail transportation or merely a device by which railroads are able to avoid their common-carrier responsibilities remains to be seen. This article will describe the effect of the Rail Passenger Service

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Act of 1970,1 which authorized AMTRAK's creation and established a new relationship between the Interstate Commerce Commission, Department of Transportation, state regulatory agencies, and carriers by rail.

The decline of railroad passenger service is a familiar story.2 The automobile has replaced all other vehicles as the dominant mode of transport. Much of this change is due to the inherent or supposed advantages of the personal car; some of this change is due to the lack of alternate transportation, especially in suburban and rural areas. Within the common-carrier market, railroads have lost patronage to the airplane and intercity bus. This loss has occurred even in markets not suited for other carriers, this fact giving some credence to the belief that the railroads, intent on concentration on the carload freight traffic, have either let other facilities wither or have actually discouraged use of their trains for travel. The resulting loss occurs when facilities are allowed to become so decrepit and inconvenient that anyone with good sense will avoid them; sometimes this result occurs when schedule and connection changes are made; and sometimes it occurs when rail travel is priced out of the market. Representative Abner Mikva (D-III) remarked about a recent fare raise by the Illinois Central:

They are going to put up the fares so high that no one will ride. . . . Then, like the guy who killed both his parents and pleaded for mercy because he was an orphan, they are going to come in and ask to discontinue the service.3

In some cases passenger trains were also used to carry preferential commodities, such as mail, milk, express shipments, perishable freight and newspapers. Diversion of these items to other modes of travel has affected passenger service. Closer scrutiny reveals that high-speed container or piggyback freight trains now carry these commodities and that in many cases mail has been removed from passenger trains at the insistence of railroads themselves, who then handled the shipments in fast freight trains.4 Many of these changes may well be natural developments in view of cost and convenience. However, while the railroads produced 39.5 billion passenger-miles in 1926, in 1956 the figure fell to 28.3 billion.5

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2 See generally P. Lyon, To Hell in a Day Coach (1968).
At present, the United States trails the industrialized world in providing rail passenger service. Britain has 1,000 intercity passenger trains; France 350; West Germany 527; and the United States, prior to operation by AMTRAK, less than 400. Meanwhile, all highways in the United States now equal the combined land area of the states of Connecticut, Delaware, Massachusetts, New Hampshire, Rhode Island, and Vermont. However, the major cities in these same European nations are closer together than the non-coastal American cities. The United States has more rationale for reliance on domestic air carriage. Public policies in this country have favored construction of highways, such as the Interstate system, which encourage use of cars and intercity buses.

In terms of capacity and efficiency, the passenger train is still unexcelled for mass movements of people. This natural efficiency, however, has been artificially weakened by the unhealthy labor climate on the railroads. Faced with declining membership and what they believe to be management’s disregard for safety in an industry in retrenchment, the operating unions have strived for as full employment as possible, although the average wage of a railway worker, compared to his counterpart in industry, is not overly great. Pay is based on a complex formula of miles and hours, which penalizes the junior brakeman on long, slow freights and work trains, and rewards the senior conductor on the passenger limiteds.

Railroads are not unique in their labor problems. Competing modes of transportation are faced not only with rising labor costs, but also with excess operating personnel. Many airliners must operate with a cockpit crew of three, although the necessity for the flight engineer is debatable. In addition, the service requirements of airlines demand a large number of cabin and ground personnel to look after the passenger’s well-being. Although the intercity bus is operated by one man, his maximum productivity is about 45 fares. In addition, terminal services for bus travel are often more extensive than those now provided by our more decrepit railroads. However, airports and bus terminals are more efficiently operated than most railroad stations. Railroad officials are nearly unanimous in citing rising labor and terminal costs as the main reason for the unprofitability of passenger trains.

When speaking of rail passenger service, we are really speaking of

\[ \text{Supra n.3, at 35-36.} \]
several different types of train operations, which are classified by the Interstate Commerce Commission as follows:

1. Short-haul or commuter service in metropolitan, suburban, and other areas for distances of 75 miles or less;
2. Medium-distance service between 75 and 300 miles in high-density population corridors;
3. Non-corridor medium distance service; and
4. Long-haul service.\(^7\)

Medium-distance corridor service is the area where most observers believe the future of rail passenger service lies. The two high-speed services operated by the Penn Central, the "Metroliner" between New York and Washington and the "Turbotrain" between New York and Boston, fit into this category. For such distances, rail service can be cheaper and competitive with air travel, if access time to airports is included.

Due to mergers and discontinuances of service, the rail passenger burden had become unevenly distributed by 1970. Three-quarters of all passenger trains in the country, and the majority of the intercity trains, were operated by the now bankrupt Penn Central, itself the culmination of a giant merger of the three largest passenger carriers in the country. On the other hand, the competing Norfolk & Western system operated only ten passenger trains, two of which were commuter trains in the Chicago area. Furthermore, some large Class I railroads, such as the Lehigh Valley, Kansas City Southern, Western Pacific and Cotton Belt, had managed to divest themselves of the passenger burden altogether.

