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Amtrak Liability

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

LRM NO: 4730

FILE NO: 2470

6/13/96

LEGISLATIVE REFERRAL MEMORANDUMTotal Page(s): 4

TO: Legislative Liaison Officer - See Distribution below:

FROM: James JUKES *J.L.*

(for) Assistant Director for Legislative Reference

OMB CONTACT: James BROWN 395-3473 Legislative Assistant's Line: 395-3454
C=US, A=TELEMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=BROWN, G=JAMES, I=A
brown_ja@a1.eop.gov
Daniel TANGHERLINI 395-5707

SUBJECT: TRANSPORTATION Qs and As on Affect of Liability Limitations on Railroad
Safety

DEADLINE: 5:00 p.m. Wednesday, June 19, 1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: These answers to questions from Senator Kerry of the Senate Commerce, Science, and Transportation Committee relate to "Tort Reform."

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366 - 0616*

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

LRM NO: **4730**

FILE NO: **2470**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: James BROWN 395-3473
 Office of Management and Budget
 Fax Number: 395-3109
 Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

SUBJECT: TRANSPORTATION Qs and As on Affect of Liability Limitations on Railroad Safety

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
- _____ Other: _____
- _____ FAX RETURN of _____ pages, attached to this response sheet

SENATOR KERRY

LIABILITY LIMITS FOR RAILROAD ACCIDENTS

QUESTION 2: In FRA's view, would limitations on liability promote or diminish the incentives for railroads to improve safety generally, and to improve passenger safety in particular?

ANSWER: The Administration has indicated throughout the Amtrak reauthorization process that it is generally opposed to the imposition of arbitrary caps on punitive damage amounts and would strongly oppose the inclusion of such caps in the Amtrak reauthorization legislation. Passenger service is such a small percentage of the traffic on the freight lines hosting Amtrak service that it is doubtful that the presence or absence of liability limitations bearing on passenger service alone would affect a host railroad's safety behavior. The potential liability from a freight accident is as large or larger than that from a passenger accident and, in general, a railroad must do the very same things to assure the safety of both kinds of service.]

↓
Suggest limits are OK re passenger service, no? Goes against basic position.

SENATOR KERRY**LIABILITY LIMITS FOR RAILROAD ACCIDENTS**

QUESTION 3: In FRA's view, would codification of such indemnification agreements promote or diminish the incentives for railroads to improve safety?

ANSWER: In 1971, when Amtrak was formed, it entered into a series of operating agreements with the private rail freight carriers through which Amtrak obtained access to the tracks and facilities it needs to operate intercity rail passenger service. These operating agreements included provisions through which Amtrak indemnifies the freight railroads for responsibility for passenger-related liability costs. Similarly, these agreements also contain language by which the freight railroads indemnify Amtrak from responsibility for freight-related liability costs. Until 1987 and the Chase, Maryland Amtrak/Conrail accident, the parties operated under the assumption that these agreements addressed liability costs derived from acts that involved both ordinary negligence and gross negligence. Following the Chase accident, Amtrak decided to challenge this assumption and was successful in having Conrail assume responsibility for a portion of the passenger-related costs of the Chase accident. Notwithstanding Amtrak's decision to challenge the agreement language with respect to the Chase accident, the FRA does not have a body of evidence that would lead the agency to conclude that operating rail passenger service on the basis of the assumptions that were included in the original operating agreements contributed to a lessening of railroad safety during the sixteen years prior to the Chase accident or that overall safety increased in light of Conrail's participation in meeting the passenger-related liability costs of that accident. There simply isn't sufficient data available on which to base a determination that rail safety was affected by the change in circumstances arising out of the Chase accident. Incidents of gross negligence have been extremely rare in Amtrak's 25 year history of operations.

18

1 serve boards, or reserve engine service positions, where an
2 increase in positions is the result of the return of an Am-
3 trak employee pursuant to an agreement entered into
4 under paragraph (1). Conrail's collective bargaining agree-
5 ments with organizations representing its train and engine
6 service employees shall be deemed to have been amended
7 to conform to this paragraph. Any dispute or controversy
8 with respect to the interpretation, application, or enforce-
9 ment of this paragraph which has not been resolved within
10 90 days after the date of the enactment of this paragraph
11 may be submitted by either party to an adjustment board
12 for a final and binding decision under section 3 of the
13 Railway Labor Act."

