GAO

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The Honorable John R. Kasich
Chairman, Committee on the Budget
House of Representatives

Dear Mr. Chairman:

This is in response to your letter of August 13, 1997, written jointly with Chairman Bud Shuster, requesting our opinion on several questions pertaining to the National Railroad Passenger Corporation (Amtrak). You asked whether any changes in law warranted altering our 1985 opinion (1) that the United States would not be liable for Amtrak's labor protection obligations in the event of a partial or complete discontinuance of passenger service, and (2) that Amtrak and its employees could not negotiate changes to existing labor protection arrangements without legislation. You also asked whether Amtrak and its employees could mutually agree to alter the current statutory restriction on Amtrak's contracting out of non-food service work. Finally, you asked whether Amtrak's pending non-labor protection liabilities would be attributable to the United States in the event of an Amtrak bankruptcy. We understand that your request was prompted, at least in part, by Amtrak's current precarious financial situation, exacerbated by the possibility of a strike this month by the Amtrak employees who maintain the tracks, bridges, buildings and other structures on Amtrak-owned rights-of-way.

As we pointed out in our 1985 opinion, B-217662, Mar. 18, 1985, legitimate differences of opinion exist with respect to questions about the rights and obligations of the United States in the event of an Amtrak bankruptcy. For the reasons stated below, we continue to believe (1) that the United States would not be liable for the labor protection obligations arising from a partial or complete discontinuance of passenger service, and (2) that modifications to Amtrak's labor protection obligations would require legislation. We also conclude that Amtrak labor and management are not free to alter the current restriction on Amtrak's contracting out of non-food service work. Further, we do not believe that the

United States would be liable for Amtrak's pending non-labor protection obligations in the event of a bankruptcy.[1]

In preparing this opinion, we formally solicited the views of Amtrak and the Departments of Justice and Transportation. We received written responses from Amtrak and the Department of Transportation. The Department of Transportation agrees with our opinion that the United States would not be liable for Amtrak's labor protection obligations and other debts, as well as our other conclusions. We have presented Amtrak's views in our discussion.

BACKGROUND

To prevent the complete abandonment of intercity rail passenger service following decades of declining passenger train usage, Congress passed the Rail Passenger Service Act of 1970. H.R. Rep. No. 91-1580, at 2-3 (1970), reprinted in 1970 U.S.C.C.A.N. 4735, 4736-7. The Act authorized the creation of the National Railroad Passenger Corporation (Amtrak) to provide intercity rail passenger service in an innovative manner so as to "fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements." Pub. L. No. 91-518 § 301, 84 Stat. 1327, 1330 (1970). Amtrak was incorporated under the District of Columbia Business Corporation Act and, under section 401(a) of the Rail Passenger Service Act, entered into contracts with existing railroads to relieve them of "their entire responsibility for the provision of intercity rail passenger service." See 84 Stat. at 1334.

Amtrak has a nine-member Board of Directors, consisting of the Secretary of Transportation who serves ex officio; five individuals appointed by the President, three with the advice and consent of the Senate;[2] two individuals selected by the Secretary of Transportation; and the President of Amtrak, who also serves as Chairman. 49 U.S.C. § 24302 (1994). Amtrak's common stock, authorized by 49 U.S.C. § 24304, is held by four private railroads. The Secretary of Transportation holds Amtrak's preferred stock, issued in amounts commensurate with the financial

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[1]Because consideration of Amtrak's labor protection obligations and other debts requires similar analysis, we consider the two issues together in the discussion that follows.

[2]One of the three appointees subject to Senate confirmation must be from a list of individuals recommended by the Railway Labor Executives Association, one must be from among the Governors of States with an interest in rail transportation, and one must be a representative of business with an interest in rail transportation. 49 U.S.C. § 24302(a)(1)(C)(i)-(iii). The two directors not subject to Senate confirmation are selected from a list of names submitted by commuter rail authorities. 49 U.S.C. § 24302(a)(1)(D).

assistance provided to Amtrak by the United States.[3] 49 U.S.C. § 24304(d). Amtrak is a rail carrier, which is operated and managed as a for-profit corporation. 49 U.S.C. § 24301(a)(1), (2). Amtrak is not a department, agency, or instrumentality of the United States Government. 49 U.S.C. § 24301(a)(3).

