



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *SCJ*

DATE: April 12, 2000

SUBJECT: MUR 4545-First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4545

DATE COMPLAINT FILED: October 29, 1996

DATE OF NOTIFICATION: November 4, 1996

DATE ACTIVATED: February 10, 1999

EXPIRATION OF STATUTE OF LIMITATIONS:

August 24, 2001

STAFF MEMBER: Delanie DeWitt Painter

COMPLAINANT: Republican National Committee

RESPONDENTS: Clinton/Gore '96 Primary Committee, Inc.
and Joan Pollitt, as treasurer

United States of America

National Railroad Passenger Corporation (Amtrak)

Consolidated Rail Corporation (Conrail)

CSX Corporation

RELEVANT STATUTES:

2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 434(a)(1)
2 U.S.C. § 434(b)(2) and (4)
2 U.S.C. § 434(b)(8)
2 U.S.C. § 437g(a)(1)
2 U.S.C. § 441a(d)
2 U.S.C. § 441a(f)
2 U.S.C. §§ 441b
26 U.S.C. § 9003(b)(2)
26 U.S.C. § 9007
26 U.S.C. § 9012
26 U.S.C. § 9032(9)
26 U.S.C. § 9035
26 U.S.C. § 9038
26 U.S.C. § 9038(b)(2)
11 C.F.R. § 100.7(a)(1)(iii)
11 C.F.R. § 104.11

11 C.F.R. §§ 104.13(a)(1) and (2)
 11 C.F.R. § 111.4(b)
 11 C.F.R. § 111.4(d)
 11 C.F.R. §§ 114.9(e)(2)
 11 C.F.R. §§ 9004.7(b)(4) and (5)
 11 C.F.R. § 9032.9(a)
 11 C.F.R. § 9034.4(a)(1)
 11 C.F.R. § 9034.7(b)(2)
 11 C.F.R. §§ 9034.7(b)(4), (5) and (7)
 11 C.F.R. § 9038.2(b)(2)

INTERNAL REPORTS CHECKED: Disclosure Reports, Audit Documents

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

MUR 4545 was generated by a complaint filed by Thomas J. Josefiak, Counsel to the Republican National Committee, on October 29, 1996.¹ Attachment 1. The complainant alleges that costs associated with President Clinton's train trip to the Democratic National Convention in August 1996 (the "Train Trip") were improperly paid by the United States Government or absorbed by the corporate providers of the train services and constituted contributions to the Clinton/Gore '96 Primary Committee, Inc. ("Primary Committee"), and Joan Pollitt, as treasurer. The Primary Committee was the authorized committee of President William J. Clinton in the 1996 presidential primary campaign.

The White House Counsel's Office responded on behalf of the United States Government, including the President and White House, on December 12, 1996.² The Department of Justice

¹ The complaint in this matter was filed in 1996; however, on October 27, 1997, the Commission voted to hold this matter in abeyance pending completion of the audit of the Primary Committee. The Commission approved the audit report on the Primary Committee on June 3, 1999. The audit report did not contain any findings related to the violations alleged in the complaint because the audit did not reveal any material non-compliance based on the Audit staff's review of the Primary Committee's records, disclosure reports and other documentation.

² On November 4, 1996, notification letters were sent to both the White House Counsel's Office and the Attorney General of the United States concerning the complainant's allegations that the United States Government

also responded on behalf of the United States Government on November 22, 1996. Attachments 2 and 3. The Primary Committee also responded, denying the allegations, on December 16, 1996. Attachment 4. The National Railroad Passenger Corporation ("Amtrak") denied the allegations in its response, submitted on December 23, 1996. Attachment 5. Consolidated Rail Corporation ("Conrail") responded and also denied the allegations on November 26, 1996. Attachment 6. Finally, CSX Transportation Corporation ("CSX") responded on November 21, 1996 and denied the allegations.³ Attachment 7.

Based upon the allegations in the complaint and the responses to the complaint, this Office recommends that the Commission find no reason to believe that the respondents in this matter violated any provision of the FECA, the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031-9042 ("Matching Payment Act"), or the Commission's regulations.

II. FACTUAL AND LEGAL ANALYSIS

A. LAW

A contribution includes any gift, subscription, loan, advance, deposit of money or anything of value made by any person for the purpose of influencing any election for federal office.

