

NLWJC - Kagan

DPC - Box 002 - Folder 009

Amtrak



Ellen S. Seidman

07/23/97 06:07:07 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: Update on possible Amtrak language as part of reconciliation

What, if anything, do you know about these liability provisions? I'll also send you my reply. ellen

----- Forwarded by Ellen S. Seidman/OPD/EOP on 07/23/97 06:06 PM -----

James J. Jukes

07/23/97 03:37:09 PM

Record Type: Record

To: William P. Marshall/WHO/EOP, Ananias Blocker III/WHO/EOP, Ellen S. Seidman/OPD/EOP, Dorothy Robyn/OPD/EOP

cc: Mark J. Schwartz/OMB/EOP, James A. Brown/OMB/EOP

Subject: Update on possible Amtrak language as part of reconciliation

Bill/Andy -- This pertains to the voicemails I left you.

Ellen -- FYI re the torts angle.

Dorothy -- FYI.

----- Forwarded by James J. Jukes/OMB/EOP on 07/23/97 03:35 PM -----



Mark J. Schwartz

07/23/97 03:27:15 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message

Subject: Update on possible Amtrak language as part of reconciliation

Senate Democrats are getting close to working out a deal with Senate Republicans on the contours of an Amtrak reform bill to be included in reconciliation. The current proposal on the table from the Senate Republicans to Senate Democrats is as follows (I have only summarized the larger issues):

LIABILITY: (This dispute has killed reform the last few years and has pitted trial lawyer groups against freight railroads). Amtrak would be subjected to state law caps for tort liability (these vary state to state). There would also be a global cap of \$150 million per incident. This global cap

would apply to both freight railroads and Amtrak. Democratic staff seems to think that the final deal may have a global cap at a higher number (maybe \$250 million per incident).

LABOR: (Current law provides up to six years of pay to employees who lose jobs in downsizing of Amtrak). The six year protection currently provided by statute, would be reduced to one year. If there were a bankruptcy the one year protection would be eliminated. (Rail labor is now meeting with Senator Kerry to discuss their objections.)

CONTRACTING OUT: The current ban prevents Amtrak from contracting out any work other than food and beverage. The ban would be repealed one year after enactment of the legislation. The subject would still be subject to negotiations under the Railway Labor Act.

LIQUIDATION: The proposal would have an expedited liquidation procedure (that is, Amtrak would be liquidated if certain performance targets and reforms were not satisfied). This procedure would require a vote of the House and Senate to approve liquidation, but no Presidential approval. The liquidation would be recommended to the Congress by a temporary Amtrak Reform Council.

We have tried to talk to many of you on the e-mail list here about the problem of Justice's concerns about constitutionality of the reform proposal. Although the Administration is on record about the labor and liability issues through letters sent to Sen. Commerce Committee last month, a DOJ letter objecting to the Senate reform proposal was prepared prior to Commerce committee mark up last month, but was not sent. DOJ has very serious concerns about the make up of a Reform Council or a revamped Board of Directors and may seek to bring their objections to the attention of the negotiators. Jim Jukes/LRD will be following up on this after consulting with all of you for your thoughts on this subject.

5-1090 if you have any questions.

Message Sent To:

Charles E. Kieffer/OMB/EOP
Lisa M. Kountoupes/OMB/EOP
Charles Konigsberg/OMB/EOP
Robert G. Damus/OMB/EOP
Barry B. Anderson/OMB/EOP
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Anita Chellaraj/OMB/EOP
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Daniel M. Tangherlini/OMB/EOP
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Jill M. Blickstein/OMB/EOP
James J. Jukes/OMB/EOP
James A. Brown/OMB/EOP
Kenneth L. Schwartz/OMB/EOP

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Ellen S. Seidman

07/23/97 06:07:35 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: Re: Update on possible Amtrak language as part of reconciliation

----- Forwarded by Ellen S. Seidman/OPD/EOP on 07/23/97 06:07 PM -----



Ellen S. Seidman

07/23/97 06:06:00 PM

Record Type: Record

To: James J. Jukes/OMB/EOP

cc:

Subject: Re: Update on possible Amtrak language as part of reconciliation 

Are these caps on compensatory damages? In which case the issue probably has something to do with arcane statutes like the Death on the High Seas Act, or are they on punitives? either way, I think we need to understand better what's happening. From the perspective of what we've been talking about on products and tobacco, we seem more concerned about a punitives cap, but there's something really weird about a compensatories cap, particularly since, as I understand it, we're proposing to eliminate such a cap for commercial airlines (DOT letter that passed by my desk yesterday.) If the caps only relate to employees, that's probably a very different matter. ellen

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Mark J. Schwartz

07/24/97 10:14:19 AM

Record Type: Record

To: Ellen S. Seidman/OPD/EOP
cc: James J. Jukes/OMB/EOP, David E. Tornquist/OMB/EOP, James A. Brown/OMB/EOP, Elena Kagan/OPD/EOP
bcc:
Subject: Re: Update on possible Amtrak language as part of reconciliation 

As of last night Senate Democrats agreed the cap was too low. They are pushing for \$350 million. I am checking on the status of discussions and will let you know if things have changed.

