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

B-217662

March 18, 1985

The Honorable Jack Danforth
Chairman, Committee on Commerce,
Science, and Transportation
United States Senate

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Dear Mr. Chairman:

This is in response to your letter dated January 29, 1985, asking six questions relating to the payment of labor protection costs in the event that the services of the National Rail Passenger Corporation (Amtrak) are terminated or significantly reduced as a result of the Administration's proposal to eliminate further Federal subsidies to Amtrak in the 1986 fiscal year and thereafter. After providing some of the basic legal background to your questions, we will address your questions in order.

BACKGROUND

In 1970, Congress enacted the Rail Passenger Service Act (RPSA), Pub. L. No. 91-518, 84 Stat. 1327, October 30, 1970, 45 U.S.C. § 501 et seq. (1982). This Act authorized the creation of Amtrak as a mixed ownership Government (31 U.S.C. § 9101) "for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service, * * * so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements." 45 U.S.C. § 541. The legislation expressly provides that Amtrak "will not be an agency or establishment of the United States Government." Id.

Under section 401(a) of RPSA, 45 U.S.C. § 561(a), Amtrak was authorized to enter into contracts with railroads to relieve them of their "entire responsibility for the provision of intercity rail passenger service." Relief under this section also requires that any contract between Amtrak and a railroad include "protective arrangements for employees." Section 405 of RPSA, 45 U.S.C. § 565, sets forth the extent to which employee interests must be protected under these arrangements as follows:

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> "(a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. * * *
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> "(b) * * * Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 11347 of title 49. Any contract entered into pursuant to the provisions of this subchapter shall specify the terms and conditions of such protective arrangements. No contract under section 561(a)(1) of this title between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad."

Subsection (c) provides that once Amtrak commences operations its employees must also receive "fair and equitable protection," as defined in subsections (a) and (b), subject to a similar requirement of certification by the Secretary of Labor.

In April 1971, pursuant to this provision, Amtrak tendered all passenger railroads in the United States an identical contract called the Basic Agreement that would relieve any railroad that accepted Amtrak's offer of its legal obligation to continue to provide rail passenger service. The labor protective arrangements required by 45 U.S.C. § 565 covering railroad employees and Amtrak employees, were set forth in Appendices C-1 and C-2 of the Basic Agreement, respectively. As required by the statute, the Secretary of Labor certified the employee protective arrangement contained in Appendices C-1 and C-2 to be "fair and equitable."

Before proceeding to answer your questions, we must note that a legitimate difference of opinion may exist with respect to some, if not all, of our answers. In the event Amtrak subsidies are terminated, resulting in a wide-spread or total discontinuance of further rail passenger service by Amtrak,

thereby triggering the labor protection provisions in Appendices C-1 and C-2 and a host of other possible adverse consequences, questions of governmental responsibility and related issues will probably be brought before the courts. Considering the many possible factual variations that might trigger such litigation as well as the differences among courts and jurisdictions, it is impossible for us to predict the likely outcome of such litigation with any degree of confidence. Nevertheless, we have attempted to answer your questions as definitively as possible.

We have discussed this matter with Amtrak. It is Amtrak's position that whether Federal subsidies are terminated entirely or are substantially reduced, the effect on Amtrak would be essentially the same. That is, Amtrak maintains that it would be unable to pay the labor protection costs caused by a discontinuance of service and would be forced into bankruptcy. This could create a situation where all service eventually was discontinued and the entire workforce was laid off. For purposes of answering these questions, we have accepted Amtrak's position in this respect as correct. However, it must be emphasized that we have not independently examined the question of whether or not Amtrak could continue to operate, perhaps on a reduced scale, if Federal subsidies are substantially decreased or eliminated and are therefore not in a position to express any opinion on this matter.

Question 1. If employees of Amtrak or the contract railroads were laid off as a result of discontinuances of railroad passenger service, would the Federal Government be legally or otherwise liable for the payment of the resultant labor protection costs? In answering this question, please include comments on the significance of § 301 of the Rail Passenger Service Act of 1970, which provides that Amtrak "will not be an agency or establishment of the U.S. Government.?"

For the reasons set forth hereafter it is our view that the United States would not be legally liable to pay labor protection costs resulting from the partial or total discontinuance of railroad passenger service by Amtrak.