2 U.S.C. § 431(8)(A)(i). "Person" does not include the federal government or any authority of the federal government. 2 U.S.C. § 431(11); 11 C.F.R. § 100.10. "Anything of value" includes all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii). No candidate or political committee shall knowingly accept any contribution that violates the contribution limitations. 2 U.S.C. § 441a(f).

violated the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("FECA"). Therefore, both the White House and the Department of Justice responded on behalf of the United States Government. The White House Counsel's Office response states that it is submitted "on behalf of the President in his official capacity and the White House." Attachment 2 at 1.

³ The complaint was sent to CSX Corporation, but the response is on behalf of CSX Transportation Corporation, a subsidiary of CSX that was involved in the Train Trip. Attachment 7. Throughout this Report, "CSX" refers to the subsidiary, CSX Transportation Corporation.

It is unlawful for any corporation to make a contribution to a federal candidate, or for any candidate or political committee to accept a contribution from a corporation. 2 U.S.C. § 441b.

The Commission's regulations provide that travel related to the campaign of a publicly-financed candidate seeking nomination to the office of President shall be a qualified campaign expense and a reportable expenditure.⁴ 11 C.F.R. § 9034.7(a). No candidate shall incur qualified campaign expenditures in excess of the applicable expenditure limitations. 26 U.S.C. § 9035; 2 U.S.C. § 441a(b)(1)(a); 11 C.F.R. § 9035.1(a)(1). Travel expenditures for United States Secret Service ("Secret Service") personnel and national security staff are considered qualified campaign expenditures, but are not subject to the overall expenditure limitations of 11 C.F.R. § 9035.1(a)(1). 11 C.F.R. § 9034.6(a)(1).

Each treasurer of a political committee shall file reports of its receipts and disbursements with the Commission. 2 U.S.C. § 434(a)(1). Committees must file reports for each reporting period, disclosing all receipts, including all contributions received, and all disbursements, including expenditures. 2 U.S.C. §§ 434(b)(2) and (4). Each in-kind contribution shall be reported as both a contribution and an expenditure. 11 C.F.R. §§ 104.13(a)(1) and (2).

For trips by charter, a copy of the official manifest and a list of all passengers on the trip, along with a designation of which passengers are campaign-related, shall be made available for Commission inspection. 11 C.F.R. § 9034.7(b)(4). If a candidate or other individual incurs expenses for campaign-related travel other than by government conveyance, an amount equal to that portion of the actual cost of the conveyance which is allocable to all passengers, including the

⁴ A qualified campaign expense of a publicly-financed primary candidate is a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, not incurred or paid in violation of state or federal law, that is made in connection with the candidate's campaign for nomination and is incurred from the date an individual becomes a candidate through the last day of his or her eligibility. 26 U.S.C. § 9032(9); 11 C.F.R. § 9032.9(a).

candidate, who are traveling for campaign purposes will be a qualified campaign expense and shall be reported as an expenditure. 11 C.F.R. § 9034.7(b)(7). For charter trips, the actual cost for each passenger shall be determined by dividing the total operating cost for the charter by the total number of passengers transported. 11 C.F.R. § 9034.7(b)(7)(i).

B. ANALYSIS

The complainant alleges that the Primary Committee used impermissible funds, or caused expenditures to be made by prohibited sources, in connection with campaign events and travel related to President Clinton's Train Trip through several states between West Virginia and Illinois from August 24, 1996 to August 28, 1996. Attachment 1 at 1. The complainant alleges that the costs of the Train Trip should have been paid by the Primary Committee as qualified campaign expenses. *Id.* The complaint continues: "[a]s acknowledged, however, by a spokesman for Clinton-Gore '96 [citing transcript of press briefing by Michael McCurry attached to the complaint, see *id.* at 8-19] significant costs associated with the campaign activity – as much as \$1 million – appear to have been absorbed and paid by either corporate providers of services or by the federal government in violation of 2 U.S.C. §§ 441b and 434(b) and 11 C.F.R. §§ 114.9(e)(2) and 9034.7."⁵ *Id.* Moreover, the complainant alleges that the "addition of the unattributed political costs" of the Train Trip would cause the Primary Committee to exceed the expenditure limitation in violation of 11 C.F.R. § 9035.1(a)(1). *Id.* at 2.

Specifically, the complainant alleges that the purpose of the Train Trip "was to facilitate numerous stops for campaign appearances and voter contact along the route." *Id.* at 2.

⁵ Section 114.9(e)(2) of the Commission's regulations provides that a candidate, candidate's agent or person traveling on behalf of a candidate who uses a means of transportation, other than an airplane, owned or leased by a corporation must reimburse the corporation the normal or usual rental charge within a commercially reasonable time. However, this section does not appear to be applicable to the Train Trip, which was a commercial charter, not a corporation's private train.