Ellen S. Seidman



Ellen S. Seidman

07/24/97 09:43:18 AM

Record Type: Record

To: James J. Jukes/OMB/EOP
cc: Mark J. Schwartz/OMB/EOP, David E. Tornquist/OMB/EOP, James A. Brown/OMB/EOP, Elena Kagan/OPD/EOP
Subject: Re: Update on possible Amtrak language as part of reconciliation 

What do we know about the state laws? Frankly, \$150 million as a global cap sounds EXTREMELY low to me. And I think it's low MAINLY in respect of the freights part, rather than the Amtrak part. (It's low for Amtrak too, if a bunch of people get killed in a wreck.) Just imagine the situation in which a train carrying chlorine gas derails and blows up in the middle of a populated area. And an Amtrak train can plow into a stopped freight (that's basically what happened in Maryland a few years ago with a commuter train), which could cause the derailment that causes the chlorine to blow up, so even if this cap only applies where Amtrak trains are involved, I think it's still too low. ellen

PS Mightn't a better solution be to have the federal government somehow get directly involved in insuring Amtrak? Or is this REALLY about limiting the freights' liability?

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Mark J. Schwartz 05/08/97 12:09:48 PM

Record Type: Record

To: Elena Kagan/OPD/EOP
cc: See the distribution list at the bottom of this message
Subject: Amtrak Board of Directors

Elena: Remember when you said we should go get a cup of coffee some time? (That was probably 18 months ago). Well, the bill has come due. Instead of a cup of coffee, or reminiscing about those precise and analytical questions you drafted for Justice Ginsburg, you have to read this e-mail about one of your favorite issues concerning the constitutionality of the Amtrak Board of Directors...

After languishing for months we are now in a big hurry to move the Amtrak reauthorization bill to the Hill by the beginning/middle of next week if we can. The sole remaining issue that needs to be ironed prior to transmittal is OLC's concerns about the constitutionality of the appointment of Board members.

We are meeting on Monday at 2 p.m. to try and resolve the issue. Our goal for this meeting to hopefully end up somewhere near to where we were at the end of the last go around -- that is, no proposal to modify the Board of Directors.

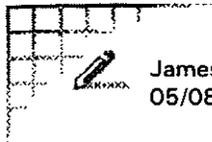
DoT has drafted a response to the OLC comments (let me know if you want a copy). This draft discusses the problems of relying on the Lebron decision and the heavy political and financial price which would be paid by supporting OLC's views (it makes it easier to argue that Amtrak's liabilities should be Federal liabilities in event of a bankruptcy). Neil Kinkopf from OLC and perhaps his boss will be coming to this meeting Monday and Bill Marshall from WH Counsel, along with other folks from DoT. We suspect that this issue will again require WH Counsel to weigh in and dissuade OLC from its current views. Any thoughts you could share with us, or Bill on the background of this subject would be helpful. Also, any opinions you have on the best way to proceed (especially opinions which reaffirm your previous wise conclusion on this issue) would be appreciated.

Message Copied To:

William P. Marshall/WHO/EOP
Michael Deich/OMB/EOP
James J. Jukes/OMB/EOP
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James A. Brown/OMB/EOP

Handwritten signature

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James A. Brown
05/08/97 03:57:21 PM

Record Type: Record

To: William P. Marshall/WHO/EOP, Robert G. Damus/OMB/EOP, Steven D. Aitken/OMB/EOP, Elena Kagan/OPD/EOP

cc: See the distribution list at the bottom of this message

Subject: Meeting at 4:00 p.m. on Monday, May 12th in room 9001

As previously noted, we hope to meet on Monday afternoon with representatives of Justice and the Department of Transportation, and the White House Counsel's Office to resolve Justice's constitutional concerns regarding Amtrak's board. This now stands as the sole remaining impediment to clearance of the Administration's Amtrak reform proposal for submission to Congress.

This meeting is now scheduled for 4:00 p.m. in room 9001. Thanks.

Message Copied To:

James J. Jukes/OMB/EOP
Mark J. Schwartz/OMB/EOP
Kenneth L. Schwartz/OMB/EOP
David E. Tornquist/OMB/EOP
Dorothy Robyn/OPD/EOP
Michael Deich/OMB/EOP

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● Mark J. Schwartz

03/21/97 12:24:35 PM

Record Type: Record

To: William P. Marshall/WHO/EOP

cc: Elena Kagan/OPD/EOP, Steven D. Aitken/OMB/EOP, David E. Tornquist/OMB/EOP, James A. Brown/OMB/EOP

Subject: OLC comments on constitutionality of Amtrak Board of Directors

Bill: We have not met...but Lanny Breuer said you were the right guy to talk to. Last Congress Elena Kagan worked with Dan Tangherlini of the Transportation Branch here at OMB to help resolve a question which OLC had raised about the constitutionality of the appointments to the Amtrak Board of Directors. This note is to familiarize you with the issues and I will follow it up with a phone call.

I have taken Dan's place and wanted to touch base with you to let you know that the issue is rearing its ugly head again. We are working on an Amtrak reauthorization bill which we hope to submit to the Congress shortly. This will become part of the NEXTEA reauthorization bill submitted last week.

If you have not received a copy of the OLC comments let me know and I will fax you a set. In summary, OLC, citing the Lebron case says that the current procedure for choosing Amtrak Board members violates the Appointments Clause.

My understanding is that in November 1995, White House counsel approved inclusion of language in a Statement of Administration Position (SAP) on a then pending House bill (H.R. 1788 Amtrak Reform and Privatization Act of 1995). H.R. 1788 had proposed replacing the then current Board of Directors. The Administration position on this question in the SAP was that:

"The current Board has proved capable of directing Amtrak during these sensitive times. (The Administration supports (1) removing existing restrictions on the President's authority to appoint **future** members of Amtrak's Board and (2) requiring that such appointees be confirmed by the Senate)."

For purposes of clearing this legislation, it is my hope that we could include a similar statement of position to accompany the bill. Whether the bill would include draft legislation to amend the current appointments process is still an open question, and one likely to be answered by folks at a higher pay grade than mine.

I will call you about this to discuss further. Thanks. My phone is 5-1090.