Historically, regulation of railroad passenger service had been primarily a concern of the states, and the general jurisdiction over its discontinuance was not shared with the federal government until 1958. In the absence of any positive duty to operate passenger service imposed by charter or statute, approval of discontinuance was based on a weighing of the financial burden to the railroad against elements of public convenience and necessity. In this adjudicative process, the burden of proof was usually upon the carrier.\(^8\)

As a result of the enactment of Section 13a of the Interstate Com-

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\(^7\) ICC, Intercity Rail Passenger Service in 1968.

merce Act in 1958, all total abandonments and discontinuances of passenger trains by carriers operating in interstate commerce were made subject to at least the concurrent jurisdiction of the Interstate Commerce Commission. This section was part of a package of reforms for the railroad industry entitled the "Transportation Act of 1958." Congress desired to strengthen the financial health of the railroads by allowing them, at their option, to have the ICC, rather than state commissions, pass upon the discontinuance or change in the operation of any passenger train. During the twelve years in which the Commission had jurisdiction over passenger trains, over one thousand intercity trains were discontinued, leaving a mere 360 trains, compared with some 20,000 in 1929. The Commission still maintains some authority over discontinuance of short-haul and commuter trains (AMTRAK trains in the basic system) and will regain jurisdiction over discontinuances by non-AMTRAK railroads in 1975.

II. THE RAIL PASSENGER SERVICE ACT OF 1970

Railpax, later called AMTRAK, was an idea whose time had come. The concept that the railroads themselves had discouraged passengers had been met with a great following. Concern over the environment and the effects of superhighways upon urban centers had become a political cause celebre. By 1970, some airlines were losing money, retrenching financially, and reducing levels of service. They suffered from a combination of seating overcapacity and failure to anticipate a leveling off of business travel due to economic woes. Airlines were especially anxious to leave the short-haul market, where high terminal costs ate up most passenger revenues. Only the intercity bus companies were showing a profit. The success of the "Metroliner," and of fast trains in such countries as France, Germany, and Japan had led many people to believe that service could be improved only if rail management were kept away from passenger service.

Proposals for rail passenger assistance took four main forms: (1) nationalization of the railroads; (2) establishment of a public corporation for nationalization of passenger service only; (3) adoption of a modification of the Canadian subsidy plan by which railroads would be compensated for some or all of their losses connected with operation of unprofitable trains; and (4) the establishment of specific federal grants to refurbish equipment and facilities or to purchase new equipment. Some members of Congress and the administration believed that this problem was best left to states or regions of the country. By April of 1970, the Senate was considering general subsidy legislation with a price tag of $435 million.

As far back as 1961, the Doyle Report had proposed a National Rail Passenger Service Corporation along the lines of the Pullman Company, but with joint public-private ownership. The idea of "Railpax" (the telegraphic symbol for "railroad passenger"), a government sponsored, though private, corporation, is credited to Professor Paul Cherington of M.I.T., a well-known student of transportation problems, who served as assistant secretary of transportation for policy development in the Johnson Administration, and since 1970 has been a trustee in bankruptcy of the Boston & Maine Railroad. John Burby, who served as special assistant to the Secretary of Transportation Alan Boyd, states that the Cherington plan was first described in a speech delivered in Arizona before a group of railroad executives in 1968 by Richard J. Barber, then deputy assistant secretary for policy development.

The Cherington plan appeared to be lost somewhere in the bureaucracy by the winter of 1969-70. Pressure from lobbyists caused Secretary of Transportation John Volpe to introduce a modification of the Railpax scheme. Debate was brief, and Volpe's bill passed the Senate on May 6, 1970, by a vote of 78-3. The legislation had the support of The National Association of Railroad Passengers, the Railway Labor Executives' Association, the Association of American Railroads, and the Department of Transportation.

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19 Passenger Train J. 20 (Fall 1970).
Action in the House was not as speedy. Senate action had been accelerated by public pressure resulting from the attempt of the moribund Penn Central to strand all its east-west passengers.\textsuperscript{21} Penn Central's petition had lumped money-losing trains together with such flagships as the "Broadway Limited," which by Penn Central's own accounting had turned a profit in 1968.

But in June, the House was faced with the Penn Central bankruptcy, and the Railpax bill was held up pending an investigation of the financial finagling involved there. In the meantime, some railroads which were down to their last two or three passenger trains and hoped the ICC would let them make their quietus peacefully in the next year or two saw an opportunity in the delay to kill the Railpax bill and achieve a final solution of the passenger question. These railroads wrought an amendment which would give those railroads which refused to accept Railpax common stock a tax write-off for the entrance fees paid to the Railpax Corporation, as an extraordinary business expense.\textsuperscript{22}

On October 7, 1970, the House Committee on Interstate and Foreign Commerce reported the Railpax bill favorably to the House. Funding was increased; the outright grant of $40 million for general and specific subsidies was retained, but the Senate figures of $60 million in loan guarantees for capital improvements of the new corporation and $75 million for railroads which needed the money to buy into it were raised to $100 and $200 million respectively, bringing the total cost of the legislation to $340 million. Finally, the railroads joining the corporation would receive a tax deduction of the full amount of their payment to Railpax as a necessary business expense.\textsuperscript{23} The beginning date for Railpax was delayed from March 1 to May 1, 1971; and the date when trains within the basic network could be dropped was changed from January, 1975, to July, 1973.

On October 14, 1971, the bill passed the House unanimously by voice vote on the motion of Commerce Committee chairman Harley Staggers (D-W.Va.). That same afternoon, Acting Majority Leader Robert C. Byrd (D-W.Va.) moved that the Senate approve the House version. The motion passed without objection.

