

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-222323

**DATE:** April 24, 1986

**MATTER OF:** Railroad Rehabilitation and Improvement Fund--  
Authority to Issue Fund Anticipation Notes

- DIGEST:** 1. Fiscal year 1986 funds appropriated to the Treasury Secretary to purchase Fund Anticipation Notes used to finance the Department of Transportation's Redeemable Preference Share Program, are available to buy Notes and thus continue the rail improvement projects financed under the Program in 1986, despite the expiration of the Program's organic authority on September 30, 1985. A specific appropriation for an expired program provides a sufficient legal basis to continue that program, absent a contrary expression of congressional intent. 55 Comp. Gen. 289 (1975).
2. Unobligated balances in the Rail Fund lapsed under the provisions of the 1984 DOT appropriation act, but obligated balances remain available to liquidate outstanding obligations.

The General Counsel of the Department of Transportation (DOT) requested our legal opinion on the Secretary of Transportation's authority to issue and sell Fund Anticipation Notes (Notes) to finance the Redeemable Preference Share Program (Program) in fiscal year 1986. The question arises in the context of an apparent conflict between the Program's enabling act, which expired on September 30, 1985, and the fiscal year 1986 DOT Appropriations Act, which provided new 1986 funds for the purchase of Notes and authority to use the proceeds of the sale of Notes for the Program. For the reasons explained below, we conclude that the Secretary is authorized to issue and sell Notes, despite the expiration of the Program's organic authority. We also considered a related issue on the status of prior year funds and conclude that obligated balances remain available to carry out the projects for which they were originally obligated.

The funds in question were proposed for rescission in the Special Message transmitted to the Congress on February 5, 1986. Since the Congress did not approve the proposed rescission within 45 days, the funds must now be released. 2 U.S.C. § 683 (1982).

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### MECHANICS OF THE PROGRAM

The Secretary of Transportation administers the Railroad Rehabilitation and Improvement Fund (Rail Fund) to provide financial assistance to marginal railroads. The Rail Fund is capitalized in several ways including the use of Fund Anticipation Notes, a kind of promissory note. As needed, Congress appropriates money to the Secretary of the Treasury to purchase these Fund Anticipation Notes. The Secretary of Transportation then issues the Notes, sells them to the Treasury and deposits the proceeds in the Rail Fund. The Rail Fund provides financial assistance to railroads by purchasing a special class of preferred stock, called "Redeemable Preference Shares," from the railroads. The shares are deposited in the Rail Fund and held until repurchase by the issuing railroad on an agreed date. The Secretary of Transportation will eventually repay the Treasury on the original Notes with either the repayments on redemption, or with funds raised by issuance of Fund Bonds (if statutorily authorized at a later date). Appropriations may also be provided in the future for the purpose of satisfying the Notes. This whole procedure constitutes the "Redeemable Preference Share Program." 45 U.S.C. §§ 822, 825-27, and 829 (1982).

Issuance of the Fund Anticipation Notes is authorized by 45 U.S.C. § 827(a) which provides:

"The Secretary shall, until September 30, 1985, issue and sell, and the Secretary of the Treasury until such date shall, to the extent of appropriated funds, purchase Fund anticipation notes in an aggregate principal amount of not more than \$1,400,000,000 \* \* \*."

A bill extending the September 30, 1985, expiration date for 2 years passed the House on September 5, 1985, but was tabled.<sup>1/</sup>

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<sup>1/</sup> 131 Cong. Rec. H7285 (daily ed. Sept. 5, 1985). This program has been extended five times since its inception in 1976. Four out of the five renewals have been late. See, e.g., Pub. L. No. 97-468, signed on January 14, 1983, extending the September 30, 1982, expiration date and the fiscal year 1983 appropriation act, Pub. L. No. 97-369, signed on December 18, 1982, providing \$5 million in "new money" for the expired program during the fiscal year already in progress.

The purchase of these Notes by the Treasury is authorized by 45 U.S.C. § 829(a) which provides:

"There is authorized to be appropriated to the Secretary of the Treasury for the purposes of the Fund not to exceed \$1,400,000,000 and the Secretary of the Treasury is authorized and directed to purchase, from time to time, prior to September 30, 1985, from the Secretary, out of such moneys in the Treasury as are appropriated under this sentence, Fund anticipation notes \* \* \*."

Use of funds derived from the sale of Notes was made further contingent on prior approval in an annual appropriations act. Id. To satisfy this latter requirement, DOT appropriation acts have always contained both an authorization to use the Rail Fund and appropriations to the Secretary of the Treasury to purchase the Notes. The 1986 act is no exception. The Department of Transportation and Related Agencies Appropriations Act, 1986, Pub. L. No. 99-190, 99 Stat. 1185, 1280 and 1284 contained the following language authorizing use of the Rail Fund and appropriating funds for the purchase of Notes:

"Redeemable Preference Shares

"Notwithstanding any other provision of law, the Secretary of Transportation is hereby authorized to expend proceeds from the sale of fund anticipation notes to the Secretary of the Treasury and any other moneys deposited in the Railroad Rehabilitation and Improvement Fund pursuant to sections 502, 505-507, and 509 [45 U.S.C. 822, 825-27 and 829] of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210), as amended \* \* \* for uses authorized for the Fund, in amounts not to exceed \$33,500,000."; and

**"DEPARTMENT OF THE TREASURY**

**"Office of the Secretary**

**"Investment In Fund Anticipation Notes**

"For the acquisition, in accordance with section 509 of the Railroad Revitalization and Regulatory Reform Act of 1976, as amended, \* \* \* of fund anticipation notes, \$33,500,000."