The legal basis for the rights of Amtrak and railroad employees to receive labor protection benefits in the event of a discontinuance of intercity rail passenger service by Amtrak rests on Appendices C-1 and C-2 of the Basic Agreement between Amtrak and the railroads with which Amtrak contracts. As stated above, Appendix C-1 protects the rights of railroad employees and Appendix C-2 protects the rights of Amtrak

employees. The United States is not a signatory to the Basic Agreement or the Appendices. While the Secretary of Labor did certify that the labor protection provisions contained in the Appendices were "fair and equitable," as required by the statute, such certification did not make the Secretary of Labor or the United States a party to the Basic Agreement or anything contained therein. Numerous court cases have described the Basic Agreement between Amtrak and the railroads as "a private operating agreement between two corporations." Tribbett v. Chicago Union Station Co., 352 F. Supp. 8, 11 (N.D. Ill. 1972). See also McLaughlin v. Penn Central Transportation Co., 384 F. Supp. 179, 183 (S.D.N.Y. 1974).

Nor does the statutory language in 45 U.S.C. § 565 that mandates the substantial degree of labor protection that must be afforded to Amtrak and railroad employees commit the United States to using Federal funds to ensure that employees receive the benefits that Amtrak and the railroads are legally obligated by contract to pay them in the event of a discontinuance of rail passenger service. It is not uncommon for a Federal statute to provide certain protections or levels of benefits to private workers or other specified groups or classes of individuals. See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982). However, enactment of such social welfare legislation does not make the United States a guarantor that is legally obligated to use Federal funds to ensure that those individuals receive the benefits the statute might otherwise entitle them to receive from a non-Government source. Congress, of course, can authorize the United States to enter into a legal obligation committing it to pay what would otherwise be a private debt. Loan guarantee provisions, such as the one contained in 45 U.S.C. § 602 authorizing the Secretary of Transportation to guarantee any lender making a loan to Amtrak, are an example of legislation that legally obligates the United States to make such payments to non-governmental entities. However, there is nothing in the Amtrak legislation that could reasonably be interpreted as authorizing or committing the United States to guarantee Amtrak's obligation to its employees to pay labor protection costs in the event of a discontinuance of rail passenger service.

To the contrary, as noted in your submission, the statute that created Amtrak specifically provides that Amtrak "will not be an agency or establishment of the United States Government." 45 U.S.C. § 541. This is not to say that we are questioning the fact that Amtrak is associated with the Federal Government to some degree. Amtrak was created by Federal legislation as a mixed-ownership Government corporation (31 U.S.C. § 9101 (1982)) to fulfill what was perceived to be

a national need for "modern, cost-efficient, and energy-efficient intercity railroad passenger service." 45 U.S.C. § 501. Ever since Amtrak was created, questions about its identity and whether it should be treated as a private entity or an instrumentality of the United States have arisen. Almost without exception, the courts have concluded in a variety of different contexts, that Amtrak is not a Federal governmental entity. The analysis used by the court in Kimbrough v. National Railroad Passenger Corp., 549 F. Supp. 169, 172-73 (M.D. Ala. 1982) to conclude that Amtrak employees were not entitled to constitutional due process under the Fifth Amendment is typical:

> "* * * As a federal corporation set up by an act of Congress, Amtrak is an unusual entity. Although Congress has stated that Amtrak is not a federal agency or establishment, 45 U.S.C. § 541, there is strong initial and continuing federal involvement in its actions. The President, with the advice and consent of the Senate, appointed the incorporators and had approval authority over the articles of incorporation. 45 U.S.C. § 542. Prior to the 1981 amendments, eight of the seventeen board members were appointed by the President with the advice and consent of the Senate, and in addition, the Secretary of Transportation must always be a board member. 45 U.S.C. § 543 (Supp. 1981). Thus, the federal government appoints a majority of the board. Congress determined the number of board members, the class of stock entitled to elect each member, the classes of stock, who may be issued stock, par value of the stock, and the maximum rate of compensation of officers.
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> "* * * Despite the financial controls exerted by the federal government, it is clear that Amtrak was chartered as a for-profit corporation and is to be operated and managed as such. It is governed not only by the Rail Passenger Service Act of 1970, as amended, but to the extent it is not inconsistent with the Act Amtrak is governed by the District of Columbia Business Corporation Act. * * * This indicates that Amtrak is to be considered a private corporation rather than a federal government entity.