Complainant cites an attached August 29, 1996 article from the *Washington Times* which states that although the Train Trip would cost as much as \$1,000,000, the Clinton campaign would only pay \$113,000, the media would pay \$250,000, and the remainder would be paid by "the taxpayers." *Id.* The article states that the public would pay additional amounts for security, welcoming ceremonies and communications. *Id.* The complainant also cites and attaches a transcript of a press briefing by presidential spokesman Michael McCurry on August 28, 1996. *Id.* Mr. McCurry stated that the Primary Committee's portion of the train cost was \$113,000, based on the contract between the carrier and the Primary Committee, which covered "every cost associated with the [T]rain [T]rip that reflects the work the President is doing in the political capacity as opposed to his official capacity as President." *Id.* at 3.

Complainant contends that while certain costs of the President, such as security costs, must be borne by the taxpayers, these costs must be "reasonably related to the necessary and official functions of the President." *Id.* at 5. Complainant also contends that a campaign train trip differs from travel on Air Force One because the Commission's regulations treat air travel differently from other transportation. *Id.* Moreover, complainant argues that the Train Trip was "not simply campaign-related travel but a campaign event" that was a "rolling campaign headquarters and a moveable campaign stage." *Id.* at 6. Thus, the complainant contends, the campaign should pay "to corporate vendors all the costs for this campaign event and, regardless of the bloated government entourage, a full and fair portion of the extraordinary costs they have generated for the government." *Id.*

Finally, the complainant alleges that since Amtrak was seeking government subsidies at the time of the Train Trip, and the Primary Committee conducted negotiations with the White House which may not have been at arms length, the Commission should "determine the proper allocation

of costs of the [T]rain [T]rip to avoid political expenditures by Amtrak, CSX or Conrail railroads, or by other corporations or vendors or by the federal government in violation of 2 U.S.C. §§ 441b and 434(b) and 11 C.F.R. §§ 114.9(e)(2) and 9034.7." *Id.*

The Primary Committee denies the complainant's allegations. Attachment 4. The Primary Committee contends that the *Washington Times* article is "inaccurate" and that it paid for the "substantial costs of this mode of transportation." *Id.* at 1. The Primary Committee states that the Train Trip began on August 24, 1996 in West Virginia and continued through Kentucky, Ohio, Michigan and Indiana for four days before the President's arrival at the convention and that the campaign held rallies and events at stops along the route. *Id.* Moreover, it contends that it had arm's length negotiations with Amtrak, the primary vendor for the Train Trip, that various other vendors supplied services for events along the route and "Committee representatives dealt with all of them on a [sic] arm's length basis, identical to any other campaign trip taken by the President during the course of the campaign." *Id.*

The Primary Committee contends that it made expenditures totaling \$1,072,163 for the campaign-related costs of the Train Trip, and attached a spreadsheet detailing the costs. *Id.* at 2 and 5. It states that it paid costs related to the Train Trip totaling \$161,702 for the train cars used by the President and other political passengers, including Amtrak's charges, the use of the cars, on-board services and labor, and meals, as well as reconfiguration of the President's car and on-board decorations. *Id.* at 2. Further, the Primary Committee states that it paid \$910,461 for other costs related to the Train Trip including advance costs, overnight costs, event and motorcade costs for stops along the route, telephone and fax, and satellite expenses, and that none of those costs were paid by the Secret Service, the White House Communications Agency, the press, Amtrak or any other vendor. *Id.* The Primary Committee argues that Mr. McCurry's

remarks were based on information available at the time, before all costs were invoiced and paid.

Id.

The Primary Committee asserts that the allegations have no merit and there is no evidence to support them. *Id.* at 2-3. Specifically, it argues that there is no evidence that Amtrak or other vendors paid for campaign-related expenses. *Id.* at 3. The Primary Committee states that while costs related to the Secret Service were paid by the Secret Service, all campaign costs were paid by the Primary Committee, not any government entity. *Id.* It further contends that the Commission has recognized that officeholders have duties relating to their office and the government "has certain expenses associated with presidential travel," and argues that when President Clinton travels "he has ongoing responsibilities which must continue to be fulfilled." *Id.*

Amtrak also denies the allegations. Attachment 5. Amtrak argues that it priced the Train Trip to make a profit, consistently following the same pricing methodology used for all Amtrak charter trains, and that the price it charged was very high, more than three times the price of the next most expensive Amtrak charter trip that year.⁶ *Id.* at 1. Moreover, Amtrak asserts that it negotiated only the total price of the Train Trip and was not involved in the division of the cost among "the four Clinton related parties paying for the train." *Id.* Amtrak explains that the price for the Train Trip, consistent with the standard pricing method, was based on estimates of Amtrak's internal costs for providing the requested service including equipment charges for cars and locomotives, equipment modification charges such as decoration and restoration, train and engine crew labor, on-board mechanical labor, on-board service labor, food and beverages,

