# Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property

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## I. Introduction

Ask a public official with responsibility for planning the expansion of public transportation alternatives for a wish list of the top ten ways to grow efficiently. Do not be surprised to hear among those a clear explanation of how the long-standing freight rail lines that extend into the heart of the city's downtown area are ideal for some form of rail-based transit. Now ask a freight railroad official for a list of the top ten nightmares he or she faces on the job. That list will almost certainly include the presence of passenger trains (whether long distance intercity or shorter distance commuters) on the company's lines.

The conflict between freight and passenger operations is not new – passenger trains traditionally have had operating priority over freights. Railroads have long recognized the substantial difference in the profitability, liability exposure and customer service sensitivity presented by passengers as opposed to freight. Historically, the decrease in passenger traffic and the drain it began to place on the railroads' ability to fulfill their freight common carrier obligations provided the railroads with a rationale to exit that side of their business. With the creation of the National Railroad Passenger Corporation (Amtrak) in 1970, Congress enabled the railroads to choose to exit the intercity passenger business altogether. Some retained commuter service, but soon that too became the province of others, usually public agencies. However, within the past ten years a resurgence of interest in commuter rail operations has caused railroads to face again the questions associated with the presence of passengers on their lines.

Faced with resistance from the freight railroads, commuter agencies looking to start new or expand existing service have struggled with the question of how to gain access to existing lines to avoid the enormous cost of corridor assemblage and infrastructure construction. The freight railroads have resisted, arguing that they should not be forced to use private property for public purposes without their consent, that increases in freight traffic following years of infrastructure rationalization have strained the available capacity of their lines, and that the presence of passengers creates an unwelcome increase in potential liability exposure.

This article reviews the history of the decline in passenger service on

traditional railroads to provide a backdrop for the examination of the questions both of the rights, if any, of commuter operators to gain access to freight lines against the owner's will, and of the obligation, if any, of freight railroads to grant that access. In some cases, existing statutory remedies can resolve the conflict between the public interest in such access and the private companies' disinterest in providing it, but other situations may require additional clarification by the U.S. Congress.

## II. Passenger Services – An Historical Perspective

From the beginning of the regulation of the rail industry, Congress recognized that the railroads' common carrier obligation extended to freight and passenger services alike. In the Act to Regulate Commerce enacted on February 4, 1887 (subsequently referred to as the Interstate Commerce Act) that created the Interstate Commerce Commission ("ICC"), Congress provided the first regulation of the railroads' obligation to provide facilities for transportation of both passengers and freight, and to provide for interchange between or among the various carriers.[1] This statute specifically recognized two distinct common carrier obligations – one to passengers and one to freight shippers.[2] Initially, the carriers did not distinguish between commuter and long-haul or intercity passenger operations.[3] They simply provided the service as required by the markets they served. Extensive commuter operations grew up around the major cities, such as Chicago, New York, Philadelphia and Boston.[4] In the railroads' heyday, passenger service was available throughout the network and virtually every community was connected to the entire country by rail.

1. Act to Regulate Commerce, Ch. 104, 24 Stat. 379, 380 (1887).

2. *Id.* at sections 1 ("[T]he provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property . . . ."), 3(2) ("Every common carrier subject to the provisions of this act shall . . . afford all reasonable, proper and equal facilities . . . for the receiving, forwarding and delivering of passengers and property . . ."), 4 ("[I]t shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under similar circumstances and conditions . . ."), and 6 ("That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property . . . .").

3. The Interstate Commerce Act since its first enactment has recognized a distinction between commuter services provided by railroads on the lines used for freight service as well, on the one hand, and the types of service now commonly referred to as "light rail". The distinction has survived in the exclusion from the definition of "rail carrier" in the Interstate Commerce Act of "street, suburban or interurban electric railways not operated as part of the general system of transportation." 49 U.S.C. §10102(5) (Supp. II 1996).

4. In other cities, such as Los Angeles, Washington, and a host of smaller cities around the nation, interurban trolley lines fulfilled some of the same functions. As noted previously, these "interurban" services were never included within the ambit of interstate commerce.

As cars, busses and then airplanes began to whittle away at, then take enormous bites out of, the passenger market share, railroads abandoned passenger service. What began as a trickle of abandonments turned into a torrent as railroads identified corridors in which they could no longer sustain passenger service. According to a report issued by the House of Representatives in 1970, the number of passenger trains in the United States had decreased from a high of 20,000 trains in 1929. "[N]ine thousand of these had disappeared by 1946" and by 1970 "there [were] less than 500 and over 100 of these are in the process of discontinuance."[5]

The Interstate Commerce Act set forth criteria for abandonment of passenger service, which could only occur with the approval of the ICC.[6] As with freight service, the question the ICC had to answer "was whether continued operation is required by public convenience and necessity and whether such continued operation will not unduly burden interstate commerce."[7] The ICC developed a set of criteria, no one of which was controlling,[8] for determining when it would approve a passenger services abandonment, and summarized the process in a case that was decided in the midst of the avalanche of requests for abandonment authority.

> The fundamental question for resolution in proceedings under section 13a(1) . . . is ". . . what effect the discontinuance of the specific train or service in question will have upon the public convenience and necessity upon interstate operations or commerce." *Southern R. Co. v. North Carolina*, 376 U.S. 93, 104 (1964). Among the factors this Commission considers in making such a determination are the population of the territory serviced, the use by the public of the service sought to be discontinued, other available transportation in the area, the general financial condition of the carrier involved, and the losses it suffers in providing the service. No one factor is, standing alone, dispositive. Thus, the fact that these trains are operating at a deficit is significant. By the same token, public use of, and reliance upon, this rail service is also an important consideration. *Missouri Pac. R. Co. Discontinuance of Passenger Trains*, 320 I.C.C. 1. (1963). The short of the matter is: we must balance public convenience and necessity against undue burden on interstate commerce. *Cf. Southern Pac. Co. Discontinuance of Trains*, 334 I.C.C. 159,

5. H.R REP. No. 91-1580 (1970) (to accompany Rail Passenger Service Act of 1970, Pub.L. No. 91-518), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4736.