The Rail Passenger Service Act required Amtrak and existing railroads to assume certain labor protection responsibilities. Sections 405(a) and (b) of the act required contracts between Amtrak and the railroads to include "fair and equitable arrangements" to protect employees affected by a discontinuance of passenger service. 84 Stat. at 1337. Section 405(b) also required the Secretary of Labor to certify that such arrangements afforded railroad employees "fair and equitable protection." Id. Section 405(c) of the act made the substantive labor protection provisions of subsection (b) applicable to Amtrak, after commencement of operations in the basic system of intercity rail service, and contained a similar certification requirement. Id.

In April 1971, Amtrak tendered to all passenger railroads in the United States an identical contract, known as the "Basic Agreement," to relieve them of their obligation to provide passenger service. Appendix C-1 to the Basic Agreement contained protective arrangements for railroad employees, which were certified by the Secretary of Labor as "fair and equitable." In October 1973, the Secretary of Labor approved protective arrangements for Amtrak employees, which were designated as Appendix C-2 to the Basic Agreement. Among other things, Appendices C-1 and C-2 provide 1 year of salary protection for each year of prior service, up to a maximum of 6 years' pay, for employees affected by a discontinuance of passenger rail service.[4] Alternatively, employees may elect to receive a one-time lump-sum severance payment.

In a paper accompanying Amtrak's fiscal year 1996 grant request, Amtrak estimated the total maximum theoretical 6-year impact of labor protection obligations attributable to a discontinuance of passenger service at $6.9 billion.[5] The paper also

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[3]Amtrak receives operating and capital grants administered by the Federal Railroad Administration (FRA). Amounts for these grants are provided in the annual appropriation for the Department of Transportation and Related Agencies. See, e.g., Pub. L. No. 104-205, 110 Stat. 2951, 2963 (1996).

[4]Section 405(b) of the act required the arrangements for railroad and Amtrak employees to include provisions that were at least as protective as those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Id. The minimum level of labor protection under section 5(2)(f) was 4 years of salary protection. See 49 U.S.C. § 5(2)(f) (1970).

[5]Amtrak is in the process of revising this information using 1997 data.

stated that if all employees accepted the alternative one-time lump-sum in lieu of the multi-year payments, the cost would be approximately $1.1 billion.

Amtrak's paper also set out Amtrak's "pre-bankruptcy obligations." These obligations include postretirement health care benefits for Amtrak retirees; obligations under various outstanding debt instruments for locomotives, passenger and mail cars, stations, highway vehicles, office facilities, and equipment; lease obligations for facilities such as stations and offices; casualty and environmental obligations; refunds to passengers and others; and other debts to employees, contract railroads, and vendors, among others. The paper did not describe these obligations in detail and we have not reviewed them for purposes of this opinion. However, the paper states that Amtrak's obligations under various outstanding debt instruments have no federal guarantee.

DISCUSSION

Liability of the United States for Labor Protection Obligations and Other Debts

In our 1985 opinion, we stated that the United States would not be liable for labor protection obligations arising from a partial or complete discontinuance of service. Without repeating the detailed analysis, our opinion rested on essentially three premises. First, the Basic Agreement is a "private operating agreement between two corporations," and neither the Secretary of Labor nor the United States were parties to the Basic Agreement or anything contained therein. B-217662, supra at 4. Second, there has been no explicit or implicit commitment by the United States to ensure that affected employees receive labor protection benefits. Rather, by statute, Amtrak is not an instrumentality of the United States, and there are a number of cases in which courts have refused to treat Amtrak as a governmental entity. Id. at 5-7. Finally, the statutory language contradicts Amtrak's suggestions that the United States would be liable either because Amtrak incurred its labor protection obligations as an agent of the United States or because, as Amtrak's putative parent, the United States created Amtrak's labor protection obligations, controlled Amtrak's conduct, and left Amtrak insufficiently capitalized to meet those obligations. Id. at 8-10.

There have been no changes in statutory or decisional law that would undermine our 1985 opinion and lead us to alter its conclusions. To the contrary, as discussed below, changes in law since 1985 only confirm our view that it is within the capacity of Congress to insulate the United States from liability for the financial and contractual obligations of a statutorily created entity and that Congress has done so with respect to Amtrak.

