



17969 Mr. Jacobson
COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-200685

April 30, 1981

The Honorable Robert C. Byrd
United States Senate

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Dear Senator Byrd:

This responds to your letter dated March 18, 1981, concerning a freeze by the Federal Railroad Administration of its local rail service assistance program. You asked whether the [withholding of funds from the West Virginia Railroad Maintenance Authority] as a result of the freeze violates the [Impoundment Control Act]. We did not conduct a detailed audit because of tight reporting deadlines presently involved in responding to this and other impoundment inquiries. Consequently, we limited our efforts to a review of departmental materials and discussions with agency personnel. We also discussed this matter informally with OMB. A summary response to your question is set out in part I below, followed by a more detailed discussion in part II.

I.

The Federal Railroad Administration (FRA), Department of Transportation, administers the local rail service assistance program pursuant to section 5 of the Department of Transportation Act, as amended, 49 U.S.C. §1654. Each State eligible to receive assistance is entitled annually to receive funds according to the statutory formula, but not less than 1 percent of the funds appropriated for each fiscal year. 49 U.S.C. §1654(h) (2). The State receives its funds after the execution of a grant agreement between the Secretary and the State. If a grant agreement is not executed before the end of the fiscal year for which the funds were appropriated, the funds are reallocated in the next fiscal year. 49 U.S.C. §1654(h)(3)(B) ✓

States have been informed of their fiscal year 1981 allocations. However, a "freeze" has been issued on the awarding of grants because the Administration plans to transfer funds appropriated for this program to other FRA activities in order to reduce the fiscal year 1981 supplemental appropriation requested by former President Carter. Only a handful of grants had been awarded in this fiscal year before the freeze.

Section 1013 of the Impoundment Control Act, 31 U.S.C. §1403, requires the President to transmit a special message whenever any official of the Executive Branch proposes to defer budget authority provided for a specific purpose or project. (The President complied with the Act when he transmitted the sixth special message for fiscal year 1981, in which he proposed a deferral (D81-91) of the funds appropriated for this program.

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Section 1001(4) of the Impoundment Control Act, 31 U.S.C. §1401(4), provides that the Act does not supersede any provision of law which requires the obligation of budget authority. The statutory scheme in 49 U.S.C. §1654(h) by entitling the States to the funds allocated by the statutory formula, is such a provision of law. (Consequently, the Impoundment Control Act cannot be used to defer funds in a manner which would defeat the States' ability to receive the funds to which they are entitled.

Such is not yet the situation here. Deferral D81-91 was proposed only for part of the year. (This was done to preserve the funds until Congress has an opportunity to respond to the President's legislative proposal to transfer these funds for other purposes. This part-of-year deferral action will not itself defeat the implementation of the program and the past practice has been for most of the grants to be awarded in the fourth quarter. Consequently, we do not believe that the Administration's actions thus far violate the Impoundment Control Act.)

As mentioned, the program gives a State an entitlement for a fiscal year, and a deferral can not be used to negate that entitlement. Therefore, it is our view that if Congress does not enact the President's transfer proposal, these funds must be released so as to allow FRA enough time to make its grant awards. We will monitor the account and report to the Congress if it appears that the continued deferral of these funds would preclude the award of grants in this fiscal year.

Alternatively, if either House of Congress passes an impoundment resolution as provided in section 1013(b) of the Impoundment Control Act, 31 U.S.C. §1403(b), or Congress otherwise specifically rejects the President's proposal to transfer these funds for purposes other than the local rail service assistance program, the funds must be released and made available for the appropriate grant awards.

II

LOCAL RAIL SERVICE ASSISTANCE PROGRAM

Section 5 of the Department of Transportation Act, 49 U.S.C. §1654, was amended by section 803 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 1305 (February 5, 1976), to provide for a program of grants to States for rail service assistance. Section 5 was further amended by the Local Rail Service Assistance Act of 1978, Pub. L. No. 95-607, 92 Stat. 3059 (November 8, 1978), which established the present entitlement formula contained in 49 U.S.C. §1654(h).

