

OUR NATIONWIDE TRANSPORTATION MESS

The Fight for a Transportation System That Works

BY THEODORE W. KHEEL



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AT ONE TIME or another everyone of us has felt annoyed by something his government has done or failed to do. But beyond complaining, we rarely know what else to do about it. Our civic teachers tell us that the cure for bad govern-

ment is the ballot box. If you do not like the incumbent, vote against him at the next election. But the answer is not quite that simple. Often the choice is not clear, especially when our frustration concerns a particular subject.

Take the matter of transportation, a subject that has disturbed me for many years. Back in 1955, I first spoke out against the imbalance we in this country were creating by favoring the automobile over the subway, the commuter railroad and the bus. Since that time I have been trying to do as much as possible to establish an equitable balance between highway automobile traffic and mass transit. I think I can take some credit for the doubling of the bridge and tunnel tolls in the New York City area by the Triborough Bridge and Tunnel Authority and the use of the surplus funds of that agency to subsidize mass transit. I believe I have also helped reverse the notion prevalent in the 1950s, actually a throw-back to the 19th century, that the New York City subway system, the most efficient way of getting people about the large metropolis, should be self-supporting. To hold to that obsolete idea means, of course, that the fare has to go up whenever expenses exceed revenues. Our experience with the self-sustaining fare since 1949 when it was a nickel shows clearly that people switch from mass to automobile transportation in large numbers when the fare goes up. The result is to clog the streets with traffic and pollute the air with carbon monoxide. The automobile is the least efficient way of getting people to their jobs or the shopping centers. While the car driver is actually not being paid, he is providing his labor usually to carry just one passenger. In comparison, buses and trains transport millions of people—with a work force that is comparatively tiny.

My concern with our continuing urge towards self-destruction through the automobile led me last fall to oppose the \$2.5-billion transportation bond issue in New York State. I was appalled to discover at that time that Governor Nelson A. Rockefeller had overspent by some \$300 million for highway construction during a period when the state was short of funds for such vital needs as education, crime control, drug abuse and the like. Not only that, but he was arguing that the voters should allow him to borrow \$1,150,000,000 for highways so that he could repay the \$300 million to avoid tax increases. But this would still have meant spending an additional \$850 million for more highways even though there was not enough money around for essentials. I compared this to a man applying for a loan to buy milk for his children and at the same time asking for an additional \$25 for champagne.

The vocal opponents of the bond issue were few and far between and had no money. On the other hand, the bond issue’s supporters were, if anything, overfinanced. The proponents included the Governor and Mayor John V. Lindsay, the Democrats and the Republicans, the Liberals and the reformers, the bankers, the brokers, the industrialists and the trade unionists. Nevertheless, the bond issue was beaten. Radio and television were of great help in defeating it. The

public was fully informed—which is why it rejected a further proliferation of polluting highways.

I have been conducting a battle on another front in the cause of a balanced and coordinated transportation system, but the results so far have been negative. Nor have I been able to get across to the public the importance of the issue. In fact, I have not even been able to make the courts understand what is involved. I refer, of course, to my fight to get the Port of New York Authority to do the job it was first mandated to do back in 1921 by the states of New York and New Jersey. It was instructed at that time to develop and coordinate *all forms of transportation* in what the framers of this compact between these two states called the "port district." Such a compact or treaty between states has to be approved by the United States Congress—and it was. The port district is the area within a radius of 25 miles of the Statue of Liberty which, the initiators of the pact said, had become commercially one center or district. Obviously, it was not possible for either New York or New Jersey separately to deal with transportation in a bi-state area. A new form of government was called for and the Port Authority was created as the first special body of its type with jurisdiction beyond the geographical limits of the states that brought it into existence. An authority is a non-elective governmental unit that can make decisions supposedly in the interest of greater efficiency, without voter approval.

But the Port Authority's bureaucracy, relieved of effective review and accountability, found that there was no money in mass transit and abandoned the mandate it was originally given to develop and coordinate *all forms of transportation*. It decided instead to invest its ever-increasing financial resources in facilities that were, as they called them, "self-supporting." In other words, profitable. (This led it into sponsoring the largest office building complex in the world, the World Trade Center, in competition with private enterprise which has erected more office space in the lower one-third of Manhattan than there exists in practically every other major city in the United States put together. And private enterprise did this without any government subsidies. But the Port Authority gets what amounts to special subsidization because it can borrow money at low rates since the interest it pays is tax exempt. As a result, the U.S. Government loses that amount in taxes. This in essence is a subsidy to an agency for a purpose not designated by Congress. The Port Authority, in effect, decides what Congressional funds should be used for.)

