

STB FINANCE DOCKET NO. 33469

APPLICATION OF THE NATIONAL RAILROAD
PASSENGER CORPORATION UNDER 49 U.S.C. 24308(a)--
UNION PACIFIC RAILROAD COMPANY AND SOUTHERN
PACIFIC TRANSPORTATION COMPANY

Decided May 28, 1998

The Board determines the nature of "express" traffic that Amtrak may transport on its passenger trains. The Board grants Amtrak's application and directs Union Pacific Railroad Company and Southern Pacific Transportation Company to permit Amtrak to transport express traffic over UP/SP lines.

BY THE BOARD:

By application filed September 16, 1997, under 49 U.S.C. 24308(a), formerly section 402(a) of the Rail Passenger Service Act of 1970 (RPSA or the Act),¹ the National Railroad Passenger Corporation (Amtrak) requested that the Board direct the Union Pacific Railroad Company and Southern Pacific Transportation Company (collectively, UP/SP) to make available to Amtrak rail facilities and services that it needs to transport "express" on Amtrak trains. To help sustain its primary passenger operations in light of Congress' goal to end its federal subsidies by 2002, Amtrak seeks to expand its transportation of express. UP/SP claims that Amtrak will do so, however, by transporting traffic that is more akin to general freight than express, and in ways that will pose significant operational and logistical problems for the freight carrier. As a result, UP/SP refused to extend its prior agreement with Amtrak, which expired

¹ Section 402(a) was originally codified at 45 U.S.C. 562(a). In Pub. L. No. 103-272, 108 Stat. 745, enacted on July 5, 1994, section 402(a) was recodified in its present form as 49 U.S.C. 24308(a). Under section 205 of the *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803, enacted December 29, 1995, any reference to the "Interstate Commerce Commission" contained in the Act and other federal statutes is deemed to refer to the Board.

September 30, 1997, that permitted Amtrak to carry express on its passenger trains over UP/SP track.

Under 49 U.S.C. 24308(a)(2)(A), Congress has directed the Board to enforce Amtrak's rights to use the freight railroads' facilities to conduct its operations. By its application, Amtrak has, in essence, asked us to determine the scope of its rights to transport express. Because the Act does not define express, and because of the potentially broad impact our interpretation of that term may have on other railroads with which Amtrak has agreements, by order served September 30, 1997, and published at 62 Fed. Reg. 52,374 (1997), we sought comments on Amtrak's application.² While the proceeding was pending, we required UP/SP, within certain limits, to continue to make its facilities available to Amtrak for express carriage under the terms of their prior agreement.³

As explained in more detail below, we find that "express" need not be restricted by commodity, shipment size, type of equipment, or a variety of other operational factors that may have been applied in the past, but instead should be defined more flexibly as a premium transportation service at premium rates — expedited, regularly scheduled train service provided at prices which are generally higher than freight service — that is provided as an adjunct to Amtrak's passenger service. Because Amtrak has proposed express service within those limits, and because Amtrak's proposal reflects Congress' intent that it transport express and take steps to increase express revenue, we find no basis, at the outset, to preclude Amtrak's initiation of that service. Thus, subject to the limitations set forth below, we grant Amtrak's application and order UP/SP to permit it to carry express traffic, as defined above, over its lines. We will of course be available, if necessary, to resolve in subsequent proceedings disputes

² Opening comments were filed by: the American Association of Private Railroad Car Owners, Inc.; Amtrak; Anthony Haswell; the Association of American Railroads (AAR); Burlington Northern and Santa Fe Railway Company (BNSF); the City of Mineola, Texas; the City of Reno; Consolidated Rail Corporation (Conrail); the Idaho Transportation Department; Illinois Central Railroad Company (Illinois Central); John W. Gohmann; the National Association of Railroad Passengers (NARP); the Ohio Rail Development Commission; the Oregon Department of Transportation (Oregon DOT); Providence and Worcester Railroad Company; Robert Mooney; Thomas A. Greibel; Toledo-Lucas County Port Authority; UP/SP; United States Department of Transportation (DOT); and the Washington Association of Rail Passengers. Amtrak; AAR; BNSF; Conrail; Illinois Central; Oregon DOT; UP/SP; and DOT replied. Several parties (Amtrak, AAR, BNSF, Conrail, Illinois Central, and UP/SP) filed both public (redacted) and confidential versions of their opening comments and/or replies. The Washington State Department of Transportation filed a statement on November 13, 1997, but we have no indication that it was served on the parties.