\textsuperscript{22} Supra n.20.
\textsuperscript{23} Id. at 21.
The Congress then adjourned for elections. However, the Council of Economic Advisers, the Office of Management and Budget, and some high White House staff men counseled against the corporation plan as a waste of money. Reportedly this advice gave President Nixon some cause for hesitating before signing the bill, but Secretary Volpe and the lobbies which had supported the bill rallied another show of support and the President, facing Congressional elections, signed the bill on Friday, October 30.24

The new legislation contains several curious features and more than one ambiguity. Title I concerns itself with findings, purposes and definitions. The “Findings and Declaration of Purpose” read, in part, as follows:

The Congress finds that . . . public convenience and necessity require the continuance and improvement of such [railroad passenger] service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; that rail passenger service can help to end the congestion on our highways and the overcrowding of airways and airports. . . .25

The act is meant to preserve and improve intercity passenger service, but the definition given for such service is highly ambiguous:

‘Intercity rail passenger service’ means all rail passenger service other than (A) commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations, and (B) auto-ferry service characterized by transportation of automobiles and their occupants where contracts for such service have been consummated prior to enactment of this Act.26

The Senate report clarifies that this section was intended to exclude commuter service, which might be eligible for assistance under the urban Mass Transportation Act.27 However, this exclusion was not made sufficiently clear in the House version. As a result, litigation has ensued concerning this definition.28

“Rail passenger service” seems to mean “passenger train service” rather than “passenger service operated by railroads.” Railroad-

operated service by water or highway was not discussed in the Congres- sional debates, and at best is a limited problem since railroads were not allowed to diversify except for certain "grandfather rights" obtained before 1935. The exceptions are not very well defined: sub-paragraph (A) definitely exempts commuter trains, but the meaning of "other short-haul service" and the extent of a commuter zone is unclear. The short-haul service must be in metropolitan and suburban areas, but the other commuter criteria need not apply. The Act does not state who determines if an exclusion from the Act's provision should be made.

Trains not operating in metropolitan and suburban areas are included in the "intercity" classification, despite the fact that many trains which offer passenger service are short-line or mixed train operations with no connection with intercity runs. The law affects the Santa Fe's "Super Chief" between Chicago and Los Angeles equally with the California Western's "Super Skunk" between the towns of Willits and Fort Bragg in California.29

The exclusion in Section 102(5)(B) seems to apply to the projected auto-train service contemplated by the Office of High Speed Ground Transportation. The exclusion is restricted to cases where contracts "have already been consummated prior to enactment" and thus is not applicable to the new Auto-Train Corporation.

The term "avoidable costs" found in Section 102(6) is apparently connected with the ICC's study of the passenger service costs of eight railroads in 1969. Since this figure is not regularly reported in ICC's accounting procedures, a substantial revision of carrier accounting requirements might be necessary if the ICC is to be able to successfully determine such costs.30 The ICC used the term "net avoidable costs" in its 1969 study, which contemplated a number of accounting considerations, including a comparison of sacrificed revenues with avoidable costs. "Net avoidable costs" was used as a measure of how much better off a carrier would have been in a stated period had it operated no passenger service. However, the Act refers to both "avoidable loss" and

29 The General Counsel of the California Western is of the opinion that, since the corporation's passenger trains operate only within California, they are solely subject to the jurisdiction of the California Public Utilities Commission. Letter to author from Robert A. Elliott, Assistant General Counsel, California Western R.R., July 28, 1971.

"avoidable costs."\textsuperscript{31} "Avoidable loss" is defined as "the avoidable costs of providing passenger service, less revenues attributable thereto, as determined by the Interstate Commerce Commission."\textsuperscript{32}

Title II of the Act authorized the Secretary of Transportation to recommend a basic national railroad passenger system, identifying end points between which service shall be provided and the routes over which trains may be operated. The statutory criteria for designation of this system are:

[O]pportunities for provision of faster service, more convenient service, service to more centers of population, and service at lower cost, by the joint operation, for passenger service, of facilities of two or more railroad companies; the importance of a given service to overall viability of the basic system; adequacy of other transportation facilities serving the same points; unique characteristics of rail service as compared to other modes of transportation; the relationship of public benefits of given services to the costs of providing such services; and potential profitability of the service.\textsuperscript{33}

The familiar criterion of public convenience and necessity have apparently fallen by the wayside.

The Secretary's recommendations are to be submitted within 30 days of enactment of the Rail Passenger Service Act. The ICC, state agencies, railroads and labor unions are given thirty days to present their views and comments before the Secretary of Transportation is required to file his final recommendations, which are not reviewable in any court of law, within 90 days after enactment of the legislation.

The heart of the legislation is Title III which creates a National Railroad Passenger Corporation. This entity

shall be a for-profit corporation, the purpose of which shall be to provide intercity rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the nation's intercity passenger transportation requirements. The Corporation will not be an agency or establishment of the United States Government.\textsuperscript{34}

The last sentence was added to show that the subsidy approach may be abandoned and that the federal government is not going to nationalize the railroads—yet.

\textsuperscript{31} Letter from George M. Stafford, ICC Chairman, to Wilfred Rommel, Assistant Director for Legislative Reference, Bureau of the Budget, Feb. 3, 1970.


\textsuperscript{34} Pub. L. No. 91-518, 84 Stat. 1330, § 301 (1970).
The establishment of a non-public corporation was for limited purposes. Professor Robert W. Harbeson of the University of Illinois Department of Economics suggests that:

If NRPC had been established as a public corporation, rail passenger service property contributed to the Corporation would have been removed from state and local tax rolls. The necessity of reimbursing state and local governments for the loss of tax revenue would consequently have become an issue.\(^{35}\)

The incorporators are appointed by the President of the United States with the advice and consent of the Senate. They serve for 180 days after enactment. The Corporation has fifteen directors, eight appointed by the President, one of whom must be the Secretary of Transportation and another of whom must be a "consumer representative." A "consumer representative" is a unique requirement for a public corporation, reflecting the recent strength of the consumer movement. However, the act does not specify that the "consumer representative" had to be a "passenger representative," so the term was so vague as to be meaningless. Everyone, after all, is a consumer.