14 (c) TECHNICAL AMENDMENT.—Section 11347 of
15 title 49, United States Code, is amended by striking "sec-
16 tions 24307(c), 24312, and" and inserting in lieu thereof
17 "section".

18 **TITLE IV—USE OF RAILROAD**
19 **FACILITIES**

20 **SEC. 401. LIABILITY LIMITATION.**

21 (a) AMENDMENT.—Chapter 281 of title 49, United
22 States Code, is amended by adding at the end the follow-
23 ing new section:

1 **“§28103. Limitations on rail passenger transpor-**
2 **tation liability**

3 **“(a) LIMITATIONS.—(1) Notwithstanding any other**
4 **statutory or common law or public policy, or the nature**
5 **of the conduct giving rise to damages or liability, in a**
6 **claim for personal injury, death, or damage to property**
7 **arising from or in connection with the provision of rail**
8 **passenger transportation, or from or in connection with**
9 **any rail passenger transportation operations over or rail**
10 **passenger transportation use of right-of-way or facilities**
11 **owned, leased, or maintained by any high-speed railroad**
12 **authority or operator, any commuter authority or opera-**
13 **tor, any rail carrier, or any State—**

14 **“(A) punitive damages shall not exceed the**
15 **greater of—**

16 **“(i) \$250,000; or**

17 **“(ii) three times the amount of economic**
18 **loss; and**

19 **“(B) noneconomic damages awarded to any**
20 **claimant for each accident or incident shall not ex-**
21 **ceed the claimant’s economic loss, if any, by more**
22 **than \$250,000.**

23 **“(2) If, in any case wherein death was caused, the**
24 **law of the place where the act or omission complained of**
25 **occurred provides, or has been construed to provide, for**
26 **damages only punitive in nature, the claimant may recover**

1 in a claim limited by this subsection for economic and non-
2 economic damages and punitive damages, subject to para-
3 graph (1)(A) and (B).

4 “(3) For purposes of this subsection—

5 “(A) the term ‘actual damages’ means damages
6 awarded to pay for economic loss;

7 “(B) the term ‘claim’ means a claim made, di-
8 rectly or indirectly—

9 “(i) against Amtrak, any high-speed rail-
10 road authority or operator, any commuter au-
11 thority or operator, any rail carrier, or any
12 State; or

13 “(ii) against an officer, employee, affiliate
14 engaged in railroad operations, or agent, of
15 Amtrak, any high-speed railroad authority or
16 operator, any commuter authority or operator,
17 any rail carrier, or any State;

18 “(C) the term ‘economic loss’ means any pecu-
19 niary loss resulting from harm, including the loss of
20 earnings, medical expense loss, replacement services
21 loss, loss due to death, burial costs, loss of business
22 or employment opportunities, and any other form of
23 pecuniary loss allowed under applicable State law or
24 under paragraph (2) of this subsection;

1 “(D) the term ‘noneconomic damages’ means
 2 damages other than punitive damages or actual
 3 damages; and

4 “(E) the term ‘punitive damages’ means dam-
 5 ages awarded against any person or entity to punish
 6 or deter such person or entity, or others, from en-
 7 gaging in similar behavior in the future.

8 “(b) INDEMNIFICATION OBLIGATIONS.—Obligations
 9 of any party, however arising, including obligations arising
 10 under leases or contracts or pursuant to orders of an ad-
 11 ministrative agency, to indemnify against damages or li-
 12 ability for personal injury, death, or damage to property
 13 described in subsection (a), incurred after the date of the
 14 enactment of the Amtrak Reform and Privatization Act
 15 of 1995, shall be enforceable, notwithstanding any other
 16 statutory or common law or public policy, or the nature
 17 of the conduct giving rise to the damages or liability.

18 “(c) EFFECT ON OTHER LAWS.—This section shall
 19 not affect the damages that may be recovered under the
 20 Act of April 27, 1908 (45 U.S.C. 51 et seq.; popularly
 21 known as the ‘Federal Employers’ Liability Act’) or under
 22 any workers compensation Act.