In 1985, on the same day as we issued our opinion, the United States Supreme Court addressed the nature of the agreements between Amtrak and the railroads. In National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.,

470 U.S. 451 (1985), the Court considered constitutional challenges to statutory provisions requiring railroads that had been relieved of their passenger service obligations to reimburse Amtrak for the costs of providing free and reduced fare service to railroad employees. The Court held that neither the Rail Passenger Service Act itself nor the Basic Agreements were contractual obligations of the United States. Id. at 467-71. The Court stated that the Basic Agreements were not contracts between the United States and the railroads, but rather private contracts between the railroads and "the non-governmental corporation, Amtrak." Id. at 470.

The Supreme Court's decision thus supports our opinion that the United States would not be expressly liable for the labor protection obligations embodied in Appendices C-1 and C-2 to the Basic Agreements. However, Amtrak continues to argue that the United States would be liable for its labor protection obligations, as well as its other debts, by implication. In response to our request for its views, Amtrak asserts that as the putative parent and controlling shareholder of Amtrak, the United States likely would be liable for its labor protection obligations, as well as its other debts, under the common law principle of corporate law generally known as "piercing the corporate veil."[6] The essence of this argument is that the United States would be liable for Amtrak's obligations because Congress created Amtrak, required it to incur labor protection obligations and operate a losing business, and left it too thinly capitalized to meet its own obligations.

Decisions regarding statutorily created corporations make clear that the principles of common law applicable to private commercial entities advanced by Amtrak do not apply to the United States in this context. It is beyond dispute that courts have identified such corporations with the United States, and subjected the United States to liability for corporate transactions, where the corporations functioned as

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[6]Under this principle, those who engage in improper conduct amounting to an abuse of the corporate form lose the presumption of separateness that would ordinarily protect parent corporations from liability for the acts of their subsidiaries. A finding of fraud is not required for a parent corporation to lose the protection from liability associated with the corporate form; inadequate capitalization of the subsidiary has been an important factor. Anderson v. Abbott, 321 U.S. 349, 362 (1944). However, the decision to "pierce the corporate veil" may not rest on a single factor. DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681, 687 (4th Cir. 1976). Among the factors that courts have considered significant are (1) gross undercapitalization for the purposes of the corporate undertaking, (2) failure to observe corporate formalities, (3) non-payment of dividends, (4) the insolvency of the debtor corporation at the time, (5) siphoning of funds of the corporation by the dominant stockholder, (6) non-functioning of other officers or directors, (7) absence of corporate records, and (8) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. Id. at 685-7.

instrumentalities of the United States. However, statutory provisions governing the entities and their operations rather than principles of common law provided the bases for such decisions.[7] See, e.g., Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946) (concerning the Reconstruction Finance Corporation); Inland Waterways Corp. v. Young, 309 U.S. 517 (1940); Breitbeck v. United States, 500 F.2d 556 (Ct. Cl. 1974) (concerning the Saint Lawrence Seaway Development Corporation); Butz Engineering Corp. v. United States, 499 F.2d 619 (Ct. Cl. 1974) (concerning the United States Postal Service); National State Bank of Newark v. United States, 357 F.2d 704 (Ct. Cl. 1966) (concerning the Federal Housing Administration); Optiperu, S.A. v. Overseas Private Investment Corp., 640 F. Supp. 420 (D.D.C. 1986). Thus, cases relying on the analogous "piercing the corporate veil" analysis, though legion, are materially distinguishable from Amtrak's situation.[8] Amtrak does not address this distinction, but rather states that "it is difficult to see why the normal rules for holding parents liable should not be fully applicable." In our view, this distinction is key to determining whether the United States would be liable for Amtrak's labor protection obligations and other debts or, in other words, whether those obligations carry the "full faith and credit" of the United States.

Decisions addressing "full faith and credit" questions point to the significance of governing statutes and suggest that the United States would not be liable for Amtrak's labor protection obligations and other debts. Statutory language expressly pledging the credit of the United States is not required to create obligations of the United States. See 6 Op. Off. Legal Counsel 262 (1982) and cases cited therein. Rather, when Congress authorizes a federal agency or officer to incur obligations, those obligations are supported by the full faith and credit of the United States, unless the authorizing statute specifically provides otherwise. Id. at 264.

