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DEATH ON THE TRACKS

## Amtrak Pays Millions for Others' Fatal Errors

By WALT BOGDANICH

It is no mystery why, one spring day two years ago, an Amtrak passenger train jumped the tracks near Crescent City, Fla., and skidded to a stop on its side, killing 4 people and injuring 142.

Investigators concluded that the track, owned by the big freight railroad CSX, had not been properly stabilized and that management's oversight of maintenance had been lax. But when millions of dollars in damage claims arose from the crash, it was not CSX, a multibillion-dollar corporation, that paid them. It was Amtrak, the perennial money loser that survives only with regular infusions of cash from American taxpayers.

Three months later, it happened again. Poor track maintenance by CSX caused an Amtrak train to derail in Maryland, investigators said, injuring nearly 100 people. Again, Amtrak covered claims against CSX.

In accident after accident, in derailments and grade-crossing collisions, CSX and other major freight railroads have used Amtrak to shield themselves from tens of millions of dollars in liability, an examination by The New York Times has found.

For three decades, Amtrak has been paying these liability claims, regardless of fault, as a condition for using the freight lines' tracks. Not only do these payments shift the burden of paying for negligence from profitable corporations to taxpayers, they remove an incentive for railroads to keep their tracks safe.

There has never been a full accounting of these payments. Even Amtrak officials could not say how much the arrangement, known as indemnification, has cost the railroad, which needed \$1.2 billion in government subsidies this year to stay afloat.

But an analysis by The Times of records obtained through the federal Freedom of Information Act found that Amtrak has paid more than \$186 million since 1984 for accidents blamed entirely or mostly on others. In each instance, freight railroads were accused of playing the major or a contributing role in causing those accidents, which killed 53 people and injured nearly 1,300, according to court records, government investigators and lawyers for crash victims.

Most of those accidents were not covered by Amtrak's insurance, an Amtrak spokesman said. And the \$186 million reflects only part of Amtrak's costs stemming from accidents. The figure does not include payments made before 1984, outstanding claims from recent accidents, settlements of less than \$100,000, the cost of repairing damaged Amtrak equipment and legal bills for defending the freight railroads in court.

These indemnity agreements represent another way in which some of the nation's freight railroads sidestep responsibility in accidents. In July, The Times reported that railroads had destroyed, mishandled or simply lost evidence in grade-crossing accidents and had also failed to properly report hundreds of accidents to federal authorities.

Freight railroads have long had the political muscle to insist that Amtrak, which is beholden to Congress for its survival, indemnify them for accident claims. In 1997, after a federal judge questioned the legality of granting railroads blanket immunity, Congress rose to the defense of the freight railroads, passing a bill that, among other things, reaffirmed Amtrak's legal right to indemnify the freight lines.

Two years later, Amtrak officials said they had no choice but to cover \$63.8 million in punitive damages, including interest, after CSX was found to have caused a fatal Amtrak crash in Lugoff, S.C. A judge called CSX's negligence "borderline criminal."

"It's a bitter pill to swallow," said an Amtrak spokesman, Cliff Black. "It hurts our bottom line. It hurts our treasury."

Amtrak says it has received about \$8 billion in government support over the last decade, and last year alone paid about \$100 million to use their tracks.

The freight railroads say indemnification merely protects them from risks they would not face if Congress had not insisted that Amtrak, which owns little track of its own, use their rails. Congress, CSX said in a statement, "balanced that demand on private property by calling upon passenger railroads to bear the costs of insuring against potential liabilities."

The freight lines also pointed out that indemnity agreements are common in the rail industry, since companies sometimes run their trains on another's tracks. And they dismiss the idea that such agreements discourage attention to safety. "We suffer great economic harm when our freight trains have accidents, and we go to great lengths to prevent accidents of all types," said Kathryn Blackwell, a spokeswoman for Union Pacific.