³ Except where it was operationally infeasible, we directed UP/SP, during the proceeding, to permit Amtrak to operate trains of up to 18 cars, that could contain as many as 9 express cars. September 30, 1997 Decision, at 4.

over whether any particular service that Amtrak seeks to provide falls outside of these parameters.

We point out to Amtrak, however, that UP/SP may appropriately charge it for the use of its facilities. 49 U.S.C. 24308(a)(2)(B) permits freight railroads to recover from Amtrak their "incremental" costs — those costs that the carrier incurs as a result of Amtrak's use of its facilities — and that term is not as limiting as Amtrak may believe. Today, UP/SP and other railroads are facing significant capacity constraints and are making major investments to add the capacity and facilities necessary for handling increased freight traffic.⁴ Amtrak's plan to expand its express service at the same time — and thus its use of the freight carriers' facilities — could further strain that capacity, require additional infrastructure investment, and impose other substantial costs. We see nothing in the incremental cost standard that would preclude the railroads' recovery of these and other costs that they incur if they are directly traceable to Amtrak's increased services. Should Amtrak and UP/SP fail to agree to the terms of Amtrak's access, then, pursuant to 49 U.S.C. 24308(a)(2)(A)(ii), we are available to prescribe compensation and will do so utilizing these principles.

PRELIMINARY MATTERS

The parties have raised three preliminary matters: motions to unseal confidential information; a motion to extend the deadline for filing reply comments; and a motion to admit supplemental testimony.

Motions to Unseal Confidential Information. UP/SP and Conrail submitted opening comments in both redacted (public) and unredacted (confidential) versions. The allegedly confidential material in the unredacted versions was obtained from Amtrak through discovery on the condition that it be submitted under seal and provided only to parties who sign a confidentiality agreement. By motion filed November 12, 1997, UP/SP urged us to unseal all of the confidential information in its unredacted version, except for information pertaining to specific rates charged by Amtrak and UP/SP. By motion filed November 14, 1997, Conrail requested that we unseal the entire unredacted version of its opening comments.

⁴ UP/SP is itself planning to dedicate \$1.4 billion to rail infrastructure in the Houston/Gulf Coast area over the next 5 years, including more than \$600 million in new rail capacity. See, Union Pacific's Report on Houston and Gulf Coast Infrastructure, at 1-2, filed May 1, 1998, in Ex Parte No. 573, *Rail Service in the Western United States*, Service Order No. 1518, *Joint Petition for Service Order*.

On November 24, 1997, Amtrak filed a reply opposing the motions to unseal, except for that information: (1) concerning routes identified as candidates for new or additional express service; and (2) regarding numbers and types of equipment that it previously considered acquiring. The specific information that Amtrak stated it would be willing to disclose is specifically identified in the attachment to Amtrak's reply (as modified by the substitute pages filed on November 25, 1997), which consists of substitute pages from the UP/SP redacted version that differ only where Amtrak has added back the material that it is now willing to disclose.⁵

By motion filed November 25, 1997, Conrail requested that the confidential information in its reply comments also be made available to the public. On December 9, 1997, Amtrak filed a reply opposing that disclosure, except for: (1) exhibits RPC-1 through RPC-4 to the Verified Reply Statement of R. Paul Cary; and (2) the Amtrak pricing information set forth in the Verified Reply Statement of Joseph F. Folk at page 6 (first two sentences of first full paragraph) and page 7 (Table 1).

We will deny all motions for public disclosure, except that we will allow public access to the above-described information that Amtrak is now willing to disclose.⁶ We can fulfill our statutory duties without disclosing the information at issue to the general public (as distinguished from the parties of record). Because Amtrak has made the information at issue available to any party of record who signs a confidentiality agreement, the information does not need to be made publicly available to satisfy the requirements of administrative due process.

Motion to Extend Deadline for Reply Comments. By motion filed November 25, 1997, Anthony Haswell, anticipating that we would grant the motions for disclosure, requested that we extend the deadline for filing reply comments so that he could examine and reply to the unredacted pleadings. On December 2, 1997, Amtrak filed a reply in opposition. Since we have denied the motions for public disclosure, we deny the motion for extension as moot. An extension would have been unnecessary in any event because Mr. Haswell could have obtained the confidential material by signing the aforementioned confidentiality agreement.