The Chief Counsel of the Federal Railroad Administration (FRA) analyzed the enabling language and the appropriations act language and concluded that the authority provided in the appropriations act was insufficient to justify continuation of the Redeemable Preference Share Program beyond the expiration date in the enabling act. We disagree.

#### EFFECT OF AN APPROPRIATION

It is a well-settled rule of appropriations law that when Congress has appropriated funds for a program whose authorization has expired there is sufficient legal basis to continue the program, absent an expression of congressional intent to the contrary. 55 Comp. Gen. 289 (1975); B-137063, May 21, 1966; B-171019, June 29, 1976.

The rule was explained in 55 Comp. Gen. 289, in which we considered a similar situation. The enabling act for the School Breakfast Program expired on June 30, 1975. The continuing resolution for fiscal year 1976 appropriated funds to the Agriculture Department for general food programs "and the School Breakfast Program." Meanwhile, a bill extending the authorization for the School Breakfast Program had passed, but experienced major delays at the conference and would not be completed until well into the fiscal year, if at all. On these facts, we held the School Breakfast Program should continue for as long as the continuing resolution was in effect, whether the authorization was signed during that period or not.

Our rule draws on two other established principles. First, a prior authorization act, although traditional, is not required by law to support each activity conducted with appropriations, although by reason of House and Senate Rules, the lack of a prior authorization act may give rise to a point of order which, if sustained, may defeat the proposed appropriation. B-202992, May 15, 1981. No such challenge was upheld in the instant case, however. Second, since one Congress cannot bind a future Congress, the most recent expression of congressional intent (in this case the appropriation act) controls. In other words, a specific appropriation can become its own authorization when an authorization act is lacking.

Here Congress appropriated funds to the Secretary of the Treasury to purchase Notes, the initial action in the funding of the Redeemable Preference Share Program. The FRA Chief Counsel's Memorandum, which reached the contrary result, does not contest the Congress' intent to continue the program. It

simply concludes that although the act provided the "requisite appropriation language" to buy the Notes, this is "clearly distinguishable from the requisite program authorizing language."

In our view, the language in the appropriation act itself, which authorizes the Secretary of Transportation to "expend proceeds from the sale of fund anticipation notes to the Secretary of the Treasury," necessarily presupposes the issuance of Notes to the Treasury. Since unobligated balances in the Rail Fund apparently lapsed on September 30, 1985, authority to use the proceeds of the sale of Notes would be meaningless unless new sales were authorized with the newly appropriated funds. The Secretary could hardly use the proceeds of sales of Notes without first issuing and selling the Notes to obtain the proceeds. Moreover, the appropriation language incorporates by reference section 507 (45 U.S.C. § 827), the section of the organic act which authorized the Secretary to issue and sell Notes in the first place. While it is true that the organic act has expired, it is not unusual for subsequently-passed legislation to utilize a provision or authority contained in the expired act as a short-hand way of describing the purpose of the new appropriation. See, e.g., the School Breakfast Program, discussed, supra.

#### **AVAILABILITY OF PREVIOUSLY APPROPRIATED FUNDS**

As the FRA acknowledges, the 1984 DOT Appropriations Act authorized DOT to expend proceeds from Note sales obtained with appropriations made in previous years. We also agree with FRA that any such proceeds which were not obligated by September 30, 1985 must be considered to have lapsed. A lapsed appropriation cannot be revived by the use of the phrase "Notwithstanding any other provision of law," enacted several months after the funds in question are moribund.

We differ with FRA, however, about the fate of the amounts in the Rail Fund that were validly obligated prior to the September 30, 1985 expiration date. It is an elementary rule of appropriations law that obligated balances remain available to liquidate the obligation well beyond the period for which the appropriation is available to incur new obligations. See, e.g., B-212151, July 11, 1983. We cannot agree, therefore, that "the conclusion is inescapable that Congress intended the 1984 DOT Act to reach all unspent funds, whether unobligated or awaiting deobligation." It is true that had such funds been deobligated, they too would have lapsed after September 30, 1985. However, the funds in question have not

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been deobligated. Accordingly, we find that obligated prior year funds remain available to carry out the projects for which they were originally obligated.

**CONCLUSION**

Based on the foregoing, it is our conclusion that because the proposed rescission of these funds was not approved, the Secretary of Transportation must take action to draw on the funds in a timely and reasonable manner by issuing Fund Anticipation Notes.<sup>2/</sup>

*for*   
Comptroller General  
of the United States

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<sup>2/</sup> A sequestration of \$1.4 million under Pub. L. No. 99-177, 99 Stat. 1037 has reduced the amount available to \$32,059,000.