Contractual Negotiation of a Statutory Obligation—A Modern Anomaly*

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I. INTRODUCTION

For the first time in the history of rail transportation in the United States, a single railroad entity is responsible for providing a unified, nationwide, intercity rail passenger service. As the bearer of that responsibility, the National Railroad Passenger Corporation—known as Amtrak—is unique.[1] Not surprisingly, many of the problems it is required to confront are also unique in rail transportation. Perhaps the single most difficult and intractable problem—and the one most fundamental to its operation—is that of track availability and condition.

Under the Rail Passenger Service Act[2] (the Act), Amtrak is required

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* Unless otherwise attributed, the opinions expressed herein are those of the author and do not reflect the views of the National Railroad Passenger Corporation.

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1. Congress authorized the creation of the National Rail Passenger Corporation under the District of Columbia Business Corporation Act. The Corporation was to function as 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." 45 U.S.C. § 541 (1970). *See generally* Adams, *The National Railroad Passenger Corporation – A Modern Corporation Neither Private nor Public*, 31 BUS. LAW 601 (1976).

2. 45 U.S.C. §§ 501-644 (1970), *as amended by* Act of June 22, 1972, Pub. L. No. 92-316, 86 Stat. 22; Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548 (1973); Amtrak Improvement Act of 1974, Pub. L. No. 93-496, 88 Stat. 1526 (1974); Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90 (1975); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Amtrak Improvement Act

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to operate a basic national rail passenger system and to provide modern, efficient, fast and comfortable service over this system.[3] In order to provide the necessary service, Amtrak is empowered to "acquire . . . or contract for the use of, physical facilities, equipment, and devices necessary to rail passenger operations."[4] More specifically, Amtrak is authorized to "contract with railroads or with regional transportation agencies for the use of tracks and other facilities . . . on such terms and conditions as the parties may agree."[5] If the parties are unable to agree, then, upon the request of Amtrak, the Interstate Commerce Commission is required, within ninety days, to order "the use of tracks or facilities . . . by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable. . . ."[6]

Under this statutory arrangement, Amtrak, originally possessing neither rolling stock[7] nor tracks,[8] has had to negotiate with the railroads

of 1976, Pub. L. No. 94-555, 90 Stat. 2613 (1976) (current version at 45 U.S.C.A. §§ 501-645 (West 1972 & Supp. 1977)).

In this Act Congress has declared that:

> modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such 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; that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs; [and] that to achieve these goals requires the designation of a basic national rail passenger system and the establishment of a Rail Passenger Corporation for the purpose of providing modern, efficient intercity rail passenger service . . . .

45 U.S.C. § 501 (1970).

3. 45 U.S.C. § 501 (1970). The basic system was predetermined by Congress on the advice and recommendations of the Secretary of Transportation as to routes, end points to be served and basic service characteristics. *See id.* § 521.

4. 45 U.S.C. § 545 (1970).

5. *Id.* § 562(a). Any railroad so contracting was thereby to be relieved of its entire responsibility for the provision of intercity rail passenger service upon payment to Amtrak of fifty percent of its fully allocated passenger service deficit for 1969, payable in three equal annual installments. *Id.* § 561(a)(2).

6. 45 U.S.C. § 562(a) (1970).

7. The only passenger rolling stock which was available for Amtrak to acquire when it began its operations on May 1, 1971 was surplus equipment owned by the erstwhile passenger railroads. Three thousand surplus passenger cars used by 24 railroads prior to May 1, 1971 were offered for acquisition. Of these Amtrak selected 1,200, plus 188 luxury coaches, 244 overnight coaches, 288 sleeping cars, 50 lounge cars and 140 dining cars. ANNUAL REPORT OF NATIONAL RAILROAD PASSENGER CORPORATION 18-20 (1971) [hereinafter cited as ANNUAL REPORT].

8. Amtrak provides intercity rail passenger service over approximately 26,000 route miles and now owns a small portion of the track on which it operates. Pursuant to an option granted under the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 791(d) (Supp. V 1975) *as amended by* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 705(b), 90 Stat. 31 (1976), Amtrak purchased approximately 620 miles of track in the Northeast Corridor between Washington, D.C. and Boston, Mass. This included 455.9 miles of main line track and two spurs between New Haven, Conn. and Springfield, Mass. (60.7 miles), and Schenectady and Harrisburg, Pa. (103.6 miles). Also purchased were 6.8 miles of track

for the acquisition of the former and the use of the latter. The major issues in these negotiations have been Amtrak's right of access to railroad owned track and the condition of the track, or level of track utility.[9] These issues give rise to a fundamental question: whether a national rail passenger system can function effectively when it has no statutory right of access to rail rights-of-way but must negotiate such rights and the costs of the attendant service provided. The purpose of this article is to review the apparent anomaly which arises from the requirement that a statutory obligation to provide rail passenger service be fulfilled by contractual means.

II. Amtrak's Initial Negotiations

Under section 401(a) of the Act, Amtrak was required to assume responsibility for operating the basic system, beginning on May 1, 1971.[10] The Incorporators[11] were confirmed by Congress in early January, 1971[12] and the Secretary of Transportation's final report on the basic system[13] was not completed until late January 1971.[14] At most the Incorporators had four months in which to negotiate, draft and execute contracts of exceptional complexity. The Incorporators concluded that they had no practical alternative but to secure contractual rights to the services which only the railroads could provide.[15] This meant contracting

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between Schenectady and Hoffmans, N.Y. and 12.2 miles of right-of-way without track from Post Road to Rensselaer, N.Y. *See generally* 45 U.S.C.A. § 851(a) (West 1972 & Supp. 1977). Funds for this acquisition of property of the bankrupt Penn Central Transportation Co. were authorized under the Railroad Revitalization and Rebulatory Reform Act of 1976, 45 U.S.C.A. § 854(a)(3)(B) (West 1972 & Supp. 1977) *as amended by* Amtrak Improvement Act of 1976, Pub. L. No. 94-555, § 217(b), 90 Stat. 2613 (1976). Conveyance to Amtrak took place on April 1, 1976. Amtrak also owns approximately 83 miles of track between Kalamazoo, Michigan and Michigan City, Indiana.