⁶ It appears that Amtrak attributes the higher cost of the Train Trip to President Clinton's security requirements. Amtrak's response states: "[t]he President's standard security needs had to be added as a component. They far exceed those of other charter trains. As noted above, the cost of the Train Trip was more than three times the cost of the next most expensive charter train trip this year." *Id.* at 2.

security, miscellaneous service and materials, insurance, indirect costs and administrative and overhead costs. *Id.* at 2-4. Amtrak states that its internal costs were subject to a mark-up for profit and contingencies. *Id.* at 4. Amtrak further states that the price included estimated charges from three freight railroads totaling \$348,000.⁷ *Id.* at 4. Amtrak states that the price of the President's trip also included "the President's standard security needs" which "far exceed those of other charter trains." *Id.* at 2. Amtrak states that the final negotiated price of the Train Trip was \$932,000, including an amount for profit and contingencies consistent with Amtrak's pricing methodology. *Id.* at 3.

Amtrak further states that the Primary Committee informed Amtrak on August 23, 1996 that the price of the Train Trip would be allocated among four entities in the following amounts: the Primary Committee - \$113,237; the Secret Service - \$593,578, the White House Travel Office - \$190,297 (one initial payment of \$50,000, the remainder to be collected by Amtrak from the press in pre-determined amounts); and the White House Military Office - \$35,428.⁸ *Id.* at 3. Amtrak argues that it "does not know what methodology was used to allocate the total price" among the four entities. *Id.* at 3.

⁷ For the Train Trip, Amtrak used the track, facilities and services of three other railroads, which according to Amtrak, estimated their costs in the following amounts: Grand Trunk Western Railroad - \$195,000; CSX - \$78,000; and Conrail - \$75,000. *Id.* at 4. Amtrak notes that the train route was changed after the estimate which may have resulted in a different amount paid to CSX. *Id.* CSX and Conrail were notified of the complaint and filed responses. Attachments 6 and 7. Grand Trunk Western Railroad was not notified of the complaint. Since this Office is recommending findings of no reason to believe with respect to all of the respondents in this matter, it is not necessary to notify Grand Trunk Western Railroad, or include it as a respondent.

⁸ Amtrak provided a breakdown of the kinds of costs involved and attached a copy of its contracts with the Primary Committee, the Secret Service, the White House Travel Office and the White House Military Office/White House Communications Agency. Attachment 4. Three of the contracts are similar and include the following charter prices: the Primary Committee - \$113,237; the Secret Service - \$593,578, and the White House Travel Office - \$190,297, including an initial payment of \$50,000. The fourth contract is in the form of an amended purchase order dated August 29, 1999, which states that the White House Military Office/White House Communications Agency share of the costs was \$35,428 for non-general and general use cars, railroad costs, labor on the main train cars and alterations/modifications made for communications equipment. *Id.* at 56-60.

In support of its contentions, Amtrak submitted declarations from Ladislav Shrbeny, Assistant Director, Charter Operations, who developed the initial pricing proposal for the trip, and Mark Wasserman, Assistant Vice President, Business Development, who negotiated the contracts. *Id.* at 6-8. Mr. Shrbeny states that during 1996 he "developed or supervised the development of pricing proposals on dozens of charter operations" including the Train Trip and the "August 10, 1996 charter train which carried members of the California Republican Party and other Republican dignitaries from Oakland to San Diego, CA for the Republican National Convention." *Id.* at 7.

Mr. Shrbeny further states that he:

personally assembled cost estimates and developed pricing proposals for the Train Trip. . . . [and] followed the same methodology in preparing all of these price proposals -- I assembled Amtrak's estimate of the cost of providing the requested service and marked it up by a percentage of Amtrak's internal costs for profit and contingencies.