Not only has the agency disregarded mass transit and simultaneously encouraged automobile usage by building bridges and tunnels—including an underdecking for the George Washington Bridge (which was originally intended for a commuter railroad)—but it also induced the legislatures of New York and New Jersey in 1962 to pass laws that make it impossible to require the agency to use any of its money for any railroad purpose whatsoever! Thus the states handcuffed themselves. What's more, the authority claims that New York and New Jersey cannot repeal this self-imposed restriction.

You might wonder how it is possible to prevent the two states from repealing their own laws. The device is an ingenious one thought up by the Port Authority's general solicitor, Daniel Goldberg. It makes use of a famous U.S. Supreme Court decision, the so-called Dartmouth College case. By getting New York and New Jersey to pass laws in the form of covenants or agreements with future holders of Port Authority bonds, these covenants become in effect contracts that, it is claimed, cannot be abrogated by the states that entered

into them. Since the agency continuously sells bonds for terms of 35 years (the most recent ones were sold in February 1972), it now claims that New York and New Jersey cannot repeal these covenants until all the bonds are paid off. That means that the earliest possible date for any Port Authority aid to mass transit is 2007 when the last bonds bought up to now can be redeemed. If the agency sells more bonds with later maturity dates, it can put off repeal indefinitely. I believe these covenants are illegal because 1) they amend the original compact without Congressional approval and 2) they improperly delegate the powers of the legislatures of the two states to a non-elective body.

Over the years the Port Authority had been able to avoid its full responsibilities to mass transit by means of slick public relations and effective lobbying. But as the subway, bus and rail crisis worsened, politicians began to come to the view that the agency should do something for mass transit, although to the present day they still do not thoroughly understand the necessity of having the rich and talent-filled Port Authority coordinate *all forms of transportation* in the port district. It is the only existing agency that can do this. Without a regional approach through a single agency with firm jurisdiction, the metropolitan area's transportation system is going to continue to become even more unbalanced.

Newspapers and public officials have begun to see a glimmer of light. THE NEW YORK TIMES, which had been one of the Port Authority's main supporters, started to talk about its "historic neglect" of mass transit. Governor William T. Cahill of New Jersey campaigned and won against former Governor Robert B. Meyner in 1969 on a platform calling for the Port Authority to do something more for mass transit. Gov. Rockefeller joined the bandwagon and together the two governors put out a statement early in 1971 outlining a variety of projects they wanted the agency to undertake.

The principal project was to construct rail links from Manhattan to Kennedy and Newark airports—with intermediate stops in between—at an estimated cost of some \$420 million. Austin J. Tobin, who was the agency's executive director but has since resigned after holding the job for almost 30 years, said in no uncertain terms that it would be unconstitutional for the Port Authority to use any of its funds for these rail links because of the 1962 covenants.

In 1958 he had beaten down a similar effort by Gov. Rockefeller to help mass transit. At that time the Governor proposed that the agency use its funds to buy rail cars and lease them to the commuter railroads. It could have done this at a considerable saving because of the tax-exempt funds it was able to borrow. But Tobin opposed Rockefeller unless New York and New Jersey guaranteed that the agency would be reimbursed by the states for the loss of any of its funds, which led one person to ask, "Who needs the Port Authority?" Nevertheless, New York's Constitution was amended to make the procedure possible. The whole affair taught Rockefeller to be careful in taking on this formidable opponent of mass transit.

In 1971, beyond saying that building rail links would be "unconstitutional," Tobin was noticeably silent about his opposition to the project, reflecting undoubtedly the fact that public opinion was demanding that some Port Authority funds be allocated to mass transit. But his silence did not mean consent.

The governors of New York and New Jersey were apparently advised that they might get around the ban on the use of Port Authority funds for any railroad purpose by redefining the term airport to include the rail links. But the Port Authority countered this strategy in defending a suit that I—

and other representatives of people in the port district dependent on mass transit—initiated to have the original covenants between the authority and states declared unconstitutional. The agency openly admitted that the links to the airports were railroads and not extensions of the airports. On this point I agree with the Port Authority. Even if there were signs in the railway cars reading, "Fasten seat belt, no smoking, please," a railroad is still a railroad—and the fact that it leads to an airport, with intermediate stops along the way, cannot change it into an airport.