⁵ Amtrak did not file similar substitute pages pertaining to Conrail's testimony because the substitute pages from UP/SP's testimony identified the information from the testimony of both movants that Amtrak is now willing to disclose.

⁶ Members of the public or parties who have not signed a confidentiality agreement may obtain access to the additional information in the opening comments that Amtrak has agreed to disclose by examining Amtrak's modified substitute redacted pages filed on November 25, 1997.

Motion to Supplement Record. By motion filed December 2, 1997, UP/SP requested leave to supplement the record in response to Amtrak's reply comments, and tendered attached supplemental statements for filing in the event that we grant its motion. UP/SP seeks to introduce the statement of Richard B. Peterson to rebut the reply verified statement of Amtrak Witness Michael A. Nelson comparing express rates offered by Amtrak on certain trains with UP/SP rates for premium freight service over the same corridors, and comparing Amtrak express service schedules with railroad intermodal schedules. The carrier also seeks to introduce the evidence of Michael D. Ongerth to counter the arguments in Amtrak's reply comments that Amtrak's express service would not be subsidized by the freight railroads. On December 9, 1997, Amtrak opposed UP/SP's motion, but tendered for acceptance supplemental statements replying to UP/SP's statements in the event that we grant UP/SP's motion.

We deny the motion. In this proceeding, we are not considering whether a specific service provided by Amtrak is express, but instead are defining express and are determining whether Amtrak's proposed service is, as a general matter, consistent with that definition. If necessary, we will resolve disputes challenging specific movements or services in subsequent proceedings. There is thus no need to supplement the record with Mr. Peterson's statement.

For similar reasons, we will not accept Mr. Ongerth's statement. We are not considering in this proceeding the level of compensation that Amtrak must pay UP/SP for the use of its facilities, or the railroad's related contention that compensation under the incremental cost standard condemns the railroads to subsidizing Amtrak services, other than to indicate that, with respect to express service, we intend to apply that standard in a way that permits the host railroad to recover the costs that it incurs due to Amtrak's service. Because we are denying UP/SP's motion to supplement the record, there is no need to accept Amtrak's statements contained in its December 9th reply.

BACKGROUND

In RPSA, Congress struck a fundamental bargain: in exchange for relieving the freight railroads of their obligation to provide passenger service — service that produced losses at levels threatening the viability of their freight operations — Congress created Amtrak and directed the railroads to permit it to operate passenger trains over their lines, 49 U.S.C. 24305(a)(1), and, in most instances, to give those trains preference over freight service. 49 U.S.C. 24308(c). Acknowledging the carriers' passenger-service losses, Congress envisioned that,

for an extended period of time, Amtrak would require significant federal subsidies, and those subsidies have continued.⁷

Congress, however, expressed the desire that Amtrak eventually become self-sufficient and directed the new passenger carrier to work to minimize the need for subsidies. 49 U.S.C. 24101(c) and (d). With that goal in mind, Amtrak was authorized, as part of its passenger operations, to transport mail and express, 49 U.S.C. 24305(a)(1) and (c)(2) and, through subsequent amendments to RPSA, to take "necessary action to increase" its mail and express revenue. 49 U.S.C. 24306(a);⁸ *see also*, 24101(c)(1)(B).

Congress and the Administration now intend for Amtrak to become subsidy-free by 2002.⁹ To meet that goal, Amtrak plans, among other steps, to increase its transportation of express — currently producing only \$3 million in annual revenue, largely from station-to-station small package delivery — by broadly offering carload/trailerload express service in specially equipped cars attached to its regularly scheduled passenger trains.¹⁰ Amtrak states that it plans to target various non-hazardous dry goods, refrigerated goods, and other perishables that now move, it claims, largely by truck, including (1) fresh fruit, vegetables, juices, and other food products; (2) consumer products such as soaps, detergents, and paper products; and (3) manufactured products such as furniture, envelopes and saline solutions; it will not transport in express service bulk commodities (such as coal and chemicals), automobiles, or hazardous materials traditionally hauled by rail carriers. Amtrak, V.S. Downs, at 9. Amtrak seeks to exploit the advantages of express for more shippers (and commodities) that are attracted to this kind of service in today's modern transportation marketplace — quick, reliable, regularly scheduled train service (often with guaranteed delivery time) that is responsive to a variety of shipper needs,

⁷ In fiscal year 1997, Amtrak indicated it had passenger revenues of \$1 billion, but an operating net loss, before federal subsidies, of approximately \$751 million. Particularly in recent years, Congress has not fully funded Amtrak's operating deficit; for fiscal year 1996, there was an \$82 million shortfall, and for fiscal year 1997, a \$60 million shortfall. Amtrak, V.S. Downs, at 3-5.