Id. Mr. Wasserman states that he negotiates the contracts for "charter operations that require a particularly high level of coordination among the parties involved." *Id.* at 6. Mr. Wasserman further states that in 1996, he "negotiated the contracts for two such charter operations," the Train Trip and "the August 10, 1996 charter train which carried members of the California Republican Party and other Republican dignitaries including House Speaker Newt Gingrich from Oakland to San Diego, CA for the Republican National Convention." *Id.*

Conrail denies the complainant's allegations that it made a corporate contribution by absorbing costs related to the Train Trip. Attachment 6. Conrail admits that it allowed an Amtrak special train to operate over its tracks in August 1996, but contends that the "administrative and operational arrangements for that train were fulfilled pursuant to the normal and ordinary business procedures Conrail has for use of its track by Amtrak." *Id.* at 1-2. Conrail submitted an affidavit from Mark M. Owens, Director of Freight/Passenger Coordination in

support of its contention that all Conrail costs incurred in connection with the Train Trip were billed to Amtrak "pursuant to customary, normal procedures and contractual obligations currently in effect between Amtrak and Conrail."⁹ *Id.* at 2 and 4-9. Conrail asserts that it did not have a contractual relationship with the Primary Committee, and it was obligated to provide its track, services and facilities for the Train Trip pursuant to a pre-existing contract with Amtrak, the "Off-Corridor Operating Agreement," and the requirements of federal statute, 49 U.S.C. § 24308, both of which are attached to the response.¹⁰ *Id.* at 2, 10-15. Conrail concludes that since its only involvement with the Train Trip was pursuant to a pre-existing contract and federal statute, it could not have made an unlawful corporate contribution to the Primary Committee. *Id.* at 2.

CSX denies the complainant's allegations and makes similar arguments to Conrail's response. Attachment 7. CSX contends that since it had no contractual relationship with the Primary Committee and its involvement in the Train Trip was required by a pre-existing contract with Amtrak and by statute, it could not have made an improper contribution to the Primary

⁹ Mr. Owens' affidavit explains that the charges were calculated consistently with other billings to Amtrak for special trains under the Off-Corridor Operating Agreement. *Id.* at 4-9. Mr. Owens explains that the Train Trip operated over a portion of Conrail's territory in Ohio, Michigan, Indiana and Illinois between August 26 and 28, 1996 pursuant to a contractual agreement "which requires Conrail to provide track access for any Amtrak special train movements upon Amtrak's request." *Id.* at 5. Conrail provided all train and engine crews when the trains operated over Conrail track, as is customary procedure, but did not provide any "rolling stock equipment" such as train cars and locomotives. *Id.* at 6. Mr. Owens states that "every identifiable cost associated with the Amtrak Presidential special train was captured and billed to Amtrak as required under the Conrail agreement with Amtrak," including a standard mileage rate and additional costs, and Conrail's only involvement with the Train Trip was through its contractual relationship with Amtrak. *Id.* at 6-7. Mr. Owens states that Conrail's services associated with the Amtrak train totaled \$87,596.40, which has been billed to Amtrak for payment. *Id.* at 7.

¹⁰ The Off-Corridor Operating Agreement, effective April 14, 1996, states, in part, "Amtrak shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement . . . Conrail hereby agrees to provide new, modified, additional, or reduced services." *Id.* at 12. The applicable statute, 49 U.S.C. § 24308(a), provides, in part, that Amtrak may make an agreement with a rail carrier or regional transportation authority to use facilities of, and have services provided by, the carrier or authority under terms on which the parties agree. 49 U.S.C.A. § 24308(a) (West 1999). If the parties cannot agree, the Surface Transportation Board, if necessary, shall order that the facilities be made available and the services provided to Amtrak and prescribe reasonable terms and compensation for using the facilities and providing the services. *Id.*

Committee. *Id.* at 1. CSX states that it billed Amtrak "for all of the costs it incurred in conjunction with that operation." *Id.* at 2.

In support of its response, CSX attached an affidavit from Assistant Vice President - Passenger Services Richard H. Young, Jr. *Id.* at 2 and 6-14. Mr. Young states that the Train Trip involved three trains traveling together, operated as Amtrak specials using CSX trackage from West Virginia to Ohio. *Id.* at 2 and 8. Moreover, he states that CSX made an effort to identify all actual costs associated with the Train Trip and billed Amtrak for \$238,959.75 for these charges on November 14, 1996. *Id.* at 3 and 7. Mr. Young also explains that CSX calculated the charges on the same basis as it would any other Amtrak special train operation. *Id.* at 3 and 7-8. Mr. Young explains the cost of the facilities and services provided to Amtrak for the Train Trip including train cars and locomotives, train and engine crews, chefs and stewards, track maintenance and liability charges, diesel fuel and special services such as constructing platforms, and that the billing included all of CSX's costs for the train and related activities. *Id.* at 10-13. In addition, Mr. Young states that "once Amtrak makes a request to use our rail lines for a special train, [CSX] is under an obligation to provide Amtrak access to its lines whether or not the special train is for the President of the United States." *Id.* at 9. CSX also attached other documentation and a copy of its agreement with Amtrak.¹¹ *Id.* at 2 and 15-24. CSX contends that it was obligated under its contract with Amtrak and 49 U.S.C. § 24308 to provide its track, facilities and services. *Id.* at 3.