Clearly, the conclusion that particular obligations are supported by the credit of the United States requires a prior finding that the entity involved is a constituent part of the United States for purposes of the obligations at issue. For example, in 68 Comp. Gen. 14 (1988), we considered whether promissory notes and assistance guarantees issued by the Federal Savings and Loan Insurance Corporation in connection with the restructuring of failed savings and loan institutions were obligations of the United States backed by its full faith and credit. In concluding that the promissory notes and assistance guarantees were obligations of the United States backed by its full faith and credit, we observed that the Federal

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[7]In contrast to Amtrak, none of the entities in these cases were disassociated from the United States by statute.

[8]This analytical distinction reflects the fundamentally different functions of private corporations and Congress. Private corporations conduct activities designed to increase profits for the benefit of investors. Congress passes legislation designed to effect particular public policies subject to the constraints of the Constitution.

Savings and Loan Insurance Corporation was defined by statute as a corporate instrumentality of the United States and that Congress had not disclaimed liability for its obligations. Id. at 18. As noted earlier, Amtrak's organic legislation states quite the opposite: that it is not a department, agency, or instrumentality of the United States Government.[9] While neither the statute nor its legislative history refers specifically to Amtrak's financial obligations, such a broad disclaimer of agency status would appear to encompass responsibility for financial obligations.[10]

Further, the language in Amtrak's organic legislation suggests that, with respect to Amtrak, the United States has not renounced its own sovereign immunity so as to expose the Treasury to liability for Amtrak's obligations. To the contrary, the United States has expressly reserved its own immunity. In this regard, the Congress has the capacity to disassociate a statutorily created entity from the United States. In Butz Engineering Corp. v. United States, supra, the Court of Claims held that a contractor could sue the United States under the Tucker Act on a Postal Service contract. In concluding that the Postal Service was an instrumentality of the United States for whose actions the United States had renounced its own sovereign immunity, the court focused on several provisions in the Postal Service's organic legislation. Id. at 624-6. Among other things, the court emphasized that its organic legislation defined the Postal Service as "an independent establishment of the executive branch of the Government of the United States" (emphasis in original). Id. at 624. However, the Court also went on to state that:

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[9]As enacted, section 301 of the Rail Passenger Service Act provided that Amtrak "will not be an agency or establishment of the United States Government." 84 Stat. at 1330. In 1988, section 301 was amended to provide that Amtrak "will not be an agency, instrumentality, authority, entity, or establishment of the United States Government." See Pub. L. No. 100-342, § 18, 102 Stat. 624, 636 (1988). Explaining his amendment, which added only the word "instrumentality" to section 301, Senator Hollings stated that he wanted to "make clear" that Amtrak was not an instrumentality of the Federal Government for purposes of Internal Revenue Code provisions on tax exempt bonds. See 133 Cong. Rec. S3119 (daily ed. Nov. 5, 1987). The words "authority" and "entity" were apparently added in Conference. See H.R. Conf. Rep. No. 100-637, at 28 (1988), reprinted in 1988 U.S.C.C.A.N. 708, 717. The provision was simplified in connection with the 1994 recodification of the Rail Passenger Service Act. See 49 U.S.C. § 24301 nt.

[10]Of course, the United States may expressly guarantee otherwise private obligations. For example, as we pointed out in our 1985 opinion, section 602 of the Rail Passenger Service Act authorized the Secretary of Transportation to guarantee certain loans made to Amtrak. 84 Stat. at 1338. As added in 1972, section 602(b) provided that such guarantees were backed by the full faith and credit of the United States. Pub. L. No. 92-316 § 10(a), 86 Stat. 227, 232 (1972). Section 602 was repealed in 1992. See Pub. L. No. 102-533 § 7(c), 106 Stat. 3515, 3519 (1992).

> "Congress has shown it is capable of unequivocally cleaving a public service or corporation from all governmental nexus when it so desires. In establishing the Securities Investors Protection Corporation, for instance, the legislature bluntly directed that the corporation 'shall not be an agency or establishment of the United States Government * * *.'"

Id. See also T.O.F.C. v. United States, 683 F.2d 389, 393 (Ct. Cl. 1982) and Consolidated Rail Corp. v. Metro-North Commuter Railroad Co., 638 F. Supp. 350 (Regional Rail Reorg. Ct. 1986) (both emphasizing similar statutory language to find that the actions of Conrail could not be imputed to the United States).