⁸ Pub. L. No. 92-316, § 2, 86 Stat. 227, 228 (1972).

⁹ Amtrak, Opening Comments, at 4, V.S. Downs, at 1, 5, 16, Reply Comments, at 4. *See also*, DOT, Opening Comments, at 7; Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 201, 111 Stat. 2573, 2578 (1997) (49 U.S.C. 24101(d)).

¹⁰ Amtrak states that it also expanding its other non-core businesses, such as conducting commuter operations for state and regional commuter agencies, performing maintenance of equipment and maintenance of way for the commuter lines, and commercial real estate. These activities, according to Amtrak, contributed \$49 million in profit in fiscal year 1996 and \$146 million in fiscal year 1997. V.S. Downs, at 5-6.

including better management of inventory costs, and for which a shipper is willing to pay a premium. Amtrak, V.S. Ellis, at 30-34.

Amtrak seeks to provide expanded express service only on passenger trains that the carrier is currently running over UP/SP lines,¹¹ and will take into account all existing operating constraints by operating trains with no more than 30 cars.¹² Amtrak will provide, as it has in the past, a door-to-door pick-up and delivery express service by cross-docking shipments between express cars and truck, or where it lacks such facilities at its stations, by employing a short-line railroad to switch the express cars to off-site cross-dock facilities a short distance away. For shipments moving in more modern equipment that Amtrak may use, such as RoadRailers, Amtrak will ramp and ground trailers adjacent to the station or in the coach yard.

Amtrak's application is supported by United States Senators Kay Bailey Hutchison of Texas, John Kerry of Massachusetts, Ron Wyden of Oregon, and Conrad Burns of Montana, by other state and local officials, by various shippers and brokers, by NARP, and by several state and federal transportation agencies, including DOT. In general, shipper interests assert that Amtrak's expanded express service will afford an important and needed transportation bridge between rail service and trucking alternatives.¹³ The Senators, NARP, and DOT emphasize the key role that express revenues may play in preserving intercity rail passenger service that might otherwise be discontinued, and argue that the Act and legislative history "support a broad, fluid interpretation" of the term express. DOT, Opening Comments, at 1.

¹¹ These trains are the Texas Eagle (Chicago to San Antonio, via Dallas) and the Sunset Limited (San Antonio to Los Angeles), in 3-day a week passenger service, and the Coast Starlight (Los Angeles to Seattle) and the California Zephyr (Oakland to Denver), in daily service. Amtrak, R.V.S. Downs, at 13.

¹² Amtrak, V.S. Downs, at 46-51. Amtrak proposes to operate a number of trains with far fewer than 30 cars. The Texas Eagle would operate with its present consist of passenger cars and up to 20 express cars (westbound, a maximum of 15 cars); the Sunset Limited, up to 15 express cars; the Coast Starlight, up to three express cars; and the California Zephyr, up to six express cars. R.V.S. Downs, at 13.

¹³ For example, the Minnesota Commercial Railway (MCR), a short-line railroad supporting Amtrak's application, identifies certain kinds of traffic in the Minneapolis-St. Paul area it claims rail freight carriers do not seek, but which Amtrak could divert from trucks: cereal made in Minneapolis and moving to eastern U.S. warehouses in 2-day truck service to ensure product freshness; truck shipments of computers from a large computer-maker; and windows and doors from a manufacturer that abandoned rail service and now transports by truck to more readily satisfy "just-in-time" construction requirements. MCR, V.S. Gohmann, at 18.

On the other hand, Amtrak's application is strongly opposed by UP/SP, certain other freight railroads, and AAR. The carriers argue that there is nothing in the Act or its legislative history to support Amtrak's authority to transport express beyond the station-to-station delivery of small packages that historically comprised most of express service, and that passenger trains comprised almost entirely of express cars, which the freight railroads claim Amtrak contemplates, would be contrary to Congress' intent that Amtrak's express service be "incidental" to its passenger service. As a result, the carriers urge the Board to find that Amtrak trains must have at least as many bona fide passenger cars as express cars; that express traffic must be differentiated from general freight by limiting it to small packages and less-than-truckload or less-than-carload (LTL or LCL) shipments of no more than 8,000 pounds; that Amtrak may not use other switching or line-haul railroads to move express shipments to or from shipper sidings, or to or from cross-docking facilities not associated with its passenger stations; and that Amtrak should not be allowed to provide carload train space to third-party consolidators or carriers such as UPS.