None of the presidential appointees may have any direct or indirect financial or employment relationship with any railroad during the time that he serves on the board. Three members of the board are to be elected by participating railroads and four by preferred stockholders. No stock will be held by the Government, which, however, will contribute grants and loans.

The financing arrangements were described by a financial writer as follows:

The railroads, you see, can get their unprofitable trains off their own books by buying common stock in the passenger corporation. If the roads decline to go through this maneuver, they must continue running their trains until at least 1975. That's one way to sell stock.

When it comes to raising other capital, the corporation has no such sales tool. It will have a high-level financial panel, which will have to come up with some clever plans to draw investors into an enterprise with bleak prospects.\(^{36}\)

AMTRAK has no immediate plans to issue preferred stocks (stock to be sold to the general public but not to railroads) until its financial prospects improve.\(^{37}\)

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\(^{35}\) Supra n.30, at 337.


\(^{37}\) Interview with Director David Bradshaw, Chicago, May 5, 1971.
The Corporation is authorized to own and operate passenger trains, or to contract for their operation, and also to carry mail and express. No specification is made as to what rates are to be charged for use of facilities, since this topic is subject to contracts between NRPC and the railroads. In case of failure to agree on terms, the ICC shall set contract provisions.

The Corporation is considered a common carrier by railroad and is subject to all provisions of the Interstate Commerce Act except for regulation of fares, abandonment of trackage and discontinuance under Section 13a, with certain exceptions provided in the Act. This provision permits the Corporation to set its own rates and to institute, change, or discontinue service except that which is in the "basic system" and that which is subsidized by the states without going through any regulatory process.

If the Corporation or a railroad engages in any act or policy inconsistent with the policy of the Act, the Attorney General of the United States may bring an action for equitable relief in any United States District Court.

The Corporation is subject to the same safety regulations as a railroad and the same laws with respect to collective bargaining with employees. In view of the prevalent dissatisfaction with the Railway Labor Act and the high labor costs which result from perpetuation of certain work rules and crew standards, this provision seems to militate against any great savings in costs of operation for the Corporation. Any employee or employee representative may bring action against the Corporation for violation of a labor agreement.

The Corporation is exempted from any state or other law pertinent to rail passenger service, and persons contracting with the Corporation for joint use or operation of facilities necessary for passenger service are exempted from the prohibitions of the antitrust laws. The Corporation must submit annual recommendations to the President and Congress for amendments to the law, including the need for financial

assistance. In addition, the Secretary of Transportation and the ICC must submit biennial reports on the state of rail passenger service and the effectiveness of this law in meeting the requirements for a balanced national transportation system, together with any legislative recommendations.43

The essence of the Act is the “carrot and stick” provisions concerning assumption of passenger service by the Corporation in Title IV. The law provides that on or before May 1, 1971, or during the period from March 1, 1973, to January 1, 1975, the Corporation is authorized to contract; and upon written request from any railroad, must tender a contract to relieve the railroad from all responsibility for providing intercity rail passenger service.

Railroads discontinuing trains under this provision must observe the notice provisions contained in Section 13a(1) of the Interstate Commerce Act.44 In consideration for being relieved of responsibility for operating these trains, the railroad must pay NRPC one of the following amounts: (1) 50 percent of its fully-distributed passenger service deficit for 1969; (2) 100 percent of the avoidable loss on all intercity passenger service rendered by it in 1969; or (3) 200 percent of the avoidable loss on intercity service provided between points on the basic national rail passenger system in 1969. The amount due must be paid over a three-year period in cash, or at NRPC’s option, by a transfer of equipment or provision of future service.45 Disputes as to the amount owed are to be resolved by the ICC. The accounting is based on figures supplied to the ICC by the railroads in 1969. This provision means that if a railroad overstated its passenger losses to the ICC, it has a higher entrance fee to pay NRPC. The fact that a railroad is not operating over the NRPC route segments does not mean it can discontinue service without paying an entrance fee to the Corporation. In exchange for the payment, the carrier may receive common stock of NRPC; but if the railroad waives its claim to stock, the payment may be treated as a tax-deductible expense.46

On May 1, 1971, the Corporation was required to begin providing

intercity rail passenger service unless such service is being performed by a non-contracting railroad or by a regional transportation agency which has given satisfactory assurance of its willingness or ability to cooperate with NRPC. No railroad may operate over any route on which the Corporation operates without NRPC's permission. The ICC can force a recalcitrant railroad to let NRPC operate its trains over the railroad's tracks. Combined with freedom from fare, service, and anti-trust regulation, this provision makes the new Corporation a very tight monopoly. Section 402(b) provides:

To facilitate the initiation of operations by the Corporation within the basic system, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities. The Commission shall immediately thereafter promptly proceed to fix such terms and conditions as are just and reasonable.

The Commission has broad discretion in fixing terms and conditions since no statutory criterion is given.

Section 403 is the "put up or shut up" section. It authorizes the Corporation to provide additional trains, including special and excursion trains, if consistent with prudent management. Where additional service is provided for two years, that service shall be considered part of the basic system. A state, regional or local agency may request additional service, which NRPC must provide if the requesting authority agrees to reimburse the Corporation two thirds of the attributable losses incurred by the system. If the agency and NRPC are unable to agree, the matter is referred to the Secretary of Transportation for determination. This section for the first time fixes responsibility for subsidizing local service with local authorities, and it may have an effect on the taxation of passenger facilities by state and local governments. A "regional transportation agency" is defined as "an authority, corporation, or other entity established for the purpose of providing passenger service within a region." In nebulous wording, the legislation encourages the widest range of public or private participation.