9. Both are governed by Amtrak's contracts with the operating railroads under which the latter have agreed:

> "to provide [Amtrak], over Rail Lines of Railroad, with the services requested by [Amtrak], for or in connection with the operation of [Amtrak's] Intercity Rail Passenger Service," NRPC Agreement, note 22 *infra*, § 3.1; "to provide [upon request] modified or additional service," *id.* § 3.2; "to provide and furnish all labor, materials, equipment and facilities necessary to perform the services to be provided [pursuant to the foregoing]," *id.* § 3.3; "[to maintain] Rail Lines of Railroad used in [Amtrak's] Intercity Rail Passenger Service . . . at not less than the level of utility existing on the date of the beginning of such use." *Id.* § 4.2.

10. 45 U.S.C. § 561(a)(1) (Supp. V 1975).

11. The President of the United States, with the advice and consent of the Senate, was required to appoint not fewer than three incorporators. They were authorized to take all necessary steps to establish the Corporation, including the filing of articles of incorporation, as approved by the President, and to serve as the board of directors for 180 days following the date of enactment of the Act. 45 U.S.C. § 542 (1970).

12. Annual Report, *supra* note 7, at 3-4.

13. Department of Transportation, Final Report on Basic National Rail Passenger System (1971).

14. Annual Report, *supra* note 7, at 3-4.

15. *Id.*

with the railroads both for the actual operation of the trains themselves and for the provision of the necessary tracks and facilities which had remained the property of the railroads. The alternative to contractual agreement on the provision of tracks and facilities would have been an application to the Interstate Commerce Commission for an order which would fix terms and compensation. In the opinion of the Incorporators, recourse on a broad scale to the ICC, with the inevitable delays and appeals which could be expected to follow, would have resulted in a chaotic situation preventing Amtrak from fulfilling its obligation to commence service on May 1, 1971.[16] This concern was evidently seized upon by the railroads, since the Incorporators have reported that the negotiations were conducted under a continuing threat (never carried out) of a suit to compel Amtrak to comply with its statutory obligation to relieve the railroads of their responsibility for operating their own rail passenger services, but without contemporaneous contracts.[17] Presumably the railroads sought to strengthen their negotiating position by this means—taking advantage of the Incorporators' reluctance to seek an ICC determination.

A. Access to Tracks of Contracting Railroads

In their negotiations with the operating railroads the Incorporators originally sought trackage rights for a term of 99 years. These rights were to be held in common with the owning railroad on all rail lines of every category whether owned, leased, controlled or operated by the railroad, together with all roadway appurtenances (and other operating facilities) usable for intercity rail passenger service. Coupled with this was a prohibition on transfer or abandonment of any lines or operating rights (except to another contracting railroad) unless there was a reservation of Amtrak's rights or unless Amtrak was given a right of first refusal.[18] The railroads, on the other hand, only wanted to provide necessary rail service over their lines for a period of two years, without the grant of any property rights to Amtrak or any restriction on abandonment or disposal.[19]

The Incorporators argued that Amtrak could not carry out its statutory mandate to provide a national rail passenger system unless it could be assured of permanent access to the necessary rail rights-of-way.[20] Furthermore, such trackage rights had to be available from the outset in order to avoid the delays and uncertainties of obtaining them through

16. *Id.*
17. *Id.* at 4.
18. The Negotiation of the Amtrak Contract 67 (July 31, 1971). This is a history prepared by the contracting railroads.
19. *Id.*
20. *Id.*

application to the ICC. The railroads, on the other hand, objected to a grant of permanent trackage rights to Amtrak as an encumbrance on their title which would be further clouded by any grant of a first refusal option. The railroads also argued that such rights were not required by section 402 of the Act.[21]

In the final resort the parties agreed that the contracting railroads would not dispose of or abandon any rail lines used in Amtrak's initial service beginning on May 1, 1971, or in service initiated thereafter, for so long as such use continued or for the duration of the contract, whichever is shorter. Rail lines were defined as including all rights-of-way and real properties appurtenant thereto which constitute a contracting railroad's trackage, "whether owned, leased or otherwise held" and which are "used in connection with the actual operation of Intercity Rail Passenger Trains."[22]

B. LEVEL OF TRACK UTILITY

As to maintenance, the Incorporators had originally proposed that the railroads maintain their tracks at the level of utility existing on the date of commencement of Amtrak's use of such tracks or on the date notice of intended use was given.[23] The railroads, which had wanted to maintain their rail lines at the lower level of utility required by freight service, countered with an offer to maintain the May 1, 1971, level of utility for all lines used in Amtrak service, provided that the contract was to be for a limited term of 26 months.[24] A compromise was reached when the parties agreed that the level of utility which the contracting railroads would maintain at their own expense for a term of 25 years, would relate to track condition "existing on the date of the beginning of such use."[25] The cost formula under which the railroads were to be compensated for providing services in general would be renegotiable and could become effective on and after July 1, 1973.[26]

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21. *Id.* at 68.

22. The National Railroad Passenger Corporation Agreement § 4.1 (April 16, 1971) [hereinafter cited as NRPC Agreement]. The Agreement became effective May 1, 1971 and expires April 30, 1996. The original railroad signatories were the Atcheson, Topeka and Santa Fe Ry. Co.; Baltimore and Ohio R.R. Co.; Burlington Northern Inc.; Central of Georgia Rwy. Co.; Chesapeake and Ohio Rwy. Co.; Chicago and Northwestern Rwy. Co.; Chicago, Milwaukee, St. Paul and Pacific R.R. Co.; Delaware and Hudson Rwy. Co.; Grand Trunk Western R.R. Co.; Gulf, Mobile and Ohio R.R. Co.; Illinois Central R.R. Co.; Louisville & Nashville R.R. Co.; Missouri Pacific R.R. Co.; Norfolk and Western Rwy. Co.; North Western Pacific R.R. Co.; Penn Central Transportation Co.; Richmond, Fredericksburg & Potomac R.R. Co.; Seaboard Coastline R.R. Co.; Southern Pacific Transportation Co.; Union Pacific R.R. Co.