UP/SP and the rail industry also assert that Amtrak's proposed service over UP/SP (which they concede, as part of an initial pilot program, is modest in scope) masks Amtrak's real intent to rapidly expand its express service nationwide to gain close to \$1 billion in new express revenue, a sum approaching its current passenger revenue. The industry asserts that, to accomplish this goal, Amtrak would not only interfere with the carriers' use of their own facilities and cause significant congestion and delays to railroad freight, but would necessarily compete with the rail carriers to divert substantial amounts of their freight traffic, using the statutory dispatching preference for passenger trains over freight trains (49 U.S.C. 24308(c)) and "incremental cost" access (49 U.S.C. 24308(a)(2)(B)) to the carriers' track and facilities to do so. The industry contends that Congress could not have intended the Act be read in a way that would permit Amtrak to compete with the freight railroads in this manner, and that doing so would amount to an unconstitutional taking.

DISCUSSION AND CONCLUSIONS

The Scope of "Express." Section 24305 of the Act confers on Amtrak broad authority to transport express, and there is nothing in the Act or subsequent statutes to support the kinds of restrictions on Amtrak's express service that UP/SP and the industry at large propose. In fact, the governing statutes, particularly section 24306(a), in which Congress admonishes Amtrak "to take necessary action to increase" its express revenues, and section

24101(c)(1)(B), where it directs Amtrak "to minimize" federal subsidies by doing the same, suggest otherwise.

The legislative history does not disclose a contrary intent. As even Conrail concedes (Comments, at 2), there is no Congressional floor or Conference language where the legislators discussed the meaning of "express" or differentiated it from general freight. While there is some legislative history concerning the relationship that express must have with passenger service,¹⁴ it shows no evidence that Congress intended to restrict express in terms of commodities transported, shipment size, equipment used, or other factors. Therefore, we find no basis to conclude that the Act prohibits Amtrak from: offering carload or trailerload express service;¹⁵ transporting express under contract or in partnership with third-party providers such as forwarders, LTL motor carriers, or express companies like UPS and Federal Express;¹⁶ or

¹⁴ Section 305 of the initial Senate bill that led to RPSA would have authorized Amtrak "to carry mail and express in connection with passenger service." [Emphasis added.] AAR proposed an amendment to clarify that Amtrak's authority to carry mail and express "is not plenary but is incidental to its authority to carry passengers." Neither the initial Senate Bill nor the AAR amendment was adopted. See, UP/SP Comments, Vol. 2, Exh. F. Instead, Congress adopted section 305(a) of the Act, which allowed Amtrak "to carry mail and express on such [intercity and commuter] trains." This language was recodified as current 49 U.S.C. 24305(a), which provides for "the transportation of mail and express."

¹⁵ Even prior to the Act, our predecessor, the Interstate Commerce Commission (ICC), did not limit express to small packages. In *Railway Exp. Agency, Inc., Extension--Nashua, N.H.*, 91 M.C.C. 311 (1962), *aff'd sub nom. Auclair Transport, Inc. v. United States*, 221 F. Supp. 328 (D. Mass. 1963), *aff'd per curiam*, 376 U.S. 514 (1964), for example, the ICC disposed of the application of Railway Express Agency (REA) for authority to transport "general commodities moving in express service" via motor carriage. Acknowledging that express had its origins in the specialized handling of small parcels, the ICC nevertheless declined to restrict express to such parcels, holding that express was defined by its premium service and premium rates, rather than the nature of the commodities or size of the shipment. *Id.*, at 324-25. See also, *Freight, All Kinds, L.C.L., Unitized Charges--USA*, 326 I.C.C. 594, 628-29 (1965), which also supports the proposition that express was traditionally defined by the service, not the cargo. In *Express Company Terminal Areas*, 332 I.C.C. 91, 100-101 (1967), the ICC noted that "REA has in recent years shown great interest in obtaining, and has actively solicited, large shipments of various commodities to produce a better 'mix' with the small shipments traditionally handled." While stating that express is primarily less-than-carload (LCL), the ICC observed that express service has included carload movements. And, in *Freight, All Kinds, L.C.L. Container Charges--U.S.A.*, 323 I.C.C. 468, 482-84 (1964), *aff'd sub nom., New England Motor Rate Bureau v. United States*, 254 F. Supp. 633 (D. Mass. 1966), the ICC refused to restrict express service only to what carriers of general freight could not carry and rejected a shipment weight limit of 500 pounds proposed by an Administrative Law Judge who believed that REA was exceeding its express authority.