¹¹ The Amtrak contract with CSX is similar to the Conrail contract. *Id.* at 18-19. It states in part, "NRPC shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement Railroad hereby agrees to provide, modified or additional services." *Id.* at 18. CSX also provided a memorandum concerning the Train Trip, *id.* at 15-17, and an Interstate Commerce Commission case, *Amtrak and Soo Line RR - Use of Tracks and Facilities and Establishing Just Compensation*, Finance Docket No. 31062, 1987 ICC LEXIS 239 (June 25, 1987), which supports its contention that it was obligated to provide track, services and facilities to Amtrak. *Id.* at 20-24.

The White House Counsel's Office and the Department of Justice on behalf of the United States Government deny the complainant's allegations and make similar arguments. Attachments 2 and 3. Both contend that any funds expended by the federal government for the President's travel, such as payments by the United States Secret Service, cannot constitute a contribution because the federal government, or any authority of the federal government, is not a "person" as defined by the FECA and cannot make a contribution or expenditure. Attachments 2 at 1-2, 3 at 1-2; *see* 2 U.S.C. § 431(11); 11 C.F.R. § 100.10. They cite the legislative history of the FECA, specifically noting that "the definitions of 'contribution' and 'person' within the Act were amended to 'incorporate the [Federal Election] Commission opinion that the use of appropriated funds of the Federal Government is not a [campaign] contribution'." Attachment 3 at 2, citing H. Rep. 96-422, 96th Cong., 1st Sess. at 7-8 (1979); *see* Attachment 2 at 1-2, *citing* H.R. Rep. No. 4221, 96th Cong. 1st Sess. at 7-8 (1979) (definition of "expenditure"). In addition, the White House contends that the media were billed for costs related to media travel on the train trip with the President, and the government did not pay for media travel. Attachment 2 at 2.

This Office recommends that the Commission find no reason to believe that the respondents violated any provision of the FECA, Matching Payment Act or the Commission's regulations in connection with the Train Trip. Based upon the responses from Amtrak, Conrail and CSX, there is no evidence to support the complainant's allegations that the vendors absorbed any of the costs related to the Train Trip. Amtrak states that it negotiated a price of \$932,000 for the Train Trip based on its standard pricing method and including an amount for profit. Attachment 5 at 1-3. There is no evidence that this price was inadequate payment for the services and facilities Amtrak provided related to the Train Trip. Indeed, Amtrak states that the Train Trip

cost more than three times the amount of the next most expensive charter trip during that year.¹²

Id. Moreover, Amtrak's assertion that its negotiations with the Primary Committee and White House entities was in the ordinary course of business is credible. Furthermore, Amtrak would not be required to involve itself in the allocation of the costs among the four contracting parties as long as its total compensation was paid.

It also appears that Conrail and CSX received adequate payment for their track and equipment. It appears that neither Conrail nor CSX was involved in negotiations with the Primary Committee and that these entities billed Amtrak for all costs related to the track, services and facilities Amtrak used in connection with the Train Trip based on their standard billing methods. Moreover, it appears that Conrail and CSX provided services and facilities in connection with the Train Trip because it was obligatory pursuant to their pre-existing contracts with Amtrak and statutory requirements. Therefore, this Office recommends the Commission find there is no reason to believe that Amtrak, CSX or Conrail violated any provision of the FECA in connection with the Train Trip.

Moreover, the complainant has provided no evidence that the Primary Committee violated the FECA, Matching Payment Act or the Commission's regulations. It appears that many costs related to the Train Trip, such as costs related to campaign events at stops along the route, were not included in the contract with Amtrak and were paid to other vendors. The Primary Committee details expenditures for the campaign-related costs of the Train Trip totaling \$1,072,163, including payment to Amtrak of \$161,702 as well as \$910,461 for other costs related to the Train Trip,

¹² Although the high cost of the Train Trip may raise the question of whether Amtrak was overpaid, resulting in the use of matching funds for expenditures other than qualified campaign expenses, *see* 26 U.S.C. § 9032(9); 11 C.F.R. §§ 9032.9(a), 9034.4(a)(1), there is no evidence that Amtrak was overpaid, or that the Primary Committee paid more than the campaign-related portion of the Train Trip. Moreover, it is plausible that the security necessary for the Train Trip made it significantly more expensive than other train charters.

including advance costs, overnight costs, event and motorcade costs for stops along the route, telephone, air transportation, facsimile and satellite costs. Attachment 4 at 2 and 5.