23. The Negotiation of the Amtrak Contract, *supra* note 18, at 69.

24. *Id.*

25. NRPC Agreement, *supra* note 22, § 4.2.

26. *Id.* § 5.1. This provided, *inter alia*, for a surcharge of 5% of the costs of service in lieu of undetermined "avoidable costs" which included compensation for use of the rail lines. Thus,

This represented a significant step forward since the railroads had originally proposed that the cost of all maintenance-of-way, including upgrading or improvement, be at the sole expense of Amtrak and that upgrading or improvement be permitted only if it did not interfere with or impair other operations of the contracting railroad.[27] The Incorporators, on the other hand, believed that the costs of additional maintenance relating to upgrading or improvement should be allocated between passenger and other services, and that Amtrak should have the right to make improvements on its own initiative.[28] The railroads rejected both these suggestions.[29] However, a further compromise was reached which permitted Amtrak to require a contracting railroad to modify or improve its rail lines, at Amtrak's expense, to the extent that the cost of modification and the cost of additional maintenance resulting from improvement was not otherwise reimbursed under the cost/payment provisions of the contract.[30]

C. *Access to Jointly-Owned Tracks*

Lack of time prevented the Incorporators from negotiating separate agreements to deal with problems peculiar to joint trackage and joint terminals. Accordingly, for an interim period between May 1, 1971 and July 1, 1973, Amtrak agreed to pay contracting railroads the costs (exclusive of costs of ownership) reasonably and necessarily incurred by them under their existing contracts relating to joint terminals, as well as similar costs in connection with the use of joint trackage to the extent that it was solely related to intercity rail passenger service.[31]

With the approach of July 1, 1973, it became necessary for Amtrak to negotiate directly with the terminal companies for continued right of access to joint terminal tracks. In the case of the Washington Terminal Company and the St. Louis Terminal Company the parties were unable to reach agreement and applications were eventually filed with the ICC pursuant to section 402(a) of the Act.

In the Washington Terminal case[32] Amtrak filed its application on August 9, 1974, and the ICC issued its decision and order on July 30, 1975.[33] In the St. Louis Terminal case, Amtrak filed its application on July

there was no provision for payment of a fee or a return on investment in respect of such lines. *See also* Annual Report, *supra* note 7, at 5, in which the Incorporators estimated that even a minimum fee of 1% of the total estimated annual operating costs of $200 million would exceed, between May 1, 1971 and July 1, 1973, Amtrak's total start-up costs. A similar result would have been produced by a return on investment of 4-6%.

27. The Negotiation of the Amtrak Contract, *supra* note 18, at 71.
28. *Id.*
29. *Id.*
30. NRPC Agreement, *supra* note 22, § 4.3 and Appendix A.
31. *Id.* § 4.4.
32. Amtrak and Wash. Terminal Co., 348 I.C.C. 86 (1975).
33. In this decision the Commission stated, "In recognition of the 90 day time limit for a

3, 1975, and the ICC issued its decision and order on April 22, 1977.[34] The ICC effectively determined, in both cases, that Amtrak should be placed on an equal footing with other users of the respective facilities. While such a determination might have been predictable, it was one which Amtrak had strongly resisted in order to preserve the contractual principle under which Amtrak reimbursed a contracting railroad only for its share of direct terminal operating costs which were solely related to intercity rail passenger service.[35]

III. CONTRACTUAL ACCESS RIGHTS

A. *DISPUTES INVOLVING MISSOURI PACIFIC*

The Amtrak Improvement Act of 1973 required Amtrak to develop and operate international service between the United States and Mexico.[36] This involved instituting service from St. Louis via Little Rock, Texarkana, Dallas and Forth Worth to Laredo, Texas, to connect with National Railways of Mexico at Nuevo Laredo. Amtrak was already operating a basic system service between St. Louis and Kansas City pursuant to its NRPC Agreement with Missouri Pacific Railroad Company.[37] Amtrak requested Missouri Pacific to operate additional service from St. Louis to Laredo, pursuant to the terms of section 3.2 of the Agreement. Missouri Pacific refused on the grounds that a section of the route between Texarkana, Arkansas and Fort Worth, Texas, involved tracks owned by the Texas and Pacific Railway Company.[38]

The new international service was scheduled to commence on March 13, 1974, but planning and preparation between Amtrak and Missouri Pacific had begun eighteen months earlier.[39] On March 13,

responsive order to the application prescribed by section 402(a), a special modified procedure on an expedited basis has been followed." *Id.* at 87.

34. National R.R. Passenger Corp. and Terminal R.R. Ass'n of St. Louis, 348 I.C.C. 901 (1977). Unlike the Washington Terminal case, no lip service was paid to the 90 day time limit in this case.

35. *But see* NRPC Agreement, *supra* note 22, § 4.4 which provided that Amtrak would pay any increased allocation in joint terminal costs resulting from reduction in use of such terminals on May 1, 1971 and which also provided that while Amtrak was, in general, not to be liable for any of the costs of employee protection, it would pay such costs to the extent that they arose from any increase in the number of job positions in existence on April 30, 1971. *See also, In re* Risk of Liability—Jointly-Owned Terminals, NAP Case No. 15 (Mar. 5, 1974), in which the National Arbitration Panel (see note 42 *infra*) held that Amtrak should not be required to pay liability and insurance expenses assessed against the operating railroads by the Washington Terminal Company. This became moot when fifty percent of the stock of the Washington Terminal Company was transferred to Amtrak as part of the April 1, 1976 conveyance of Northeast Corridor properties (see note 8 *supra*). The remaining 50% is held by The Chessie System.

36. 45 U.S.C. § 545(e)(7) (Supp. V 1975).

37. *In re* Request for Additional Services, NAP Case No. 23 (Dec. 6, 1974).

38. *Id.*

39. *Id.*

1974, Missouri Pacific informed Amtrak that it would not provide the service requested between Texarkana and Fort Worth.[40] In order to protect the interests of passengers, Amtrak obtained a temporary restraining order from the United States District Court for the Western District of Missouri.[41] On the same day Amtrak filed a Demand for Arbitration before the National Arbitration Panel.[42] Thus, international rail service between the United States and Mexico was inaugurated. Pending arbitration, the service continued to be operated pursuant to a service order issues by the ICC[43] at the request of Amtrak under section 402(c) of the Act.[44]

In view of Missouri Pacific's reluctance to arbitrate, Amtrak combined with its request for a temporary restraining order a request for an order to compel arbitration.[45] This was denied by the District Court which was reversed on appeal to the United States Court of Appeals for the Eighth Circuit.[46] The latter remanded the case to the District Court for entry of an order to require arbitration.[47]

At a hearing before the National Arbitration Panel,[48] Amtrak argued that since Texas and Pacific was a wholly owned subsidiary of Missouri Pacific,[49] the tracks in question fell within the definition of rail lines in section 4.1 of the NRPC Agreement.[50] The National Arbitration Panel, however, found that Missouri Pacific's rail lines, as defined in section 4.1 of the Agreement, did not include the rail lines of Texas and Pacific and that Missouri Pacific was not required under the terms of section 3.2 of the Agreement to provide services to Amtrak over the latter.[51] Consequently, Amtrak filed an application under section 402(a) of the Act,

40. *Id.*

41. *Id.*

42. *Id.* The National Arbitration Panel (NAP) is a permanent tripartite panel established by agreement between Amtrak and its contracting railroads. Arbitration may be granted on demand of either party. One-half of the cost of maintaining the panel is borne by the contracting railroads jointly through the Association of American Railroads and one-half is borne by Amtrak.