"The opinion that Amtrak is a private corporation is reenforced when one looks at the provisions for employees under the Act. In the context of the status of employees of Amtrak it appears that Congress intended Amtrak employees to be treated the same as employees of any other railroad. * * * Finally, Amtrak relied on the individual railroads to provide employees necessary to the operation of the passenger trains to the extent the railroads were capable of providing such service and when Amtrak contracted to take over a railroad's passenger service, the Act provided that there be protective arrangements for the employees. 45 U.S.C. § 561(a)(1). These provisions lead this Court to the conclusion that Amtrak was to be treated as a private, for-profit railroad in regard to its employee relations." (Emphasis added.)

The reasoning and holding of this case supports the conclusion that the United States is not liable to Amtrak employees for any labor protection payments mandated by the Basic Agreement or the underlying statute, just as the United States would not be liable for similar debts owed by other private railroads to their employees.

In a recent unpublished decision, Anderson v. The National Railroad Passenger Corp., No. 83-2786, slip op. at 3 (7th Cir. Dec. 6, 1984) the 7th Circuit Court of Appeals held that "[t]he ties between Amtrak and the federal government do not warrant a finding of governmental action for purposes of the fifth amendment." The court went on to say that "[t]he existence of a relationship, without more, is insufficient to support a finding of governmental action * * *."

In another case, Senter v. Amtrak, 540 F. Supp. 557 (D.N.J. 1982), the District Court considered the question of Amtrak's potential liability for punitive damages in a civil case. After noting that the United States, its agencies and instrumentalities were not subject to liability for punitive damages without the express consent of Congress, the court went on to emphasize that it was the clear intent of Congress, expressed in the statute and its legislative history, that Amtrak would not be an agency or instrumentality of the United States. Thus, the court held as follows:

"* * * It is not for this Court to determine, in the face of clear statutory language to the

> contrary, that federal involvement on behalf of Amtrak has become so extensive as to render it an instrumentality of the United States Government." Id. at 561.

Similarly, in Ehm v. National Railroad Passenger Corp., 732 F.2d 1250 (5th Cir. 1984) the Court of Appeals recently held that Amtrak was neither a Government agency or a Government controlled corporation for purposes of the Privacy Act, 5 U.S.C. § 552a. While recognizing that the Federal Government had a significant amount of representation on Amtrak's board of directors and a degree of "financial control" over Amtrak the court concluded that such control was not--

> "* * * sufficient in and of itself to negate Amtrak's character as a private nonfederally-chartered corporation." Id. at 1255.

The Supreme Court reached a similar conclusion about the nature of a very similar corporate entity, the Consolidated Rail Corporation (Conrail), in Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102 (1974). The Conrail authorizing legislation, like Amtrak's, provides that Conrail is not "an agency or instrumentality of the Federal Government." 45 U.S.C. § 741(b) (1982). The Supreme Court said the following as to Conrail's status:

> "* * * But Conrail is not a federal instrumentality by reason of the federal representation on its board of directors. That representation was provided to protect the United States' important interest in assuring payment of the obligations guaranteed by the United States. * * * The responsibilities of the federal directors are not different from those of the other directors--to operate Conrail at a profit for the benefit of its shareholders. Thus, Conrail will be basically a private, not a governmental, enterprise." Id. at 152.

Similarly, our Office has also concluded that Amtrak is not a Federal agency or instrumentality. See, e.g., B-175155, September 26, 1978, and July 26, 1976.

In light of the consistent description of Amtrak by the courts and our Office in a variety of different contexts, that Amtrak is essentially a private for-profit corporation, we do not believe that Amtrak can reasonably be considered a Federal entity for the purpose of making the Federal Government liable

for Amtrak's debts--a much more difficult proposition to justify in our view.

Essentially, Amtrak identifies two arguments that might be used to support a determination that the United States has acted in a misleading and inequitable fashion and should be held liable for any valid employee claims that Amtrak is unable to satisfy. We note that Amtrak does not advance either of these arguments as its own position. Amtrak has acknowledged in its discussions with us that it is not ready to adopt these arguments in its own position because the arguments are complex and do not rest on any clear precedent. Also these arguments are often advanced against Amtrak's interest in various contexts. Thus, Amtrak does not take the position that either of these arguments would be likely to prevail in future litigation.

The first argument identified by Amtrak is that Amtrak acted as the agent for the United States in negotiating and signing the terms of Appendix C-2 and the Basic Agreements with the contracting railroads. Under this theory, the United States would be bound under the agreements entered into on its behalf to the Amtrak employees who are third-party beneficiaries of those agreements. While we agree that Amtrak and railroad employees are third-party beneficiaries under Appendices C-2 and C-1, we do not believe that Amtrak acted as the agent of the United States in entering into these agreements. Such an interpretation is contrary to the statutory language, discussed above, that expressly provided that Amtrak is not an agency or establishment of the United States. It is also contrary to the long line of judicial opinions, discussed herein, that have held, in a wide variety of contexts, that no such agency relationship exists between Amtrak and the Federal Government.

