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THE WHITE HOUSE
WASHINGTON

December 18, 1975

Dick Cheney -

The attached was returned in the
President's outbox.

Jim Connor



Dick Cheney

The Penn Central is in reorganization under Section 77.

It owns about 20,000 miles of right-of-way and track, over 6,000 locomotives, more than 150,000 cars, extensive supporting equipment, and many parcels of real estate. Parts of these various assets are subject to liens in favor of numerous creditors.

The Congress in 1973, by its adoption of the ConRail Act (Regional Rail Reorganization Act), requires that on February 27, 1976, the trustees in reorganization convey the rights-of-way, track, locomotives, cars, and supporting equipment to ConRail (Consolidated Rail Corporation). The Act provides for a limited form of payment (not in cash) for the property to be transferred.

The Supreme Court in passing on the constitutionality of the Act in the Regional Rail Reorganization Act cases, 419 U.S. 102 (1974), held that the ConRail Act constitutes a taking, and that the creditors must be paid the fair value plus interest:

"Because of this congressional insistence upon accomplishing the transfer whatever the ultimate equity of the compensation provisions, any deficiency of constitutional magnitude in the value of the limited compensation provided under the Act will indeed be a taking of private property for public use As long as creditors are assured fair value, with interest, for the properties, the Constitution requires nothing more." (Pages 155, 156.)

Our purpose in asking to see you is to call attention to that decision by the Supreme Court. It is a final decision on the principle of the constitutional necessity for the payment of fair value with interest, and no legislative or administrative act can void or supersede that decision.

The Senate in passing S. 2718 ("Amendments to the Regional Rail Reorganization Act of 1973") has adopted a variety of amendments affecting the authorization of the Interstate Commerce Commission in setting rates, has appropriated funds for the operation of ConRail, and has also provided, as to the payment for the taking of railroad property, that the base value of the instruments of payment ("certificates of value") is to be the "constitutional minimum value" of those properties as determined by the Special Court created by the ConRail Act, with "such interest as may be constitutionally required."

The Congress cannot change the Supreme Court's decision, but we believe that the Senate by that text does not attempt to do so. In fact, the Senate Commerce Committee report acknowledges that "the ultimate answer to the valuation question is for the judiciary."

However, the companion House bill (H.R. 10979) does attempt to legislate a restriction on the Supreme Court decision in its language which would limit any payment to "net liquidation value."

If this phrase has any significance, it would appear to be an attempt to restrict the decision of the Supreme Court, which merely calls for "fair value, with interest." This attempted restriction will lead to unnecessary and costly litigation.

The Supreme Court explained why it left the determination of the method of valuation for later judicial determination:

"Valuation issues peculiarly require a much more developed record than has been prepared We hold further that decision of the questions concerning the method of valuation to be applied to either the rail properties or the consideration therefor is premature." (419 U.S. 102, at 146, 147-148.)

"The Rail Act in terms vests the Special Court with the initial responsibility for valuation determinations, subject to review by this Court. In that circumstance, we should surely await the Special Court's determinations. . . . Were we to attempt decisions of valuation questions before the Special Court's determinations, we would necessarily be forced to a speculative interpretation of a statute not clear on the subject of valuation before the court entrusted with its construction has given us the benefit of its views." (419 U.S. 102, at 147.)

Clearly, therefore, determination of the basis of payment (whether liquidation value or operating value, etc.) and the specific amount to be paid, is, by the ConRail Act, to be determined by the Special Court created by that Act, with, as was pointed out in the Supreme Court decision, the right to recover any "constitutional shortfall" in the Court of Claims under the Tucker Act.

The "net liquidation value" concept flows from the United States Railway Association's Final System Plan issued on July 26, 1975. The fallacy of the "net liquidation value" theory appears from pages 125 and 126 of the Final System Plan:

"In essence, then, the liquidation plan postulated by USRA is for an orderly transfer of the transportation services provided by the estates to other railroads with the prices of such transfers computed as if the estates had actually been allowed to exercise their asserted right to liquidate by selling all of their assets for nonrail uses It is important to emphasize that the value inherent in the creditors' asserted right to liquidate is . . . the net price which sale of the existing facility for nonrail use would produce."

But it is precisely the fact that the existing facility is to be used for rail use (a use as to which the property owners have no choice) which USRA's valuation process -- the "net liquidation" theory -- ignores.

We do not ask you for any adjudication of the basis of the calculation or the determination of any amount: Those two issues can only be determined by the courts.

What we do seek is a recognition by the Congress and a similar recognition by the Administration that the Supreme Court has determined that the trustees of the bankrupt railroads are to receive "fair value, with interest" which value is to be determined by the courts and not by either Congress or the Administration.