23 “(d) DEFINITION.—For purposes of this section, the
 24 term ‘rail carrier’ includes a person providing excursion,



1 scenic, or museum train service, and an owner or operator
2 of a privately owned rail passenger car.”.

3 (b) CONFORMING AMENDMENT.—The table of sec-
4 tions of chapter 281 of title 49, United States Code, is
5 amended by adding at the end the following new item:

“28103. Limitations on rail passenger transportation liability.”.

6 ~~TITLE V—FINANCIAL REFORMS~~

7 SEC. 501. FINANCIAL POWERS.

8 (a) CAPITALIZATION.—(1) Section 24304 of title 49,
9 United States Code, is amended to read as follows:

10 “§ 24304. Employee stock ownership plans

11 “In issuing stock pursuant to applicable corporate
12 law, Amtrak is encouraged to include employee stock own-
13 ership plans.”.

14 (2) The item relating to section 24304 of title 49,
15 United States Code, in the table of sections of chapter 243
16 of such title is amended to read as follows:

“24304. Employee stock ownership plans.”.

17 (b) REDEMPTION OF COMMON STOCK.—(1) Amtrak
18 shall, within 2 months after the date of the enactment of
19 this Act, redeem all common stock previously issued, for
20 the fair market value of such stock.

21 (2) Section 28103 of title 49, United States Code,
22 shall not apply to any rail carrier holding common stock
23 of Amtrak after the expiration of 2 months after the date
24 of the enactment of this Act.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 6, 1996
(Senate)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

S. 1318 - Amtrak and Local Rail Revitalization Act (Pressler (R) South Dakota)

The Administration agrees with the thrust of S. 1318, to enable Amtrak to respond to consumer needs and market realities and to free itself from Federal subsidies. Although S. 1318 includes many provisions to that end, some of its provisions could impede achievement of these objectives or impose other unnecessary burdens.

The Administration is generally opposed to the imposition of arbitrary caps on punitive damage amounts, and would strongly oppose the inclusion of any provision in S. 1318 imposing such caps.

The Administration also strongly opposes the requirement that appropriated funds be provided to Amtrak on an accelerated basis. This requirement, which is not necessary to support Amtrak's operations, would shift \$659 million of Federal outlays to FY 1996 that would occur, under current law, in FY 1997 and FY 1998. This would unnecessarily increase Federal borrowing costs.

In addition, the Administration strongly opposes Senate passage of S. 1318 unless it is amended to:

- o Delete the provisions for a permanent authorization of appropriations for the Local Rail Freight Assistance Program (LRFAP), and modifications to the section 511 loan program. The President did not request, and Congress did not provide, any appropriations for LRFAP for the current fiscal year. The rail freight industry has clearly established its ability to operate without Federal subsidies or loans. Any future decisions to subsidize the rail freight industry should be made by local and State governments in the context of their overall transportation planning, not by the Federal Government.
- o Delete the provisions which would subordinate the Federal interest as a creditor in the event of a default under the section 511 loan program. Such provisions increase the risk, and therefore the "subsidy rate," of loans guaranteed under this program, thereby reducing the number of loans which could be made with the resources available.

- o Delete the proposed guarantee of new borrowing authority for Amtrak, as Amtrak already has sufficient authority to borrow. Amtrak would probably be required to rely on Federal subsidies to repay these loans. Consequently, any amounts appropriated for loan guarantees would leverage few, if any, additional dollars in loans.
- o Delete the mandatory transfer of ownership of Washington's Union Station to Amtrak. Union Station has been successfully restored and redeveloped at Federal expense. This National Landmark should remain under Federal ownership.
- o Provide an appropriate role for the Executive branch, including the Department of the Treasury, in reviewing recommendations to be made by the Amtrak Reform Council, which would be established by S. 1318.

Pay-As-You-Go Scoring

S.1318 would increase direct spending. It is therefore subject to the pay-as-you-go requirements of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimates for this bill are presented in the table below. Final scoring of this legislation may deviate from these estimates.

<u>Pay-As-You-Go Estimates</u>						
(\$ millions)						
	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>1996-2000</u>
Outlays	658.9	-370.5	-288.4	0	0	0

* * * * *

Bruce -

On another subject (sent y), see
The attached, which Jim Tukes of
OMB sent to me last night. He
wants to know whether the
bracketed material on p. 1 is OK -
or whether we want to put in
a veto threat. There is some
background on the issue at p. 3.
What do you think? We apparently
need to decide soon.

