

1970

Mass Transit Legislation: The Future of Urban Public Transportation

Barry T. Crickmer

Follow this and additional works at: <http://scholarship.law.edu/lawreview>

Recommended Citation

Barry T. Crickmer, *Mass Transit Legislation: The Future of Urban Public Transportation*, 20 *Cath. U. L. Rev.* 133 (1971).
Available at: <http://scholarship.law.edu/lawreview/vol20/iss1/10>

This Symposium is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Mass Transit Legislation: The Future of Urban Public Transportation

Barry T. Crickmer

Until recently, urban traffic congestion and the broader area of urban transportation in general have had a lot in common with the weather as a subject. "Everybody talks about it, but . . ." Fortunately, that period is coming to a close. The legislative foundations for a renaissance in urban public transportation are being laid today. Billions of federal dollars will soon be channeled into the effort. And, as might be expected with any sizeable structure, there will be ample opportunity for the legal architects to argue over where to put the doors.

Considering the magnitude of the problem and the novelty of the institutions created to grapple with it, there is even the possibility that a new legal specialty will evolve to serve as go-between for the complex new federal program and those who seek its benefits.

Now is a good time to learn the background. There is not too much to digest, and it is still possible to watch many of the important developments taking place.

Transit Problems: Decentralization and Increasing Costs

Fifteen years ago it was widely believed that both people and job sites would continue to decentralize, resulting in a travel pattern ideally served by the automobile alone. All that was needed was just a few more highways. To a degree, this decentralization did take place. But the city center did not vanish; it became more crowded than ever before. The new suburbs also filled up experiencing many of the same problems of congestion and immobility that they had been founded to avoid.

At this point the highway-automobile combination began to lose some of its luster. People who appreciated the interstate system were, nevertheless, unconvinced that "a few more highways" could achieve equally dramatic

results downtown. They had heard it all before. Two other factors entered the picture. Militant blacks and other minority groups protested the dislocation new urban freeways would bring,¹ and the country became conscious of the fact that 60 to 80 percent of the poisons in urban air are caused by the gasoline engine.²

The last year the transit industry "finished in the black" was 1962.³ Since then, an \$880,000 net deficit in 1963 has increased geometrically to a loss of \$220 million in 1969.⁴ Of course, the bulk of that figure is accounted for by a few of the largest public systems, operating in areas which have long recognized the need for subsidization. But no one is getting rich in the transit industry these days. An American Transit Association survey of 71 of the largest investor-owned systems disclosed a total aggregate profit of only \$3 million for 1968.⁵ Moreover, the number of riders has declined from a high of 17 billion a year in the late 1920's to about 8 billion through the 1960's.⁶

A transit system thrives on population density. If there are enough high-density routes, the income derived therefrom can support the low-density runs which must be operated as a public service, and contribute to overhead and profit as well. But if the population spreads out, requiring the addition of more and more low-density service, a point is soon reached where the system operates at a net loss.

There are then two choices: increase income or cut costs. Income may be increased by raising fares or by public subsidy. Raising fares may be self-defeating, since the total loss in the number of riders resulting from imposition of a higher fare can leave the balance sheet even further in the red. What about costs? Since 1945, the annual average earnings per employee has increased 296 percent,⁷ while all other operating expenses have risen

1. See, e.g., *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

2. For discussion of the air pollution problem as it relates to urban highways and automobiles, see Schneiderman, Cohn & Paulson, *Air Pollution and Urban Freeways: Making a Record on Hazards to Health and Property*, 20 CATHOLIC U.L. REV. 5 (1970); *Control of Motor Vehicle Emission: State or Federal Responsibility?*, 20 CATHOLIC U.L. REV. 157 (1970).

3. AMERICAN TRANSIT ASSOCIATION, *TRANSIT FACT BOOK 4* (27th ed. 1969).

4. The primary sources of this datum are financial and statistical reports received by the American Transit Association from transit companies representing more than 85 percent of the passenger capacity of the transit industry. This information will be published in the 28th edition of the *TRANSIT FACT BOOK*.