Service not included within the basic system may be dropped by NRPC at any time. However, unless a railroad has entered into a con-

51 See Passenger Train J. (Spring 1971).
tract with NRPC, it may not discontinue any intercity passenger service whatsoever prior to January 1, 1975. After that date, passenger intercity trains may be discontinued under Section 13a of the Interstate Commerce Act.

Section 405 provides that the railroads or the Corporation shall protect the interests of employees affected by discontinuance of passenger service. All such discontinuances are subject to protective labor conditions no less favorable than those provided by the Interstate Commerce Act in connection with railroad mergers.\textsuperscript{52}

Title V directs the President to appoint a fifteen-man financial advisory panel to advise the Corporation on methods of increasing its capitalization. Six members shall represent investment banking, commercial banking, and rail transportation; two members shall represent the Secretary of the Treasury; and seven members shall represent the public in the various regions of the nation.\textsuperscript{53}

Titles VI and VII provide for federal financial assistance. A sum of $40 million is authorized (to be available until spent) to organize and to meet the operating costs of the Corporation, to establish an improved reservation system (this provision was necessary to avoid one of the grievances against the railroads, the lack of a coordinated reservation scheme),\textsuperscript{54} to advertise, to maintain passenger equipment, to conduct research and development, and to maintain fixed facilities for operation of basic system service where none presently exist.\textsuperscript{55} This grant appears to be both a general and specific subsidy.

The Secretary of Transportation is authorized to guarantee loans to the Corporation of $100 million for new rolling stock, upgrading of roadbeds, and other corporate purposes. The Secretary is also authorized to make loans or to guarantee loans (totalling $200 million outstanding at any one time) to railroads to enable them to perform contracts under the Act. Such loans must be necessary and related to matters involved in the legislation.\textsuperscript{56} Most financial experts think that this amount of gov-

\textsuperscript{54} Only the Penn Central and the Burlington Northern maintained computerized reservation systems, and those only for some trains.
ernment financing, $340 million in all, is insufficient and that the sale of preferred stock will be difficult at best. Also, most of the carriers' payments to NRPC will probably be in the form of equipment and services rather than in cash, even though acceptance of payments in kind depends on the discretion of the Corporation.\textsuperscript{57} Considering the amounts allowed for highway and airway subsidy and development, $340 million seems niggardly indeed.\textsuperscript{58}

In Section 801, the ICC is granted the power to prescribe such regulations as it considers necessary to provide safe and adequate service, equipment, and facilities for intercity rail passenger service. Any person who violates such a regulation can be fined up to $500 per day for each violation.\textsuperscript{59} The fact that "any person" is used rather than "the Corporation" indicates that the ICC now has jurisdiction over all intercity passenger trains, be they operated by NRPC or others. Thus, the passenger finally has a stronger remedy than the essentially negative procedure of requiring a railroad to continue operating an inadequate service.

Section 802 established a moratorium on all intercity train discontinuances, which was effective from October 30, 1970, until May 1, 1971. The Corporation is declared in Section 804 to be a mixed corporation under the Government Corporation Control Act.\textsuperscript{60}

The Act bears the marks of last-minute patchwork and compromise, and a more definitive analysis must await experience with its administration and resolution of some of the litigation which it has inspired.

III. EXPERIENCE UNDER THE ACT

On October 30, 1970, the long decline in the number of passenger trains in the United States was temporarily arrested. All pending discontinuance petitions before the Interstate Commerce Commission and state regulatory commissions were dismissed for want of jurisdiction.

One month later, Secretary Volpe released his report outlining the

\textsuperscript{57} Supra n.30, at 337.
\textsuperscript{58} The amount requested by the Nixon administration for continuing work on the ill-fated prototype SST for one year was $289,000,000.
\textsuperscript{60} 31 U.S.C. § 856 et seq. (1970).
basic system. In determining the basic system, the Transportation Department proceeded on the following assumptions:

—Improving the quality of service is essential to reverse ridership trends. Available funds should be concentrated on a limited number of routes which show some promise of profitability so that improvements can be made.

—in selecting routes, the emphasis should be on realistic projection of future demands and costs.

—even though funds should be concentrated on a limited number of routes, route selection should provide a basic system on which service can be added if response is favorable.61

A selection of end points for routes followed, based on eight general criteria: the nation's total transportation needs, demand, and cost; capability of being integrated into a national system; population (estimated SMSA population of 1,000,000 or more); profitability; corporate flexibility; and minimum of capital improvements required.62

Service characteristics were required to be identified by the Secretary of Transportation.63 In designing the standards of service, the Secretary stated that his intention was to preserve the discretion of NRPC to expand rail passenger service as rapidly as the Corporation develops a market strategy, gains experience, and shows routes to be justified on the basis of public demand. The Secretary included the following provisions:

(1) Private-room sleeping car service shall be provided for all schedules having an overnight journey of at least six hours during the time period from Midnight to 8:00 a.m.

(2) Food service shall be provided on all schedules operating between the hours of 7:00 a.m. to 8:00 p.m. and exceeding two hours trip time.

(3) Non-revenue lounge space shall be provided on all schedules in excess of six hours duration.