6. Former 49 U.S.C. §13a(1), *recodified at* 49 U.S.C. §10908(a), Pub. L. No. 95-473, 92 Stat. 1407 (1978), *repealed,* ICC Termination Act of 1995, Pub. L. No. 104-88, §102(a), 109 Stat. 805 (1995).

7. Southern R.R.- Discontinuance of Trains Nos. 5 and 6 The "Piedmont" Between Washington, D.C. and Charlotte, N.C., 348 I.C.C. 716, 739 (1976). The standard for abandonment or discontinuance of freight service has long been, and remains, whether the public convenience and necessity permits the abandonment. *See* Transportation Act of 1920, Pub. L. No. 66-152, §402, 41 Stat. 456, 477 (1920) (adding Section 1(18) to the Interstate Commerce Act), *now codified at* 49 U.S.C. §10903 (1996).

8. Southern R.R. . – Discontinuance, 348 I.C.C. at 739.

and *Colorado v. United States*, 271 U.S. 153 (1926).[9]

### A. The Creation of Amtrak

The railroads' unwillingness or inability to continue operating passenger service led Congress to recognize that a nationwide solution was required. In passing the Rail Passenger Service Act of 1970 ("RPSA")[10], Congress acknowledged that absent direct intervention the nation was

> faced with the immediate threat of complete curtailment of rail passenger service. Faced as we are with clogged highway traffic in our densely populated areas, and to a considerable extent with growing and uneconomic congestion in our air transportation system again particularly surrounding the densely populated areas of the country, we simply cannot afford to abandon what has established as a highly serviceable and – where properly planned – convenient form of transportation.[11]

The RPSA created a new corporation, the National Railroad Passenger Corporation[12] (now commonly known as Amtrak), the purpose of which was to allow the railroads the choice whether to relinquish their obligation to provide intercity passenger service. In describing the obligations that the new corporation was to assume, Congress made a statutory distinction between the long-haul intercity and the shorter haul passenger services provided by the railroads.[13] "Commuter" service was coupled with "other short haul service" and defined as service "characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations."[14] Intercity service was everything else (other than auto-ferry service).[15]

A railroad that wanted to exit the intercity passenger business could enter into a contract with Amtrak and thereby be completely absolved of its obligation to provide intercity rail passenger service.[16] Railroads thus

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9. Atchison, T. & S. F. R. Discontinuance of Trains Nos. 211 and 212 Between Kansas City, MO., and Tulsa, Okla., 334 I.C.C. 735, 745 (1969).

10. Railway Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327.

11. H.R. Rep. No. 91-1580 (1970), *reprinted in* 1970 U.S.C.C.A.N. at 4735.

12. Railway Passenger Service Act of 1970, Pub. L. No. 91-518, §301, 84 Stat. 1327, 1330.

13. The statute, in essence, added a third category of passenger service on rails: (1) the "street, suburban, or electric interurban railways"; (2) intercity; and (3) commuter. 49 U.S.C. §10102(5).

14. Railway Passenger Service Act of 1970, Pub. L. No. 91-518, §102(5), 84 Stat. 1327, 1328 (codified at 49 U.S.C. §24102(5) 1996).

15. *Id.* Once a major factor in the services provided by railroads nationwide, the number of auto-ferry operations has dwindled dramatically.

16. Railway Passenger Service Act of 1970, Pub. L. No. 91-518, §401(a)(1), 84 Stat. 1327, 1334. A railroad that did not enter into a contract for Amtrak to assume the passenger service obligation on its lines faced a five year moratorium on discontinuances. After that five year period, a railroad wishing to discontinue any train was required to comply with the ICC's §13a(1) procedures. *Id.*, §404(a), 84 Stat. at 1336.

exiting the intercity passenger business avoided the lengthy process and uncertainty of the ICC's §13a(1) proceedings,[17] and were freed of the long standing common carrier obligation to long distance passengers that had been confirmed in 1887 by the first version of the Interstate Commerce Act. Railroads had the choice about whether to relinquish their passenger operations to Amtrak, and not all of them did. For instance, the Southern Railway Company retained its passenger operations, but surrendered to the inevitable before the end of the decade with the last run of its signature long distance train the Southern Crescent (operating between Washington, D.C. and New Orleans) in 1978.[18]

When Amtrak took over a railroad's passenger obligations, the railroad paid Amtrak for the privilege of being relieved of that drain on its resources.[19] In addition, Congress recognized that even though a railroad that had left the business was unlikely ever to return, new demands for passenger service might surface and Amtrak should have the ability to initiate that new service. Amtrak was now the passenger common carrier, and even though its obligation was not absolute, it owned no right-of-way of its own[20] to be able to fulfill that obligation. As a result, Congress granted Amtrak the power to obtain the right to operate intercity service on new routes other than those it operated when it first began providing service. Congress wanted Amtrak to negotiate first, but if that did not work Amtrak could force its way onto the subject railroad's lines.[21] Once it won that right, Amtrak had to pay the railroads the amount the ICC determined was just and reasonable to conduct those operations.[22] The current version of the Amtrak authorizing legislation is clear that Amtrak's "just and reasonable" compensation to the owning railroads can not be greater than "the incremental costs" of Amtrak's use

17. Section 13a(1) was not repealed, only modified in various respects by RPSA. However, a railroad entering into a contract with Amtrak at the beginning was required only to provide the 30 day notice required by §13a(1) before discontinuing a train. *Id.*

18. Southern R.R. – Discontinuance of Trains No. 1 and 2 the "Southern Crescent" Between Washington, D.C. and New Orleans, LA, 354 I.C.C. 630 (1978).

19. Railway Passenger Service Act of 1970, Pub. L. No. 91-518, §401(a)(2), 84 Stat. 1327, 1334.

20. Amtrak later acquired the Northeast Corridor, the line between Washington, D.C., and Boston. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, §701, 90 Stat. 31, 119-20.