5. American Transit Association, *Federal Aid to Transit*, April 1, 1969 (pamphlet distributed by the American Transit Association, 815 Connecticut Avenue, N.W., Washington, D.C.).

6. *TRANSIT FACT BOOK*, *supra* note 3, at 6.

7. *Id.* at 10.

18 percent.⁸ Labor costs today claim 70 percent of gross revenues.⁹ Clearly, any successful cost-cutting program must either increase productivity or reduce labor cost.

Productivity is determined by vehicle speed and vehicle size. But size is limited by city streets (even if it were not, larger vehicles would be more productive only on densest routes) and speed is limited by the flow of traffic. Neither factor is under the control of transit management. There is some room for maneuver in this area. There are no panaceas, however.

If automation is considered as an increase in productivity rather than an absolute reduction in labor cost, the only effective form of cost-cutting left in the latter category is a reduction of service. This can take the form of abandonment of poorly-patronized routes, less frequent service, or some combination of the two.

Decreases in service or increases in fare are understandably unpopular with the public. Regulatory agencies are, therefore, reluctant to authorize these steps, even when the financial condition of the transit company clearly justifies them. Publicly-owned transit authorities are no less subject to public pressure, though they usually are not under the jurisdiction of some outside regulatory body. Consequently, whatever the form of ownership, a transit system is often driven to use up any reserves available before obtaining relief. Capital equipment replacement funds are among the first to go, which is one of the reasons the initial federal aid programs center on capital equipment grants.

Federal Aid

The federal aid program for the urban transit industry is based on four premises: (1) urban public transportation is a necessity; (2) a good transit system benefits the entire community, not just those who use it; (3) revenue from fares is not sufficient to support a system offering the level of service demanded by the community; and (4) the industry is faced with a desperate need for new capital equipment—and perhaps for operating subsidies as well—and this need can not be met by the industry, the cities, or even the states.¹⁰

The Urban Mass Transportation Act of 1964¹¹ was passed to assist public agencies and private transit companies by financing capital facilities and equipment needed for mass transportation service in urban areas. It au-

8. *Id.* at 8 (calculated figure does not include payroll).

9. *Id.* at 4, 10.

10. H.R. REP. NO. 204, 88th Cong., 2d Sess. 3 (1963).

11. 49 U.S.C. §§ 1601-11 (1964).

thorized a program of capital grants and continued a program of loans. The act also authorized additional funds for a demonstration program first approved in the Housing Act of 1961.¹² A three-year authorization totaling \$375 million in federal grants was ultimately provided.¹³ A maximum of \$30 million of this money could be used for the demonstration program.¹⁴ The appropriation for fiscal year 1965 totaled \$60 million, and appropriations for each of the fiscal years 1966 and 1967 were \$130 million.¹⁵

The Act provided that federal grants for capital facilities could be made for up to two-thirds of the net project cost.¹⁶ The other one-third of the net project cost must be provided by the applicant from sources other than federal funds.¹⁷ Net project cost was defined as the portion of the total project cost that cannot reasonably be financed from revenues.¹⁸ Emergency grants were authorized to cover up to one-half of the net project cost where the transit development program was under active preparation although not yet completed.¹⁹ Moreover, if repayment was reasonably assured, loans could be made, but could not be combined with a grant on the same project.²⁰ Finally, federal assistance could be provided only after the Secretary of Transportation²¹ made certain determinations about the applicant, the facilities for which aid was sought, the relocation program, and the contracts involved.²²

12. 42 U.S.C. § 1436 (1964).

13. 49 U.S.C. § 1603(b) (Supp. V, 1970).

14. *Id.* § 1605(b) (1964).

15. S. REP. NO. 1436, 89th Cong., 2d Sess. 3-4 (1966).

16. 49 U.S.C. § 1603(a) (1964).

17. *Id.*

18. *Id.*

19. *Id.* § 1604.

20. *Id.* § 1602.