But those arguments do not sway Angelica Palank, who received the \$63.8 million payment after her husband, Paul, a police officer, was among eight people killed in the South Carolina crash in 1991. A faulty CSX track switch caused the accident.

Ms. Palank said she gave eight years of her life to legal warfare against CSX. After raising her two children alone, suffering depression and enrolling in law school so she could better understand the case, she believed that justice had finally been done after the judge in her case upheld the jury verdict, calling CSX's carelessness and greed "the functional equivalent of manslaughter." She believed that CSX, chastened, might not misbehave in the future.

But several weeks ago, a Times reporter told her, for the first time, that the money she received by wire transfer had not come from CSX, but rather from Amtrak.

First came disbelief, then anger, and finally tears. "I'm mortified," she said. "Everything I've been living under is a lie. I was feeling on a personal level at least I did my part, and now I find out I didn't."

## **Origins of an Obligation**

Amtrak's obligation to pay for the mistakes of others dates back to its first days. Created by Congress in 1970, Amtrak preserved passenger travel by allowing railroads to unload this money-losing service - which the railroads had been threatening to drop - onto a semipublic corporation.

But Amtrak still had to negotiate the terms for using tracks it did not own. The American Association of Railroads, the freight lines' trade group, made it clear that its members wanted no liability for passenger deaths and injuries even if they caused them. Amtrak, on the other hand, worried that such an agreement might be fiscally unsound and potentially unsafe for passengers, records show. It wanted liability assigned on the basis of fault.

Neither side appeared willing to budge. Then, just before the matter was to be turned over to arbitration, Amtrak tried negotiating with just one railroad, Burlington Northern, rather than the association, records show. Soon, Amtrak relented and signed an indemnity agreement that became a model for the industry.

Amtrak backed down, records show, after Burlington Northern argued that its tracks were safe and that disputes over fault might inflate the cost of settling claims. Ultimately, Amtrak agreed to cover accident claims from its own passengers and employees. The freight railroads were responsible for their own employees should they be injured by an Amtrak train.

How vigorously Amtrak pressed its case is open to question. Records show that when negotiations began, Burlington Northern was in a position to exert influence over Amtrak's affairs. Not only did its chairman, Louis W. Menk, sit on Amtrak's board, along with two executives from other freight railroads, but Burlington Northern also owned about 3.3 million shares of Amtrak's common stock, which it obtained in exchange for giving Amtrak rail equipment. Other railroads were also given shares.

Although the government owned the controlling shares in the corporation, the railroads did initially have a say in picking three of Amtrak's directors, with the government picking most of them.

"Was the fox in the hen house?" said Thomas M. Downs, who served as Amtrak's chief executive two decades later, from 1993 to December 1997. "Of course."

The negotiations over indemnity, Mr. Downs said he believed, were not conducted at arms-length among equals. "There was barely a railroad to negotiate with on the Amtrak side," he said, adding that Amtrak was dependent on the freight railroads to keep its passenger trains on schedule. "Freight railroads had all the marbles."

At the time, Mr. Black said some members of Congress believed that Amtrak would merely be a stepping stone to getting rid of passenger service. "Many observers thought it would just go away," he said.

But it did not, and indemnity agreements has haunted Amtrak for years, said Mr. Downs, who now runs the Eno Transportation Foundation, which seeks to improve different modes of transportation. "It was one of the things that always gave me heartburn in my dealings with the freight railroads, because there was no accountability."

## Questions of Costs

Amtrak's indemnity payments stemmed not just from derailments but also from accidents at grade crossings.

Such was the case on Sept. 26, 1999, when an Amtrak train came barreling through tiny McLean, Ill. Two high school honor students, Stuart A. Curtis and C. Dannen Latherow, did not realize a train was approaching because an employee for Union Pacific, which owned the tracks, had accidentally disconnected the warning lights and gates, according to an investigation by the National Transportation Safety Board.

Both boys were killed. Amtrak paid \$4 million to their families.