Courts have repeatedly relied upon the explicit disclaimer of agency status in Amtrak's organic legislation to address assertions that Amtrak should be identified with the United States. For example, quoting the above cited language from Butz, the Court of Claims dismissed an action in which the plaintiff sought to impute the allegedly improper actions of Amtrak to the United States. Green v. United States, 229 Ct. Cl. 812, 814 (1982). See also Hrubec v. National Railroad Passenger Corp., 49 F.3d 1269 (7th Cir. 1995) (holding that Amtrak's employees are not employees of the United States); Ehm v. National Railroad Passenger Corp., 732 F.2d 1250 (5th Cir. 1984) (holding that Amtrak is not subject to the Privacy Act); National Railroad Passenger Corp. v. Commonwealth of Pennsylvania Public Utility Commission, No. 86-5357, 1997 U.S. Dist. WESTLAW 597963 (E.D. Pa. Sept. 15, 1997) (holding that Amtrak is not a federal entity for purposes of state sovereign immunity under the Eleventh Amendment);[11] Riddle v. National Railroad Passenger Corp., 831 F. Supp. 442 (E.D. Pa. 1993) (holding that the doctrine of qualified immunity is not applicable to Amtrak in a suit alleging negligence by its statutorily created Office of Inspector General); Held v. National Railroad Passenger Corp., 101 F.R.D. 420 (D.D.C. 1984) (holding that Amtrak is not a government-controlled corporation for purposes of the Age Discrimination in Employment Act); Sentner v. Amtrak, 540 F. Supp. 557 (D.N.J. 1982) (holding that Amtrak, unlike a federal agency, may be subject to liability for punitive damages). We find nothing in these decisions to support Amtrak's claim that the statutory disclaimer would be effective

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[11]Summarizing the statutory provisions exempting Amtrak from state and local taxes and other fees, the Court stated that "it is probable that Congress intended Amtrak not to be an agency, entity or instrumentality of the United States government for the purposes of extending those privileges and immunities which are only available to the United States, except where Congress explicitly stated that Amtrak should be so treated." Id. at *5-6.

with respect to ordinary business transactions, but of no legal effect in the event of bankruptcy.[12]

In 1995, the Supreme Court addressed the limits of the disclaimer of agency status in Amtrak's organic legislation. In Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995), the Court considered a claim that Amtrak's refusal to display a political advertisement on a billboard in Pennsylvania Station violated the petitioner's First Amendment rights. Responding to the argument that the statutory language regarding Amtrak's non-agency status was dispositive, the Court stated that if Amtrak is what the Constitution regards as the Government, a congressional pronouncement to the contrary could not relieve it of the restrictions of the First Amendment. Id. at 392. The Court held that where, as in the case of Amtrak, "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." Id. at 400.

While holding that the statutory provision regarding Amtrak's status was not dispositive for purposes of the First Amendment, the Court stated that it would be dispositive for purposes of Amtrak's financial and contractual obligations. The Court stated that the provision:

> ". . . is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control--for example whether it is subject to statutes that impose obligations or confer powers upon Government entities, ... And even beyond that, we think [section 24301] can suffice to deprive Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate. We have no doubt, for example, that the statutory disavowal of Amtrak's agency status deprives Amtrak of sovereign immunity from suit . . ., and of the ordinarily presumed power of Government agencies

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[12]We recognize that in several cases concerning the constitutionality of personnel actions, courts considered whether the ties between Amtrak and the United States were sufficient to render Amtrak a "government actor" and concluded that they were not. See Anderson v. National Railroad Passenger Corp., 754 F.2d 202 (7th Cir. 1985); Wilson v. Amtrak National Railroad Corp., 824 F. Supp. 55 (D. Md. 1992); Marcucci v. National Railroad Passenger Corp., 589 F. Supp. 725 (N.D. Ill. 1984). The purpose of the analyses in these cases was to determine whether the actions of an ostensibly private entity gave rise to a constitutional injury, not to assign liability for a pre-existing injury or obligation.

> authorized to incur obligations to pledge the credit of the United States . . .."

Id. at 392. In addition, commenting on its earlier decision in National Railroad Passenger Corp. v. Atchison, Topeka, and Santa Fe Railway Co., the Court stated that:

> "for the purpose at hand in Atchison it was quite proper for the Court to treat Congress's assertion of Amtrak's nongovernmental status in [section 24301] as conclusive. . . . [E]ven if Amtrak is a Government entity, [section 24301's] disavowal of that status certainly suffices to disable that agency from incurring contractual obligations on behalf of the United States" (emphasis in original).