21. As originally enacted, this Act vested urban mass transportation functions in the Administrator of the Housing and Home Finance Agency. The Act has been amended to transfer most urban mass transportation functions to the Secretary of Transportation. Some functions under the Act, however, were retained by the Secretary of Housing and Urban Development. 49 U.S.C. §§ 1601-11 (Supp. V, 1970).

22. The Secretary must determine that:

(1) The applicant is a public body, which may be a state, a local body or agency, or an agency established by the action of two or more States [49 U.S.C. § 1602(a) (Supp. V, 1970)]. (2) The applicant has the legal, financial, and technical capacity to carry out the proposed project, and is in a good position to provide satisfactory continuing control over the use of the facilities and equipment for which assistance is provided [*Id.*]. (3) Facilities for which assistance is sought are needed for carrying out a program, meeting criteria established by the Secretary, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area. The program must provide for the maximum feasible participation of private transportation companies [*Id.* § 1602(c)].

Although the amendments to the Act in 1968 were intended to increase the opportunity for participation by investor-owned transit systems, the changes did not go far enough to remedy the effective procedural exclusion of these systems from the program. Initially, the local one-third of the net project cost had to be supplied by the applicant public agency.²³ But local authorities have little spare cash to begin with, and they are frequently reluctant to use such cash to aid a private company.²⁴ The 1968 amendments permitted up to 50 percent of the local share to come from "other than public sources," and up to 100 percent "in cases of demonstrated fiscal inability of an applicant" public agency.²⁵

From the industry viewpoint, this legislation was a step in the right direction, but not a big enough one. Local public agencies, understandably, did not favor getting themselves in the position of pleading poverty to obtain a federal grant and then trying to look prosperous to sell their next bond issue. Consequently, through July 1969 less than three-tenths of one percent of the transit aid dispensed under the federal program had gone to investor-owned bus systems.²⁶

The Urban Mass Transportation Assistance Act of 1970

By 1968, three major flaws had been identified in the fledgling federal transit aid program: (1) the total funding—averaging little more than \$100 million a year—was hopelessly inadequate;²⁷ (2) some form of long-term funding guarantee was essential since local citizens were unwilling to obligate themselves to five, ten, or fifteen year transit projects without advance knowledge of what the federal share would be; and (3) aid must be available to the private systems serving small-town America, as well as the big city authorities.

(4) There is an adequate relocation program through which persons and families displaced by the project can be relocated in decent, safe, and sanitary dwellings [*Id.* § 1606(a)]. (5) All contracts contain the usual provisions relating to the Davis-Bacon Act and other labor standards, and also labor protective provisions, under criteria specified in the Act [*Id.* § 1609(a)].

S. REP. NO. 1436, 89th Cong., 2d Sess. 3-4 (1966).

23. 49 U.S.C. § 1603(a) (1964).

24. There are, however, local governments (*e.g.*, Philadelphia, San Francisco, and Wichita) that have found subsidization of a private operation is less of a strain on the budget than "buying it out."

25. 49 U.S.C. § 1603(a) (Supp. V, 1970).

26. *Hearings on H.R.6663, S.3154, H.R.7006, H.R.13463, and H.R.16261 Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 414 (1970).*

27. Estimates prepared for the Urban Mass Transportation Administration by the Institute for Public Administration put the ten-year capital requirements at between \$28 and \$34 billion. H.R. REP. NO. 1264, 91st Cong., 2d Sess. 4 (1970).

An alliance was formed to secure new legislation embodying three points: more money, long-term guarantees, and expanded participation. The group was spearheaded by trade associations representing the industry and the nation's cities.²⁸ It would eventually attract the support of just about every element of American society with an interest in urban transportation, becoming, in the words of Senator Russell, "the damndest coalition I ever saw put together."²⁹

Early in 1969, bills were introduced in the Senate and House to establish a trust fund for aid to urban public transportation.³⁰ These twin measures would have provided \$1.8 billion over a four year period, drawing on the automobile excise tax for funds.