(4) Parlor car or other first class accommodations may be provided wherever justifiable by market demand.64

The end points selected by the Secretary were as follows:

New York—Boston
New York—Washington
New York—Buffalo

62 Id. at 4.
64 Supra n.61, at 5-6.
The Act required the Secretary to "consider the need for such service within the states of Alaska and Hawaii and the Commonwealth of Puerto Rico." Volpe replied as follows:

No end points were designated in the States of Alaska and Hawaii or the Commonwealth of Puerto Rico. In Alaska, the Alaska Railroad provides a level of service consistent with demand. Daily roundtrip service is operated between Anchorage and Fairbanks and twice weekly round-trip service is operated during winter months. Hawaii and Puerto Rico do not have the facilities or demand which would support institution of intercity rail passenger service.

From the preliminary report, three factors were evident. First, no services were designated that were not currently operated by the railroads. No new services were to be introduced. Second, the route structure seems to show a preference for the nearly-vanished "nostalgia," or long-haul market over the short-haul "corridor" routes. Only the first six routes fall into the latter category. This fact seems to be a change from previous Department policy which had seen more potential in such omitted routes as Chicago-Milwaukee, Cleveland-Cincinnati, St. Louis-Kansas City, Los Angeles-San Diego, and Dallas-Houston.

Third, the proposed network provided little service between cities in the West. The only trains operating west of the Mississippi were the trains from Chicago to Seattle, San Francisco, Los Angeles and Houston. The Administration may have been influenced by a study made by

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65 Id. at 7-29.
67 The Alaska Railroad is a nationalized carrier operated by the Department of Transportation's Federal Railroad Administration. By this statement, Volpe decided that the Alaska Railroad would not participate in NRPC. Alaska is also served by the White Pass & Yukon, a Canadian railroad into Skagway.
68 Supra n.61, at 8.
the Stanford Research Institute for the Southern Pacific Co. in 1966, which predicted a poor future for intercity rail passenger service in the Far West.\textsuperscript{70} One train could serve all these points, starting at Chicago, with the Houston section splitting off at Kansas City, the Seattle section at Green River, Wyoming, and the remaining San Francisco and Los Angeles sections dividing at Ogden, Utah. Additional routes between New Orleans and Los Angeles and between Seattle and San Diego had been recommended by Volpe privately, but were deleted by the Office of Management and Budget.\textsuperscript{71}

In December, President Nixon nominated eight incorporators to serve a 180-day term. The incorporators were approved by a voice vote of the Congress on December 30, 1970, as was the 15-man advisory financial panel.

During the month of December, interested parties and the Interstate Commerce Commission filed their replies to the basic system proposed by the Secretary of Transportation. Fifteen railroads, forty-three states, and several affected cities and regions produced their own individual proposals, mostly geared to specific new routes or required routings over favored routes between given end points.\textsuperscript{72}

On January 28, 1971, Secretary Volpe released his final report. The Secretary claimed that he lacked authority to include Canadian or Mexican points within the basic system, since such service could be provided only with the consent of Canadian or Mexican authorities.\textsuperscript{73} The report concluded:

Several service points have been added to the basic system in response to these suggestions despite some remaining questions on the profitability of this additional service which led to their exclusion in the Preliminary Report.\textsuperscript{74}

This additional service included the following routes:

\textsuperscript{70} E. Brandes and A. Lazar, Rail Passenger Traffic in the West (SRI Project 5676, 1966).
\textsuperscript{71} Wall St. J., Jan. 29, 1971, at 3, col. 3. The Southern Pacific had launched a major lobbying effort to keep the New Orleans-Los Angeles and Portland-Los Angeles segments out of the basic system, since the difference between retention and elimination of the routes was a matter of at least $5,000,000 in immediate obligations to the railroad. See N.Y. Times, Jan. 25, 1971, at 1, col. 1.
\textsuperscript{73} Id. at I-6.
\textsuperscript{74} Id.
In addition, the Miami routes were expanded to include Tampa-St. Petersburg as an additional end point "because it is an integral part of the rail travel pattern to Florida from northern points." 75

Chicago-Seattle trains were required to run via the Twin Cities, 76 Chicago-San Francisco trains via Denver, 77 and Chicago-Los Angeles trains via Kansas City. 78

On March 22, 1971, the NRPC made its final decisions, which can be summarized as follows: 184 trains were to operate, of which four would run tri-weekly, the rest daily. Such a system would serve eighty-five percent of our urban population. This plan effectively reduced by over fifty percent the number of trains operating in October, 1970-April, 1971.

Contracts were offered to twenty-two railroads. 79 Certain railroads, such as the state-owned Long Island Rail Road and the federally-owned Alaska Railroad, were not offered contracts and did not participate. None of the short lines requested or were offered contracts, nor were the United States portions of Canadian operations. The Georgia Railroad elected to continue its Augusta-Atlanta train and branchline mixed trains for fear that its tax status might be affected. The Reading and the South Shore operated service between Philadelphia and Newark, and Chicago and South Bend, respectively; but as the distance involved was only 90 miles, they considered these runs to be commuter operations and thus were not interested in participating. None of these railroads were offered a contract by NRPC. 80

