



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

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December 1, 1972

Dear Mr. Secretary:

Reference is made to letter of November 22, 1972, from Acting Secretary James M. Beggs, requesting our opinion as to the extent to which the Secretary of Transportation (Secretary) is authorized under the Emergency Rail Service Act of 1970, Public Law 91-663, approved January 8, 1971, 84 Stat. 1975, (act), to acquire trackage rights and equipment in order to provide essential transportation services.

The question regarding this matter is said to arise in the context of the reorganization proceedings of the Central Railroad of New Jersey (CNJ).

It is stated that pursuant to authority contained in section 3 of the act, the Secretary has guaranteed the issuance of trustee's certificates by CNJ, and as a condition of such guarantee, as required by section 3(b)(4), has obtained the option, in the event of actual or threatened cessation of essential transportation services by CNJ, to procure by purchase or lease trackage rights over the lines of the railroad and such equipment as may be necessary to provide such services.

Since it now appears possible that CNJ will not be successfully reorganized, your Department is considering the possibility of exercising the Secretary's option under 3(b)(4) of the act to purchase or lease trackage rights and equipment from CNJ and to provide for the continuance of its essential rail services. A question regarding such course of action arises, however, in that the act does not contain express authority to exercise the option nor does it specifically provide funds immediately necessary for the purchase or lease of trackage rights and equipment or for payment of operating expenses incurred in the rendition of essential rail services.

Specifically our opinion is requested as to whether the Secretary is authorized to exercise the option discussed above and, if so, whether there is any limitation on the amount of money that can be obligated to carry out the exercise of the option absent any appropriations by the Congress for that purpose.

PUBLISHED DECISION
52 Comp. Gen. _____

B-162502

Section 3(a) of the act authorizes the Secretary to guarantee certificates issued by trustees of any railroad undergoing reorganization under certain conditions including findings that cessation of essential transportation services would endanger the public welfare and that such cessation is imminent.

Subsection 3(b) provides in pertinent part that the Secretary, as a condition to such guarantee shall require that—

"(4) in the event of actual or threatened cessation of essential transportation services by the railroad, the Secretary shall have the option to procure by purchase or lease trackage rights over the lines of the railroad and such equipment as may be necessary to provide such services by the Secretary or his assignee, and, in the event of a default in the payment of principal or interest as provided by the certificates, the money paid or expenses incurred by the United States as a result thereof shall be deemed to have been applied to the purchase or lease price. The terms of purchase or lease shall be subject to the approval of the reorganization court and the operation over the lines shall be subject to the approval of the Commission pursuant to the provisions of section 5 of the Interstate Commerce Act, but in no event shall the rendition of services by the Secretary or his assignee await the outcome of proceedings before the reorganization court or the Commission."

Section 3(e) provides that the outstanding aggregate principal amount of all certificates shall not exceed \$125,000,000.

Funds needed by the Secretary to carry out his rights and responsibilities under section 3 are provided by section 5(a) whereby the Secretary is authorized to issue notes to the Secretary of the Treasury.

As stated by the Acting Secretary, there is hardly any discussion in the legislative history of the act to indicate that Congress intended to vest the Secretary with the authority to take over a railroad and operate it; the discussion being centered almost entirely on the loan guarantee provision. Also, as noted in the letter, although the \$125 million limitation in section 3(e) applies only to loan guarantees, and section 5(a), if applicable, places no limit on the amount of funds

which the Secretary would be authorized to expend in the exercise of his rights under section 3(b)(4), the legislative history is replete with discussions indicating the congressional intent to limit the Federal obligation under the act to \$125 million.

H.R. 19953, 91st Congress (which subsequently was enacted as the Emergency Rail Services Act of 1970), when introduced on December 14, 1970, contained no provisions such as those now contained in section 3(b)(4). Hearings were held on this bill by the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, on December 15, 1970. Members of that subcommittee were concerned that the bill contained no provision for Federal operation of a railroad in the event the railroad was unable to provide necessary transportation services. See pages 550, 567-570 of those hearings.

Apparently as a result of those hearings the subcommittee added the language in question when it reported the bill to the House on the following day, December 16, 1970. The House report accompanying the bill, No. 91-1770, which also includes the minority views, contains no explanation as to what was intended by the added section 3(b)(4). However, we feel confident that if authority for such drastic action as the taking over and the operation of a railroad were intended thereby without further congressional action, such intent would have been specifically stated in the report or elsewhere in the legislative history.

The related Senate Report No. 91-1510, page 12, merely notes that-- "Subsection 3(b)(4) provides an option of direct action to ensure that essential service is continued." Nothing therein indicates that the Senate Committee on Commerce believed that the Secretary would be authorized to exercise such option without further congressional action. A different construction of the reference to section 3(b)(4) would, it seems, fly in the face of a statement on the same page of that report wherein, under the heading "COST," it is explained that--"The cost of preserving essential service as authorized by this act is limited to \$125,000,000 by section 3(e) of the legislation" which amount clearly refers only to the loan guarantees. (Underscoring supplied.)

Concerning the language of section 5(a) which, as stated above, authorizes the Secretary to issue notes to the Secretary of the Treasury to enable the Secretary of Transportation "to carry out his rights and responsibilities under section 3 of this Act," it is suggested that—

"* * * If Congress intended to provide the section 5(a) financing authority solely to enable the Secretary to honor the guarantees, it is difficult to understand why it provided in section 5(a) a source of funds to carry out the Secretary's 'rights' as well as his 'responsibilities' under section 3. Arguably, these funds were provided for the exercise of section 3(b)(4) options necessary to continue essential rail services, as well as for honoring loan guarantees. Thus, section 5(a) of the Act is strong evidence supporting the proposition that Congress intended to vest authority in the Secretary to exercise the purchase or lease option. * * *"

Whatever the effect of the term "rights and responsibilities" might be, we believe the above argument must fail in that such term appeared in H.R. 19953 when originally introduced, before section 3(b)(4) was added thereto.

With respect to the last sentence of section 3(b)(4) the Acting Secretary suggests that such provision is designed to ensure that the exercise of the option not be delayed by judicial or regulatory proceedings and would not have been necessary if Congress had not contemplated that the option could be exercised without further congressional action.

We agree that, standing alone, the last sentence of section 3(b)(4) reasonably could be construed as suggested by you. However, when read in connection with the entire paragraph 4 and considering the legislative history discussed above, we believe such sentence does not permit the Secretary to exercise his option without further congressional action but rather that it merely directs the Secretary, following favorable action by the Congress, to exercise his option to take over and operate a railroad without waiting the outcome of the reorganization court or Interstate Commerce Commission proceedings. That is to say, section 3(b)(4) requires the Secretary to include in the guarantee as

B-162502

a condition thereof an option which would give him the right to procure by purchase or lease trackage rights and equipment as may be necessary to operate the railroad and—if otherwise authorized by law—to exercise the option and operate the railroad without awaiting the outcome of proceedings before the reorganization court or the Interstate Commerce Commission.

Accordingly, and as above-indicated, it is our view that the act provides no authority for the Secretary to exercise any option acquired thereunder.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

The Honorable
The Secretary of Transportation