Id. at 394.

The Court's discussion, coupled with the statute and pertinent case law, supports our view that Congress can insulate the United States from liability for obligations of a statutorily created corporate entity and that Congress has in fact done so with respect to Amtrak.

Amtrak asserts that the Court's comments as to the liability of the United States for Amtrak's financial obligations "cannot be stretched to dispose of the possibility of liability of the United States in the context of an Amtrak bankruptcy." Amtrak states that 49 U.S.C. § 24301(a) "is best read as making it clear that . . . the United States would not be liable for [Amtrak's] debts merely because it was created by statute" and that the provision did not exempt "the United States-Amtrak relationship from the entire body of common law on the subject of parents and subsidiaries."

We acknowledge that the Court did not specifically address the prospect of an Amtrak bankruptcy. However, it did not restrict its discussion of Amtrak's financial and contractual obligations to those arising in the ordinary course of business. Further, as discussed above, we are not aware of any basis in the statute, its legislative history, or pertinent case law for so limiting the disclaimer in Amtrak's organic legislation.

With respect to labor protection, Amtrak also states that the loss of the economic benefit of labor protection must be evaluated as a taking without just compensation in violation of the Fifth Amendment. Amtrak constructs a "takings" argument from the 1972 amendment to section 305 of the Rail Passenger Service Act. Under section 305, as enacted, freight railroads were extensively involved in passenger service and would have borne primary responsibility under Appendix C-1 for labor protection payments to employees. In 1972, section 305 was amended to require

Amtrak, to "directly operate and control all aspects of its rail passenger service" insofar as practicable. See 86 Stat. at 228. Amtrak asserts that, as a result of the 1972 amendment, the "labor protections that [employees] once enjoyed [were] over the course of about fifteen years transformed from valuable rights against solvent freight railroads to claims in a potential Amtrak liquidation, which would presumably be worthless unless paid by the United States." Amtrak raises the question whether the United States may so shift the labor protection obligation and then "reject responsibility for that obligation to the individuals affected."

This argument assumes that the United States had accepted responsibility for the labor protection obligations at issue and relies on an underlying assumption that Amtrak and the United States are one for purposes of Amtrak's financial obligations, such that those obligations are attributable to the United States. The Court's decision in Lebron does not support Amtrak's assumption. To the contrary, the decision draws a sharp distinction between Amtrak's financial and contractual obligations and its obligations under the First Amendment. In light of the Court's distinction, we do not presume that such obligations would be the source of a constitutional injury and, therefore, liability on the part of the United States.

As we understand Amtrak's argument, a "taking" may occur upon Amtrak's demise since the economic benefit of labor protection is not the same as it would have been had Congress maintained the freight railroads' involvement in passenger service. However, benefits from freight railroads would have been subject to the same constraints as those from Amtrak. Under section 405(c) of the Rail Passenger Service Act, as amended in 1972, Amtrak was required to provide its employees with the same degree of protection as the freight railroads. In addition, the procedural requirements associated with Appendix C-1, i.e., certification by the Secretary of Labor, were also applicable to Appendix C-2. Moreover, recoveries from the freight railroads, like those from Amtrak, would have been limited by the railroads' capacity to provide such benefits under the circumstances.[13]

In support of its position, Amtrak cites Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). In Duke Power, the Court upheld the constitutionality of the Price-Anderson Act, which replaced common law remedies for the destruction of property in connection with a nuclear accident with a statutory guarantee of compensation capped at $560 million, plus a commitment to

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[13]A number of railroads confronted bankruptcy in the 1970s. We understand that, in at least one case, involving the Rock Island and Pacific Railroad Co., no labor protection was paid. In 1982, the Supreme Court struck down a provision of the Rock Island Transition and Employee Assistance Act that provided benefits to certain employees on the grounds that the provision violated the bankruptcy clause of the Constitution. See Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982).

take "whatever action is deemed necessary and appropriate." Id. at 66-7. The Court did not address the plaintiff's "takings" argument because of the availability of the Tucker Act remedy, presumably to recover such additional amounts.[14] Rather, the Court noted that "the question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day." Id. at 94, n. 39.