75 Id.
76 Id. at II-50.
77 Id. at II-54.
78 Id. at II-58.
79 Sixteen of the participating lines declined to accept stock in the new corporation, taking a tax deduction for the calendar year 1970 in lieu of common stock. The four railroads which accepted the stock are the Burlington Northern; the Chicago, Milwaukee, St. Paul & Pacific; the Penn Central; and the Grand Trunk Western. The latter is a wholly owned subsidiary of the Canadian National Railways, which is in turn owned completely by the Canadian government. Thus, although the United States Government has no equity or ownership in AMTRAK, the Canadian government indirectly controls a large percentage of the system.
80 Trains 10 (August 1971).
Shortly before contracts were offered, the Chicago, Rock Island & Pacific Railroad decided that it wanted no part of the new system. The Rock Island had made several attempts to improve the image of its passenger service. These efforts were successful for its Chicago suburban trains, but did not help its intercity service. Thus, the company, faced with removal of mail from its remaining passenger trains, began a retrenchment program in 1967, and at the same time tried to upgrade the remaining trains with luxury cars off the vanished limiteds. This program was moderately successful in reducing losses and retaining a good deal of patronage. By the cut-off date of October 30, 1970, the Rock Island operated only four intercity trains, all within the state of Illinois. However, the fee for joining the National Railroad Passenger Corporation was based on 1969 losses. At that time, the railroad was also operating a Chicago-Omaha and a Minneapolis-Kansas City train, with resulting losses of $9,000,000 for the year. With the remaining trains, the total projected loss was estimated at no more than $1,000,000 per year. The minimum cost of joining NRPC was about $4,700,000. In addition, no savings on fixed facilities would occur by abandoning passenger service except for one agent's position at Rock Island, Illinois.  

The Corporation's route decisions involved the immediate discontinuance of over half the passenger routes then operated, reduction of New York-Chicago service to one train daily, and the elimination of any service whatsoever to Cleveland and Toledo, Ohio. Resentment in the press and in Congress was acute.

On April 20, 1971, the National Railroad Passenger Corporation dropped the "Railpax" nickname in favor of "AMTRAK," an amalgam for "American track." The new term was coined by a consulting firm that found the word "Railpax" not only had limited consumer recall but might also be sued for infringement of copyright by a company that had registered "Railpak" as a trade name for a waste disposal system.  

AMTRAK had a new name but was missing four important members. As shown previously, the Georgia Railroad and Chicago, Rock

Island & Pacific Railroad, both marginal intercity carriers, had decided it was more economical to cope with their manageable passenger deficits than to join the new program. On April 21, 1971, the Southern Railway (and its subsidiary Alabama Great Southern) refused to contract with the AMTRAK system. However, the Central of Georgia, a subsidiary of Southern, had joined. Southern issued a statement promising cooperation “in every feasible way” with AMTRAK in coordinating schedules and service.83 Since 1969, Southern had reduced its fleet of trains to eight, and had a manageable passenger deficit. Furthermore, under the guidance of its current president, the railroad had viewed its passenger trains as a vital part of its public relations program, had refurbished its remaining trains, and had even gone to the extent of purchasing two steam engines to haul passenger excursions. None of these publicity benefits would inure to Southern were the trains to operate under the AMTRAK aegis. In addition, the entrance fee for AMTRAK was considered to be overly high in comparison to possible savings from discontinuing the remaining trains. As a result, AMTRAK did not have to dissipate any of its resources in the New York-New Orleans market.

The Denver and Rio Grande Western operated two sets of trains: the tri-weekly remnant of the old “California Zephyr” between Denver and Ogden, and a rather profitable narrow-gauge tourist operation between Durango and Silverton, Colorado. Its passenger deficit for 1969 was much higher, due to the fact that the “Zephyr” then operated daily, and the amount called for in its AMTRAK contract would be substantially higher than the costs of continuing to run its “Rio Grande Zephyr” on a tri-weekly coach-only basis. In an interview, the president of the Rio Grande said, “Our trouble is we have to compete with Union Pacific which is a flat country double-track mainline railroad. We have a single track mountain line.” Of course, the Rio Grande must run its “Zephyr” over the route in question. But since it is an independent operation, the railroad can shunt it onto sidings to permit freight trains to pass. In view of this situation, the Rio Grande opted out of the system on April 26, 1971.84 Therefore, the net effect of these new arrangements was to increase the number of intercity trains scheduled for operation in the period 1971-1973, because these four holdout roads operated 18 trains, in addition to the 184 trains saved by AMTRAK.

84 News from National Association of Railroad Passengers (May 1971).
The contracts arranged between AMTRAK and the 20 participating railroads provided for reimbursement to the railroads solely for related costs, plus the reasonable value of terminal services required, plus 5 percent to cover additional but unidentifiable costs and to represent the railroads' assumption of all damage and tort liability for the passenger train service. This provision meant that AMTRAK would pay the railroads about $200,000,000 in 1970. The contract provision concerning service standards reads as follows:

Railroad shall provide services hereunder in an economic and efficient manner and shall give appropriate recognition to the importance of on-time passenger train operations and passenger comfort and convenience. Railroad shall make every reasonable effort to maintain the schedules established by NRPC for its Intercity Rail Passenger Service.

No penalties were provided for nonperformance, as compared to the contract between the Transportation Department and Penn Central for "Metroliner" operation which provides $1,000 per violation. The AMTRAK contracts appear to rest solely on the good faith of the participating railroads.

The birth of the new national passenger rail system was hardly an auspicious occasion. Objections were heard in the courts and in Congress. Several suits were filed to halt the May 1 starting date of the new Corporation, protesting labor agreements, adequacy of notice, and the discontinuance of certain trains which were claimed to be for commuters. None of these suits succeeded, all being dismissed for want of standing. Judge Howard F. Corcoran of the United States District Court for the District of Columbia stated that as far as he was aware "there is no indication in the legislative history that Congress intended the Secretary of Labor's certification of the Rail Passenger Service Act to be reviewable by the court on its merits." In another proceeding, Judge Corcoran stated that "Clearly in a non-labor agreement dispute, only the Attorney-General can bring suit for violation of the act."