43. I.C.C. Service Order No. 1179 (Mar. 21, 1974).

44. Section 402(c) authorizes the ICC to require a railroad to make tracks available if such action is deemed by the ICC "to be necessary in an emergency." 45 U.S.C. § 562(c) (Supp. V 1975).

45. NRPC v. Mo. Pac. R.R., 501 F.2d 423,425 (8th Cir. 1975).

46. *Id.* at 429.

47. *Id.*

48. *In re* Request for Additional Services, NAP Case No. 23 (Dec. 6, 1974).

49. At that time Missouri Pacific owned 96.5% of the stock of Texas and Pacific and the respective Boards of Directors had nine members in common. *See* Missouri Pac. Ry.—Merger—T&P and C&EI, 348 I.C.C. 414 (1976) in which the ICC authorized the merger of T&P into its parent company, Missouri Pacific Railroad Company.

50. Section 4.1 defines a railroad's rail lines as "all of its rights of way . . . which constitute its trackage, whether owned or leased or otherwise held, and all of its rights to use such properties of others. . . ."

51. *In re* Request for Additional Services, NAP Case No. 23 (Dec. 6, 1974).

requesting the ICC to fix just and reasonable compensation for services and use of tracks to be provided by Texas and Pacific.[52]

Relying on section 402(a) of the Act, Amtrak argued before the Commission that Texas and Pacific was entitled only to the incremental costs of providing service, including the use of tracks and facilities.[53] Texas and Pacific, on the other hand, argued that "just and reasonable" compensation under the Act must include all the costs of providing services, compensation for use of its property and a reasonable profit.[54] Texas and Pacific, therefore, submitted proposed compensation figures related to train and engine crew wages, crew meals and lodgings, fuel, equipment inspection and servicing, station maintenance and utilities, track and roadbed maintenance, train movement service, supervision, property taxes, station rent and return on investment.[55] After considering both arguments the Commission arrived at a series of compromise figures.[56]

B. Union Pacific

In a more recent case, Amtrak and the Union Pacific Railroad Company jointly applied to the ICC under section 402(a) of the Act for an order to fix just and reasonable compensation to be paid by Amtrak for services, and use of tracks and fixed facilities to be provided by Union Pacific.[57]

This matter arose out of the renegotiation of Union Pacific's NRPC Agreement which had been amended in 1974 to modify the cost reim-

52. Amtrak and the Texas and Pac. Ry., 348 I.C.C. 645 (1976).

53. *Id.* at 646.

54. *Id.* at 649.

55. *Id.* at 653-55.

56. For Example, Texas and Pacific calculated its maintenance-of-way and structures expense at $3.58 per train-mile. Applying this rate to Amtrak's 6,448 train-miles per month, the railroad calculated Amtrak's share of that expense at $23,084 per month. Amtrak, on the other hand, took the weighted average maintenance-of-way cost per thousand gross ton-miles that it paid to its contracting railroads under amendments to its agreements with them, i.e., $0.2897 per gross ton-mile, and applied that figure to the 190,848 gross ton-miles generated per trip by Amtrak's train. This produced a figure of $55 per trip or $1,430 per month.

The ICC would not accept the Texas and Pacific figure "because it rests on the assumption that track and roadbed expenses for a line vary with the number of train-miles run over it." At the same time the Commission stated: "we are not inclined to accept Amtrak's figure either." The Commission then acknowledged that it was difficult to develop a generally applicable formula primarily due to lack of sufficient empirical data and the absence of scientific theory from which to equate track depredation to the myriad of independent variables which cause it. The Commission expressed the view that the most equitable figure was to be found by dividing Texas and Pacific's total cost of maintenance-of-way, amounting to $19,849,000, by its 1974 gross ton-miles of 21,073,519,000. This produced a cost per gross ton-mile of $0.0009417 which, multiplied by Amtrak's 190,848 gross ton-miles, resulted in a cost per trip of $179.72 or $4,673 per month based on 26 trips per month. *Id.* at 661.

57. National R.R. Passenger Corp. and Union Pac. R.R., 348 I.C.C. 926 (1977).

bursement provisions of the original 1971 Agreement.[58] In 1976, Amtrak proposed that incremental costs be determined through cost identification and standardized costs for billing in other words, flat-rating.[59] Union Pacific, however, asserted that it was entitled not only to incremental costs for services provided but also to incremental costs related to Amtrak's use of its tracks and other facilities, plus additional compensation based on the quality of service provided.[60]

With particular reference to track condition, Amtrak contended that maintenance-of-way expenses are not reimbursable costs under the NRPC Agreement. Asserting that this was a matter of interpretation under the Agreement, Amtrak requested the Commission to defer action on track maintenance costs pending a decision of the National Arbitration Panel,[61] which had been requested to confirm that it was Union Pacific's obligation under the Agreement to maintain the level of utility of its tracks at its own expense.[62]

Relying on the language of section 402(a) of the Act, the Commission took the position that any order which it might issue thereunder requiring the use of tracks by Amtrak must be conditioned upon payment of compensation fixed by the Commission. Therefore, it disregarded the pending arbitration and fixed the level of compensation in accordance with the formula developed in the Texas and Pacific matter discussed above.[63]

C. *OTHER CASES*

The question of access has also been the subject of disagreement and consequent arbitration between Amtrak and its contracting railroads on a number of other occasions. It has been held, for example, that a contracting railroad's obligation to provide service is limited to service

58. NRPC Agreement § 5.1 originally provided for reimbursement of "those [categories of] expenses described in Appendix A [of the Agreement] reasonably and necessarily incurred by Railroad which are solely for the benefit of Intercity Rail Passenger Service. . . ." A surcharge of 5% for "avoidable costs" not so included was allowed. *See also* note 26 *supra*. The 1974 agreement modified the reimbursement provisions and added incentive/penalty provisions.