21. Amtrak can require the carrier either: (1) to grant it trackage rights, that is the right to conduct its own operations over another's line; or (2) in some cases, to convey the fee, simple title to the line of railroad. National R.R. Passenger Corp. – Conveyance of Boston & Maine Interests in Connecticut River Line in Vt. and N.H., 4 I.C.C.2d 761 (1988), *rev'd and remanded*, Boston & Maine Corp. v. I.C.C., 911 F.2d 743 (D.C. Cir. 1990), *rev'd,* National R.R. Pass. Corp. v. Boston and Maine Corp., 503 U.S. 407 (1992).

22. Railway Passenger Service Act of 1970, Pub. L. No. 91-518, §402(a), 84 Stat. 1327, 1335, (codified at 49 U.S.C. §24308(a)(2)(A)).

of the railroad's facilities or of any services that railroad might provide.[23] This, to Congress and to the railroads at the time, as well, was a fair trade. The railroads received a benefit from Amtrak's assumption of their burdensome passenger obligations, while Amtrak has the right to decide which of their lines it might wish to use to provide passenger service in the future, and to pay only the "incremental", not the fully allocated, cost of its presence on and use of those lines and facilities.

### B. The Transfer of Commuter Operations to Government Agencies

The RPSA did not provide for Amtrak to take on the railroads' commuter services, and many continued them. Conrail in Philadelphia and the northern New York City suburbs, the Boston & Maine in Boston, the Long Island Railroad in New York, and in Chicago, a host of railroads – the "Milwaukee Road" (the Chicago, Milwaukee, St. Paul & Pacific Railroad Company), the Chicago Rock Island & Pacific ("Rock Island"), the Norfolk & Western Railway, the Burlington Northern (successor to the Chicago, Burlington & Quincy), the Illinois Central Gulf Railroad, and the "North Western" (the Chicago & North Western Transportation Company) – all continued providing passenger services to commuters even as Amtrak took over those same railroads' long distance passenger obligations. However, even those arrangements began to transform as railroads either went bankrupt and could not afford to continue operating passenger services, or governments began recognizing that state or local subsidization (at least) or complete take over and operation (at most) of these services was essential to their continued existence.

In Chicago, for example, the state legislature recognized that mass transportation is:

> essential to the public health, safety and welfare . . . [and to] economic well-being, maintenance of full employment, conservation of sources of energy and land for open space and reduction of traffic congestion and for providing and maintaining a healthful environment for the benefit of present and future generations in the metropolitan region.[24]

In 1973, the state created a Regional Transportation Authority ("RTA"), which was authorized to acquire and operate public transit facilities in the six-county Chicago metropolitan area, or to enter into purchase of service contracts with public or private entities to provide transportation services.[25] As a result of this legislation, purchase of service agreements were

23. 49 U.S.C. §24308(a)(2)(B) (1996).

24. Regional Transportation Authority Act, P.A. 78-5 3rd Sp. Sess., Part I, art. I (1973), *codified at* 70 ILCS §3615 1.02(a)(ii) (1993 ed.).

25. *Id.* at §§3615/2.02, 3615/2.05.

entered into with all of the railroads providing commuter service in Illinois except for the (former) Penn Central and the Chicago South Shore and South Bend Railroad, both of which served the Indiana suburbs principally.

In 1983, the Illinois legislature recognized that deficits were continuing and that further action was required to preserve commuter rail service. New legislation created the "Commuter Rail Division" as "the operating division responsible for providing public transportation by commuter rail."[26] The jurisdiction of the new Division, operating under the trade name "Metra", was over "any public transportation within the metropolitan region outside of the City of Chicago by commuter rail" and within the City of Chicago any public transportation furnished by the Burlington Northern, the Milwaukee Road, the Rock Island, the Illinois Central, the N&W, the North Western and the South Shore, other than public transportation provided by the Chicago Transit Authority.[27] As a result of this legislation, all commuter rail service in northeastern Illinois came within the purview of the public agency, even if the private railroads were still operating the service through purchase of service agreements.

In the Northeast U.S., as the federal government came to grips with the need to allow Conrail to make a success of the freight operations it inherited from the wrecks of the Penn Central (the ill-advised and ill-fated combination of the once-mighty Pennsylvania Railroad and New York Central Railroad companies), the Erie- Lackawanna (the equally ill-fated combination of the former Erie Railroad and the Delaware, Lackawanna & Western Railroad), the New Haven, the Lehigh Valley, and the Central of New Jersey, Conrail was allowed to pass off the commuter obligations to local public agencies.[28] The Southeastern Pennsylvania Transportation Authority in the Philadelphia area, the New Jersey Transit Corporation, and Metro-North on the Conrail lines north of New York City took over Conrail's remaining passenger operations in their service areas. In Boston, the Massachusetts Bay Transportation Authority took over the commuter service previously provided by the bankrupt Boston & Maine and by Conrail.

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26. 70 ILCS 3615/3B.011 (1993 ed.).

27. 70 ILCC 36153B.08 (1993 ed.). Similar provisions are found in both Public Act 83-885 (Nov. 2, 1983) and Public Act 83-886, §1 (Nov. 2, 1983). Ill. Rev. Stat. ch. 1, ¶1105 deals with the effect of (1) more than one amendment of a section at the same session of the General Assembly or (2) two or more acts relating to the same subject matter enacted by the same General Assembly, and provides that two such acts be "construed together to give full effect to each Act except in case of an irreconcilable conflict." Because there is no such irreconcilable conflict between the two versions of this section passed by the General Assembly on November 2, 1983, this jurisdictional grant remains in effect.

28. *See* Northeast Rail Service Act of 1981, Pub. L. No. 97-35, §1136, 95 Stat. 357, 647.