The only case of which we are aware that lends any specific support for this proposition is the unreported District Court opinion in Atchison, Topeka and Santa Fe Railway Co. v. National Railroad Passenger Corp., No. 80-C-6749 (N.D. Ill. 1982). This case involves a suit by the plaintiff railroads against Amtrak on the grounds that the statute was unconstitutional. The plaintiffs sued:

> "* * * to relieve themselves of their federal statutory obligation to reimburse Amtrak at a specified rate for free or reduced-rate rail transportation services provided by Amtrak to present and retired railroad employees and their dependents."

While the court did grant Amtrak's and the Government's motions for a summary judgment, the court acknowledged, without so holding, that the "Basic Agreement may well constitute a contract between the United States and the railroads." The court based this view on the following analysis:

> "Although Amtrak is the nominal contracting party, the consideration it gives--relieving the railroads from the responsibility to provide passenger rail service--is something that only the United States, if anyone at all, can offer."

Nevertheless, the court went on to conclude given that even if the United States was a party to the contract the requirement that the railroads pay for pass riders did not impair any rights vested in the railroads by that contract.

The United States Court of Appeals for the 7th Circuit reversed in part the District Court's decision in Atchison, Topeka, and Santa Fe Railway v. National Railroad Passenger Corp., 723 F.2d 1298 (7th Cir. 1983). While the decision of the Court of Appeals did not expressly address the view of the District Court that the United States may have been a party to the Basic Agreement, the Court's finding that an unconstitutional impairment of contract had occurred followed a different line of reasoning that implicitly rejected the District Court's view. This case has since been appealed to the Supreme Court where oral argument was held on January 15, 1985. While we do not subscribe to the "agency" theory advanced by the District Court for the reasons discussed above, we do note the possibility that the Supreme Court's decision on this case, when issued, could have a significant bearing on this question.

The second argument raised by Amtrak is related to the first. That is, because the United States created Amtrak's labor protection obligations and controls Amtrak's conduct through its statutory oversight, ownership of preferred shares, and its ability to shape the board of directors, the United States bears ultimate responsibility for Amtrak's financial obligations. As further developed by Amtrak, this argument rests on the contention that Congress purposely left Amtrak too thinly capitalized to meet its own statutory obligations for the very purpose of protecting the financial interest of the Federal Government.

The first part of this argument has already been addressed. Many of the previously cited cases carefully analyze

the association between the United States and Amtrak before concluding that the Federal Government's control over Amtrak did not "negate Amtrak's character as a private nonfederally-chartered corporation." See Ehm v. National Railroad Passenger Corp., 732 F.2d 1250, 1255 (5th Cir. 1984).

Furthermore, we are not convinced that the doctrine of inadequate capitalization is really applicable to this situation. See Abbott v. United States, 112 F. Supp. 801, 804 (Ct. Cl. 1953) where the possibility of such a theory was raised in the context of wholly owned Government corporations. The concept of undercapitalization has been used in the private sector to "pierce the corporate veil" in certain circumstances in order to hold corporate shareholders or the parent corporation liable for the debts of the intentionally undercapitalized subsidiary corporation. Anderson v. Abbott, 342 U.S. 349 (1944). For a leading case that discusses the theory of under-capitalization, in which the court refused to pierce the corporate veil, see Matter of Mobile Steel Co., 563 F.2d 692 (5th Cir. 1977).

Thus, even if we accept the argument that Amtrak was undercapitalized by the United States--a difficult proposition to prove by itself--the conclusion that the Federal Government is liable for Amtrak's debts necessarily rests on the previously rejected determination that Amtrak was a subsidiary or instrumentality of the United States. Moreover, we question the applicability of the undercapitalization doctrine to a situation in which the allegedly undercapitalized entity was created by Federal legislation which establishes, for all to see, the extent and nature of Federal assistance that can be provided to that entity. See 45 U.S.C. §§ 601 and 602. If the Government is held liable for Amtrak's debts under this or any similar theory it could very well mean that whenever the United States establishes and provides funding to an entity such as Amtrak, the Government would be legally obligated to continue to provide such subsidies on a virtually open-ended and never ending basis. We do not accept this proposition which might, if generally accepted, substantially undermine the authority of Congress to control Federal expenditures through the authorization and appropriation process.