Amtrak paid considerably more - \$32 million - after a jury concluded that Union Pacific bore prime responsibility for an August 1997 grade-crossing accident in Missouri. The jury said Amtrak played a minor role in that accident.

Local residents had complained about the difficulty in seeing approaching trains, partly because of overgrown vegetation. A state judge concluded that Union Pacific knew or should have known that the crossing was dangerous. In fact, another Amtrak train had killed a motorist there just four months earlier. And Amtrak paid for that accident, too - \$1.7 million.

Mr. Downs said he had been concerned enough about having to pay for the mistakes of others that he called Union Pacific's chairman, Dick Davidson. As Mr. Downs recalls the conversation, "He said, 'That's not our job, that's yours. That's the price for carrying passengers on our railroad.' "

A spokeswoman for Union Pacific said that Mr. Davidson did not recall that conversation, and that it "would be inaccurate to quote him in this manner."

Last year, Amtrak paid the freight lines about \$100 million for using their tracks. That figure is so low, according to the Association of American Railroads, that its members should be upset with Amtrak, not the other way around. The association sent The Times a copy of its own study for 2001 that said that the freight railroads actually gave Amtrak about \$243 million in indirect subsidies by discounting the cost of using their tracks.

But Harvey Levine, a former economist for the railroad association - who now testifies on behalf of accident victims - said the association study ignored the fact that Amtrak was already shouldering nearly \$1 billion in losses each year, losses that the railroads themselves would have faced had Amtrak not stepped in and assumed the burden of carrying passengers.

An Amtrak official said it was "completely bogus" for the association to suggest that Amtrak was not paying its fair and agreed-upon share. If the freight railroads could prove Amtrak was underpaying them, the official said, they would make an issue of it. But they have not, he added.

In fact, the inspector general for Amtrak, Fred E. Weiderhold Jr., said that over the last 10 years he had questioned about \$54 million in billings that the freight railroads submitted to Amtrak. Those billings relating to track use were either unjustified or unsupported by records, Mr. Weiderhold said. Amtrak, he added, negotiated settlements with the railroads for about 30 percent to 40 percent of the disputed amount.

Most of Amtrak's accidents are not covered by insurance. Since 1995, Amtrak itself has had to pay all claims of up to \$10 million for a single accident; before that, its deductible was \$25 million for collisions and derailments, an Amtrak spokesman said.

Told of the size of some of Amtrak's indemnification payments, Frank Clemente, who runs the consumer group Public Citizens Congress Watch, said, "I think if the public knew this it would be up in arms."

## **Questions of Safety**

Government officials in recent years have expressed concern about the safety of America's 200,000 miles of railroad track. Federal statistics show that in 2003 there were slightly more derailments than a decade ago, though train accidents over all have been dropping.

The effect on Amtrak has been a particular concern. In October 2002, worried about CSX's track-related accidents, particularly those involving passenger trains, an official of the federal Department of Transportation wrote a memorandum urging regulators to form a special task force to monitor CSX's

track-safety programs, records show. That memorandum, from the department's inspector general's office, cited repeated attempts by the Federal Railroad Administration, dating back to the mid 1990's, to bring CSX's tracks up to standard.

In its statement, CSX said it had "invested more than \$5 billion in track, signals, training and inspection programs over the last five years to make a safe railroad even safer." At the same time, CSX said that "it is not only false, it defies logic" to suggest any relationship between indemnity and CSX's, or the entire industry's, attention to safety. "The industry has dramatically improved safety since the type of Amtrak agreements you question were put in place in the 1970's," the statement said.

Still, the question of such a relationship was at the center of the most serious challenge to Amtrak's indemnity agreements.

On Jan. 4, 1987, an Amtrak train crashed into a Conrail train in Chase, Md. Sixteen people were killed and more than 174 were injured. Just before the crash, the Conrail engineer had used marijuana and had intentionally disabled an audible warning device in his cab. The engineer later pleaded guilty to manslaughter and was sent to jail.