Section 1654(h)(2) of title 49 provides, in part:

"Effective October 1, 1979, each State which is eligible to receive rail service assistance under this section is entitled annually to a sum from available funds as determined * * * [by the formula established in subsection (h)(2)]. Available funds are funds appropriated for rail service assistance for that fiscal year and any funds to be reallocated for that fiscal year * * *.

* * * * *

Notwithstanding the * * * [formula established in subsection (h)(2)], the entitlement of each State in a fiscal year shall not be less than 1 percent of the funds appropriated for such fiscal year."

The allocation formula in section 1654(h)(2) does not by itself constitute a funding commitment or obligation. It provides for determining the amount of funds an eligible State is entitled to receive if it complies with the program's requirements contained in 49 U.S.C. §1654(j) and (k). The States submit grant applications for specific projects. As FRA approves applications, grants are awarded and the funds are made available. Each State's grant total cannot exceed its entitlement. Entitlement funds are available to a State during the fiscal year for which the funds are appropriated. Entitlement funds which have not been the subject of an executed grant agreement before the fiscal year for which appropriated are reallocated to eligible States according to the formula contained in subsection 1654(h)(2). See 49 U.S.C. §1654(h)(3)(B).

FRA's ACTIONS AFFECTING WEST VIRGINIA

The Department of Transportation and Related Agencies Appropriations Act, 1981, Pub. L. No. 96-400, 94 Stat. 1681, 1687 (October 9, 1980), provided \$124,423,000 for fiscal year 1981 to FRA for rail service assistance. Of that amount, \$80 million has been allocated to the local rail service assistance program. There also was a carryover of approximately \$7.4 million in unobligated funds from fiscal year 1980. Therefore, for purposes of 49 U.S.C. §1654(h)(2), the available funds for fiscal year 1981 totaled approximately \$87.4 million. West Virginia's entitlement was \$874,367, the 1 percent minimum.

Until fiscal year 1981, almost all grants were awarded close to the end of the fiscal year. Section 320 of Pub. L. No. 96-400, 94 Stat. 1698, provides that no more than 30 percent of available appropriations may be obligated in the last quarter. Therefore, when FRA notified the States of their allocations on January 19, 1981, the States were given a proposed timetable for submission and processing of grant applications in order to comply with section 320.

Several States, including West Virginia, actually submitted grant applications before the fiscal year 1981 entitlements were announced. West Virginia submitted two applications. One was for \$250,000 for an operating subsidy for the South Branch Valley Railroad, which is owned and operated by the State of West Virginia. FRA awarded this grant shortly after the allocations were announced on January 19, 1981, and issued a line of credit for \$250,000. The other application was for \$693,000 to rehabilitate the same railroad. (The amount which actually could be awarded is \$624,000 in order to stay within West Virginia's entitlement of \$874,000). We understand that this latter application has been processed, but has not been forwarded beyond FRA's Office of State Assistance Program. FRA representatives told us that States were advised informally about February 13, 1981, of the President's plan to terminate the program and, therefore, that additional grants applications would not be approved.

On March 10, 1981, the President transmitted to the Congress the sixth special message for fiscal year 1981. In that message, he proposed a deferral (D81-91) of the \$80 million appropriated for the program. The \$7.4 million carryover from fiscal year 1980 has not been deferred and remains available for the program. The message states that the funds are deferred pending congressional action on a request to use these funds for other purposes in order to reduce the amount of pending supplemental appropriation requests initiated by former President Carter. Specifically, \$50 million would be used to offset a supplemental of like amount for rail restructuring assistance, \$25 million would be used to offset a supplemental of like amount for Conrail's workforce reduction program, and \$5 million would be used to offset approximately half of a \$9.6 supplemental for loan guarantee defaults.

FRA approved grants to five States totalling \$1.9 million before the freeze on grant awards was implemented. Additionally, States have incurred costs pursuant to FRA's regulations (49 C.F.R. §266.11) which allow States to incur costs prior to the execution of a grant agreement if authorized by FRA. We understand that FRA polled the States by telephone and estimates that

they have obligated \$4 million in fiscal year 1981. There is an unknown amount of overlap between the obligations incurred under 49 C.F.R. §266.11 and the funds provided under grants already awarded. Therefore, it is not yet known exactly how much FRA would have to furnish to the States if it fulfills the grants already awarded and reimburses States for obligations incurred under 49 C.F.R. §266.11, but the amount would be between \$4 million and \$5.9 million.