Based on the foregoing we do not believe that the United States is legally liable under existing law to pay labor protection costs that would result from the total or partial discontinuance of intercity rail passenger service by Amtrak. We note that your question asks if the Federal Government is "legally or otherwise liable" to pay labor protection costs

that would result from the discontinuance of railroad passenger service. In answering this question, we have only focused on whether there is a legal basis for the Government's liability to pay labor protection costs. Our Office is not in the position to determine whether or not the United States might have any "responsibility" to pay labor protection costs on some basis other than a finding that it is legally obligated to do so under the law as it now exists. However, for your information, we note that it is Amtrak's position that the history of labor protection in general and of Amtrak employees' protection in particular creates a "very strong moral claim" on Federal funding.

Question 2. Would Amtrak be liable for the payment of the resultant labor protection costs?

Liability under Appendix C-2

We do not think that there is any basis upon which Amtrak could successfully deny its legal liability to its own employees for labor protection costs that would result from a total or partial discontinuance of intercity rail passenger service by Amtrak. This is Amtrak's position as well. Under Appendix C-2 of the Basic Agreement between Amtrak and the railroads with which Amtrak contracted, Amtrak is legally obligated once it commences operations to make labor protection payments and provide other benefits to any Amtrak employee who "is placed in a worse position with respect to his compensation and rules governing his working conditions" as a result of a "discontinuance of Intercity Rail Passenger Service." The provisions of Appendix C-2 are consistent with section 405 of RPSA, 45 U.S.C. § 565(c), which requires Amtrak to provide "fair and equitable" protective arrangements for its employees. As required by that provision, the Secretary of Labor certified that the provisions in Appendix C-2 provided fair and equitable protection to Amtrak's employees. In Congress of Railway Unions v. Hodgson, 326 F. Supp. 68, 76 (D.D.C. 1971), the court found that:

> "The protective arrangements certified by the Secretary not only meet the requirements of Section 405 of the Act [45 U.S.C. § 565(c)] and of Section 5(2) (f) of the Interstate Commerce Act but they in fact exceed these requirements in significant respects."

Liability under Appendix C-1

While it is thus clear that Amtrak would be legally liable under Appendix C-2 to make labor protection payments to any of its employees that were adversely affected by a discontinuance of rail passenger service, the railroads with which Amtrak contracted would be liable under Appendix C-1 of the Basic Agreement to make some labor protection payments to railroad employees who were adversely affected by a discontinuance of rail passenger service before or after Amtrak commenced operations. This could occur because the contract between Amtrak and the railroads that relieved the railroads of their legal obligation to provide intercity passenger service provided that the railroads would provide services to Amtrak on a reimbursable basis.

Where employee protection costs result from the elimination or consolidation of railroad positions which a railroad informed Amtrak would be required in order for it to provide Amtrak with the service Amtrak requested, section 7.3 of the Basic Agreement provides that either party is authorized to resort to arbitration or to seek a declaratory judgment from the United States District Court for the District of Columbia to determine Amtrak's liability, if any, to reimburse the railroad. In 1972, section 405(c) of RPSA, 45 U.S.C. § 565(c), was amended to provide specifically that "nothing in this subsection shall be construed to impose upon the Corporation any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad." See Pub. L. No. 92-316, § 7, June 22, 1972, 86 Stat. 230. This clarifying amendment was intended to ensure that obligations flowing from rights earned prior to "Amtrak's hiring" of a railroad employee would continue to be the obligation of the railroad. Thus, the railroads are responsible for paying these specified labor protection claims made by such employees, without reimbursement from Amtrak.

Where the railroads were required to increase the number of listed employee positions in order to provide necessary services to Amtrak, Amtrak would be required to reimburse the railroads for any resulting labor protection costs if those employees are subsequently adversely affected by a discontinuance of rail passenger service.

Amtrak estimates that its total labor protection liability, assuming a total termination of service, would be approximately $2.1 billion over the 6-year period following discontinuance. Of this amount, Amtrak has advised us that approximately $200 million would be owed to the railroads

under Appendix C-1 to pay the claims of additional employees hired by the railroads. In addition, Amtrak estimates that the railroads would have their own unreimbursed C-1 obligations to railroad employees of approximately another $200 million.

