



Feb. 3, 2022

**Via E-Response Form**

Dear Editorial Desk:

I write in response to CNBC’s long-form segment distributed via YouTube on Feb. 2 “*Why U.S. Freight Trains Are So Much Better Than Passenger Rail*”. (<https://youtu.be/Q79BHfxfaSI>).

Any statement describing Amtrak as a private, for-profit company that is heavily subsidized by the U.S. government is both factually and legally incorrect, and as you’ll see below, more than a harmless error.

Amtrak is a government-created entity that is supposed to *behave* like a for-profit company, but the law authorizing the existence of Amtrak does not call it a private company and it most assuredly does not require it to make a profit. This not a controversial statement or an opinion. The statutes governing Amtrak were modified in 1978 to remove profit as an express objective and two Supreme Court rulings – one in 1995 and another in 2015 – repudiated the “private company” interpretation.

Moreover, the recently passed Bipartisan Infrastructure Law goes further in removing any mention of a profit motive for Amtrak’s service decisions, instead replacing them with references to providing service in underserved areas.

This is not nitpicking. The question of profit and private vs. government status is at the heart of whether Amtrak has a public service mission to carry out on behalf of the taxpayers who have paid for it since 1971, so it’s not a minor or tangential question.

Amtrak is a quasi-public government corporation created by the government to carry out public policy. It is not a private, profit-making corporation. Unfortunately, this perception persists and sometimes poor policy decisions result from this misunderstanding of Amtrak’s purpose, mission, and structure.

**Congressional language recognizing that Amtrak is organized for public purposes and not to make a profit**

The original 1970 law that created Amtrak *did* call for Amtrak to make a profit. But those who drafted the law acknowledged that it wasn’t really possible, and in 1978 that law was changed to recognize that Amtrak was not supposed to be a profit-making venture.

Section 301 of the Rail Passenger Service Act was amended in 1978, so that where it originally read Amtrak would be “a for profit corporation,” the amendment made it read that Amtrak should be “operated and managed as a for profit corporation.” You’ll find that clause in the Amtrak Improvement Act of 1978. That may seem like the same thing, but it’s not and Congress expressly said it was not.

Here is what Congress said in the report language accompanying the bill (H.R. Rep. No. 1182, 95th Congress, Second Session, 15):

“Section 9 amends section 301 of the RPSA...to conform the law to reality, providing that Amtrak shall be ‘operated and managed as’ a for-profit corporation. This amendment recognizes that Amtrak is not a for-profit corporation.”

When you interpret the law, the first thing you do is look at the text of that law, the plain language of the statute. After that, you try to assess legislative intent; that is, what the lawmakers who made the law meant that law to do. Report language that accompanies bills is the ideal vehicle for communicating legislative intent, and this report language is pretty unambiguous. This wording was deliberate, and intended to recognize the reality that the objective was for Amtrak to do its best to run a tight ship, but not necessarily to make a profit.

Depending on its mood, Amtrak sometimes thinks this is a good thing (i.e., when it wants money) and sometimes thinks this is a bad thing (when they want to do something on their own without worrying about public policy outcomes). But nevertheless, this has been the law of the land since 1978.

Furthermore, two subsequent Supreme Court rulings recognized this intent and incorporated it into their own judgments about Amtrak’s status as a government entity.

### **Supreme Court rulings that Amtrak is not private**

The Supreme Court in 1995 put Amtrak firmly into the realm of a government agency rather than a private corporation (Lebron v National Railroad Passenger Corp.). You can find that ruling here: <https://www.law.cornell.edu/supct/html/93-1525.ZO.html> Lebron v. Nat’l R.R. Passenger Corp., 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902, 1995 U.S. LEXIS 909, 63 U.S.L.W. 4109, 95 Cal. Daily Op. Service 1228, 95 Daily Journal DAR 2219, 8 Fla. L. Weekly Fed. S 564 (Supreme Court of the United States February 21, 1995, Decided )

Writing for the majority, then-Justice Antonin Scalia noted that “Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals....six of the corporation's eight externally named directors (the ninth is named by a majority of the board itself) are appointed directly by the President of the United States--four of them (including the Secretary of Transportation) with the advice and consent of the Senate. See §§543(a)(1)(A), (C)-(D). Although the statute restricts most of the President's choices to persons suggested by certain organizations or persons having certain qualifications, those restrictions have been tailor made by Congress for this entity alone. They do not in our view establish an absence of control by the Government as a whole, but rather constitute a restriction imposed by one of the political branches upon the other....

...Moreover, Amtrak is not merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be); it is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission, which are run by Presidential appointees with fixed terms.”

Although it is true that in 2013 the DC Circuit Court of Appeals reversed a District court ruling on Amtrak by determining that Amtrak was a private entity, that was a very, very short-lived determination.

In 2015 the Supreme Court reversed that finding – soundly, and nearly unanimously. Writing for the majority in 2015, then-Justice Anthony Kennedy concluded that “the Court of Appeals’ premise that Amtrak is a private entity was flawed” DOT v. Ass’n of Am. R.R., 575 U.S. 43, 135 S. Ct. 1225, 191 L. Ed. 2d 153, 2015 U.S. LEXIS 1763, 83 U.S.L.W. 4145, 25 Fla. L. Weekly Fed. S 114 (Supreme Court of the United States March 9, 2015, Decided).

Kennedy then harkened back to Scalia’s ruling some 20 years earlier, pointing out that the government controls most of Amtrak’s stock, the majority of its Board is appointed by the President of the United States and confirmed by the Senate, and that Amtrak was created by Congress with an expressly public purpose.

You can find the text of that 2015 ruling here:

[https://www.supremecourt.gov/opinions/14pdf/13-1080\\_f29g.pdf](https://www.supremecourt.gov/opinions/14pdf/13-1080_f29g.pdf)

## **Who We Are**

At 54 years old, the *Rail Passengers Association* is a recognized 501c3 nonprofit organization and is the oldest and largest national entity serving as a voice for the more than 40 million rail passengers in the U.S. Our mission is to organize our members and supporters to improve and expand conventional intercity and regional passenger train services, support higher speed rail initiatives, increase connectivity among all forms of transportation and ensure safety for our country's trains and passengers. All of this makes communities safer, more accessible, and more productive, improving the lives of everyone who lives, works, and plays in towns all across America.

Please feel free to contact me for any further discussion or clarification. We are happy to help on this issue and, indeed, on any other stories you may be considering on passenger rail.

Sincerely,



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1990



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