Meanwhile, a change in administration put John Volpe in the cabinet as Secretary of Transportation. He became one of the strongest proponents of the trust fund concept, and promised an administration bill of even greater scope than the existing legislation.³¹ But President Nixon's financial advisors—traditionally loathe to support any dedicated account—opposed the proposal, and the debate between them and trust fund proponents raged well into the summer. Finally, the administration ruled against the trust fund.³²

In August, the administration produced a bill calling for a 12-year, \$10 billion transit aid program.³³ The measure actually authorized \$3.1 billion for the first five years, with biannual review thereafter. It also authorized one-year contract authority. In other words, the federal government might commit itself up to one year in advance, but no longer. Backers of the aid program found much to admire in the administration bill, but the short-term funding problem was a major sticking point. For that reason the bill garnered little support outside the administration.

A compromise was clearly in order. Senator Harrison Williams, Jr., sponsor of the original trust-fund bill and the Senate's leading expert on urban transportation, offered an amendment extending to five years the one-year contract authority in the administration bill.³⁴ The Williams Amendment was acceptable to all concerned. A new bill, embodying the new five-year contract authority and the other provisions carried over from the

28. This group included the American Transit Association, the Institute for Rapid Transit, the National League of Cities, U.S. Conference of Mayors, and the Railway Progress Institute.

29. Wall Street Journal, June 24, 1970, at 32, col. 1.

30. S.1032, 91st Cong., 1st Sess. (1969); H.R. 6663, 91st Cong., 1st Sess. (1969).

31. Address by Secretary Volpe, Meeting of the Institute for Rapid Transit, at the Madison Hotel, Washington, D.C., April 17, 1969.

32. Wall Street Journal, *supra* note 29.

33. S.2821, 91st Cong., 1st Sess. (1969).

34. 115 CONG. REC. 12,373 (daily ed. Oct. 13, 1969).

original administration bill, was introduced in both Houses.³⁵ On February 3, 1970, it passed the Senate by 84-4.³⁶ The only substantial change wrought by the Senate was a sharp reduction in the proposed discretionary fund. This fund would have given the Secretary of Transportation a special reserve equal to 15 percent of the money available for obligation, for use in those states nearing the 12.5 percent limit on funds apportionable to any one state in a single year.³⁷

In March, the Housing Subcommittee of the House Banking and Currency Committee held hearings on the Senate bill and related measures. The subcommittee was sufficiently impressed with the testimony to increase the initial five-year authorization from \$3.1 to \$5 billion, but the discretionary fund was left at 15 percent.³⁸ After a long delay involving parliamentary maneuvering over other legislation, the parent Banking and Currency Committee reported the bill unchanged by a vote of 34-0.³⁹ On September 29, the House passed HR 18185 by 327-16, after amending it on the floor to bring the \$5 billion authorization back down to the \$3.1 billion figure found in the corresponding Senate bill, S. 3154. The House then replaced the body of S. 3154 with the language of the House bill, and sent the product back to the Senate. The Senate accepted the House changes and passed the bill without resort to a conference committee on October 5. President Nixon signed the Urban Mass Transportation Assistance Act of 1970 into law on October 15.⁴⁰

The Effect of the New Legislation

This legislation represents a firm federal commitment⁴¹ to find and implement a solution to growing urban immobility. Given adequate financing, there are many things that can be done for a community that is more concerned with the movement of people than the movement of vehicles. New subways, such as those under construction in San Francisco and Washington, D.C., will be built in several of our larger cities. They will be faster, more comfortable, and more aesthetically pleasing than the older systems familiar to many Americans. With new capital, the old systems will also be able to modernize and to add badly-needed new routes. In cities large

35. S.3154, 91st Cong., 2d Sess. (1970); H.R. 16261, 91st Cong., 2d Sess. (1970).

36. 116 CONG. REC. 1,134 (daily ed.).

37. S. REP. NO. 633, 91st Cong., 1st Sess. 4 (1969).

38. H.R. REP. NO. 1264, 91st Cong., 2d Sess. 7, 9 (1970).

39. *Id.* at 2.