Question 3. Would any liability on the part of either the Federal Government or Amtrak be affected if the discontinuance of service was system-wide rather than partial? For your information, there are court cases that indicate it is the ICC's policy to deny labor protection in system-wide abandonments, but to grant it in partial abandonments.

We do not believe that the matter of Amtrak's liability to pay labor protection costs is related to the extent of the discontinuance of intercity rail passenger service. For labor protection purposes, the provisions of Appendices C-1 and C-2 do not make any distinction between a total or partial discontinuances of rail passenger service.

Amtrak agrees with our position in this respect. Moreover, it is Amtrak's position that a significant partial discontinuance would in all likelihood never occur. Amtrak has advised us that if a reduced budget caused Amtrak to discontinue portions of its service, the labor protection costs resulting from the "partial" discontinuance would consume its resources and prevent it from operating any service whatsoever.

In your question, you refer to the policy of the Interstate Commerce Commission (ICC) to refuse to grant labor protection in system-wide abandonments. We are aware of these cases in which the ICC will ordinarily decline to impose protective benefits where there is "a complete abandonment of operations." See Tennessee Central Railway Co. Abandonment, 333 ICC 443, 453 (1968). See also, Northampton and Bath Railroad Co. Abandonment, 354 ICC 784, 785 (1978); and In Re Auto-Train Corp., 11 BR 418, 427 (1981), where the Bankruptcy Court reached a similar result.

However, none of those cases involved a situation in which there was a contract mandating that employees receive labor protection benefits. In Bush Terminal Railroad Co. Entire Line Abandonment, 342 ICC 34, 51 (1971), the ICC acknowledged the limitation on its authority where the contract rights of employees to labor protective benefits were concerned:

> "The rights under this or any other agreements employees may have are of course, subject to interpretation and enforcement by the courts, and not within the province of the Commission."

Thus, we do not believe that any of those cases in which the ICC refused to grant labor protection in a system-wide abandonment has relevance to the situation involved here where the employees labor protection claims are based on contractual provisions. In our view, under the terms of the Appendices, Amtrak (or the railroads) would be legally responsible to pay labor protection benefits to their employees whether a discontinuance was partial or total.

Question 4. Assuming Amtrak were liable for such costs but received no Federal subsidies, how would it pay for the costs?

As stated at the outset of this opinion, it is Amtrak's position that without substantial Federal funding Amtrak would be unable to satisfy labor protection claims caused by even a partial discontinuance of service and would cease all further operations. While, as noted above, we are not in a position to determine whether or not Amtrak is correct in this respect, we note that 45 U.S.C. § 564(c)(4)(A) does provide that Amtrak's "annual total costs shall not exceed the funds, including grants made under section 601 of this title, contributions provided by States, regional and local agencies and other persons, and revenues, available to the Corporation within the then-current fiscal year." Thus, if Federal subsidies are terminated and not replaced with other revenues, this provision would prohibit Amtrak from continuing even substantially reduced operations at a loss.

Assuming Amtrak became insolvent, presumably it would be placed into bankruptcy where all of its assets would be available to pay the claims of its creditors. In these circumstances, the priorities and entitlements of the labor protection claims of Amtrak's employees and the claims of other creditors, including the United States, would be determined in a bankruptcy proceeding.

Amtrak estimates that its labor protection liability over the 6-year period following a complete discontinuance would total approximately $2.1 billion. These employee claims would be unsecured. The United States would have secured claims against Amtrak of approximately $3 billion plus interest. Other creditors would have substantial claims, totalling

between $400 and $900 million. Amtrak estimates that in a forced liquidation its assets would have little more than scrap value, probably approximating $400 million. In any event, Amtrak advises us that the total value of its assets would fall far short of the approximately $5.5 to $6 billion needed to satisfy the claims of all of Amtrak's creditors including the United States. Amtrak also advises us that claims that would indisputably be senior to the labor protection claims of its employees could consume as much as one half of the liquidation value of the estate. If all claims that may be superior to the labor protection claims remain in that category in bankruptcy, no assets would remain to cover the labor protection claims.

Amtrak does advance the theory of equitable subordination to suggest the possibility that the United States could lose its priority as a secured creditor to the unsecured claims of other creditors including Amtrak employees with labor protection claims. See 11 U.S.C. § 510(c)(a) (1982). This would leave the United States with little or no opportunity to collect under its $3 billion in notes. The doctrine of equitable subordination may be used by a bankruptcy court to relegate a superior claim to inferior status where the claimant engaged in some inequitable conduct that resulted in injury to other creditors or conferred an unfair advantage on the claimant, if such subordination is not otherwise inconsistent with the Bankruptcy Act. See Matter of Mobile Steel Co., 563 F.2d 692, 700 (5th hir. 1977).