Where once the great railroad companies took pride in marketing their sleek and modern passenger operations to long-haul (now called intercity) and short-haul (now called commuter) passengers, they now are either out of the business altogether or operating the services as contractor for a local government authority. Passengers, however, along with environmental activists, urban planners and fans of rail service, have not lost sight of the value provided to communities by the presence of commuter rail on existing rail infrastructure. The voices of these constituencies were not stilled entirely by the decline in interest in rail passenger service, and through the 1980's they began to be heard in communities around the country. Gradually, interest in the provision of commuter rail service swelled to the point where government agencies in Los Angeles, San Diego, Dallas, the Seattle area, San Francisco and the nearby Peninsula, Miami and Salt Lake City began acquiring lines or interests in lines to begin providing commuter rail service.[29]

However, as interest in using these rights-of-way expands on the local level, a seemingly insurmountable obstacle often appears in the path of the oncoming passenger train: the freight railroads, anxious to see the passenger trains virtually disappear when they were such a drain on their resources, do not always welcome their return. In fact, in most cases, the railroads are quite adamant that there is no room on their lines for this service. Arguing about capacity constraints, service obligations that could be impeded by the need to give commuting passengers priority during peak rush hours, and potential liability exposure, the freight railroads have become quite adept at saying "no," even in the face of mounting public pressure. Public agencies, unlike Amtrak, do not have a statutory right created specifically to allow them to gain access when the freight carrier does not acquiesce. The commuter operators argue that, when this occurs, there is a need for a specific and carefully tailored statutory remedy and for a forum with power to order its implementation.[30]

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29. The reviving interest in rail passenger service is not limited to commuter operations. For example, in the Midwest, a coalition of the states of Ohio, Indiana, Michigan, Illinois, Missouri, Iowa, Wisconsin, Minnesota and Nebraska is working together with Amtrak and the Federal Railroad Administration on a "Midwest Regional Rail Initiative", described as "an ongoing effort to develop an expanded and improved passenger rail system in the Midwest." *See Midwest Regional Rail Initiative: Strategic Assessment and Business Plan*, Final Report, August 1998 (prepared by Transportation Economics & Management Systems, Inc., in association with Paine Webber Incorporated, Quandel & Associates, Davis O'Connell, Inc. and W. L. Gallagher) http://www.dot.state.wi.us/dtim/bop/mwrail.html. In addition, Congress continues to fund research into high speed rail corridors and technologies for the purpose of finding new, faster, more efficient ways to use rail-related technologies for the movement of passengers. *See, e.g.*, Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-164, 103 Stat. 1069, 1084 (1989).

30. *See, e.g.*, Testimony of William W. Millar, President, American Public Transit Associa-

## III. Solving The Question of Commuter Access to Freight Rail Lines

When the local agencies identify a track on which they wish to move commuters, the optimal way to achieve that goal is through negotiation. This has occurred in locations across the country, to the advantage of commuters.[31] However, negotiation does not always work. In some circumstances, the railroads have agreed to allow access for a few trains but balk at the addition of more when the commuter service proves successful. In other cases, the railroads object from the outset.

In similar situations outside the railroad context, when a government wants to use private property and the owner disagrees, the government can use its eminent domain powers to force the issue. In the railroad arena, this does not work. The STB's jurisdiction over transportation by rail carriers, including the facilities of such carriers, is exclusive.[32] The STB has recently confirmed that local governments can not, on their own, seize, regulate or otherwise assert control over rail facilities dedicated to or used in interstate commerce if the taking or local regulation will unreasonably burden the ability of the railroad to fulfill its common carrier obligation in interstate commerce.[33] For some of the situations where public and private interests cannot agree, the Interstate Commerce Act already includes a remedy that permits the commuter agency to force its way onto the railroad's lines. For others, that remedy may not be available according to some interpretations, and additional clarification by Congress may be required.

In the Transportation Act of 1920,[34] when returning the railroads to private ownership after the federalization that occurred during World War I, Congress added a provision that became the basis for the solution

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tion, on Reauthorization of the Surface Transportation Board before the Senate Subcommittee on Surface Transportation and Merchant Marine, March 2, 1999, at 3-4.

31. E.g., Southern Pac. Trans. Co. - Abandonment - L. A. County, CA, 8 I.C.C.2d 495 (1992), *reconsidered and clarified,* 9 I.C.C. 2d 385 (1993) (acquisition by Los Angeles County of property and facilities from Southern Pacific Transportation Company); Orange County Transp. Auth. – Acquisition Exemption – The Atchison, T.&S.F. Ry., 10 I.C.C. 2d 78 (1994); Utah Transit Authority Acquisition Exemption – Line of Union Pac. R.R., Finance Docket No. 32186, 1992 WL 386409 (I.C.C.) (served Dec. 31, 1992); Dallas Area Rapid Transit – Acquisition & Operation Exemption – Rail Lines of Missouri Pac. R.R., Finance Docket No. 31690, 1990 WL 288378 (I.C.C.) (July 11, 1990).

32. 49 U.S.C. §10501(b) (1996).

33. Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington N. R.R. – Stampede Pass Line, STB Finance Docket No. 33200, 1997 WL 362017 (I.C.C.) (served July 2, 1997), *aff'd,* 154 F.3d 1025 (9th Cir. 1998). *See also* Hayfield Northern R.R. Co., Chicago and N.W. Transp. Co., 467 U.S. 622 (1984) (stating condemnation law not preempted by Interstate Commerce Act when line has already been abandoned and the ICC's jurisdiction over the line has therefore terminated).

34. Pub. L. No. 66-152, ch. 91, 41 Stat. 456 (1920).

to commuter agencies' inability to accomplish their service objectives. Congress added a new provision to the Interstate Commerce Act as follows:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the affected carriers may agree upon, or in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings.[35]

In its current incarnation following the recodification of the Interstate Commerce Act in the ICC Termination Act of 1995 (the "ICCTA"),[36] the statute now states the following:

> The Board may require terminal facilities, including mainline tracks for a reasonable distance outside a terminal, owned by a rail carrier providing transportation subject to the jurisdiction of the Board under this part, to be used by another rail carrier if the Board finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.[37]

Continuing, the statute requires the parties to try to set the terms and conditions of the tenant's use. If they can not, the STB will establish conditions and compensation "under the principle controlling compensation in condemnation proceedings."[38]

The ICC and its successor the STB have viewed this section as one that is available to redress competitive abuses on the freight side.[39] However, it is not by either specific statutory language or judicial interpretation limited to that context. A careful parsing of the language of the statute demonstrates that commuter agencies can use this statute to gain leverage in negotiations with railroads that own property over which they seek the right to operate.[40]

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35. *Id.* at §405, 41 Stat. at 479, *now revised and codified* at 49 U.S.C. §11102(a).