Amtrak argued in federal court that Conrail's wrongdoing was so egregious that any indemnity payments would violate public policy. The judge, Oliver Gasch of Federal District Court in Washington, agreed - in part. He wrote that Amtrak officials who negotiated the original indemnity agreement "were deeply concerned about the maintenance of safety" and did not intend for the agreement to "deprive the traveling public of its reasonable expectation" that Conrail would operate safely. To insulate Conrail from punitive damages, he concluded, "would render meaningless" the obligation of Conrail to meet safety standards.

Even so, Amtrak ended up paying compensatory damages of \$9.3 million.

Judge Gasch's decision caused considerable unease among the freight railroads, said government officials. Concerned that their liability protection was being chipped away, the freight railroads turned to Congress for help. In 1996 and 1997 alone, records show, the freight railroads spent \$35 million lobbying Congress on different issues, including indemnity. And eventually, Congress put its weight behind the indemnity agreements, passing the Amtrak Reform and Accountability Act of 1997.

## **Biggest Payout Yet**

Two years after enactment of the 1997 law, CSX used the indemnity agreement as a shield against the biggest payout yet - the \$63.8 million in punitive damages, including interest, paid to Mrs. Palank.

Arthur J. Franza, the judge in her case, was harshly critical of CSX for eliminating too many maintenance workers. "Although cost-cutting measures may have saved defendant over \$2 billion, society paid the cost with eight human lives," Judge Franza said.

Mrs. Palank said she had pursued the punitive damages with the understanding that CSX, not Amtrak, would pay it. And for years, she said, she believed that CSX indeed had. For good reason, according to one of her lawyers, F. Gregory Barnhart, who said records show that Mrs. Palank's money was sent to her by CSX.

Her other lawyer, Christian D. Searcy, said he had even asked Amtrak officials to state in writing whether they had reimbursed CSX. "They said no letter will be forthcoming," Mr. Searcy said.

Mrs. Palank said the jury was never told that CSX would escape the sting of its verdict. "It's so secretive, so manipulative," she said. "Someone in the federal government needs to answer for this, because there was no legal justification for them to be paying for somebody else's wrongdoing."

Mark Geistfeld, a law professor at New York University, said indemnification, a form of insurance, has its limits. "Certainly, you cannot get insurance for criminal fines, for example," Professor Geistfeld said. "It's against public policy. No court would enforce it." But, whether Amtrak should have paid in this case depends on what kind of behavior you are talking about, he added.

Mr. Downs, the former Amtrak chief, said that after the railroad's lawyers told him Amtrak could not escape paying the punitive verdict, he called John Snow, then CSX's chief executive, to complain. Mr. Snow, now President Bush's treasury secretary, said in essence that a deal was a deal, Mr. Downs recalls. Mr. Snow declined to discuss the conversation or the case. CSX also declined to comment specifically on Amtrak's payment of punitive damages.

Amtrak's obligation did not end with the \$63.8 million payment to Mrs. Palank, though. It was also responsible for \$24 million in compensatory damages to her and other crash victims, for a total of \$88 million. For causing the accident, CSX paid the Federal Railroad Administration the maximum fine - \$20,000.

"It's very difficult to convince railroads that the carrying of people has a higher standard of operating discipline and safety than, say, coal," Mr. Downs said. "And the reason I think that is, is that they are immune from any cost."

At about the same time that the Palank case was working its way through the courts, in fact, CSX was working on a different front to soften its litigation costs. It played a prominent role in a business coalition that helped persuade the Florida Legislature in 1999 to change liability laws in the state, imposing limits on punitive damages, for example.

"We, like many other companies across the country, support a civil justice system that is fair and balanced," said Adam Hollingsworth, a CSX spokesman. CSX, said Mr. Hollingsworth, who has since left the company, wants to make sure "that those responsible for injury pay their portion of fault."

*Claire Hoffman, Eric Koli and Jenny Nordberg contributed reporting for this article.*

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