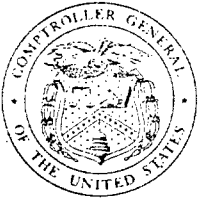


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**DECISION**



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

FILE: B-196132

DATE: October 11, 1979

MATTER OF: Statutory Authority <sup>Limits</sup> of Interstate Commerce Commission to Direct Rail Transportation

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DIGEST: Interstate Commerce Commission may order a substitute rail carrier to service shippers abandoned by the primary carrier under 49 U.S.C. § 11125 in advance of an appropriation to cover whatever additional costs it may be obligated to pay. 49 U.S.C. § 11125 contemplates that the Commission's order, in emergency circumstances, may be issued before an appropriation is available. Therefore, the prohibition in the Anti-deficiency Act, 31 U.S.C. § 665a, does not apply.

The Acting Chairman, Interstate Commerce Commission, requests our opinion as to the limits of the Commission's authority under the provisions of 49 U.S.C. § 11125 to direct substitute rail transportation in advance of an appropriation to pay the substitute carrier. Section 11125 reads in part as follows:

"(a) When a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title cannot transport the traffic offered to it because--

"(1) its cash position makes its continuing operation impossible;

"(2) transportation has been discontinued under court order; or

"(3) it has discontinued transportation without obtaining a required certificate under section 10903 of this title;

"the Commission may direct the handling, routing, and movement of the traffic available to that carrier and its distribution over the railroad lines of that carrier by another carrier to promote service in the interest of the public and of commerce. \* \* \*

\* \* \* \* \*

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"(b)(5) A directed carrier may apply to the Commission for payment of an amount equal to the amount by which (A) the total expenses of that carrier incurred in or attributable to the handling, routing, and moving the traffic over the lines of the other carrier for the period during which the action of the Commission is effective, including renting or leasing necessary equipment and an allocation of common expenses, overhead, and a reasonable profit, exceed (B) the direct revenues from handling, routing, and moving that traffic over the lines of the other carrier during that period. The carrier must submit a current record of those total expenses to the Commission. The Commission shall certify promptly, to the Secretary of the Treasury, the amount to be paid. The Secretary shall pay that amount by the 90th day after the end of the period during which the direction of the Commission is effective, and funds are authorized to be appropriated for that payment. The Commission may audit any such record."

The Commission states that it may have to direct substitute rail carriers to undertake service for the shippers that may be abandoned by two financially troubled railroads, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Chicago, Rock Island and Pacific Railroad Company. The Commission says it has available to it for payment for service approximately \$14.6 million, while directing service for either railroad "will no doubt require funds far in excess of that amount." The appropriation is being sought but "may not be received in time or the amounts required may be in excess of such appropriation."

Specifically, the Commission has requested us to rule on whether it may direct a substitute rail carrier to provide service under 49 U.S.C. § 11125(a) when no appropriations are available to reimburse potential costs that may result under 49 U.S.C. § 11125(b), in view of 31 U.S.C. § 665(a), the Antideficiency Act, which prohibits either the creation of an obligation under any appropriation or fund in excess of the amount available therein or the involvement of the Government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose unless such contract or obligation is authorized by law.

As noted, (the Antideficiency Act provides an exception for obligations which are authorized by law to be made in excess of or in advance of appropriations.) The question is thus whether the

*GAO believes*  
provisions of 49 U.S.C. § 11125 constitute such other authority. Based on the rationale set forth below, we believe that the Commission's authority in 49 U.S.C. § 11125 to order a rail carrier to take over another's operations may be regarded as coming under the exception to 31 U.S.C. § 665(a).

*In the Act.*  
Section 11125(a) empowers the Commission to take immediate action in an emergency situation to restore service to shippers for an interim period of time where the primary rail carrier can no longer provide the service. The cessation of operation of the primary rail carrier may not be foreseeable and there may not be time for the Commission to obtain an appropriation to cover the cost of directing a substitute carrier to service the abandoned shippers. It might also be very difficult to estimate the cost of such substitute service in advance. The substitute carrier is entitled to bill the Commission only for the excess of his costs (and other factors stipulated in the statute) over direct revenues received while operating the financially troubled railroad. It is conceivable that the Commission could estimate that such revenues would cover all the costs for the substitute rail carrier, so that no further appropriation would be necessary. However, unforeseen costs could develop later that would require a special appropriation. On the other hand, the revenues generated by the substitute service may cover the costs of such service, contrary to Commission estimates of required subsidy payments.

*interpretation by the GAO*  
Thus, <sup>in view of the nature of the directed service</sup> under 49 U.S.C. § 11125 (and the uncertainty of the cost to the Government, it appears that the intent of the statute is to confer upon the Commission authority to deal with an emergency even if the Commission's action should result in an obligation on the part of the U.S. Government to pay the directed railroad in advance of appropriations.) This interpretation seems justified by the wording of 49 U.S.C. § 11125(b)(5) which allows <sup>the substituted</sup> carrier to apply to the Commission for payment and requires it to account to the Commission for unrecovered costs at the end of the emergency. On the basis of this information, the Commission, while it may perform an audit, must certify the amount to be paid to the Secretary of the Treasury. Funds are authorized by the statute to be appropriated in any amount required for the payment.


*It appears also that*  
Moreover, the legislative history of 49 U.S.C. § 11125 contains evidence that the Congress intended that the Commission would be empowered to issue its order in advance of an appropriation for the directed rail transportation. Senate Report No. 93-302 contains the following analysis of Senate Bill 1925, 93d Congress, which was the derivative source of 49 U.S.C. § 11125:

"However, to the extent that expenditures for track maintenance or other costs cannot be covered by additional revenues generated from the added traffic, the directed carrier would be eligible for reimbursement of deficits by the Federal Government in accordance with the provisions of S. 1925. The bill provides that if a carrier's costs from such operations exceed the direct revenues, then payment can be made to the directed carrier in the amount by which those costs exceed revenues. \* \* \* Payment would be made within ninety days of the expiration of the order, assuming there was no dispute over the amount of reimbursement and assuming the availability of appropriated funds. The bill authorizes the appropriation of such sums as may be necessary for the purposes of paying a directed carrier for costs not covered by revenues generated during the directed operations.

"Cost Estimate

"It is not possible to estimate with precision the costs of S. 1925. On the one hand, there may be no additional costs because the cost of providing the essential rail services which the Commission would direct one carrier to undertake on behalf of a non-operating carrier could be exceeded by the additional revenues received by the directed carrier. On the other hand, the Commission might find it necessary to direct a carrier to perform functions which are not profitable. But in no event would such operations continue for more than sixty days (or, in an exceptional case more than 240 days). The Commission does not anticipate that it would incur additional administration costs to carry out its responsibilities under S. 1925." (At 4-5.)

The above-quoted legislative history recognizes that the cost of directed rail transportation cannot always be estimated in advance, that the Commission must act without delay to protect the public interest, and that payment to the directed carrier will depend on the availability of appropriations. Hence the Commission may direct a substitute rail carrier to serve abandoned shippers even though no appropriations are available at the time the direction is given to cover the ultimate costs of such service.

  
Comptroller General  
of the United States