36. Pub. L. 104-88, 109 Stat. 805 (1995). This statute eliminated the ICC but created a new, smaller agency, the Surface Transportation Board ("STB") to carry out the remaining non-safety regulatory functions.

37. 49 U.S.C. §11102(a) (1996).

38. *Id.*

39. *See, e.g.*, Philadelphia Belt Line R.R. v. Consolidated Rail Corp., Finance Docket No. 32802, 1996 WL 362996 (I.C.C.) (served July 2, 1996); Midtec Paper Corp. v. Chicago & N. W. Transp. Co., 3 I.C.C.2d 171 (1986), *aff'd*, 857 F.2d 1987 (D.C. Cir. 1988).

40. Indeed, two local transportation agencies in Southern California sought the forced ac-

### A. What Property can the STB Require be Used?

The property must be either a "terminal facility" or "main line track for a reasonable distance outside a terminal", and these must be owned by a "rail carrier providing transportation subject to the jurisdiction of the Board under this part."[41] The ICC has stated that a terminal facility is "any property of a carrier which assists in the performance of the functions of a terminal."[42] Use, however, is not the only subject of inquiry; the nature of the facilities and the area in which they are located are as important as the use. The ICC and the STB have considered significant a number of circumstances, such as whether operations take place within a railroad's yard limits and whether service is performed within a cohesive commercial area, in determining whether a particular track or facility meets this description.[43]

When the track a commuter agency seeks to use is in the heart of a bustling metropolis, or when tracks are within city limits leading to or into the vicinity of a passenger station, determining whether the statutory requirements are satisfied is an easy one. As the tracks become more distant from the center of downtown commercial or central city industrial activity, the question of the meaning of a "reasonable distance outside a terminal area" comes to the fore. The ICC has been willing to find that trackage rights over 60 miles of track met the test when that track passed through the heavily industrialized Chicago Sanitary and Ship Corridor.[44]

It seems logical that the only lines a commuter authority would seek to use would be within a reasonable distance outside a central city "terminal" area. However, in many major metropolitan centers where several different business districts exist within the city, and suburbs have them-

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cess to terminal trackage that is provided in this section, but withdrew their applications when negotiations led to a resolution of the dispute with the owning railroad. Application of Ventura County Transp. Comm'n for an Order Requiring Joint Use of Terminal Facilities in Ventura County, *CA*, STB Finance Docket No. 33557; Application of Southern California Regional Rail Auth. for an Order Requiring Joint Use of Terminal Facilities of The Atchison, T. & S.F. Ry., ICC Finance Docket No. 31951.

41. 49 U.S.C. §11102(a) (1996).

42. CSX Corp. – Control – Chessie Sys., Inc., 363 I.C.C. 518, 585 (1980).

43. *See* Midtec, 3 I.C.C.2d at 179.

44. Rio Grande Indus. – Purchase and Trackage Rights – Chicago, M.&W. Ry, 5 I.C.C.2d 952, 983 (1989). One commentator disagreed with the ICC's extension of the "terminal trackage rights" remedy to this extent and its interpretation of the law. *See* Fritz R. Kahn, Stretching Terminal Trackage Rights, 58 Transp. Prac. J., 165 (1991). Kahn views the remedy as one that should be used to provide one railroad with access to another's terminal, with the trackage rights available only as necessary to allow the newcomer or tenant to reach that terminal facility. While he cites substantial legislative history of the Transportation Act of 1920 to support his thesis, the literal language of the statute can be read more broadly. In fact, subsequent legislative expressions, discussed more fully *infra* indicate that Congress acknowledges and does not necessarily dispute the broader reading of the statute.

selves become major commercial centers, this definitional line is blurred. How far out into or beyond the Chicago suburbs is a "reasonable distance", when Des Plaines and Schaumburg, to cite only two examples among the far western suburban communities, are significant business centers on their own? What about in Los Angeles, where the Southern California Regional Rail Authority ("SCRRA") "Inland Empire - Orange County" service (between San Bernardino and Irvine, via a route that goes around and not through the downtown Los Angeles system hub) is the first inter-suburban, as opposed to city center-suburban (hub-and-spoke) commuter rail operation in the country? San Bernardino and Riverside, at the eastern edges of the SCRRA system are in some respects actual terminals themselves. How far beyond them is a "reasonable distance"?

The property must be "owned by a rail carrier providing transportation subject to the jurisdiction of the Board under this part." This means nearly all of the freight railroads and terminal area switching companies in the United States. The STB, like the ICC, reads its broad grant of jurisdiction very broadly.[45] A movement on a line of railroad that is wholly within one state and that is owned by a company located in that state, nonetheless can be part of the interstate network and thus subject to the STB's jurisdiction. This will be the case even if the movement stays wholly within that one state, as long as the rail line connects to the broader network and any traffic on it moves onto that interstate system.

In the ICCTA, Congress attempted to clarify the extent of the STB's jurisdiction over commuter authorities that might otherwise be conducting operations that are only intrastate. The question arises because the jurisdictional section specifically states that: "[e]xcept as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local government authority."[46] In the

45. Under 49 U.S.C. §10501(a)(2) (1996), the STB has jurisdiction over rail transportation "in the United States between a place in –

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country;

(F) the United States and a foreign country.

46. 49 U.S.C. §10501(c)(2) (1996). "Local government authority" here has the same meaning as in 49 U.S.C. §5302(a), and includes a person or entity that contracts with that authority to provided transportation services. 49 U.S.C. §10501(c)(1)(A). According to §10501(c)(1)(B), "mass transportation" has the same meaning as in 49 U.S.C. §5302, *i.e.*, "transportation by a conveyance that provides regular continuing general or special transportation to the public, but does not include schoolbus, charter or sightseeing transportation." 49 U.S.C. §5302(a)(6) (1996).