59. 348 I.C.C. 926, 927 (1977).

60. *Id.* at 930-31.

61. *In re* Cost of Maintaining Level of Utility, NAP Case No. 39 (filed July 25, 1976).

62. 348 I.C.C. 926, 941-42 (1977).

63. *Id.* (the order, issued May 6, 1977, is attached but is unpaged). However, in response to a Petition for Reconsideration on June 15, 1977, the Commission, Fin. Docket No. 28165 (ICC Order, Div. 3, Aug. 24, 1977), modified its earlier Order to provide that no compensation would be payable by Amtrak unless Union Pacific obtained a favorable arbitration decision. In that event, compensation for track and roadbed maintenance would be payable in accordance with the guidelines contained in the ICC Order of May 6, 1977, 348 I.C.C. 926. *In re* Maintaining Level of Utility, NAP Case No. 39 (Sept. 8, 1977) (Order of Dismissal), states that Amtrak and Union Pacific "jointly moved for dismissal of the case on the ground that all the issues in dispute between them herein, have been settled."

over its own rail lines (as contractually defined) and does not extend to the lines of any other railroad.[64] Similarly, it has been held that a contracting railroad is not required to provide service even over its own lines if they are located outside the United States,[65] nor over the lines of an (essentially) wholly owned subsidiary.[66] However, a contracting railroad may be required to provide service over any of its rail lines, notwithstanding the fact that a particular line might not have been previously used for passenger service.[67]

IV. TRACK UTILITY—CONTRACTUAL AND REGULATORY INTERPRETATION

A. *NATIONAL ARBITRATION PANEL DECISIONS*

Section 4.2 of the NRPC Agreement provides that a contracting railroad shall maintain those of its rail lines used in Amtrak operations "at not less than the level of utility existing on the date of the beginning of such use." The National Arbitration Panel has held that this requires tracks to be maintained "in such a way as to allow the accomplishment of the agreed upon (i.e., May 1, 1971) schedules with a reasonable degree of passenger comfort."[68] The award in that case[69] therefore ordered the railroad in question, the Illinois Central Gulf, to make the necessary repairs at its own expense in order to restore the level of utility in conformity with the Panel's decision.[70]

In a companion decision in the same arbitration, the Panel reaffirmed those findings as to the Trustees of the Property of Penn Central Transportation Company and ordered that the Penn Central lines in question be restored by the Trustees.[71] However, the United States District Court for the Eastern District of Pennsylvania (the Reorganization Court) denied a petition by Amtrak to enforce the award.[72] This denial was affirmed by the United States Court of Appeals for the Third Circuit.[73] At the same time the Court of Appeals directed the Reorganization Court to "join the Consolidated Rail Corporation (Conrail) under Rule 719 and

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64. *In re* Commissary Consolidation, NAP Case No. 4 (Oct. 24, 1972).

65. *In re* Canadian Border—Vancouver, Canada Service, NAP Case No. 14 (Jan. 17, 1973).

66. *In re* Request for Additional Service, NAP Case No. 23 (Dec. 6, 1974). See text accompanying notes 48-51.

67. *In re* Chicago-Cincinnati Service, NAP Case No. 29 (Nov. 7, 1974).

68. *In re* Level of Rail Utility, NAP Case No. 11 (Dec. 4, 1974).

69. *Id.*

70. This award was confirmed, Misc. No. 74-23 (D.D.C. Mar. 11, 1975).

71. *In re* Level of Rail Utility, NAP Case No. 11 (Feb. 3, 1976).

72. *In re* Penn Cent. Transp. Co., 422 F. Supp. 67, 74 (E.D. Pa. 1976) In Order 238 the Reorganization Court had expressly stated that, in authorizing Penn Central to enter into the NRPC Agreement, the Court was reserving the right to review future arbitration decisions arising out of the Agreement. *In re* Penn Cent. Transp. Co., 560 F.2d 169, 175 (3d Cir. 1977). *See also, In re* Penn Cent. Transp. Co., 329 F. Supp. 477, 480 (E.D. Pa. 1971).

73. *In re* Penn Cent. Transp. Co., 560 F.2d 169 (3d Cir. 1977).

to proceed to the question of any enforcement of the arbitration Award or the claim on which it is based taking into consideration any defenses that may be raised by the trustees [of Penn Central] in accordance with the opinion of this Court."[74]

B. ICC Track Standards

In July of 1974, the ICC instituted a rulemaking proceeding to develop federal regulations governing track standards for carriers providing intercity rail passenger service.[75] This action was pursuant to section 801 of the Rail Passenger Service Act, as amended in 1973, which provides that: "The Commission shall promulgate, within 60 days [from November 3, 1973], and shall from time to time revise such regulations as it considers necessary to provide adequate service, equipment, tracks, and other facilities for quality intercity rail passenger service. . . ."[76]

The notice of proposed rulemaking announced that the proceeding would comprise two parts. First, the ICC would establish a track standard which would require the restoration of intercity track used in rail passenger service to the level existing on May 1, 1971, the date on which Amtrak began its operations.[77] Second, the ICC would establish higher track standards for certain corridors in order to permit high-speed passenger operations in excess of 110 miles per hour.[78]

1. Track Maintenance—Minimum Standards

In determining the form of the regulation requiring track to be maintained at the May 1, 1971 level, the principal issue was whether to adopt the language of the National Arbitration Panel in defining the term "level of utility" (as used in the NRPC Agreement), or to adopt alternative language proposed by the contracting railroads. The Panel, having

74. *Id.* at 179. Under the provisions of the Regional Rail Reorganization Act of 1973 and the Railroad Revitalization and Regulatory Reform Act of 1976 the Consolidated Rail Corporation acquired the rail properties of Penn Central Transportation Company, with transfer effective April 1, 1976. The Northeast Corridor portion of the properties were simultaneously reconveyed to Amtrak. *See* note 8 *supra*.

75. Adequacy of Intercity Rail Passenger Service— Track, Ex Parte No. 277 (Sub. No. 2) (July 3, 1974).

Statements of position were filed by the United States Department of Transportation, the Departments of Transportation of the State of New York and the Commonwealth of Pennsylvania, the Association of American Railroads, the Michigan Association of Railroad Passengers, the National Association of Regulatory Utility Commissioners, and by Amtrak and eighteen railroads which either provide services, tracks and facilities to Amtrak or provide their own intercity rail passenger service.

76. Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548 (codified at 45 U.S.C. § 641(a) (Supp. V 1975). *See also* note 92 *infra*.

77. Adequacy of Intercity Rail Passenger Service—Track, *supra* note 75, at 5-6.

78. *Id.* at 6-7.

decided that level of utility "is reflected and embodied in the schedules agreed upon,"[79] held that the contracting railroad must maintain its rail lines "in such a way as to allow the accomplishment of the agreed-upon schedules with a reasonable degree of regularity and with a reasonable degree of passenger comfort."[80] The contracting railroads argued that this definition was "neither objective nor reasonably ascertainable,"[81] and proposed that the Commission require the railroads to maintain their tracks "so as to permit a similar train, under similar circumstances, to complete a run between terminals in the same elapsed time now as it would in 1971."[82]

The Commission found the Panel's definition to be more reasonable. They expressly stated that they did not intend to disturb the decisions and awards of the Panel with respect to Penn Central and Illinois Central Gulf, nor to interfere with the operation of the NRPC Agreement or its arbitration provisions.[83]

In adopting the Panel's definition of level of utility for incorporation in its regulations, the Commission expressed its expectation that in any enforcement proceedings under its new trackage regulations, slow orders[84] in effect on May 1, 1971 and at the time of such proceedings would be relevant considerations for the Commission.[85] The Commission also decided to retain the Panel's reference to reasonable passenger comfort, noting that while it might not be readily determinable, adherence to schedules would be of small consolation to a passenger without it. At the same time, the Commission made it clear that it would turn a jaundiced eye on any hair-splitting discussion of the matter in future enforcement proceedings.[86]

2. Track Maintenance—High Speed Standards

The ICC did not issue regulations governing high-speed corridor operations, apparently on the grounds that the promulgation of such regulations would be a significant federal action within the meaning of the National Environmental Policy Act of 1969.[87] In deferring such action

79. Adequacy of Intercity Rail Passenger Service— Track, 348 I.C.C. 518, 572 (1976).

80. *Id.*

81. *Id.*

82. *Id.* at 573.

83. *Id.* at 574. Even if the proposed alternative definition had been adopted, Amtrak would still be free to pursue its contractual remedy of arbitration in the event that it believed the May 1, 1971 level of utility was not being maintained.

84. A "slow order" is a term of art referring to a reduction in the maximum permissible speed on a given stretch of track imposed either by the operating railroad or by a regulatory authority for reasons of safety.

85. 348 I.C.C. 518, 574 (1976).

86. *Id.*

87. *Id.* at 575.

indefinitely, the ICC also commented that the question of high-speed service is "inevitably a political one."[88] The Commission referred to the tortuous course of passage of the Railroad Revitalization and Regulatory Reform Act of 1976[89] which provides $1.6 billion for upgrading of the Northeast Corridor for high-speed service.[90] Describing this as a compromise figure which was adopted only with considerable difficulty, the Commission expressed the opinion that the cost of upgrading the entire Washington-Boston corridor to permit speeds of 110 m.p.h. might not be possible without the expenditure of many hundreds of millions of dollars more.

V. THE CLOUDED FUTURE OF TRACK ACCESS AND UTILITY

The problems of track access and utility have not yet been fully addressed by Congress from the perspective of the needs of a national rail passenger system. Nevertheless, under the Railroad Revitalization and Regulatory Reform Act of 1976 the Secretary of Transportation is required to conduct a comprehensive study of "the American railway system."[92] This is to include "a showing of the potential cost savings and of possible improvements in service quality which could result from

88. *Id.* at 571.

89. Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified at 45 U.S.C.A. §§ 801-854 (West 1972 & Supp. 1977)) *See generally* Adams, *Railroad Revitalization and Regulatory Reform Act of 1976—An Interim Review*, 32 BUS. LAW. 975 (1977).

90. 45 U.S.C.A. § 854(a)(1) (West 1972 & Supp. 1977).

91. 348 I.C.C. 518, 571-72 (1976). The Commission also expressed the opinion that the Northeast Corridor, being the most suitable for high speed operations, was likely to be the first one in the country to be so developed. Other corridors, it was thought, would probably be developed only for lower maximum speeds "most likely DOT class 4 or 5." *Id.* This would presumably be Federal Railroad Administration (FRA) class 4 or 5. *See* 49 C.F.R. § 213.9 (1976). The regulations provide for the following maximum allowable operating speeds, so long as all prescribed engineering requirements are met:

	Freight Trains	Passenger Trains
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

Id. § 213.9(a). *See also* INTERSTATE COMMERCE COMMISSION'S REPORT TO THE PRESIDENT AND THE CONGRESS: EFFECTIVENESS OF THE RAIL PASSENGER SERVICE ACT 6 (1977) [hereinafter cited as ICC REPORT TO THE PRESIDENT], which states:

> Since the costs of improvements to above the May, 1971 level are the responsibility of Amtrak and thus ultimately the Federal Government's, the Commission declined further formal action at the time, pending Congressional resolution of the major policy and financing questions entailed in the numerous expenditures involved in such an upgrading program.

92. Pub. L. No. 94-210, § 901, 90 Stat. 31 (1976). The Rail Services Planning Office of the ICC is also conducting a study "with a view toward developing a program for further long term upgradings in accordance with section 801 of the Rail Passenger Service Act." See ICC REPORT TO THE PRESIDENT, *supra* note 91, at 6 (in footnote).

restructuring the railroads in the United States"[93] and "an assessment of the extent to which common or public ownership of fixed facilities could improve the national rail transportation system."[94] In addition, the Rail Rehabilitation Act of 1977 has been introduced in the House.[95]

In view of the fact that Congress has allotted a period of two years, beginning February 5, 1976, for the Department of Transportation to conduct the above study,[96] it seems unlikely that early action will be taken on the pending bill. However, because the study will address the possibility of common or public ownership of fixed facilities, it may be of interest to review the principal provisions of the proposed act.