¹⁶ In section 24101(d) of the Act, Amtrak is encouraged to maximize the use of its resources by making "agreements with the private sector" and undertaking "initiatives that are consistent with

(continued...)

engaging other carriers, including other railroads, to transfer express traffic to off-terminal cross-docking facilities or otherwise perform off-terminal pickup, delivery, and consolidation.¹⁷

With no contrary indication from the Congress, we believe that express, as it has in the past, may continue to be broadly and flexibly defined in terms of the nature of the service — a premium transportation service, characterized in large measure by expedited handling on regularly scheduled trains, and by prices that are typically higher than conventional freight service — rather than by commodity, shipment size, or other operational limitations. Since Amtrak has proposed express service consistent within that definition, we find no basis not to require UP/SP to make its facilities available to permit initiation of that service. As a practical matter, neither Amtrak, UP/SP, nor the Board will have much of an understanding of the extent of Amtrak's planned express service until it occurs. An up-front attempt to circumscribe Amtrak's efforts within rigid limits will likely frustrate any attempts that it would make to institute an

¹⁶(...continued)

good business judgment and designed to maximize its revenues and minimize Government subsidies." The use of third party contracts and interlining would further this provision. Amtrak has long maintained business relationships with third party couriers and consolidators. Amtrak, V.S. Von Schilgen, at 4.

¹⁷ Even accepting the freight railroads' contention that, prior to Amtrak, much, if not most, express traffic was not interchanged with other carriers, but loaded, unloaded, and sorted in facilities adjacent to passenger facilities, express was still often gathered or delivered by the railroads prior to, or after, its movement in passenger trains. See, e.g., *Increased Express Rates and Charges, 1957*, 304 I.C.C. 699, 730-31 (1958), modified, 308 I.C.C. 65 (1959); *Illinois Central R.R. Discontinuance of Trains*, 328 I.C.C. 763, 770 (1967). Mail was, and continues to be, gathered and distributed outside of passenger terminals. The prior use of interlining for express and mail is not surprising, for a prohibition of interlining with passenger trains would have been grossly inefficient.

We see no Congressional intent to prohibit Amtrak from the same practice; the legislative history, in fact, suggests otherwise. In its report on the Amtrak Improvement Act of 1973, the Senate stated that Amtrak "could carry mail and express in trailers or containers on flat cars if it so desired." S. Rep. No. 93-226 (1973), 93d Cong., 1st Sess., reprinted in 1973 U.S.C.C.A.N. 2324, 2325. The use of trailers or containers implies interlining with other carriers — such equipment was designed for interlining. It seems unlikely that, when Congress, in section 24306(a), admonished Amtrak to increase its express traffic and revenues, it intended to require Amtrak to turn its passenger stations into loading and unloading points for trailers and containers that would be able to move only over track where passenger cars move.

For similar reasons, we find no basis to preclude Amtrak's use of modern rolling stock like RoadRailers and refrigerator cars in its express service. There is no indication that Congress envisioned an Amtrak whose express service could not grow and improve with the technology; any other conclusion would be contrary to Congress' goal that Amtrak shall "carry out strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient transportation." 49 U.S.C. 24101(c)(3).

expanded freight service and to increase its express revenues, efforts that Congress admonished Amtrak to pursue.¹⁸

Scheduled service, expedited transportation, and premium rates have long been characteristics and requirements of express service, and we will require them for any Amtrak express service as well. No party here, however, has attempted to devise formulas or exact definitions for the requirements of express service — what constitutes, for example, “expedited” service or “premium” rates; this proceeding has not been designed to do that. As a result, we will explore and apply those requirements subsequently on a case-by-case basis, if a particular express service is challenged.