40. Pub. L. No. 91-453.

41. Compared to the size of the problem, even \$5 billion is small. But it is enough to make some visible progress, which has not been true of the previous efforts.

enough to be troubled by congestion, but too small to support a rail system, buses operating on reserved freeway lanes or even private rights-of-way will speed through congested corridors, providing a strong inducement for commuters to leave their cars at home. Buses will also be given preference in the city, through "transit lanes" and electronic signal-trippers, so that public transportation will always have the "green light."⁴² Service will improve. Equipment will be newer. Experiments will be undertaken with more exotic forms of urban transportation hardware,⁴³ although it will be many years before any of it is used on the streets.

With improvements in the equipment some of the strain will be taken off the budget, and the rate of fare increase will probably decrease. However, industry-wide fares are not likely to go down until society faces the other half of the transit problem—operating subsidies.⁴⁴ Such subsidies are

42. Separate bus lanes are now used in Baltimore and other cities and have been somewhat successful in speeding up transit vehicles. A better solution would be to construct new roadways to be used solely by buses. In certain situations (lack of money, space, etc.) special rights-of-way are not feasible. In these situations, traffic signals may be commanded directly from the bus with the use of electronic devices.

43. According to the Department of Housing and Urban Development, the more promising new systems include:

[1] *Dial-a-Bus*: A bus type of system activated on demand of the potential passengers, perhaps by telephone, after which a computer logs the calls, origins, destinations, location of vehicles and number of passengers, and then selects the vehicle and dispatches it.

[2] *Personal Rapid Transit*: Small vehicles, traveling over exclusive rights-of-way, automatically routed from origin to destination over a network guideway system, primarily to serve low-to-medium-population density areas of a metropolis.

[3] *Dual Mode Vehicle Systems*: Small vehicles which can be individually driven and converted from street travel to travel on automatic guideway networks.

[4] *Automated Dual Mode Bus*: A large vehicle system which would combine the high-speed capacity of a rail system operating on its private right-of-way with the flexibility and adaptability of a city bus.

[5] *Pallet or Ferry Systems*: An alternative to dual mode vehicle systems is the use of pallets to carry (or ferry) conventional automobiles, mini-buses, or freight automatically on high-speed guideways.

[6] *Fast Intraurban Transit Links*: Automatically controlled vehicles capable of operating either independently or coupling into trains, serving metropolitan area travel needs between major urban nodes.

[7] *New Systems for Major Activity Centers*: Continuously moving belts; capsule transit systems, some on guideways, perhaps suspended above city streets.

U.S. DEPT OF HOUSING AND URBAN DEVELOPMENT, TOMORROW'S TRANSPORTATION 3 (1968).

44. Communities do not expect the police department to support itself on the parking citations it writes. Nor do they expect the fire department to levy a "user charge" for fighting fires. Citizens contribute to the public school system whether or not they have children attending public schools, because they recognize that an educated population is of benefit to everyone. Likewise, efficient urban public transportation benefits the entire community, users and non-users alike.

essential to an efficient urban transit system, but this fact has not been acknowledged.⁴⁵ Thus far Congress and the administration have seen fit to deal only with the capital subsidies portion of the transit problem. Whether operating subsidies will come as separate legislation or part of a comprehensive national transportation policy will be a subject of much thought and discussion for the next few years.

45. As was mentioned, the last year the transit industry showed a profit was 1962. AMERICAN TRANSIT ASSOCIATION, TRANSIT FACT BOOK 4 (27th ed. 1969). American Transit Association figures show that 258 transit systems have been abandoned since 1964. Local subsidies are rare today, although a few transit systems (*e.g.*, New York, Boston, San Francisco) do receive various forms of continuing aid from local and/or state sources.

Student contributions complement the preceding articles with a broad range of highway related topics. Challenging Highways: Widening the Access to Judicial Review examines the reviewability of highway route location procedures and various means of obtaining judicial relief. Control of Motor Vehicle Emissions: State or Federal Responsibility? provides a timely analysis of this current controversy. The Highway Trust Fund: Road to Anti-Pollution? explains the operation of the trust fund and explores alternatives for transportation financing. NEPA: Birth and Infancy traces the background of the National Environmental Policy Act and summarizes its effectiveness during the first six months of its operation.