Elena

cc: Sach

~~drive version~~

DRAFT
May 1, 1996
(Senate)

S. 1318 - Amtrak and Local Rail Revitalization Act
(Pressler (R) South Dakota)

The Administration agrees with the thrust of S. 1318, to enable Amtrak to respond to consumer needs and market realities and to free itself from Federal subsidies. Although S. 1318 includes many provisions to that end, some of its provisions could impede achievement of these objectives or impose other unnecessary burdens.

[The Administration is particularly concerned that Amtrak reform legislation avoid the imposition of arbitrary caps on punitive damage amounts, and would strongly oppose any amendments to impose such caps.]

In addition, the Administration strongly opposes Senate passage of S. 1318 unless it is amended to:

- o Delete the requirement that appropriated funds be provided to Amtrak on an accelerated basis. This requirement, which is not necessary to support Amtrak's operations, would shift \$659 million of Federal spending to FY 1996 that would occur under current law in FY 1997 and FY 1998.
- o Delete the provisions for a permanent authorization of appropriations for the Local Rail Freight Assistance Program (LRFAP), and modifications to the section 511 loan program. The President did not request, and Congress did not provide, any appropriations for LRFAP for the current fiscal year. The rail freight industry has clearly established its ability to operate without Federal subsidies or loans. Any future decisions to subsidize the rail freight industry should be made by local and State governments in the context of their overall transportation planning, not by the Federal Government.
- o Delete the provisions which would subordinate the Federal interest as a creditor in the event of a default under the section 511 loan program. Such provisions increase the risk, and therefore the "subsidy rate," of loans guaranteed under this program, thereby reducing the number of loans which could be made with the resources

available. (The subsidy rate is the cost to the Federal Government of guaranteeing a loan, expressed as a percentage of the total amount guaranteed.)

- o Delete the proposed guarantee of new borrowing authority for Amtrak, as Amtrak already has sufficient authority to borrow. Moreover, OMB and CRO would be required to score the subsidy rate for guarantees of any new loans at, or close to, 100 percent. This is because Amtrak would probably be required to rely on Federal subsidies to repay these loans. Consequently, any amounts appropriated for loan guarantees would leverage few, if any, additional dollars in loans.
- o Delete the mandatory transfer of ownership of Washington's Union Station to Amtrak. Union Station has been successfully restored and redeveloped at Federal expense. This National Landmark should remain under Federal ownership.
- o Provide an appropriate role for the Executive branch, including the Department of the Treasury, in reviewing recommendations to be made by the Amtrak Reform Council, which would be established by S. 1318.

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Pay-As-You-Go Estimates (\$ millions)

	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>1996-2000</u>
Outlays	658.9	-370.5	-288.4	0	0	0

* * * * *

(Do Not Distribute Outside the Executive Office of the President)

This Statement of Administration Policy (SAP) was developed by the Legislative Reference Division (Brown), in consultation with the Departments of Transportation (Crouter), Justice (Taylor), Labor (Taylor), Energy (Slaughter), and the Treasury (Thompson, Farrell, Levy), EPA (Coronado), Railroad Retirement Board (Cook), National Mediation Board (Elters), U.S. Postal Service (Mires), NEC (Dcich), White House Counsel's Office (Kagan), BRCD (Zimmerman), BASD (Stigile and Balis), EP (Lyon), HR (Himler), and TCJS (Schwartz, Tornquist and Tangherlini). We are attempting to confirm with the White House Counsel's office that liability cap amendments cited in the bracketed paragraph would not rise to the level of

making S. 1318 a veto candidate.

The Senate Commerce, Science, and Transportation Committee reported S. 1318 on October 12th by a vote of 17-2. On November 2nd, the Senate Finance Committee reported S. 1318 with an amendment deleting tax-related provisions. The Statement of Administration Policy (above) and description of the bill (below) are based on the text of a Manager's Amendment which the Department of Transportation (DOT) advises will be considered on the Senate floor.

Liability caps. The text of the Manager's Amendment, which we understand is the version of S. 1318 that will be considered by the Senate, includes no provision this issue.