Even if this theory is applicable here, which is questionable, we are not convinced that the court would find that the United States had acted so unfairly that its secured claims should be equitably subordinated to the claims of other creditors. However, we do not believe that it would be advisable at the present time for our Office to speculate on what theories might be employed and what actions might be taken by a bankruptcy court in a proceeding to determine the order of priority among the claims of Amtrak's various creditors if Amtrak goes into bankruptcy. In any event, this would appear to go beyond the scope of this question.

Question 5. Could Amtrak and its employees agree without legislation to revise the existing labor protection arrangements? For your information, § 405 of the Rail Passenger Service Act of 1970 required Amtrak and the contract railroads to "provide fair and equitable arrangements to protect the interests of employees * * * affected by a discontinuance of intercity rail passenger service." It also required that such

arrangements should "in no event provide benefits less than those established pursuant to § 5(2)(f) of the Interstate Commerce Act."

This question appears to make two assumptions which we shall briefly address. First, the question implies that Amtrak and its employees might have some reason to consider voluntarily revising the existing labor protection arrangements. In our view, it is questionable whether Amtrak and, particularly, its employees would have any such incentive to substantially revise the labor protection arrangements in the current atmosphere or in the event of an impending or actual bankruptcy. Amtrak agrees with this observation.

Second, your question seems to assume that revisions to the labor protective arrangements could be accomplished with legislation. This is not clear, in our view. Since the labor protective arrangements between Amtrak and its employees were created and currently exist in a contractual context, any attempt by Congress to enact legislation that would substantially modify labor protection arrangements by reducing employee benefits payable thereunder, without employee consent, might be subject to attack on the grounds that it unconstitutionally impairs the rights of the Amtrak employees under the existing agreement. See Atchison, Topeka, and Santa Fe Railway Co. v. National Railroad Passenger Corp., 723 F.2d 1298 (7th Cir. 1983), currently on appeal to the Supreme Court. But cf. Railway Labor Executives Associations v. United States, 575 F. Supp. 1554 (Regional Rail Reorganization Court, 1983), cert. denied 104 S. Ct. 1596 (1984), in which the court held that statutory labor protection for Conrail employees was a social welfare benefit that could be repealed.

Turning our attention to the specific issue you asked us to address, we do not believe that Amtrak and its employees could agree, without legislation, to revise the existing labor protection arrangements. The statute itself does not explicitly bar subsequent modification of the labor protection arrangements contained in Appendices C-1 and C-2 of the Basic Agreement. However, the statutory language in 45 U.S.C. § 561(a) that authorizes Amtrak to contract with the railroads suggests that Congress did not contemplate subsequent modification of the contracts once they became effective.

Under 45 U.S.C. § 565, the Secretary of Labor must certify that the protective arrangements for employees contained in those contracts are fair and equitable. The provision requiring certification of the labor protection arrangements for Amtrak employees mandates that the certification must be

made within 180 days after Amtrak commences operation. 45 U.S.C. § 565(c).

The statutory language in these provisions clearly implies that the contract between Amtrak and a particular railroad, and the required certification by the Secretary of Labor of the employee protective arrangements contained therein, would be executed on a one-time basis. In addition, 45 U.S.C. § 561(a)(1) specifies that the Amtrak-railroad contract be executed only during two time periods--either "on or before May 1, 1971" or alternatively "on or after March 1, 1973, but before January 1, 1975." See Congress of the Railway Unions v. Hodgson, 326 F.Supp. 68, 76-79 (D.C. 1971). Any amendment that might now, or hereafter, be made to the protective arrangements contained in the Amtrak-railroad contracts entered into during those time periods, could not be executed in accordance with the statutory language. Also, since any amendment to the labor protective arrangements for Amtrak employees, contained in Appendix C-2 would be subject to the same certification requirement that applied to the original protective arrangements, such certification could not be made in accordance with the specific requirements in 45 U.S.C. § 565(c) that the certification by the Secretary of Labor be made within 180 days after Amtrak commenced operations.