ICCTA, at the request of public agencies that had faced questions about their ability to assert the remedy in §11102, Congress added the following:

> The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before the effective date of the ICC Termination Act of 1995.[47]

Thus, if a local agency owns transportation facilities that fall within the definition of "transportation" in 49 U.S.C. §10102(9), and if that agency meets the standards set forth in §10501(c)(3)(B), another carrier – freight or passenger – can invoke the §11102 remedy and secure the right to use that property as well.

### B. Can Non-STB Regulated Carriers Invoke this Remedy?

The current statute allows "another rail carrier" to seek the STB's help in gaining access to terminal facilities or main line track. The text of the statute does not require the rail carrier *seeking* the authority to be one providing transportation subject to the Board's jurisdiction, even though the *owner* of the property over which the applicant seeks authority to operate must be such a carrier. Recent changes in the statute have further confused the law on this issue.

Who is a rail carrier? Any "person who is providing common carrier railroad transportation for compensation", except for "street, suburban, or interurban electric railways not operated as part of the general system of rail transportation" is included.[48] A government agency that is just planning to start service is not a rail carrier until it begins to provide service, or until it acquires sufficient interests in existing rail property to bring it within the ambit of the STB's jurisdiction.

However, even for authorities that are already providing service, the current formulation of §11102 raises questions. The statute permits the STB to require "terminal facilities . . . owned by a rail carrier providing transportation subject to the jurisdiction of the Board . . . to be used by *another rail carrier* . . . ."[49] Neither the statutory definition of "rail carrier," nor the definition of "transportation" includes a tie to the Board's jurisdiction.[50] A company or authority can be a rail carrier providing

47. 49 U.S.C. §10501(c)(3)(B) (1996).

48. 49 U.S.C. §10102(5) (1996).

49. 49 U.S.C. §11102(a) (1996).

50. *See supra* note 48 and accompanying text for the definition of "rail carrier." Transportation means:

> [A] a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property,

transportation, but there is rail transportation that is not subject to the jurisdiction of the STB.[51] Can a rail carrier that is providing transportation that is *not* subject to the STB's jurisdiction invoke this remedy? The statute as originally formulated suggests that the answer should be yes.

A review of the history of this section is instructive. When the terminal access provision was added to the Interstate Commerce Act in 1920, the statutory language did not require that the applicant seeking to force its way onto the lines of a jurisdictional rail carrier itself be providing transportation subject to the jurisdiction of the ICC. The statute stated the following (in pertinent part):

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal of any carrier, by another carrier or carriers . . . .[52]

This statute makes no mention here of a requirement that the applicant carrier be one whose transportation services are subject to the jurisdiction of the ICC.

A 1940 amendment to section 3(4) revised this text somewhat. Following the enactment of the Transportation Act of 1940, the statute read (in pertinent part) as follows:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a *common carrier by railroad* owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal of *any common carrier by railroad, by another such carrier or*

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facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

[B] services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. §10102(9).

51. For example, even though the counties that are the members of the Joint Powers Board that is the SCRRA have been found by the ICC to be rail carriers providing transportation subject to the jurisdiction of the ICC (now the STB) because of the rights and obligations they undertook when acquiring rail lines from two freight railroads, the ICC specifically ruled that it did not have jurisdiction over the actual passenger train service operated by SCRRA since it was wholly within a state. Orange Co. Transp. Auth., 10 I.C.C.2d 75. *See also* 49 U.S.C. §10501(c)(3)(B).

52. Transportation Act of 1920, §405, amending the second paragraph of section 3 of the Interstate Commerce Act. 41 Stat. at 479.

*carriers. . . .*[53]

Still, there is no mention of a requirement that the transportation provided by the invoking carrier be subject to the jurisdiction of the STB. The reference, "such carrier", refers only to the earlier-mentioned "common carrier by railroad", not to any tie to the scope of the ICC's jurisdiction. The current version of the statute, like its immediate predecessor,[54] is the same – only the carrier over whose property the applicant seeks the right to operate must be one providing STB-jurisdictional transportation.

The ICCTA, however, introduced confusion. Can a public agency planning for new service use this statutory remedy if the freight railroad proves intransigent in the negotiations? Sections 11102 seems to say yes (as long as that agency is already providing some railroad transportation). However, the legislative history of the ICCTA suggests the answer might be no. A close reading of §11102 demonstrates the only transportation that must be subject to the STB's jurisdiction is that provided by the *owner*, not the *applicant*. Thus, it should not matter that §10501(c)(2) states clearly that the STB does not have jurisdiction over mass transportation provided by a local government authority, or that §10501(c)(3)(B) makes an exception to that for the purpose of §§11102 and 11103.

What, then, is the meaning or purpose of the following text from the Conference Report on the ICCTA:

> This section also clarifies that, although regulation of passenger transportation is generally eliminated, public transportation authorities that meet existing criteria for being rail carriers may *invoke* the terminal area and reciprocal switching remedies of section 11102 and 11103.[55]

Even though §11102 on its face does not require that the *invoking* carrier be one that provides transportation subject to the jurisdiction of the STB, this legislative history suggests that perhaps there is such a limitation. The question is whether by this reference in the House Report to the rail carrier that is "invoking the terminal area and switching remedies," Congress meant to amend §11102. Congress clearly meant to be amending something when it added §10501(c)(3)(B). However, when the two sections — §11102 and 10501(c)(3)(B) — are read together, and when the

53. Transportation Act of 1940, Pub. L. No. 76-785, §5(f), 554 Stat. 898, 904 (Sept. 18, 1940). The italicized words show the changes from the original text.

54. Prior to the ICC Termination Act of 1995, this section was codified at 49 U.S.C. §11103(a) (1994 ed.). The text remained the same from the 1940 amendment until the recodification of the Interstate Commerce Act in 1978. *See* 49 U.S.C. §3(5) (1976 ed.) recodified at 49 U.S.C. §11103 by Pub. L. 95-473, 92 Stat. 1337, 1419 (1978) (revising and recodifying the Interstate Commerce Act and related laws without substantive change).