A. *The Proposed Rail Rehabilitation Act*

In its declaration of findings and purpose the bill holds "that modern, efficient rail service is essential to interstate commerce and to national defense; that the international energy crisis requires more intensive use of fuel-economic freight and passenger trains; that better utilization of existing rail rights-of-way is more compatible with the environment . . . than . . . expansion of facilities for other modes of transportation; that many railroad tracks and roadbeds have greatly deteriorated in recent years [resulting in] inferior railroad transportation for both freight and passengers . . .;[97] that rehabilitation of tracks and roadbeds will provide substantial public benefits through improved rail freight and passenger service; that both the efficiency and quality of railroad service and the economic utilization of the railroad plant can be improved by freer access by rail carriers to rail lines and facilities they do not own."[98]

1. *Development of an Interstate Railroad System*

In order to achieve the purposes of the proposed act, the Secretary of Transportation would be authorized to designate an Interstate Railroad System. This would be administered by a new agency to be created within the Department of Transportation and named the Federal Rail Property Administration. With certain specified exclusions the Interstate Railroad System would initially encompass all rail lines operated by

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93. Pub. L. No. 94-210, § 901(1), 90 Stat. 31 (1976).

94. *Id.* § 901(4).

95. H.R. 8819, 95th Cong., 1st Sess., 123 Cong. Rec. H 8775 (daily ed. Aug. 5, 1977) (referred to Committee on Interstate and Foreign Commerce).

96. Pub. L. No. 94-210, § 901, 90 Stat. 31 (1976).

97. An indication of the magnitude of the problem may be found in an ICC report on deferred maintenance and delayed capital improvements issued during the month of March, 1977. This report stated that a survey of more than 48,000 miles of track found slow orders as low as 5-10 m.p.h. in effect; that more than 4.6 million tons of rail required replacement; that more than 47.5 million new crossties were needed; and that more than 210 million board-feet of bridge and switch ties are over age.

98. H.R. 8819, *supra* note 95, § 101.

railroad companies within the United States on the date of enactment. Also included would be all rail lines owned, leased or otherwise controlled by domestic railroad companies and which are out of service on the date of enactment except lines abandoned or taken out of service pursuant to the Interstate Commerce Act. In addition, lines outside the United States which are operated by a railroad company that operates primarily within the United States would be included if they are deemed essential to the System by the Secretary of Transportation.[99]

The bill specifies the information which is to be provided to the Secretary within ninety days of enactment by all rail carriers,[100] and time schedules are provided for the development of an Initial System,[101] an Intermediate System,[102] and a Final System.[103] Following their designation by the Secretary, the Initial and Intermediate Systems would each be the subject of public hearings conducted by the Rail Services Planning Office of the ICC. Thereafter, the Secretary would designate the Final System which would be deemed approved by Congress unless disapproved by either House within sixty days. In the latter event provision is made for submission of a Revised System.[104] However, assuming approval on the first submission, the minimum period in which the Final System could become effective would be a little less than twenty-two months following the date of enactment of the proposed act. It may be noted in passing that notwithstanding any changes which may be made during the process of designating the Final System, the System must include rail lines conveyed to Consolidated Rail Corporation (ConRail) and to Amtrak on April 1, 1976 pursuant to the Regional Rail Reorganization Act of 1973.[105]

2. Rehabilitation and Maintenance

The Secretary of Transportation would also be required to develop and publish a program of rehabilitation, capital improvements and maintenance (including future maintenance standards) for all rail lines in the System.[106] The entire program would be required to be scheduled for

99. *Id.* § 202.

100. "Rail carrier" includes any railroad company; mail express, or less-than-carload rail freight carrier; state, regional or local transportation agency; the National Railroad Passenger Corporation; and any other private rail passenger carrier. *Id.* § 102(10).

101. *Id.* § 202(c).

102. *Id.* § 205(a).

103. *Id.* § 208(a).

104. *Id.* § 208(d).

105. *Id.* § 210.

106. *Id.* § 209(a). Section 205(a) designates the following future maintenance standards:

1. Rail lines with *no* overhead traffic (i.e., freight traffic carried over a line on which it neither originates nor terminates):
   10 miles or less in length—FRA Class I

completion within twelve years from the date of enactment[107] with the costs of rehabilitation and capital improvements to be borne by the proposed Federal Rail Property Administration.[108]

Within three years of enactment, the Secretary of Transportation and the Secretary of the Army would be required jointly to undertake a study of the long-term capital needs for modernization of signal systems, line relocation, tunneling, highway grade crossing elimination, electrification and other major upgrading of the System. A full report would then be made with recommendations for appropriate "legislative, administrative and other action."[109]

3. The Final System

Upon approval of the Final System, railroad companies[110] would be permitted to transfer to the proposed Federal Rail Property Administration, and the Administration would be authorized to acquire, rail lines and other transportation property within the System.[111] The Administration would then be authorized to lease such property back to the former owning railroad for a maximum term of twenty-five years, subject to renewal upon certification of fitness by the ICC.[112] Such leases would provide, *inter alia*, for payment of a user charge[113] and for maintenance by the leaseholding railroad in accordance with Federal Rail Property Administration standards, subject to a fine of $1,000 per day per mile of track improperly maintained.[114]

The leaseholding railroad would, in general, have exclusive operating rights,[115] except that the terms and conditions of existing agreements

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between 10 and 50 miles in length—FRA Class II
50 miles or more in length—FRA Class III

2. Rail lines *with* overhead traffic: highest speeds operated at anytime since January 1, 1935
3. Rail lines longer than 10 miles and more than 10 million gross ton miles—FRA Class IV
4. All lines with more than 20 intercity passenger trains—FRA Class IV
5. Boston, Mass.—Washingtin D.C. Corridor—150 m.p.h.
6. More than 2 intercity passenger trains—FRA Class III

See also note 91 *supra*.

107. *Id.* § 209(b).

108. *Id.* § 304.

109. *Id.* § 209(c)—209(d).

110. "Railroad company" means any class I or class II railroad, including the Consolidated Rail Corporation and switching and terminal companies, as designated by the Interstate Commerce Commission and subject to Part I of the Interstate Commerce Act, together with all subsidiaries, affiliates and leased lines of such railroads. *Id.* § 102(12). A class I railroad is a carrier having annual railway operating revenues of $10 million or more. A class II railroad has less than $10 million. 49 C.F.R. § 1201(1-1) (1976).

111. H.R. 8819, *supra* note 95, § 302(a).

112. *Id.* § 302(b).

113. *Id.* § 302(b)(3) and § 402.

114. *Id.* § 302(b)(4) and § 305.