However, S. 1318, as ordered reported by the Senate Commerce, Science, and Transportation Committee, included a provision which would permit Amtrak to "contract" with its passengers to limit liability claims for punitive damages to \$250,000 per individual per incident. It is anticipated that an amendment providing for such a limitation on punitive damages will be offered on the Senate floor. (The House-passed Amtrak reauthorization bill, H.R. 1788, contains caps on certain punitive and noneconomic damages.)

2 - Bruce - Jaska 406-4

Objectionable Provisions of S. 1318. The provisions objected to in this Statement of Administration Policy would:

- o Accelerate the transfer from DOT to Amtrak of unexpended balances of certain appropriations.
- o Authorize new borrowing authority for Amtrak. (This would be accomplished by authorizing appropriations of \$50 million annually to the Department of Transportation for use in guaranteeing new loans for Amtrak.)
- o Provide a permanent authorization of appropriations for the Local Rail Freight Service Assistance Program of \$25 million per year beginning in FY 1996; and liberalize the terms and conditions of certain federally-guaranteed loans to freight railroads.
- o Transfer ownership of Union Station to Amtrak.
- o Prohibit the Secretary of Transportation from requiring, as a condition of guaranteeing loans, that other debt be subordinated to the Federal interest in the event of a default under the section 511 loan program for railroads.

Other Major Provisions of S. 1318. In addition to the provisions discussed above, major provisions of S. 1318 would:

- o Authorize appropriations for Amtrak totaling \$962 million for each of Fiscal Years 1996-1998 and \$653 million for FY 1999. (This compares with the enacted FY

1996 appropriation of \$635 million.)

- o Establish an Amtrak Reform Council, with 8 members appointed by the President with the advice and consent of the Senate. The Council would be responsible for: (1) reviewing and providing advice to Amtrak on its business plans and performance; (2) providing annual reports to Congress on Amtrak's performance; and (3) developing and submitting to Congress a financial action plan for Amtrak that would take effect no later than the fifth anniversary of the bill's enactment.
- o Repeal statutory prohibitions on Amtrak contracting out certain work, and establish a mechanism for arbitration of disputes between Amtrak and its unions regarding functions to be contracted out.
- o Prohibit Amtrak from submitting bids for the provision of transportation services which are less than the cost to Amtrak of providing those services.
- o Require Amtrak to provide 180 days notice (rather than the current 90 day notice) prior to discontinuing routes in order to give States an opportunity to share or assume the cost of the service.
- o Repeal various statutory mandates and restrictions relating to Amtrak's route and service decisions.
- o Provide for payment by DOT on behalf of Amtrak, subject to the availability of appropriations, of certain railroad retirement and unemployment taxes.
- o Encourage Amtrak to increase non-Federal revenues through vending machines and concessions.
- o Require states in the Northeast Corridor to begin, within two years of the bill's enactment, to compensate Amtrak fully for commuter services.
- o Extend, until January 1, 1998, the deadline for bringing existing Amtrak passenger rail cars and stations into compliance with the Americans with Disabilities Act (ADA), and clarify that Amtrak is responsible for assuming a portion of the cost of retrofitting stations it shares with local commuter rail authorities.

Administration Position To Date

In an October 16th letter to the Senate Commerce, Science, and Transportation Committee, the the Department of Transportation expressed "serious concern" regarding a provision which would have interfered with collective bargaining rights. This objectionable provision was subsequently deleted from the bill.

A Statement of Administration Policy sent to the House on November 30th stated that the Administration supports House passage of H.R. 1788 with amendments. The requested amendments are similar to those in this SAP. H.R. 1788 passed the House on November 30th by a vote of 406-4, without the Administration's recommended amendments.

Pay-As-You-Go Scoring

According to TCJS (Tangherlini) and BASD (Balis and Stigile), S. 1318 would increase direct spending, and is therefore subject to the pay-as-you-go requirements of the Omnibus Budget Reconciliation Act of 1990. The major portion of this increase is derived from a provision of the bill which accelerates the transfer from DOT to Amtrak of unexpended balances of certain appropriations. CBO concurs that the bill is covered by pay-as-you-go but has not yet developed final estimates.

LEGISLATIVE REFERENCE DIVISION
May 1, 1996 - 4:00 P.M.