55. H.R. 104-422 at 167 (emphasis supplied), *reprinted in* 1995 U.S.C.C.A.N. 793, 852 (1995).

explanation in H.R. 104-422 is added to the analysis, it is not clear what Congress' objective was, and whether that objective was achieved.

Here, then, is an area that requires clarification by Congress. Congress seemed to intend that this remedy be available to public agencies seeking to use existing rail lines for commuter service. For it to be useful to newly beginning operations as well as to established systems and to avoid any argument that would prevent "new starts" from using this remedy, Congress must state clearly its intentions in this regard.

### C. How Much Must the User Pay the Owner?

The statute has been consistent on this point since its inception – "principles controlling compensation in condemnation proceedings" is the standard.[56] The ICC has been quite clear in defining the methodology for determining compensation. The same methodology that is used in determining compensation in merger cases where trackage rights are imposed applies in the "terminal access" context as well.[57] The ICC described the formula it uses to determine compensation for imposed trackage rights, referred to as the "SSW formula", as follows:

> [C]ompensation should be determined in three parts: (1) the variable cost of operation including standard additives; (2) a proportionate share of maintenance and operation expenses based on the tenant's usage of the facility, and (3) interest rental.[58]

The "interest rental" part of the formula, that is, the computation of return on investment, is to be determined by using the "capitalized earnings approach." According to the ICC:

> We believe the capitalized earnings multiplier is the most appropriate technique for valuing railroad assets in these proceedings. The capitalized earnings approach estimates the value of the lines on the basis of a contemporaneous arms-length transaction, thereby reasonably approximating the fair market value. The going concern value of a corporation has been found to be an appropriate method of valuation . . . . In evaluating "going concern value," the "commercial value of property consists in the expectation of income from it."[59]

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56. 49 U.S.C. §11102(a).

57. *See* Finance Docket No. 32760, Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al., Decision No. 44, *slip op.* at 150, 1996 W.L. 467636, (Service Date August 12, 1996).

58. St. Louis Southwestern Ry. Co. – Trackage Rights over Missouri Pac. R.R. Co. – Kansas City to St. Louis, 4 I.C.C.2d 668, 670 (1987). In a merger case, the Board and parties have information about the valuation of the railroad, whether in terms of property value or earning stream, that can be allocated to the segment in question. Outside of that context, the Board will require information about recent valuation, as well as other data to determine appropriate compensation.

59. *Id.* at 674 (citation omitted).

This is a different compensation structure than Congress used in permitting Amtrak to force its way onto the lines of unwilling railroads. Amtrak, as noted previously, pays only the "incremental cost" of its operations on a freight railroad's lines.[60] Amtrak earned the right to pay less than the fully allocated cost of its presence on these lines because it was relieving those carriers of the duty to provide intercity passenger services themselves. Commuter authorities seeking to force their way onto the lines of unwilling host railroads are not in the same position and have no claim for the same reduced consideration. The STB has determined that the "SSW formula" is one that is appropriate to compensate owners of rail lines for forced use of their lines by others, and is one possibly fair way to assess commuter authorities for use of others' lines.

A commuter authority might argue that using this methodology does not make sense because passenger-only agencies are not in precisely the same position as a freight railroad competitor that wins the right to use another's track. Part of the value that is inherent in the compensation paid by a freight railroad to the owner in this context is some measure of the owner's lost business opportunities. The commuter operator, while consuming capacity, is not necessarily taking away revenue that would otherwise be available to the owner of the lines if there is surplus capacity on the line. As a result, another compensation formula might be appropriate for this arrangement, presenting another issue that could be clarified by Congress or the STB in a future proceeding.

Allocation of liability also relates to the cost of the presence of the commuter operator on the freight railroad's lines. Amtrak struggled for several years with questions of allocation of liability arising from its use of the owning railroad's lines and continuously sought ways to limit the liability of both itself and the freights.[61] In 1997, Congress finally adopted a liability allocation structure that imposes limits applicable to all passenger operations on a particular freight line. Congress limited punitive damages to cases where "the harm that is the subject of the action was the result of conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others."[62] Congress also placed a $200 million cap on liability from any single incident, and encouraged all providers of rail passenger transportation to enter into con-

60. 49 U.S.C. §24308(a)(2)(B) (1996).

61. The Senate Report accompanying the passage of the Amtrak Authorization for Appropriations in 1997 states that Amtrak had "testified four times before the Senate Commerce Committee during the 104th and 105th Congress to report on plans to improve its financial performance and achieve long-term viability" and had "consistently discussed the need for statutorily imposed liability limits in order to achieve long-term viability." S. REP. NO. 105-85 to accompany Pub. L. 105-134, 111 Stat. 2570 (1997), 1997 U.S.C.C.A.N., 3055, 3059.

62. Amtrak Authorization for Appropriations, Pub. L. 105-34, §161, 111 Stat. 2570, 2577 (1997), *codified at* 49 U.S.C. §28103 (1996).

tracts that allocate financial responsibility for claims.[63] Resolving an issue that had plagued freight railroads that host Amtrak trains, Congress also affirmed the enforceability of contracts that include indemnification obligations.[64] As a result of these recent changes in the law, the liability issue is one that should not be perceived as necessarily adding cost to the freight railroads. The parties can be free to negotiate an arrangement, or the STB can require that one be reached, that is mutually beneficial and that recognizes the reality of the relationship and the responsibilities of each party.