115. *Id.* § 302(b)(1).

for joint usage of rail properties would remain in force, unless terminated by mutual consent of the parties with the concurrence of the Federal Rail Property Administration.[116] In addition, the Administration would be empowered to grant bridge traffic rights subject to payment of a user fee by the bridge railroad to the leaseholding railroad.[117] The Administration would also be empowered to grant operating rights to Amtrak or to a state, regional or local authority for the operation of passenger service over leased lines so long as such operation "does not materially impair the operations of the leaseholding railroad."[118] Furthermore, although the Administration "may specify operating rules to give passenger trains priority over freight trains *when appropriate*"[119] it must require the grantee to make full compensation to the leaseholding railroad "for all costs resulting from the operation of . . . passenger service . . . including the cost of delays to freight trains because of the passenger train operations."[120]

B. *Analysis of the Proposed Rail Rehabilitation Act*

Although one of the principal purposes of the proposed act is to improve rail freight and passenger service by providing operators with easier access to rail lines and facilities which they do not own, the act appears to preserve the present inferior status of passenger service. First, where the leaseholding railroad is primarily a freight operator (as is likely to be the case in most instances), the Administration must satisfy itself that a grant of operating rights to a passenger operator will not materially impair freight operations. Second, even when such a determination is made, passenger trains are to have no priority over freight trains as of right but only "when appropriate." Thus, the act fails to provide, unequivocally, that the comfort and convenience of people shall take precedence over the shipment of freight. Furthermore, even if given priority, it is clear that passenger trains over most of the national route system would be limited to sixty miles per hour maximum speed, with only the most heavily used tracks capable of supporting speeds of up to eighty miles per hour.[121] Third, the unlimited reimbursement provisions permit the leaseholding railroad, in effect, to determine the costs of operation of passenger service. In the case of Amtrak this will, in turn, directly affect the level of federal subsidy.

116. *Id.* § 302(b)(7)(A).

117. *Id.* § 302(b)(7)(B). "Bridge traffic" means any traffic carried by a railroad which neither originates nor terminates on the railroad, but is received from and delivered to another carrier for further movement. *Id.* § 102(4).

118. *Id.* § 302(b)(7)(B).

119. *Id.* (emphasis added).

120. *Id.* § 302(b)(7)(C).

121. *See* note 106 *supra*.

VI. Conclusion

Amtrak's operating rights over the lines of the operating railroads, and the compensation which it must pay those railroads, is governed by contractual terms negotiated and renegotiated since 1971 and interpreted, defined, and confirmed by numerous arbitration and judicial decisions and ICC determinations. The process has been complex, difficult, and costly. The tendency of some of the operating railroads to construe their contractual obligations narrowly in an effort to limit or restrict Amtrak's right to operate over their tracks is a constant factor. Experience in the cases referred to above indicates that although disputed access can be obtained through the ICC under section 402(a) of the Rail Passenger Service Act if it is "necessary to carry out the purposes" of the Act, or under section 402(c) if access is required in order to meet an emergency, the cost is high in both time and money.

In addition, the question of developing and paying for improved track which would be superior to the May 1, 1971 level of utility remains largely unresolved. It is interesting to note that while the ICC took no action to regulate track standards for high-speed operations in its 1976 rulemaking proceedings, it made pointed reference to the provisions of the NRPC Agreement which permit Amtrak to request track upgrading beyond the May 1, 1971 level at its own expense.[122] Equally significant are the Commission's comments on the political nature of the question and its views on the considerable cost of developing high-speed tracks.[123]

The proposed Rail Rehabilitation Act of 1977 appears to be a modest attempt to address the problems of access and level of track utility. To the extent that the proposed Interstate Railroad System might permit, the national rail passenger system would obtain access to the necessary rail lines by federal grant of operating rights rather than by contractual negotiation. At the same time, the condition of such rail lines would be rehabilitated and improved at public expense, thus enabling improved passenger service to be provided. However, this would be allowed only to the extent that it did not interfere with the movement of freight,[124] and if movement occurred at relatively moderate speeds.[125] On the other hand, the proposed act, as presently drafted, requires the payment of full compensation to the leaseholding railroads for all costs resulting from the operation of passenger service, including the cost of

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122. Adequacy of Intercity Rail Passenger Service—Track, 348 I.C.C. 518, 571-72 (1976).

123. *See* notes 88 & 91 *supra*.

124. *See* note 120 *supra*.

125. *See* notes 91 & 106 *supra*. Except in the Boston, Mass.—Washington D.C. corridor, the proposed act does not provide for any track of FRA class 6 level which permits maximum speeds of 110 m.p.h. Modern rolling stock, of which Amtrak's Turboliners and Metroliners are examples, are capable of speeds significantly in excess of 110 m.p.h.

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any resultant delays to freight trains. Thus, the act would tend to negate existing Amtrak contracts and raise the spectre of renewed uncertainty by exposing Amtrak, once again, to interminable argument and negotiation with the operating railroads as to what elements of cost may be properly included in "full compensation." This would be likely to lead to increased cost of operation and increased need of federal subsidy. Rather than providing for such broad and unlimited compensation, the proposed act should provide that operating rights granted to passenger operators, like those to be granted to bridge railroads, be subject to a fixed user charge. A middle ground might be found in those cases where a leaseholding railroad's own operating rights were subject to an existing agreement for joint usage. In such cases the compensation to be paid by the passenger operator pursuant to such contract would govern.

The anomaly referred to at the outset—that of attempting to fulfill a statutory obligation by contractual means—would be partially removed by the proposed act to the extent that the national rail passenger system would obtain statutorily assured operating rights. However, it would also have the contradictory effect of creating a further anomaly in which the operating costs of the system would be, to some extent, determined by leaseholders of federal property. Thus, it remains to be seen whether the fundamental problem of track availability and condition can be resolved by adding yet another regulatory layer to those which already exist.[126] A national rail passenger system needs modern well-maintained roads on which to run if it is to provide modern, efficient, fast, and comfortable service just as the highly developed and generally efficient truck and bus transportation systems do. Like trucks and buses, its access to such roads should be certain, economically acceptable, and provide no lesser priority of movement.

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126. These regulatory layers consist of the congressional transportation committees, the various agencies and offices of the Department of Transportation and the Interstate Commerce Commission, the congressional appropriations committees, the Office of Management and Budget and the General Accounting Office.