With respect to the payments to Amtrak by the Primary Committee and the United States Government, this matter involves a question of allocation; specifically, whether the allocation of the Amtrak expenditures between the Primary Committee, the Secret Service and the two White House offices was proper. While the available evidence is inadequate to determine conclusively whether the allocation and payment of the expenditures related to the Train Trip was proper, there is no indication that the allocation was improper.¹³

The amounts paid to Amtrak by the Primary Committee and the press, although only approximately one-third of the total amount paid to Amtrak for the Train Trip, may have accurately reflected the campaign-related and press costs of the Train Trip. There is no evidence that the higher cost of the Train Trip compared to Amtrak's other charters was caused by the

¹³ After informally requesting assistance with this matter, this Office sent a memorandum to the Audit Division on July 6, 1999 requesting that:

the Audit Division review the expenditures related to the Train Trip to determine whether the allocation of the costs between the Primary Committee and the other contracting entities was proper, based on the information provided in the complaint and responses, as well as disclosure reports and documents provided during audit fieldwork. This review should include verification of the expenses the Primary Committee contends it incurred related to the Train Trip, and an assessment of the proper amounts of Secret Service payments and press reimbursements.

See Memorandum to Robert J. Costa, "MURs 4395, 4480, 4545 and 4669 – Complaint-Generated Enforcement Matters Involving Clinton/Gore '96 Committees" (July 6, 1999) at 2. In a memorandum dated August 9, 1999, the Audit Division stated that it could "perform only a limited review of records made available to your staff by various respondents. Further, it is our understanding that documentation, necessary to determine if the cost of the train trip was allocated properly has not been made available. Therefore, our review will not address this concern." Memorandum to Kim Bright-Coleman, "MURs 4395, 4480, 4545 and 4669 and Related General Counsel Request," (Aug. 9, 1999) at 2. On October 14, 1999, the Audit staff informed staff of this Office of several suggested changes based on its limited review of the complaint and responses in this matter.

Additional investigation would clarify the facts in this matter and could reveal whether the Primary Committee and the three government entities paid the proper amounts for the Train Trip. For example, information such as the cost of security modifications to the train cars and the number of campaign-related and non-campaign passengers would be useful to determine whether the expenditures were properly paid.

campaign-related nature of the Train Trip. Rather, it appears that the difference between the cost of the Train Trip and the next most expensive Amtrak charter may have related to expenditures for standard security required for the President, which according to Amtrak, "far exceed[ed] those of other charter trains." Attachment 5 at 2. While the Secret Service paid \$593,578 and the White House Military and Communications offices paid \$35,428, there is no evidence that these amounts exceeded President Clinton's standard security and communications requirements. It is inherently difficult to separate campaign-related travel costs from official and security travel costs for an incumbent President, who has unique security requirements and ongoing official duties even while he is campaigning.¹⁴ Since a passenger manifest and a breakdown of all costs associated with the Train Trip, including the portions allocated to each paying entity, are not available, it is not possible to determine if the Primary Committee's payment to Amtrak was appropriate.¹⁵ See 11 C.F.R. § 9034.7(b)(7)(i). Nevertheless, the available evidence provides no indication that the Primary Committee's payment to Amtrak was inadequate.

Moreover, even if government entities paid more than a reasonable portion of the costs related to the Train Trip, such payments would not have constituted excessive contributions under the FECA. The FECA expressly states that "person" for the purposes of making a contribution

¹⁴ While the complainant is correct that the Commission's regulations have specific requirements for air travel by government conveyance, 11 C.F.R. § 9034.7(b)(5), the same section of the regulations also discusses specific requirements for campaign travel by government conveyance that is not an airplane. 11 C.F.R. § 9034.7(b)(5)(iii). The regulations also discuss specific rules for campaign-related travel by charter and commercial transportation. 11 C.F.R. § 9034.7(b)(7).