The railroads complain that, should the Board adopt a liberal definition of express, Amtrak would simply use it as a springboard to dramatically expand its express service nationwide with the goal of producing close to \$1 billion in annual revenue, compared with only \$3 million in express revenue that it receives today. In fact, Amtrak has approved only an “Express Pilot” program that, while still ambitious, would produce earnings of \$60 million in 1998 (based on \$150 million in annual express revenue), and \$75 million by 2003 (Amtrak, V.S. Downs, at 7), and Amtrak has just announced that it is scaling back even that plan, because it has reduced its projected profits for the service by more than 50%.¹⁹ In any event, even if Amtrak’s ambitions for its express service were as the rail industry portrays, or could, at some point along the way, prove problematic, that does not warrant the imposition of suggested restrictions on Amtrak now that would likely curtail its fledgling express initiative and, we believe, thereby prevent it from attempting to fully satisfy Congress’ directives to increase its express revenues.²⁰

General Restrictions on Amtrak’s Transportation of Express. Although Amtrak’s proposed service falls within accepted parameters of “express,” its discretion to transport express is not unlimited. Amtrak may not run express-

¹⁸ We will hold Amtrak, however, to its self-imposed limitation against transporting in express service bulk commodities, automobiles, or hazardous materials and to its undertaking to cooperate with UP/SP in implementing its expanded express service so as not to unduly interfere with freight operations.

¹⁹ Anna Wilde Mathews, *Amtrak Scales Back Freight Plan, Projects a Huge Loss for Fiscal Year*, Wall St. J., May 15, 1998, at A2.

²⁰ Moreover, as DOT points out, should Amtrak’s increased express service — at any higher level — pose operational concerns for the freight railroads, the Board or the Secretary has ample jurisdiction under 49 U.S.C. 24308 to intervene and resolve them. DOT, Opening Comments, at 10.

only trains, at least outside the Northeast Corridor.²¹ Further, express service must be an adjunct to passenger service. 49 U.S.C. 24101 indicates that Amtrak's overriding purpose is the provision of passenger service, and section 305(a) of the Act — subsequently codified as 49 U.S.C. 24305(a) without substantive change — provides that Amtrak was created "for the purpose of providing modern, efficient, intercity transportation of passengers and to carry mail and express on such trains."²² The prime purpose of Amtrak must be passenger service, and the service must be genuine.²³

We also point out that, in the request before us, Amtrak conducted its own study and discovered operating constraints on UP/SP's lines that could limit the number of express cars it can handle on its existing passenger trains, and it states that it will operate within those constraints. To that end, we will require Amtrak to observe its self-imposed 30-car limit on the total number of cars (passenger and express) per train.

²¹ According to Conrail, Amtrak concedes that it runs express-only trains on the Northeast Corridor. Conrail Reply Comments, at 19; R.V.S. Carey, at 7. Amtrak owns its own track in the Northeast Corridor, and does not need an order from the Board to provide express service on its own lines. Where it uses the lines of freight railroads, however, Amtrak acknowledges that it may not operate trains, without passenger service, that are devoted entirely to mail and express. Amtrak, Reply Comments, at 24 and n.16.

Congress viewed express service as one that must be compatible and integrated with passenger service, not separate and independent. As a Senate committee indicated in its report on the 1972 Amendments promoting express traffic, "[t]he Committee believes that there are a number of opportunities within the Amtrak System for a 'remarriage' of passengers, mail, and express on a compatible basis * * *. For example, mail and express revenue could improve the financial performance of some of Amtrak's long distance passenger trains, whose passenger volume falls-off sharply after the summer tourist season is over." S. Rep. No. 92-756, at 9, *reprinted in* 1972 U.S.C.C.A.N. 2393, 2398.

²² The legislative history makes clear that Amtrak's carriage of express is not to detract from its overall mission as a provider of passenger service; as the House indicated, the purpose of the 1972 Amendments was "to enable Amtrak to restore revenues that once existed as a valuable adjunct to rail passenger service in the carriage of mail and express." H.R. Rep. No. 92-905, 92d Cong., 2d Sess. 10 (1972).

²³ The railroads allege that Amtrak has increasingly subordinated passenger service to express service by, *inter alia*, increased delays awaiting the attachment of express cars or assembling longer trains, sometimes to the point that its passenger schedules must be modified. The railroads urge that, to ensure compliance with its passenger-service obligations, we require Amtrak to include an equal number of passenger and express cars on its trains. The purpose of this decision, however, is not to determine whether, on past movements, Amtrak has subordinated its passenger service obligations to express, and we do not believe it is necessary to impose on Amtrak now a rigid requirement as to how it should operate its business. Instead, we are available to examine complaints that Amtrak express movements do not support, or are not incidental to, its primary mission of providing passenger service.