Our suit to have the restrictions declared unconstitutional was really designed to help the governors carry out their program. It was begun in the Federal Courts in March of 1971—along with a companion suit in New Jersey that has been held in abeyance pending the outcome of the New York suit. You might think that the officials advocating Port Authority help for mass transit would have welcomed this litigation. If successful, it would have enabled the governors to avoid the subterfuge of trying to call a railroad an airport, when obviously this strategy was not going to work. Not only were we unaided in this suit, but practically all public officials have silently stood by while the Port Authority has fought to prevent the courts from deciding whether or not the covenants are unconstitutional. To this end, the agency moved to prevent us from having our case heard. It made four arguments. Firstly, it said we were merely asking for an advisory opinion and not a declaratory judgment. Legally that meant we had no case because there was no real problem. It also said that our claim did not raise a substantial Federal question for two reasons: 1) that we were merely attacking a defense the Port Authority might urge if called upon to help mass transit and 2) that there was under \$10,000 involved in the claim we made, the requisite minimum amount necessary for Federal jurisdiction. Lastly, it claimed that under Federal law we had no standing to sue.

This case was argued before District Court Judge Harold R. Tyler in early June of 1971. In late July he handed down a decision saying that it was not necessary for him to pass on the four reasons the Port Authority gave why we should be thrown out of court because in his judgment there was still a *fifth* reason why he had no right to sue. Our contention that the covenants amended the compact and therefore required Congressional approval before becoming effective was, he ruled, incorrect. Congressional approval was not needed, he maintained, because the covenants merely reduced the number of duties the Port Authority was assigned. Congressional approval was necessary only if the agency were given new duties, he reasoned.

We immediately made a motion to reargue, contending that the judge had missed the essential point of our case. It was that the Port Authority was required to coordinate all forms of transportation in the port district. If it could not use any of its funds for mass transit, it was incapable of performing the essential job of coordinating—and that was a fundamental amendment of the compact. How could it stop the imbalance in transportation resulting from the overabundance of automobiles it had so helped to encourage if it could do nothing for mass transit?

The Port Authority opposed our motion to reargue, contending that Judge Tyler was correct—and Judge Tyler agreed that he was correct.

We then took our case to the Second Circuit Court of Appeals, arguing that Judge Tyler failed to understand why the Port Authority was created. This time in its answer to our brief, to our great surprise, the agency abandoned Judge Tyler's argument, contending that he should never have decided the

case on the basis on which he did, but rather should have held that we had no right to be in court for the four reasons originally stipulated. We pointed out to the Second Circuit that the Port Authority's revised position meant that the Appeals Court had before it both our claim that Judge Tyler was wrong and the Port Authority's contention that he should not have made the decision he did but should have thrown us out of court for the four reasons he did not pass on. Needless to say, it was far from simple to join issue with the Port Authority in the appellate court.

Two months later, the Court of Appeals handed down a decision saying that Judge Tyler should never have considered the issue he based his decision on. It claimed instead that we were not entitled to test the constitutionality of the covenants because there was not \$10,000 involved in our suit. It based its conclusion primarily on an affidavit I had submitted to satisfy this requirement, pointing out that because of the deterioration in mass transportation I was required to use taxis at a personal cost of at least \$1,350 a year. Multiplied by the number of years until I would reach the retirement age of 65, the extra cost to me exceeded \$10,000. I felt awkward about making this petty argument in a suit involving the future of transportation in the port district, but prior decisions of the court indicated that it would think along these lines.

In a unanimous opinion, the court said that the test of jurisdiction is not the damages that the people of the port district suffered because the Port Authority violated its mandate, but whether I personally stand to gain, if the suit were successful, the kind of a transportation system I required for my own needs. The court inferred that this called for building me a new subway and concluded that it would take too long to do this to do me any good. Consequently, the court reasoned, I could not show that there would be \$10,000 worth of advantage to me in having declared unconstitutional the absolute ban on the Port Authority's use of its funds for mass transportation.

That may be the law but we do not think it is. The purpose of the \$10,000 limitation is to keep minor matters out of the Federal courts—and that makes sense. The issue here is whether the Port Authority, the only agency that can perform a bi-state function, should carry out its original mandate to develop and coordinate transportation in the port district. More immediately, it is whether the Port Authority should build the rail links to airports at a cost of \$420 million of its money. It is also a question of whether the agency should follow the example of the Triborough Bridge and Tunnel Authority and double the tolls of the bridges and tunnels it owns and use those funds—an additional \$70 million a year—for mass transit. It is also a question of whether the Port Authority should use its vast borrowing capacity—and its huge rental income from the World Trade Center—to obtain the \$2.5 billion I estimate it could and should borrow for mass transit.

In a motion to have the court reconsider its decision, we are now arguing that the rail links can be built in time to be of use to me. Regardless of the outcome, the essential question remains: what can a private citizen do—beyond voting "no"—when his government is doing something wrong. I am still trying to find out. ■