Amtrak seems to suggest that a court could determine that Congress implicitly made an analogous promise with respect to Amtrak's labor protection obligations, and, as in Duke Power, the Tucker Act or other remedy for a taking would be available to Amtrak employees. As discussed at length above and in our 1985 opinion, there simply is no explicit or implicit guarantee here. Further, we question whether the 1972 legislation could lead to a "taking" on the ground that it interfered with employees' settled expectations of recovery under Appendix C-1. While contracts may create rights of property, the fact that legislation disregards or destroys such rights, and the associated expectations, does not always transform the legislation into a taking. Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240 (1935); Omnia Commercial Co., Inc. v. United States, 261 U.S. 502 (1923). Rather, the fact that legislation nullifies a contractual provision does not justify a holding that the legislation violates the Taking Clause where the United States has appropriated nothing for its own use. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) (upholding the statutory nullification of contractual provisions limiting an employer's liability upon withdrawal from a multi-employer pension plan);[15] see also United Transportation Union v. Consolidated Rail Corp.,

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[14]One commentator has suggested that, while the Court repeatedly emphasized the fact that Congress had expressly committed itself to taking further action, "the constitutionality of the [statute] cannot possibly turn on a Congressional promise to 'make everything all right' in the event of a nuclear disaster, for such a pledge would not be binding on a subsequent Congress." Lawrence H. Tribe, American Constitutional Law 610-612 (1988).

[15]Citing Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), the Court emphasized that the interference at issue could not be characterized as a physical invasion or appropriation, but rather one arising from a public program adjusting the benefits and burdens of economic life to promote the common good. The Court reinforced its view that the statute did not constitute a compensable taking by examining two additional factors identified in Penn Central: the economic impact of the regulation on the claimant and the extent to which the regulation interfered with distinct investment-backed expectations. 475 U.S. at 225. The Court declined to find a compensable taking notwithstanding the fact that the statute "completely deprived the employer of whatever amount of money it [was] obligated to pay to fulfill its statutory liability." Further, with respect to the argument that the statute interfered with the employers' reasonable expectations, the Court noted the long time legislative concern with pension plans. Id. at 225-7.

535 F. Supp. 697 (Regional Rail Reorg. Ct. 1982) (upholding statutory provisions for the elimination of excess positions that superseded provisions in collective bargaining agreements). Even if it were true that the 1972 amendment to the Rail Passenger Service Act indirectly interfered with employees' ability to receive labor protection benefits, the United States did not appropriate anything for its own use.

Modification of Labor Protection Arrangements for Amtrak Employees

In our 1985 opinion, we also concluded that, without legislation, Amtrak and its employees could not agree to modify existing labor protection arrangements. We based our conclusion largely on the statutory provisions under which Amtrak's labor protection arrangements were put in place. B-217662 at 16-17.

Section 24706(c) of title 49, United States Code, which governs protective arrangements for Amtrak or railroad employees affected by a discontinuance of passenger service, does not explicitly bar Amtrak and its employees from renegotiating such arrangements. Rather, it merely establishes the minimum requirements for such arrangements and identifies certain modifications to service that would not trigger labor protection benefits.

However, the text and subsequent amendments to this statutory provision suggest that Amtrak and its employees would not be authorized to renegotiate the labor protection arrangements embodied in Appendix C-2. As enacted, section 405(a) of the Rail Passenger Service Act required railroads "to provide fair and equitable arrangements to protect the interests of employees affected by discontinuances of intercity rail passenger service." 84 Stat. at 1337. Section 405(b) set out the substantive requirements of such labor protection arrangements and made certification by the Secretary of Labor a prerequisite to the execution of contracts between Amtrak and the railroads. Id. Section 405(c) made the substantive requirements of section 405(b) applicable to Amtrak "after commencement of operations in the basic system." Id. With respect to Amtrak, section 405(c) also provided that "[t]he certification by the Secretary of Labor that employees affected have been provided fair and equitable protection as required by this section shall be a condition to the completion of any transaction requiring such protection" (emphasis added). Id. Thus, it could be argued that, as enacted, section 405(c) would have permitted Amtrak and its employees to negotiate labor protection arrangements on a transaction-by-transaction basis.

Any doubt in this area was resolved when section 405(c) was amended in 1972. Among other things, Public Law 92-316 amended the last sentence of section 405(c) to read as follows:

> "[t]he Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equitable protection as required by this section within one hundred and

> eighty days after assumption of operations by the Corporation."