Amtrak's Access Terms. In the end, the railroads' major concern is that, in accommodating Amtrak's increased express service — which will allegedly capture traffic that, in some measure, they now haul — the industry will be forced to subsidize its own competition. The carriers repeatedly cite to section 402 (d) of the Act (49 U.S.C. 24308(a)(2)(B)), which permits railroads to recover from Amtrak the "incremental costs" that they incur through Amtrak's use of their facilities. The railroads argue that they must bear the full costs of providing freight service, and that the Act's incremental cost recovery standard shields Amtrak from those costs.

However, just as Amtrak has latitude, in the first instance, to initiate its increased express service, so do the railroads, under the Act, have initial discretion in establishing the terms for Amtrak's access, and it is premature to conclude that railroads will be unable to obtain adequate compensation from Amtrak for the costs they incur for the use of their track and facilities. The railroads do not argue that they are locked into long-term contracts negotiated in the belief that express service was far more circumscribed than that which Amtrak now proposes to provide. At least in the matter before us, the contract between UP/SP and Amtrak has expired, and UP/SP is free to quote and negotiate terms that they believe will compensate them fully for the additional costs that Amtrak's increased service will impose on them.

Moreover, even if Amtrak refuses UP/SP's terms, and subsequently asks the Board to prescribe them, the incremental cost standard entitles the rail carrier to recover the costs that it incurs as a result of Amtrak's services over its facilities. We see no basis for the railroads' concern that the compensation we prescribe will be inadequate. As we indicated earlier, UP/SP and other freight railroads, facing significant capacity constraints today for their freight operations, are investing heavily in added track and facilities to accommodate increased demand for rail freight service. Should Amtrak's increased express service cause capacity constraints requiring additional infrastructure investment, we see no reason why we would not include those directly attributable costs in a compensation order. The same result should likely apply to any other cost the carrier incurs that is traceable to Amtrak's operations.²⁴

²⁴ In *National R.R. Passenger Corp. & Consolidated Rail Corp.--Application Under Section 402(a) of the Rail Passenger Service Act For an Order Fixing Just Compensation*, Finance Docket No. 32467, at 1 (ICC served January 19, 1996), the ICC, in setting compensation for Amtrak's use of certain Conrail lines, noted that "[t]he major incremental costs related to Amtrak's operations (and the only type of incremental cost at issue here) is the incremental cost of maintaining and replacing rail, ties, ballast, and other track materials, i.e., incremental track 'maintenance-of-way' (MOW) (continued...)

Thus, in response to UP/SP's constitutional arguments, we would observe that the carrier — either through agreement with Amtrak or Board prescription — will be compensated for Amtrak's access, and that it is premature to conclude that the compensation will be inadequate. To the extent, however, that the incremental cost standard that Congress established precludes UP/SP or any other rail carrier from recovering from Amtrak, for the use of its facilities, a portion of the carrier's "full" costs — *i.e.*, a share of the joint and common costs of the rail network that cannot be attributed to any particular traffic — the courts have already determined that "incremental cost" compensation, pursuant to RPSA, does not effect a compensable taking under the Fifth Amendment. *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir.), *cert. denied*, 479 U.S. 1017 (1986).²⁵

Environmental Review. UP/SP argues that we must undertake an environmental review of Amtrak's proposal to carry express freight. We disagree. We are merely interpreting the statutory limits on Amtrak's express service. Once traffic is determined to be express traffic, Congress has not given us the discretion to refuse to require landlord carriers to allow Amtrak express cars on their tracks. We are merely performing a ministerial function, not taking discretionary action. For these reasons, our decision is not a Federal action of the type requiring environmental review under the National Environmental Policy Act (NEPA).²⁶

It is ordered:

1. Subject to the limitations set forth in this decision, Amtrak's application is granted, and UP/SP is ordered to make available to Amtrak facilities and services needed to allow it to transport express, as defined herein.
2. This proceeding is discontinued.
3. This decision is effective June 28, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

²⁴(...continued)

costs." In that case, the parties did not ask, nor did the ICC address, any costs other than maintenance costs, and the ICC's decision did not find that there are no other costs that are relevant. The Board emphasizes that, as a matter of course, we view all costs that a freight carrier would not incur but for the operations of Amtrak as incremental costs.

²⁵ See also, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (federal statutes that alter a regulatory scheme and reallocate economic benefits and burdens among regulated parties are presumptively constitutional under the Fifth Amendment and do not constitute a taking).

²⁶ 49 CFR 1105.5(c). See also, *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244-45 (D.C. Cir. 1980); *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990).