The constitutionality of the Act was also questioned. One such question touches upon the propriety of requiring a private corporation to make large payments to another corporation in order to be relieved

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85 Railway Age 11 (Apr. 26, 1971).
86 Supra n.84, at 1.
89 Id.
of an uneconomic service requirement. The penalty for non-participation is continuance of service until 1975, regardless of public need, which raises questions of confiscation. However, the precedents for "mixed" governmental-private enterprise consortia are too well-established for this particular issue to impede AMTRAK.

A three-judge district court in Illinois has declared the Act constitutional holding that it was a rational attempt to preserve and revitalize seriously declining passenger service, which did not deny substantive due process to railroads or affected users of the service.90

Since May 1, 1971, AMTRAK has added service between Boston-New York-Washington, Chicago-Milwaukee-Minneapolis, on an alternate route between Minneapolis and Spokane, between Chicago and Indianapolis, between Washington and Parkersburg, W.Va., between Chicago and Boston via Cincinnati, and between Milwaukee and St. Louis via Chicago. In addition, pledges of financial support from the states of Massachusetts and Illinois has caused service to be restored under the "put up or shut up" provision91 between Boston and Springfield, Mass., and Chicago and West Quincy, Mo., respectively.

On May 10, 1971, AMTRAK, relying on the good faith of political leaders from New York, Pennsylvania, Ohio, Indiana and Illinois, instituted through service from New York to Chicago on the "Lake Shore" route via Buffalo, Cleveland and Toledo. The train had never really been improved and AMTRAK operated freshly-scrubbed equipment under old work rules, through old stations, with old fares, little advertising and a nearly useless reservation system. Although AMTRAK claimed it lost $3.6 million on the run, it failed to supply state officials with audited bills accounting for the costs, which were paid directly by the railroad.92 Cleveland's Union Terminal now remains the costliest and most elaborate subway station this side of Moscow, as the Corporation has ceased all service to that city of over two million residents.93 To make matters worse, apparently the agreements entered into with the states were not binding, and the Corporation will not be compensated

for the service. The last "Lake Shore Limited" ran on January 5, 1972, without the necessity of obtaining authorization for discontinuance from any government agency.

The Cleveland example points out a fundamental inequity in the AMTRAK legislation—that which some cities get free, other communities must pay for. Perhaps this inequity is inherent in any governmental decision to place facilities, but the two-thirds matching requirement seems to this writer a bit high, at least for smaller states.

The cost of entry into AMTRAK is based on the railroad's 1969 loss—which in many cases is unrealistic. Interstate Commerce Commission Chairman George M. Stafford has written:

If the carrier is to pay an amount hinged to its 1969 passenger deficit under the specified formula, the larger the deficit, the more the carrier must pay. Though entry into Railpax may well be selected by a deficit carrier as the lesser of two evils, that does not cure the lack of equity in this concept. The carrier that has borne the greatest burden of providing a public service could be required to pay the highest price for relief.¹⁴

Commissioner Stafford also pointed out that if a railroad showed a profit on passenger operations in 1969, it would have no way of getting into the Corporation, even if each year thereafter it should show a hopeless loss on the operation.¹⁵ Similarly, the burden is not equally distributed among all railroads. Lines which had dropped passenger service before October, 1970 need pay nothing whatsoever to the new Corporation.

But a more fundamental defect of the legislation was Congress' insistence that AMTRAK operate on a for-profit basis. This writer suggests that the more realistic approach would be for AMTRAK to be established as a public, tax-exempt corporation with a clear mandate to establish modern passenger routes on an expanded system. The semi-private form of organization chosen is at best a hybrid, and at worst merely a vehicle by which the railroads can effect massive discontinuance on an unprecedented scale. In view of the traditional deficits incurred in this business, and AMTRAK's apparent inability to quickly change marketing methods, the financial outlook for the Corporation does not look bright.

¹⁴ Letter from George M. Stafford, ICC Chairman, to Wilfred Rommel, Ass't Dir. for Legislative Reference, Bureau of the Budget, Feb. 3, 1970.
¹⁵ Id.
AMTRAK has not, during its brief existence, attempted to operate its own trains with its own personnel, but has instead chosen to rely upon contracts with the railroads. The result has been the immediate freeing of railroads from the passenger deficit. AMTRAK has also created a type of cost-plus subsidy, with no incentive to the operating railroad to improve services or control costs. The results are generally what one would expect. As of February, 1972:

—Equipment obtained from various lines is not compatible with other cars on the same train.
—The January timetable is still not distributed and is already inaccurate.
—No uniform fare policy has been established, and some fares are higher than analogous air rates.
—The logical market for AMTRAK—distances within 400 miles—has not been effectively exploited.
—No changes have been made in labor agreements determining crew consists for passenger trains, although some modification has been made in freight agreements by the various railroads.
—AMTRAK hires hostesses who cannot serve drinks or usurp porters' duties, but are paid $600 a month, plus free meals and accommodations while enroute.
—No on-the-scene AMTRAK supervisors exist at such key terminals as Chicago that have decision-making authority and everything must be cleared from Washington.  

In October, 1971, the National Railroad Passenger Corporation sought further appropriations from Congress of $170,000,000 to cover increased operating expenses. Many observers felt that this amount would not be enough to provide for the upgrading of service necessary to attract riders back to the rails. The appropriation is now pending in Congress.  

The Rail Passenger Service Act of 1970 signifies a departure from the concept of taxation by regulation of the transportation industry that began in the nineteenth century. The experience of the next two years should demonstrate whether a demand for rail passenger service still exists or can be rekindled, and whether it is worth the effort. However, without adequate funding, independence, or initiative, the trial may prove to be a sham, and AMTRAK may be derailed for good in 1973.