86 Stat. at 230. Explaining the amendment, the Senate Commerce Committee stated that:

> "[t]he second sentence of amended subsection 405(c) makes clear first that the Secretary of Labor must certify that 'fair and equitable' arrangements have been provided for. Second it requires that such certification be issued by a certain point in time, namely '180 days after assumption of operations' by Amtrak."

S. Rep. No. 92-756, at 11 (1972), reprinted in 1972 U.S.C.C.A.N. 2393, 2399.

The 1972 amendment thus established a procedure for the implementation of labor protection arrangements for Amtrak employees, namely, a single certification at a specific point in time. It would be impossible for this procedure to be followed at present. Therefore, we believe that Amtrak and its employees would not be free to renegotiate those labor protection arrangements. See Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929) (holding that statutory procedures for the compromise of tax claims were exclusive because "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode").[16]

Amtrak agrees with our view that any modification of the presently certified labor protection arrangement would require legislation. Amtrak also points out that, notwithstanding the matter of certification, unions would be unable to waive their statutory entitlement to at least four years of labor protection. In support of its assertion, Amtrak cites Norfolk and Western Railway Co. v. Nemitz, 404 U.S. 37 (1971), in which the Supreme Court held that a union could not bargain away the statutorily mandated labor protection afforded to employees under the Interstate Commerce Act. We have no basis to disagree with Amtrak's observation.

Amtrak's Authority to Contract Out

Section 24312(b)(1) of title 49, United States Code states that Amtrak "may not contract out work normally performed by an employee in a bargaining unit covered

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[16]In the 1994 recodification of the Rail Passenger Service Act, the provision requiring the Secretary of Labor's certification of labor protection arrangements for Amtrak employees was omitted as executed. See 49 U.S.C. § 24706 nt. Given the context of this amendment, we do not view it as a substantive change. Accordingly, it provides us with no basis for concluding that Amtrak and its employees would be free to renegotiate the labor protection arrangements contained in Appendix C-2.

by a contract between a labor organization and Amtrak or a rail carrier that provided intercity rail passenger transportation on October 30, 1970, if contracting out results in the layoff of an employee in the bargaining unit." Section 24312(b)(2) provides that the prohibition contained in subsection (b)(1) does not apply to food and beverage services provided on Amtrak trains. On its face, section 24312(b) restricts Amtrak's authority to contract out for services.[17]
Amtrak agrees with our conclusion and points out that, like the statutory labor protection provisions, the statutory prohibition on contracting out is not the type of statutory right that could be waived by Amtrak's unions since it represents a public policy of providing protection to employees.

Sincerely yours,

Robert P. Murphy
General Counsel

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[17]The report of the House Judiciary Committee accompanying Public Law 103-272, which recodified the provision on contracting out, states that "[t]he words 'may not' are used in a prohibitory sense, as 'is not authorized to' and 'is not permitted to.'" H.R. Rep. No. 103-180, at 4 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 821.

bcc: Mr. Fitzgerald, OGC/RCED
Mr. Volpe, OGC/RCED
Ms. Desaulniers, OGC/RCED
Mr. Belkin, OGC/GGD
Mr. Centola, OGC/AIMD
Ms. Scheinberg, RCED
Mr. Ratzenberger, RCED
Mr. Jorgenson, RCED
Ms. Ruchala, RCED
Ms. Fleming, RCED
Ms. Scott, OCR
OGC/RCED

DIGESTS

B-277814

October 20, 1997

1. The United States would not be legally liable for the labor protection obligations that would result from the partial or complete discontinuance of intercity rail passenger service by the National Railroad Passenger Corporation (amtrak) since the United States was not a part to the agreement giving rise to such obligations and has not explicitly or implicitly guaranteed such obligations. To the contrary, Amtrak's organic legislation provides that it is not a department, agency, or instrumentality of the United States Government. For similar reasons, the United States would not be liable for Amtrak's other debts in the event of an Amtrak bankruptcy.

2. The labor and management of the National Railroad Passenger Corporation (Amtrak) would not be authorized to renegotiate the terms of labor protection arrangements known as "Appendix C-2" in the absence of legislation.

3. The labor and management of the National Railroad Passenger Corporation (Amtrak) could not agree to alter the current restriction on Amtrak's contracting out of non-food service work contained at 49 U.S.C. § 24312(b).