### D. What are the Limitations on Use of this Remedy?

Among the reasons articulated by freight railroads for denying access to commuter agencies is lack of capacity. Section 11102, like its predecessors, will not allow the STB to order railroads to grant access to terminal facilities or lines if the introduction of the second carrier will not be "practicable" or would "substantially [impair] the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business."[65] In many locations, lack of capacity has become a serious issue. If a railroad can prove that the subject lines or facilities do not have sufficient capacity, the STB does not in all situations have the authority to order the company to make enhancements that would make commuter operations "practicable."[66]

The limited infrastructure capacity is a relatively new phenomenon. At one time, nearly all major metropolitan areas were served by multiple competing railroads that laid down a spiderweb of interconnected tracks leading to and within the central commercial districts. However, the spate of mergers and consolidations in the rail industry over the past 20 years, while reducing the number of major freight railroads, has also exposed the duplication of facilities within nearly every major city in the

63. *Id.*

64. *Id.* at (a)(2)(b). *See* S. Rep. No. 105-85, at 3063. The Senate explained the need for this provision as follows:

> The need for this provision arises because of concern about liability in the case of an accident. This concern is the result of a court decision that required Conrail to pay substantial damages for a collision between an Amtrak train and a Conrail train, despite the existence of a contract limiting Conrail's liability. Without enactment of this provision, it is possible that owners of rail rights-of-way, such as Conrail, would press rail passenger operators, including state and local commuter rail authorities, for higher compensation to cover this increased risk when current operating agreements come up for renegotiation.

65. 49 U.S.C. §11102(a) (1996).

66. If terminal access is sought as a condition of a merger, the STB has broad powers to impose requirements on the merging carriers that could include capacity enhancements, if necessary to offset an adverse impact of the proposed merger. *See* 49 U.S.C. §11324(c) (1996); 49 C.F.R. §1180 2(d).

country. Railroad managers faced with excess lines in an era of explosive commercial growth in those cities took the opportunity to harvest many of those properties and thereby enhance the companies' financial performance and value to shareholders. That worked well in a time when rail traffic volumes were diminishing. However, the nation's railroads and their customers learned a hard lesson when the reduction in infrastructure and personnel following the merger of the Union Pacific Railroad and the Southern Pacific Transportation Companies in 1996[67] coincided with an increase in freight traffic bought about by a booming, healthy economy. The resulting meltdown of rail operations brought extensive shipper outcry, media attention, and an investigation by the STB at the direct request of two Senators who states (Texas and Arizona) were among the hardest hit by the UP's problems.[68]

However, notwithstanding UP's well-publicized problems, not all claims of insufficient capacity are valid. Most commuter agencies are not seeking high volume, high frequency operating rights and are willing to cooperate with the freight railroads to find a workable schedule. It is true that commuter trains want to run at certain peak hours when freight might need to be delivered to customers to satisfy just-in-time inventory requirements. It is also true that freight railroads have the ability, in most instances if they choose, to stage their operations so that trains can be on sidings or near customers' facilities before peak commuter hours begin in order to meet the customers' needs.

"Practicability" is a fact-specific inquiry, and one that can be answered only by fact-finders, where a dispute exists, with expertise in understanding the realities and complexities of railroad operations. Where the public is clamoring for passenger service, the railroads, the public and the STB need to think carefully before coming to conclusions about whether use by the commuter trains will unduly interfere with the freight operations. Sometimes they will, many times they will not. Where they will, the public needs to be prepared to fund improvements that will

67. Each of the two parties in the UP-SP merger were themselves the products of a number of consolidations. In the past 20 years alone, Union Pacific has swallowed, the Missouri Pacific and the Western Pacific Railroads, Finance Docket No. 30,000 Union Pac. Corp. – Control – Missouri Pac. Corp., 366 I.C.C. 462 (1982); the Missouri-Kansas-Texas R.R. Co., Finance Docket No. 30800, Union Pac. Corp. – Control – Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409 (1988), and the Chicago and Northwestern Transp. Co., Union Pac. Corp. – Control – Chicago & N.W. Transp. Co., Finance Docket No. 32133, 1995 WL 141757 (I.C.C.) (served Mar. 7, 1995). The SP, similarly, grew to its size before the merger by acquiring the Denver & Rio Grande Western Railroad Company, Rio Grande Indus., Inc. – Control – Southern Pac. Transp. Co., Finance Docket No. 32000, 1988 WL 224782 (I.C.C.) (Aug. 25, 1988). Each of those mergers had themselves resulted in facility consolidations and work force reductions to achieve operating efficiencies and cost savings.

68. *See* Ex Parte 573, *Rail Service in the Western United States.*

make operations possible, and the STB needs to be authorized and prepared to render decisions about what level of improvements is necessary to make the proposed operations practicable. Where there will not be undue interference, the railroads need to recognize that they will be compensated fairly and that increases in either their own or the commuters' operations in the future will require contributions to the cost of capacity enhancements by the party whose volume or frequency of operations has grown.

## IV. Conclusion

Judging from the increasing public support for commuter rail service, there needs to be an accommodation between the public interest in securing the use of rail right-of-way for this purpose and the private interest in discouraging such use. State and local governments, accustomed to using their eminent domain powers to force agreements with private property owners, are stymied by the STB's exclusive jurisdiction over any use of rail lines that would burden interstate commerce. Congress needs to clarify the ability of the STB to require the railroads to share their tracks and facilities with the public. This is not a situation in which the public should have all of the leverage and the railroads none. To the contrary, railroads have made substantial investments using largely private capital[69] and their shareholders deserve to reap the benefits. If Congress is serious, as suggested by the legislative history of the ICCTA, about public agencies gaining access to private right-of-way, it needs to clarify the answers to questions raised by the current statutory framework. These include:

- Whether public agencies, either new starts or established systems, should have the same right as Amtrak to force private owners to relinquish some use of their property for the public good.
- If so, how can the railroads be adequately and appropriately compensated for the mandated transfer of an interest in their property and for the new tenant's continued use of that property?
- What is an appropriate standard for determining whether the railroad has capacity to allow the proposed use (the "practicability" question)?
- How will the parties allocate the cost of improvements required to enhance capacity when required by growth in freight traffic or increased frequency of commuter trains?

The debate between public and private sectors will continue, and the current statutory framework suggests possible answers. Somewhere, there is a middle ground between the public interest and the private objection to sharing use of the right-of-way.

69. Not all of the investment has been privately funded. For example, Congress and the taxpayers invested enormous amounts of money in Conrail during the 11 years it was government owned. Also, state governments nationwide have aided railroads that serve their populace.