If the President's proposals are enacted, there may be problems in satisfying both the grants already awarded and the obligations incurred under 49 C.F.R. §266.11. As noted previously \$7.4 million was carried over from fiscal year 1980, and FRA plans to make these funds available to the States. FRA would like to use the \$7.4 million to cover the awarded grants and incurred obligations. However, these funds are subject to reallocation under the formula contained in 49 U.S.C. §1654(h)(2). The situation with West Virginia illustrates the problem. As mentioned, West Virginia already has received a grant for \$250,000, but under the statutory formula, it would be entitled to approximately \$74,000, the 1 percent minimum. We understand that the FRA Chief Counsel's Office is examining how the \$7.4 million can be reallocated and that FRA has not decided what will be done about honoring its commitments to the States if the funds have to be reallocated among the States according to the statutory formula. Therefore, if Congress approves the President's transfer proposal, additional legislation may be necessary to deal with this problem. One approach might be to legislatively authorize FRA to allocate the funds in the most equitable manner so as to ensure that States which already have incurred obligations are reimbursed.

IMPOUNDMENT CONTROL ACT

FRA's implementation of a freeze on awarding grants has resulted in a delay in the obligation to the States of the funds appropriated for the local rail service assistance program. This constituted a deferral of budget authority as defined in section 1011(1) of the Impoundment Control Act, 31 U.S.C. §1401(1). Section 1013(a) of the Act, 31 U.S.C. §1403(a), requires the President to transmit a special message to the Congress when such a deferral occurs. The President fulfilled the requirements of section 1013(a) when he transmitted the sixth special message for fiscal year 1981 to the Congress on March 10, 1981, and proposed deferral D81-91.

However, another impoundment issue arises because of the nature of the local rail service assistance program. As previously discussed, 49 U.S.C. §1654(h)(2) provides for a formula

allocation of funds to eligible States. The statute describes the amounts derived from the formula as "entitlements." While the funds are not automatically given to the States, FRA has no discretion to refuse funds to a State once that State has satisfied the criteria specified in the statute.

Section 1001 of the Impoundment Control Act, 31 U.S.C. §1400, commonly referred to as the disclaimer section, provides in pertinent part:

"Nothing contained in this Act, or in any amendments made by this Act, shall be construed as --

* * * * *

"(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."

Section 1654(h)(2) of title 49, by creating, in effect, an "entitlement" in the States to the funds allocated by formula, as described previously, is such a provision of law. Therefore, the fourth disclaimer means that the Impoundment Control Act cannot be used to defer funds in a manner which would defeat the States' ability to receive the funds to which they are entitled.

This is not yet the situation here. Deferral D81-91 was proposed only for part of the year in order to preserve the funds until Congress has an opportunity to respond to the President's transfer proposal. The deferral does not itself defeat implementation of the program and the past practice has been for most of the grants to be awarded in the fourth quarter. Consequently, we do not find the Administration's actions thus far to violate the Impoundment Control Act. At some point, the deferral would, as a practical matter, preclude the award of grants in this fiscal year. Consistent with the limitation in the fourth disclaimer discussed above, such a continuation of the deferral would be unauthorized. Therefore, it is our view that if Congress does not enact the President's transfer proposal, the funds must be released so as to allow FRA enough time to make its grant awards.

Congress has the opportunity to expeditiously compel the release of these funds under the Impoundment Control Act. Section 1013(b) of the Act, 31 U.S.C. §1403(b), provides that if

either House of Congress passes an impoundment resolution disapproving the deferral, the funds must be made available for obligation. If an impoundment resolution is passed, or Congress otherwise specifically rejects the President's proposal to transfer these funds for other purposes, the funds must be released and made available for the appropriate grant awards.

We hope this responds to your letter. Please do not hesitate to call us if we can be of further assistance.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Rowland". The signature is written in dark ink and is positioned above the typed name.

Acting Comptroller General
of the United States