¹⁵ It is not clear whether the Primary Committee maintained a list of passengers on the Train Trip designating which passengers were campaign-related as required by 11 C.F.R. § 9034.7(b)(4). Moreover, it is possible, but not likely, that additional allocable expenditures related to the Train Trip would cause the Primary Committee to exceed the expenditure limitations in violation of 26 U.S.C. § 9035. See 2 U.S.C. § 441a(b)(1)(a); 11 C.F.R. § 9035.1(a)(1). According to the Audit staff, the Primary Committee is approximately \$232,000 below the overall expenditure limitation for the 1996 primary campaign of \$30,910,000. Since the information provided by the complaint and responses does not indicate that the Primary Committee paid less than the proper amount for the campaign-related expenditures related to the Train Trip, this Office does not believe that these potential violations warrant a finding of reason to believe that a violation occurred.

does not include the federal government or any authority of the federal government.¹⁶ 2 U.S.C. § 431(11); 11 C.F.R. § 100.10. While the available evidence is inadequate to determine whether the costs of the Train Trip were properly paid, the complainant's allegations are not sufficient to support a finding of reason to believe that the Primary Committee or the United States Government violated the FECA, Matching Payment Act or the Commission's regulations. Therefore, this Office recommends that the Commission find no reason to believe that any violations occurred in this matter.

III. RECOMMENDATIONS

1. Find no reason to believe that the Clinton/Gore '96 Primary Committee, Inc. and Joan Pollitt, as treasurer, violated any provision of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031-9042, or the Commission's regulations with respect to the allegations in MUR 4545;
2. Find no reason to believe that the United States of America violated any provision of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031-9042, or the Commission's regulations with respect to the allegations in MUR 4545;
3. Find no reason to believe that the National Railroad Passenger Corporation (Amtrak) violated any provision of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, the Presidential Primary Matching Payment Account Act, as

¹⁶ The legislative history of the 1979 amendments to the FECA reveals that the:

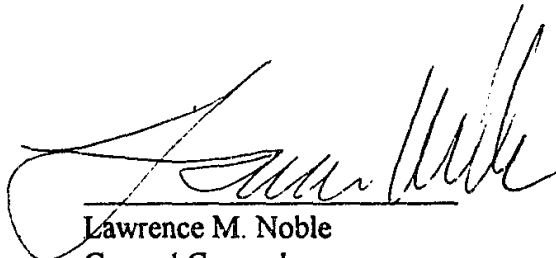
phrase 'by any person' was added to the definition of contribution to incorporate the Commission opinion that the use of appropriated funds of the Federal Government is not a contribution. (The Federal Government is also excluded from the definition of person.) Misuse of appropriated funds is a violation of Federal law and subject to enforcement by other agencies.

H.R. Rep. No. 422, 96th Cong. 1st Sess. at 6-7 (1979), contained in *Legislative History of the Federal Election Campaign Act Amendments of 1979*, Federal Election Commission, (1983) at 190-191. The report also notes that the only change to the definition of "person" "was the specific exclusion of the Federal Government from the definition." *Id.* at 11. Moreover, the Commission has found no reason to believe that the federal government has made contributions in several enforcement matters. For example, the Commission found no reason to believe that the federal government's payment of salary and office expenses for James A. Baker III, the White House Chief of Staff who was also involved in the Bush-Quayle '92 campaign, constituted a contribution under the FECA because the federal government cannot make contributions and the position was inherently both official and political. MURs 3602 and 3628.

amended, 26 U.S.C. §§ 9031-9042, or the Commission's regulations with respect to the allegations in MUR 4545;

4. Find no reason to believe that Consolidated Rail Corporation (Conrail) violated any provision of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031-9042, or the Commission's regulations with respect to the allegations in MUR 4545;
5. Find no reason to believe that CSX Corporation violated any provision of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031-9042, or the Commission's regulations with respect to the allegations in MUR 4545;
6. Approve the appropriate letters; and
7. Close the file.

9/11/00
Date


Lawrence M. Noble
General Counsel

Attachments:

1. Complaint by Thomas J. Josefiak, Counsel to the Republican National Committee dated October 28, 1996.
2. Response from Cheryl Mills, Associate Counsel to the President, dated December 12, 1996.
3. Response from Richard Brown, Trial Attorney at the Department of Justice, Civil Division, on behalf of the United States Government, dated November 22, 1996.
4. Response from Lyn Utrecht and Eric Kleinfeld dated December 16, 1996.
5. Response from the National Railroad Passenger Corporation dated December 23, 1996.
6. Response from Conrail dated November 26, 1996.
7. Response from CSX Transportation Corporation dated November 21, 1996.



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARY W. DOVE/VENESHE FEREBEE-VINES
COMMISSION SECRETARY

DATE: APRIL 18, 2000

SUBJECT: MUR 4545 - First General Counsel's Report
Dated April 11, 2000.

The above-captioned document was circulated to the Commission
on Thursday, April 13, 2000.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	—
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	—
Commissioner Wold	—

This matter will be placed on the meeting agenda for Wednesday,
April 26, 2000. Please notify us who will represent your Division before the
Commission on this matter.