Secondly, we do not believe that Amtrak and its employees could agree to modify the protective arrangements for another reason. The labor protective arrangements are part of the Basic Agreement between Amtrak and the railroads it contracted with to relieve them of their responsibility to provide intercity rail passenger service. The employees themselves were not a party to those agreements, being at most third-party beneficiaries. For example, in McLaughlin v. Penn Central Transportation Co., 384 F. Supp. 179, 183-84 (S.D.N.Y. 1974) the court said:

> "* * * Is this a case involving a labor agreement? Clearly it is not. Appendix C-1, certified by the Secretary of Labor to implement adequate protection of Penn Central employees affected by discontinuances, is part of the private operating agreement between Penn Central and Amtrak. The Union is not a party to that agreement. The agreement is therefore not a labor agreement, and the case is not maintainable by plaintiff [a railroad employee] as a private action." (Emphasis added.)

See also, Tribbett v. Chicago Union Station Co., 352 F. Supp. 8, 11 (N.D. Ill. 1972); and Congress of Railway Unions v. Hodgson, id.

Thus, it is clear that Amtrak's employees and the unions that represent them were not a party to the Basic Agreement and Appendices C-1 and C-2 which contain the labor protection arrangements. Therefore, we do not believe that Amtrak's employees can agree to modify or amend an agreement that they were not a party to in the first instance. As for the possibility that Amtrak and the railroads might mutually agree to modify the labor protective arrangements contained in the Basic Agreement, we do not believe they can do so for the previously stated reason.

Question 6. Assuming Amtrak filed for bankruptcy, could the bankruptcy court without legislation revise the existing labor protection arrangements?

As we stated earlier, we believe that it would be inadvisable for us to speculate in detail at the present time on what a bankruptcy court might do in the event Amtrak filed for bankruptcy. Bankruptcy is a highly specialized area of the law involving special rules and procedures, where the bankruptcy court sometimes fashions complex remedies involving legal as well as equitable powers. As is true of any litigation, the remedies fashioned by the court are likely to depend on the particular facts and circumstances of the case as they are developed in the bankruptcy proceedings. Therefore, we are not in a position to provide our views on this question.

However, for your information we do note that it is Amtrak's view that a bankruptcy court would probably not have the authority to revise the existing labor protection arrangements. It is Amtrak's position that in a bankruptcy proceeding following a complete cessation of Amtrak service, claims presented under Appendix C-2 would not be "executory agreements" and thus under 11 U.S.C. § 365 would not be subject to amendment by the bankruptcy court.

We will make this letter generally available in 30 days, unless your office agrees to an earlier release date.

Sincerely yours,

Shelton J. Dorsey

for Comptroller General
of the United States

OCR FORM 3(1 85)

RELEASE OF GAO LEGAL DECISION OR OPINION

531532/126609

RELEASED APR. 2 1985

DATE: April 2, 1985
NO. 85-24

SUBJECT: Concerns payment of labor protection costs at the National Rail Passenger Corporation (AMTRAK)

B-NUMBER: B-217662 DATE: March 18, 1985

ADDRESSEE: Chrmn. Jack Danforth
Com. on Commerce, Science and Transportation
United States Senate

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B-217662

March 18, 1985

The Honorable Jack Danforth
Chairman, Committee on Commerce,
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United States Senate

DO NOT MAKE AVAILABLE TO PUBLIC READING FOR 30 DAYS

Dear Mr. Chairman:

This is in response to your letter dated January 29, 1985, asking six questions relating to the payment of labor protection costs in the event that the services of the National Rail Passenger Corporation (Amtrak) are terminated or significantly reduced as a result of the Administration's proposal to eliminate further Federal subsidies to Amtrak in the 1986 fiscal year and thereafter. After providing some of the basic legal background to your questions, we will address your questions in order.

BACKGROUND

In 1970, Congress enacted the Rail Passenger Service Act (RPSA), Pub. L. No. 91-518, 84 Stat. 1327, October 30, 1970, 45 U.S.C. § 501 et seq. (1982). This Act authorized the creation of Amtrak as a mixed ownership Government (31 U.S.C. § 9101) "for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service, * * * so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements." 45 U.S.C. § 541. The legislation expressly provides that Amtrak "will not be an agency or establishment of the United States Government." Id.

Under section 401(a) of RPSA, 45 U.S.C. § 561(a), Amtrak was authorized to enter into contracts with railroads to relieve them of their "entire responsibility for the provision of intercity rail passenger service." Relief under this section also requires that any contract between Amtrak and a railroad include "protective arrangements for employees." Section 405 of RPSA, 45 U.S.C. § 565, sets forth the extent to which employee interests must be protected under these arrangements as follows: