Articles

The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act

William G. Mahoney*

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* William G. Mahoney is a founding partner in the law firm of Highsaw, Mahoney & Clarke, P.C. He holds a law degree from the University of Notre Dame Law School. He has represented railroad and airline unions in state and federal courts and is counsel for the Railway Labor Executives Association. He has been involved in various legislative campaigns including participating in the drafting of a number of statutes and amendments to statutes affecting railroad and airline labor relations as well as representing the rail unions in the negotiation of the legislation and agreements that created and privatized Conrail.

For almost a century the predecessor of the Surface Transportation Board, the Interstate Commerce Commission ["STB" and "ICC"], regulated the financial and economic aspects of the railroad industry. For most of the latter half of that century, when the ICC approved railroad for financial transactions (mergers, stock controls, purchases of railroad assets, leases, trackage rights agreements), it imposed upon individual railroads seeking that approval conditions for the protection of the interests of their employees which the approval might affect. Then in late 1983, without benefit of legislative or judicial sanction, the Commission reversed course and began to protect the interests of the railroads against those of their employees, whether the employees' interests were protected by contract or by the Railway Labor Act. The ICC simply injected itself directly into the relationship between management and labor to the benefit of the former and to the decided detriment of the employee interests it was mandated to protect.

Prior to that time, the ICC had deliberately and very carefully avoided involvement in labor matters as being outside its jurisdiction and beyond its area of expertise.[1] The Commission's practical reasons for such avoidance would be evident to anyone who, for the first time, compared point, district and system seniority rosters; attempted to fathom the workings of a pool extra board; reviewed the work rules at a railroad terminal; or just read a railroad collective bargaining agreement. Unless one has had daily practical experience in the application of these key elements of the working relationship between railroad labor and management, one simply cannot make judgments about the extent to which modifications to any of those elements would affect the rights of individual employees or the operations of the railroads for which they work. Also, without knowledge of the content of the negotiations which culminated in a collective bargaining agreement and the consideration traded by the parties to reach that agreement, one cannot intelligently assess the effects of the removal from one party of its contract obligations to the other.

The Commission's reasons for expressly avoiding involvement in railroad labor relations matters for over 50 years were based not only upon its lack of knowledge and expertise, both legal and practical, but also upon Congress' acknowledged purpose in creating the ICC and in the duties and responsibilities Congress imposed upon that agency. The ICC was created as a reaction to abuses of the so-called "Robber Barons"

1. *Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce*, 73rd Cong. 2d Sess. 54 (1934); Leavens v. Burlington N. Inc., 348 I.C.C. 962, 975, 976 (1977); Brotherhood of Locomotive Eng'r v. Chicago and N. W. Transp. Co., 366 I.C.C. 857, 861 (January 26, 1983). *See also*, Southern Ry.—Control—Central of Ga. Ry., 331 I.C.C. 151, 169-170 (1967).

of the late nineteenth century. The discriminatory rates charged farmers and other shippers had forced reaction from state legislatures, which enacted "Granger Laws" that were intended to end the rate-setting abuses of the railroads. At that time the railroads were the dominant economic force in this country.[2] The frenzy of railroad industry expansion between the end of the Civil War and the turn of the century, coupled with its absolute monopoly of transportation, led author-historian Henry Adams to describe his generation as one "mortgaged" to the railroads. He wrote:

> [S]ociety dropped every thought of dealing with anything more than the single fraction [of society] called a railroad system. This relatively small part of its task was still so big as to need the energies of a generation, for it required all the new machinery to be created—capital, banks, mines, furnaces, shops, powerhouse, technical knowledge, mechanical population, together with a steady remodeling of social and political habits, ideas and institutions to fit the new scale and suit the new conditions. The generation between 1865 and 1895 was already mortgaged to the railways, and no one knew it better than the generation itself.[3]

Other industry abuses included stock frauds, manipulation of financial markets[4] and corruption of public officials in connection with the building of the western railroads.[5] Congress stepped in and created the Interstate Commerce Commission in an attempt to end these industry abuses on a nationwide basis. The ICC was not authorized by the Act of February 4, 1887 (which created it)[6] to interfere in any way with the daily operations of individual railroads, but only in the pricing of their transportation services to their customers and in their intercorporate financial dealings.

In time, as the deplorable working conditions of railroad employees fomented labor unrest, which in turn threatened the economic fabric of the nation, Congress enacted a series of laws independent of the Interstate Commerce Act which sought a solution to that problem.[7] Its efforts culminated in the enactment of the Railway Labor Act of 1926.[8] How-

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2. Between 1869 and 1889 the railroads laid 114,442 miles of main line track and 31,443 miles of other track. Shelton Stromquist, A GENERATION OF BOOMERS, THE PATTERN OF RAILROAD LABOR CONFLICT IN NINETEENTH CENTURY AMERICA, 7 (1987).

3. Henry Adams, THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY 240 (Boston, 1918), *as quoted* in STROMQUIST, 15.

4. CHARLES FRANCIS ADAMS, THE CHAPTERS OF ERIE (Osgood, 1871).

5. DEE BROWN, HEAR THE LONESOME WHISTLE BLOW (Simon & Shuster, 1977).

6. ICC Act of 1887, Ch. 104, § 1, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

7. The Arbitration Act of 1888, ch. 1063, 25 Stat. 501 (1888); Erdman Act of 1898, ch. 370, 30 Stat. 424 (1898); Newlands Act of 1913, ch. 6, 38 Stat. 103 (1913); Adamson Act of 1916, ch. 436, 39 Stat. 721 (1916);Transportation Act of 1920, Title III, Pub. L. No. 66-152, 41 Stat. 456 (1920) (codified as amended in scattered sections of 49 U.S.C.).

8. Pub. L. No. 69-257, 44 Stat. 577 (1926) (codified as 45 U.S.C. § 151 (1940)).

ever, as the Supreme Court has noted, that Act merely provided a process for dispute resolution; it was, and is, indifferent to the substantive terms of the parties' agreement which may be as favorable or unfavorable to labor or management as they choose.[9] When Congress did address itself directly to railroad labor concerns within the parameters of the Interstate Commerce Act or other laws involving railroads and their service to the public, it was to provide employees with the protection of their interests against the effects of railroad actions taken pursuant to those statutes.[10]

Yet, in late 1983, the ICC suddenly concluded, with little explanation and no reference to its history, that it had "expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements"[11] and within two more years the Commission held that its orders, "not the RLA [Railway Labor Act] or the [collectively bargained] WJPA [Washington Job Protection Agreement], . . . govern employee-management relations in connection with the approved transaction."[12] Since 1983 those orders, without exception, have approved carrier-desired changes in employees' contractual and statutory rights over the objections of the affected employees.[13]

The 1983 and 1985 holdings of the ICC constituted a radical break with its traditional statutory role as viewed by the ICC itself,[14] the railroads[15] and their employees. In order to obtain some understanding of the Congressional approach to railroad labor relations and to evaluate the more recent ICC/STB assumption of the role of labor relations ex-

9. Terminal R.R. Ass'n of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 (1942).

10. Emergency Railroad Transportation Act of 1933, ch. 91, §§ 1-17, 48 Stat. 211; The Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898 (1940); Urban Mass Transportation Act of 1964, Pub L. No. 88-365, 78 Stat. 302 (1964) (codified at 49 U.S.C. § 1601 *et seq.*) (1988 and 1993 Supp. V); Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (1970) (codified at 45 U.S.C. § 501 *et seq.* (1988)); Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1973) (codified as amended at 45 U.S.C. § 701, *et seq.* (1988)); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended in scattered sections of 45 U.S.C.); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1897 (1980) (codified in scattered sections of 49 U.S.C.); Northeast Rail Services Act of 1981, Pub. L. No. 97-35. 95 Stat. 643 (codified as 45 U.S.C. § 1101, *et seq.)*; ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as 49 U.S.C. § 14501, *et seq.*).

11. Denver and Rio Grande W. R.R. Co.—Trackage Rights—Missouri Pac. R.R. Co., Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (not printed) ("DRGW").

12. Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343, Finance Docket No. 30522 (Sept. 16, 1985) (not printed), *aff'd per curiam*, Railway Labor Executives' Ass'n v. I.C.C., 812 F.2d 1443 (D.C. Cir. 1987) (Table) ("Maine Central").

13. *See* cases cited *infra*, Section V and note 318.

14. *See* sources cited supra note 1, *infra*, pp. 269-271.

15. *See infra*, pp. 258-259.

pert, in addition to its traditional congressionally mandated role of transportation expert, one must examine the history of transportation, labor and deregulation legislation as that history relates to railroad employee interests.

I. The Congress and Railroad Labor Relations

Congressional interest in railroad labor relations has a long history dating well into the last century. It was born in the turmoil and bloodshed of the major railroad strikes of 1877, 1886 and 1888 along with the many lesser strikes of that time. The railroads utilized two types of government assistance in combating those strikes: first, they sought and obtained federal court injunctions against the strikes and related activity;[16] and, second, they sought and obtained the aid of federal troops to suppress the strikers.[17] The railroads successfully lobbied for the establishment of armories and federal military establishments in or near large population centers so that federal troops would be handy to put down "civil disturbances."[18] Following a bloody strike on the Chicago, Burlington & Quincy Railroad in 1886, Congress knew it had to do something to avoid these repeated disruptions to the commerce and economy of the nation.[19]

The first federal statute directly dealing with labor disputes, the Arbitration Act of 1888, was enacted one year after the Interstate Commerce Act.[20] It provided for investigation and voluntary arbitration of labor disputes, but no arbitrations were handled pursuant to its provisions. Then came the economic recession of 1893 and the Pullman Strike of 1894.

The Pullman Company maintained the company-owned town of Pullman, Illinois, near Chicago. The Pullman Company workers lived in this town and paid Pullman for their rent and their utilities. The Pullman Company imposed the rules by which the town was governed, and it was considered by some to be a model city: no saloons, no brothels, no public speaking and, no union activity.[21]

During the 1893 recession, Pullman cut jobs and wages by 25% to 40%. However, Pullman did not reduce its rents or its charges for utilities. At the time Pullman paid $.33 for one thousand cubic feet of gas and charged its tenants $2.25; it paid $.04 for one thousand gallons of water

16. Stromquist, *supra* note 2, at 19.
17. *Id.*
18. *Id.*
19. *Id.* at 27. Between 1881 and 1894 some 668 strikes occurred on the railroads. *Id.* 27.
20. The Arbitration Act of 1888, ch. 1063, 25 Stat. 501.
21. William Cahn, A Pictorial History of American Labor, 174 (1972).

and charged its tenants $.10.[22]

The situation became so serious that Governor John P. Altgeld of Illinois visited the town of Pullman, and then wrote a personal letter to George M. Pullman pleading for him to relieve the suffering of his employees. He closed his letter with these lines:

> I repeat now that it seems to me your Company cannot afford to have me appeal to the charity and humanity of the State to save the lives of your employees. Four-fifths of those people are women and children. No matter what caused this distress, it must be met.[23]

Pullman did nothing. The strike began in the spring of 1894.

As the strike broadened through employee boycotts of the use of Pullman equipment on other railroads, particularly in the West, U.S. Attorney General Richard B. Olney entered the picture. As a lawyer and legislative draftsman, Olney would have a significant impact on railroad labor relations into the Twentieth Century.

Prior to his cabinet appointment, Mr. Olney had been a leading attorney for and director of the Chicago, Burlington & Quincy Railroad. Still on the payroll of that railroad even as U.S. Attorney General, Olney quickly proved his worth. When Governor Altgeld refused to ask for federal troops, Olney had them called out over Altgeld's protest. Olney sought injunctions against the strikers as well as the unions and employees of other railroads who were boycotting Pullman equipment. His first theory was that the strike and boycott interfered with the U.S. mail, but if a national general strike of railroad workers was developing as it seemed to be, he considered that argument to be too narrow to obtain the relief he sought. He modified his arguments to rely upon the Sherman Anti-Trust Act and its prohibitions upon restraint of trade and interference with interstate commerce. Olney obtained broad injunctions based upon this theory and, using them, broke the strike.[24] Later, before the Supreme Court, Olney would shift his arguments once again, relying on the historic right of government to prevent public nuisances and obstructions of "public highways" which, it was argued, the railroads had become since the enactment of the Interstate Commerce Act.[25]

The Supreme Court decision in *In Re Debs,* upheld Mr. Olney's theories, virtually outlawing all future railroad strikes as obstructions of the public highways or interstate commerce.[26] Olney however, knew that a

22. *Id.*

23. *Id.*

24. Some of the injunctions issued during the strike and boycott included prohibitions against workers consulting with the heads of their unions. STROMQUIST, *supra* note 2, at 88.

25. *Id.* at 257-9.

26. 158 U.S. 564, 584-7 (1895) .

Supreme Court decision outlawing strikes would neither eliminate stikes or the severe labor unrest then prevalent throughout the industry. Moreover, to the surprise and shock of many of his colleagues, Olney believed that workers had the right to associate themselves into unions.

Shortly after he had won the *In Re Debs* case Olney submitted a proposed bill to the Congress in which he incorporated many of the recommendations of the Strike Commission appointed by President Cleveland to investigate the Pullman Strike along with many other ideas. For example, Olney proposed that since the government should be able to enjoin strikes, it should also be able to appoint receivers to operate railroads that were at fault in labor disputes and refused to correct the situation.[27]

Many of Olney's recommendations were incorporated into the Erdman Act of 1898, including a broad provision, Section 10,[28] which made it a misdemeanor for a carrier to require an employee, as a condition of employment, to promise to join or not join or to remain a member of a union; to blacklist employees;[29] to threaten employees with dismissal or unjustly discriminate against them, because of their membership in a union; or to require an employee to contribute to any type of fund. In 1908, Section 10 was declared unconstitutional by the Supreme Court on the ground that it deprived carriers of their freedom of contract (a right which the Court found to be protected by the Fifth Amendment) and was not justified by the Commerce Clause.[30] The Erdman Act covered only operating employees and telegraphers, as these crafts of employees were the most highly organized in late 1898.[31] It provided for government involvement through mediation before arbitration, and if mediation failed, voluntary, binding (for one year) arbitration. It made unions "parties" to the labor dispute and authorized them to select one member of the three-person arbitration panel.[32]

In 1899 a union requested mediation, but the railroads refused to participate, and the Act lay unused for eight years,[33] during which time there were some 105 strikes.[34] However, in 1906 the Southern Pacific sought the aid of the ICC Chairman and the Commissioner of Labor who were the designated Erdman Act mediators, to mediate a dispute with

27. STROMQUIST, *supra* note 2, at 260.

28. The Erdman Act, ch. 370, 30 Stat. 424, 425 (1898).

29. The blacklist had been an extremely effective weapon of the railroads after the Pullman Strike and Boycott with employees being required to change their names in order to secure railroad work. *See* STROMQUIST, *supra* note 2, at 274.

30. Adair v. U.S., 208 U.S. 161 (1908).

31. *Railway Labor Act*, 1995 A.B.A. SEC. OF LABOR AND EMPLOY. LAW 14.

32. The Erdman Act, ch. 370, 30 Stat. at 424, 425, §§ 2-3.

33. ABA, *supra* note 31, at 17.

34. *Id.* at 18.

the Brotherhood of Locomotive Firemen and Enginemen. Following the successful conclusion of that dispute, those officials resolved some 42 cases by mediation, arbitration, or a combination of the two over the next seven years.[35]

The Erdman Act was amended by the Newlands Act of 1913.[36] Like its predecessor, it applied only to operating employees and telegraphers. The Act created a permanent Board of Mediation and Conciliation consisting of a Commissioner, two other government officials, and an Assistant Commissioner.[37] In the four years of its existence, the Board was quite successful, as it entertained 71 disputes and helped resolve 52 by mediation and 6 by a combination of mediation and voluntary arbitration.[38] During its life, there were fewer than half a dozen strikes on the railroads, all of which were relatively minor.[39]

In 1915 the four operating brotherhoods began a movement for an 8-hour work day. President Wilson convened a conference of the parties and asked the unions to arbitrate. They refused. He then asked the railroads to agree to the 8-hour day. They refused. The unions set a strike date of September 4, 1916. The President went before Congress and requested enactment of an 8-hour law, a rate increase for the railroads, and a prohibition against strikes pending an investigation of the dispute. Congress enacted the 8-hour day, but rejected Wilson's other proposals.[40]

The railroads refused to implement the law and sought to have it declared unconstitutional. The Supreme Court held Congress' action to be constitutional because under the Commerce Clause the Congress could "compulsorily arbitrate [a] dispute" that labor and management could not "fix by agreement."[41] This holding became the basis for Congressional imposition of President Emergency Board recommendations in future years. Thus, from the time of enactment of the Arbitration Act of 1888 through passage of the eight-hour day, the Congress' only role in the regulation of relations between railroad labor and railroad management was to seek means of facilitating the voluntary resolution of railroad labor disputes. The ICC never entered the legislative picture.

Because the United States had entered World War I in desperate need of the services of a coordinated continental railway system which did not exist in 1917, on December 26, 1917, President Wilson ordered

35. *Id.*

36. The Newlands Act of 1913, ch. 6, 38 Stat. 103 (1913).

37. *Id.* at 104.

38. ABA, *supra* note 31, at 21.

39. *Id.*

40. *Id.* at 22.

41. Wilson v. New, 243 U.S. 332, 351-2 (1917).

the takeover of the railroads by the government[42] pursuant to the Army Appropriations Act of 1919.[43]

A Director General of the Railroads was appointed to operate the railroads. He, in turn, appointed Directors of Divisions, including a Division of Labor.[44] The results of the government's operation of the railroads between 1918 and 1920 had far-reaching effects upon the future of railroad labor relations in the United States.[45] For example,

- Wages, and to a large extent rules and working conditions, were standardized throughout the country,
- Negotiations between railroads and unions were conducted on a national basis,
- A National Board of Adjustment was created to consider all disputes involving "the interpretation or application of . . . agreements."[46]

After the war, the government had to decide what to do with the railroads. It was determined to return them to their owners, but "not to be operated in the future as they had been under the old system."[47] Among other things, there was a realization that the pre-war system had resulted in a hodge-podge rail network which had hindered war effort transportation and could not provide efficient service for shippers. Ultimately, the Transportation Act of 1920,[48] was signed into law on February 8, 1920.

The first two titles of the Act dealt with amendments to the Interstate Commerce Act, and Title III dealt with labor relations matters. The ICC was given greater control over the economic affairs of the railroads by regulating market entry and exit. The Commission was also to prepare a plan for the consolidation of the many railroad companies then operating into fewer, larger systems. Only future railroad merger or consolidation operations consistent with that plan could be approved by the ICC.[49]

Title III of the 1920 Act created the U.S. Railroad Labor Board, an agency wholly separate from the ICC. A number of the provisions and much of the language of Title III presaged the Railway Labor Act. For example: it required the carriers and their employees "to exert every reasonable effort . . . to avoid any interruption" to commerce;[50] it empha-

42. A.B.A., *supra* note 31 at 24-5.

43. Army Appropriations Act, ch. 8, 39 Stat. 619 (1919) (codified in scattered sections of 18 U.S.C. (1976)).

44. A.B.A. *supra* note 31, at 25-6.

45. *Id.* at 26-32.

46. The Boards successfully handled over 3500 cases with only 10 deadlocks. *Id.* at 32.

47. *Id.* at 34.

48. Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920).

49. A.B.A. *supra* note 31, at 35.

50. *Id.* at 36-7.

sized negotiation to resolve disputes; and, it authorized establishment of adjustment boards. Any disputes, including those involving wages, rules and working conditions, not resolved by negotiation could be submitted to an adjustment board and then appealed to the U.S. Railroad Labor Board.[51] The latter, as created by the 1920 Act, could hold hearings and issue decisions providing "just and reasonable" wages and working conditions, but its decisions were not binding, and its only power was the "moral constraint . . . of publication of its decision."[52]

While labor had agreed to abide by the Board's decisions, several large railroads, primarily the Pennsylvania Railroad, repeatedly violated or ignored its decisions.[53] Representative Alben Barkley reflected labor's feelings in an April 1924 statement:

> [U]p until November, 1923, there had been 148 violations of the decisions of the Railroad Labor Board by the carriers . . . . If an employee or group of employees is dissatisfied with the decision of the Railroad Labor Board all they can do is quit work. They either must abide by the decision or subject themselves to discharge by their employer, or quit work. In other words, the carrier has the means of enforcing the law against the employee by compelling him either to quit or to go on strike, while the employee has no remedy either legal or economic against the carrier who disobeys the orders of the commission except to strike.[54]

A spokesman for rail labor, D.B. Robertson, testifying before the Senate, described the Railroad Labor Board as a single-edged sword that had no effect upon railroad employers, but when used against their employees "is sharp and cuts deep."[55]

Following a national strike by shopcraft employees in 1922 and labor's boycott of Board procedures thereafter, it was clear that Title III had to be replaced. Indeed, in the election year of 1924, the platforms of both major political parties recognized the shortcomings of Title III and called for changes in its provisions.[56]

The change came about with the enactment of the Railway Labor Act of 1926.[57] Rail labor had submitted a bill to Congress in 1924, but Congress had not acted upon it. In late 1924, President Coolidge urged the carriers and the unions jointly to work out a procedure for labor peace. Labor and management met during 1925, and a draft bill similar

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51. *Id.*
52. Pennsylvania R.R. v. RLB, 261 U.S. 72, 84 (1923).
53. A.B.A. *supra* note 31, at 38.
54. *Id.*
55. HARRY D. WOLF, THE RAILROAD LABOR BOARD 373 (1927), *quoting Hearings on S. 2646 Before the Senate Committee on Interstate Commerce*, 68th Cong. 233 (1924) (statement of D. B. Robertson).
56. A.B.A. *supra* note 31, at 43-4.
57. Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926).

to the 1924 bill submitted by rail labor was agreed upon.[58] As Professor Charles Rehmus has said, the "underlying philosophy of the [RLA]. . . was, as it still is almost total reliance on collective bargaining for the settlement of labor-management disputes." [59] Congress strictly adhered to that philosophy in the intervening 70 years, even when in 1973 it forced the merger of the five bankrupt northeast railroads and parts of three other railroads which now comprise Conrail. In creating Conrail, Congress sought the consolidation of the agreements of each craft on each of the eight railroads into one agreement for each craft on Conrail, with suggested time limits for achieving the consolidations; but, it did not mandate the parties' agreements by any means other than negotiation.[60]

In dealing with management-labor relations, Congressional history is pristine in authorizing the creation, modification, or termination of contracts covering rates of pay, rules, and working conditions only by negotiation between the parties. The ICC was never mentioned in the legislation creating our national rail labor policy, and the agencies which were mentioned and were authorized to implement that policy were provided no authority to devise or change the terms of rail labor contracts, whether directly or by means of compelling interest arbitration.[61]

II. The Congress and the Protection of Employee Interests

Beginning in 1933, the Congress enacted a series of laws to improve the finances and services of the railroad system in the United States. These laws were not addressed to the ongoing relationship between rail management and labor. They did, however, contain provisions directed to the protection of the interests of employees which might be affected by implementing the laws.[62]

The first example of a direct and specific provision for the protection of railroad employees is to be found in the Emergency Railroad Trans-

58. Charles M. Rehmus, The Railway Labor Act at Fifty 7-8 (GPO 1977) (published under the auspices of the National Mediation Board).

59. *Id.* at 8. *See also* Detroit and Toledo Shore Line R. Co. v. United Transportation Union, 396 U.S. 142 (1969). For a detailed discussion of the development, meaning and effect of the Congressional policy of complete voluntarism of in railroad labor relations culminating in the enactment of the Railway Labor Act, *see* Lawrence S. Zakson, *Railway Labor Legislation 1888 to 1930*, 20 Rutgers L.J. 317 (1989).

60. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (codified in scattered sections of 45 U.S.C. (1988)).

61. The National Mediation Board and the National Railroad Adjustment Board are both authorized to implement national rail labor policy.

62. Congress has expressed a concern for railroad employees for almost a century in its attempts to shield them from arbitrary and unilateral acts of employers. *See* Rehmus *supra* note 58, at 1-22.

portation Act of 1933.[63] This law was enacted in a time of great financial peril for the railroad industry. It was passed to save certain railroads from bankruptcy and to perpetuate an efficient means of railroad transportation in the United States.[64] In the words of the district court in *Louisville,* the 1933 Act evidenced "the announced policy of the Government to render assistance to all carriers and keep their heads above water until calmer times appeared".[65]

Certain provisions of the 1933 Act amended the merger provisions of the Transportation Act of 1920. Other provisions of the 1933 Act provided for the appointment of a federal coordinator of railroad transportation who was charged with the duty of encouraging, promoting, or requiring action on the part of railroads to avoid unnecessary duplication of their services and facilities and promote financial reorganization. There was also provision for the immediate study of other means of improving conditions surrounding railroad transportation.[66] All actions taken to carry out the purposes of the 1933 Act were governed by Section 7(b) which provided:

> The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay rolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the pay rolls after the effective date of this Act by reason of death, normal retirements, or resignations, but not more in any one year then 5 percentum of said number in service during May, 1933; nor shall any employee be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.[67]

Section 7(b) of the 1933 Act clearly provided that in mergers or other matters to which it applied, an employee must be given a job at least equivalent to his former position and compensation equal to that which he formerly received; in other words, he must be placed in no "worse position with respect to [his] . . . employment".

Section 17 of the 1933 Act provided that the provisions relating to

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63. Emergency Railroad Transportation Act of 1933, ch. 91, §§ 1-17, 209, 48 Stat. 211 (1933).

64. Louisville and N. R. Co. v. U.S., 10 F. Supp. 185, 191 (N.D. Ill. 1934).

65. *Louisville,* 10 F. Supp. at 192.

66. Emergency Transportation Act of 1933, ch. 91, § 4, 48 Stat. at 212.

67. *Id.* at 213. Paragraph (d) of § 7 directed the Federal Coordinator of Railroads to require the railroads to compensate employees for financial losses caused by reason of moving to follow their work when it had been transferred:

> The Coordinator is authorized and directed to provide means for determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title.

the Federal Coordinator would expire on June 16, 1934, unless extended by proclamation of the President. The Act was extended to June 17, 1936, on which date it expired.

One month before the 1933 Act was to expire, an agreement was executed in Washington, D.C., by 85% of the major railroads in the United States and all of the standard railroad labor unions. This agreement was entitled "Agreement of May, 1936, Washington, D.C.". It is commonly referred to in the railroad industry as the "Washington Job Protection Agreement" (a misnomer, as it does not protect jobs), or the "Washington Agreement."[68] Much of the Washington Agreement was based upon provisions of the 1933 Act. Its purpose was to provide partial financial protection to employees who were deprived of their employment or otherwise adversely affected in their employment as a result of a "coordination"[69] and to provide by specific provision for the negotiation of a means of protecting employees in their seniority rights, and their place and type of work, before the railroad could take any action to affect them.

The expiration of the 1933 Act did not affect the merger provisions of the Transportation Act of 1920 which had amended the Interstate Commerce Act. Among these amendments, Section 5(4) of the Interstate Commerce Act permitted approval of a merger upon findings by the Commission that such merger would "be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and will promote the public interest".[70] The Commission had the power to approve a merger "upon the terms and conditions and with the modifications so found to be just and reasonable."

In 1939, the Supreme Court unanimously reversed a three-judge dis-

68. The WJPA provides a monthly "dismissal" allowance for those deprived of employment, or at the employeee's option, a "separation" allowance upon resignation; a monthly "displacement" allowance for retained employees who received reduced compensation; preservation of benefits attaching to previous employment; moving expenses when required to move to retain employment; and protection against loss on sale of home. The employee is protected up to five years depending upon length of previous service. Prior to the negotiation of the WJPA, the ICC had concluded that it had discretionary authority to impose, as a condition of its approval of a consolidation application, "just and reasonable requirements . . . in the interests of employees of the railways concerned." St. Paul Bridge & T. Ry.—Control, 199 I.C.C. 588, 596 (1934). After the Washington Agreement was negotiated, the Commission used that agreement as a model for its employee protective conditions. *See* U.S. v. Lowden, 308 U.S. 225 (1939).

69. A "coordination" is defined in section 2(a) of the Agreement as "joint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such facilities."

70. Transportation Act of 1920, ch. 91, 41 Stat. 480, 482 (1920); Interstate Commerce Act of 1933, ch. 91, Title II, 48 Stat. 217-220 (1933).

trict court decision and affirmed the Commission's conclusion that Congress had empowered it under the Interstate Commerce Act to impose employee protective conditions as "just and reasonable conditions" in the public interest.[71] In its decision, the Court said:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.[72]

Soon after the Supreme Court rendered its *Lowden* decision, Congress enacted the Transportation Act of 1940.[73] This legislation, particularly Section 5(2), effected a considerable liberalization of the merger requirements of the Interstate Commerce Act. No longer would railroads seeking authority to merge be required to prove that their merger would be "in harmony with and in furtherance of" a national plan for railroad consolidation established by the Commission or would "promote" the public interest. The railroads now need only show that the merger would be "consistent" with the public interest.[74]

Congress was thoroughly familiar with the serious and extensive adverse effects which the railroads' utilization of Section 5(2) would have upon railroad employees. Therefore, in enacting those provisions, Congress added a subparagraph (f) which required mandatory protection for railroad employee interests similar to those Congress had provided for such employees in the 1933 Act. Specifically, Congress provided that employees could not be placed "in a worse position with respect to their employment" as a result of the use of the liberalized merger provisions for a period of at least four years after the merger had been approved.[75] These provisions protecting the interests of employees flowed directly from the Congressional policy of encouraging mergers deemed to be in the public interest, since advancement of that public interest clearly would have an impact on railroad workers. The protections remained unchanged until 1976.

In 1964 the Congress, faced with the collapse of privately owned ur-

71. United States v. Lowden, 308 U.S. 225 (1939).

72. *Id.* at 234.

73. Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 899 (1940) (codified in scattered sections of 31 U.S.C. and 49 U.S.C.).

74. *See* County of Marin v. U.S., 356 U.S. 412, 416-17 (1958) ("The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system.").

75. Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 906 (1940) (codified in scattered sections of 31 U.S.C. and 49 U.S.C.).

ban bus, transit and rail commuter systems throughout the country, enacted the Urban Mass Transportation Act of 1964.[76] Congress' purpose was to provide federal assistance to support continued mass transit. Again, aware that promotion of public interest would affect employees, Congress balanced its action by providing protections for affected employees. Section 10(c) of that Act, later renumbered Section 13(c), provided not only for protection of the economic interests of employees by guaranteeing them protections no less beneficial than those established by the ICC under Section 5(2)(f), but five additional protections, only one of which was specifically set forth in the Interstate Commerce Act:

1. preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
2. continuation of collective bargaining rights;
3. protection of individual employees against a worsening of their positions with respect to their employment [similar to the requirement in section 5(2)(f)];
4. assurance of employment to employees of acquired mass transportation systems and priority of re-employment of employees terminated or laid off;
5. paid training or retraining programs.[77]

In 1970, when confronted with the ever-worsening rail passenger service crisis, Congress created Amtrak through the enactment of the Rail Passenger Service Act of 1970 [hereinafter "RPSA"].[78] Congress had been apprised of the adverse effects this legislation would have upon railroad employees and required each contract between Amtrak and each railroad transferring its passenger service obligations to Amtrak to provide protections for the interests of its employees.[79] The Congress lifted virtually verbatim the employee protection language found in the Urban Mass Transportation Act and placed it in Section 405 of RPSA. Section 405(a) of that Act,[80] provided that a "railroad shall provide fair and equitable arrangements to protect the interests of employees affected by discontinuance of intercity rail passenger service . . .," and Section 405(b),[81] amplified the directive in subsection (a) by mandating that such "protective arrangements shall include, without being limited to, such provisions as may be necessary" to accomplish the same five objectives as set forth

76. Urban Mass Transportation Act of 1964, Pub. L. No. 91-518, 78 Stat. 302 (codified at 49 U.S.C. §§ 1601-25) (1988 and Supp. V 1993).

77. Identical employee protective provisions were enacted into the High Speed Ground Transportation Act of 1965, 49 U.S.C. § 1636(a).

78. Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1327 (1970).

79. Section 405(a) of RSPA; 45 U.S.C. § 565(a).

80. 45 U.S.C. § 565(a).

81. 45 U.S.C. § 565(b).

in Section 13(c) of the Urban Mass Transportation Act listed above. Moreover, that subsection, like Section 13(c), further provided:

> Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to Section 5(2)(f) of the Interstate Commerce Act.

Finally, Congress entrusted the Secretary of Labor with the responsibility of certifying whether the protective arrangement afforded affected employees "fair and equitable protection . . . ."[82]

Rail labor and management were unable to agree upon a protective formula under section 405, and on April 16, 1971, President Nixon's Secretary of Labor, James D. Hodgson, promulgated a protective arrangement and certified that it complied with the statutory mandate.[83] That arrangement, which was designated Appendix C-1 to the National Railroad Passenger Corporation [Amtrak] Contract, expressly provided those levels of protection specified in section 405(b)(1) through (5) of the RPSA and contained certain protections which exceeded in several respects the protections the ICC was providing under section 5(2)(f): First, article 1, sections 5 and 6 of Appendix C-1 extended the protective period from five to six years for employees with six or more years of service; second, in the arbitration of disputes on the issue whether an employee had been "affected," article 1, section 11(e) placed the burden of proof upon the carrier after the employee had merely "[identified] the transaction and [specified] the pertinent facts . . . relied upon;"[84] and, finally, article 1, sections 5 and 6, provided that the monthly guarantee should be increased by general wage increases during the protective periods.

The most notable deficiency of Appendix C-1 from the employees' viewpoint was that, while it required carriers to give notice before they consummated a transaction,[85] it permitted the carriers to consummate the transaction before they executed an implementing agreement.[86] Also, Appendix C-1, unlike the WJPA portion of the *New Orleans* conditions[87] then being imposed by the Commission, limited the protective period for

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82. *Id.*

83. *See Review and Refunding of RPSA: Hearings on House Committee on Interstate and Foreign Commerce*, 92nd Cong. 331 (1971) (Statement of James D. Hodgson) [hereinafter, "Hearings on RPSA"]; *See also* Congress of Railway Unions v. Hodgson, 326 F.Supp. 68 (D.D.C. 1971).

84. *See* Affidavit of Secretary Hodgson, *Hodgson*, 326 F.Supp. 68 (D.D.C. 1971), at para. 9(i).

85. Art. 1, § 4.

86. *Id.*

87. *New Orleans*, the immediate predecessor of the *New York Dock* conditions, simply incorporated by reference a slightly modified WJPA and, in addition, for the first four years following ICC approval, superimposed upon WJPA the so-called *Oklahoma* conditions. These

a displaced employee who had less than six years of service (art. 1, section 1(d)). Unlike the *Oklahoma* portion of the *New Orleans* conditions, Appendix C-1 required an employee to relocate before he became a "dismissed" employee (Article 1, section 1(c)). Appendix C-1 limited the protective period of the fringe benefits protections to six years, or to the period of the employee's length of service, if less.[88]

Several unions brought suit against Secretary Hodgson and others to enjoin Amtrak from taking over the rail passenger service on May 1, 1971. They asserted that Appendix C-1 did not comply with the mandatory requirements of Section 405(b) of the RPSA.[89] On April 30, 1971, the District Court, after reviewing Secretary Hodgson's affidavit which cured all the defects complained of but one, denied the unions' request for a preliminary injunction. In so doing, the Court concluded that, in the unusual circumstances of that case, particularly the statutory deadline of May 1, 1971, for Amtrak to take over passenger service, the failure of the Secretary to include the precise language of Sections 4 and 5 of the WJPA did not invalidate the provisions certified.[90] Appendix C-1 and the equivalent protective arrangement applicable to employees of Amtrak (Appendix C-2) continue in place for the protection of employee interests affected by discontinuances of intercity rail passenger service.[91]

Between 1959 and 1970, many railroad merger and control cases were approved by the Commission in which the unions and managements involved had agreed to guarantees of lifetime employment in return for a management right to transfer work and employees throughout the merged system.[92] In 1973, the Congress extended the protection of employee interests by providing lifetime attrition-type protection to employ-

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conditions required 100% compensation for "dismissed" employees instead of WJPA's 60%. The proceedings in which these conditions were promulgated are described *infra*, pp. 267-268.

88. *Compare* WJPA section 8 *with* Appendix C-1, Art. 1, § 8.

89. *Hodgson*, 326 F.Supp. at 75.

90. *Id.* at 76.

91. Section 405 has been amended over the years to restrict the application of Appendix C-2 and is currentlly the subject of pending legislation that would repeal it.

92. In the numerous merger and control cases which began with the *Norfolk & Western—Virginian* merger case in 1959 and ended in 1972 when the *Penn Central* met with disaster, labor and management executed so-called attrition agreements in which the railroads provided guarantees of lifetime compensation and employment in return for the right to move employees and their work from one formerly independent railroad property to another throughout the merged or commonly-controlled systems. Norfolk & Western Railway Company—Merger, etc., Virginian Railway Company, 307 I.C.C. 401, 439 (1959); Chicago & N.W. Ry. Co.—Purchase—Minneapolis & St. L. Ry. Co., 312 I.C.C. 285, 296 (1960); Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger, 324 I.C.C. 1, 50 (1964); Atchison, T. & S. Ry. Co.—Merger, 324 I.C.C. 254, 255, 261 (1965); Pennsylvania R.R. Co.—Merger—New York Central R.R. Co., 328 I.C.C. 304, 313 (1966); Great Northern Pac.—Merger—Great Northern, 331 I.C.C. 228, 277-279 (1967); Seaboard Coast Line R.R. Co.—Merger—Piedmont & N. Ry. Co., 334 I.C.C. 378, 384-385 (1969).

ees affected by the legislation creating Conrail.[93]

After the collapse of the Penn Central and other Northeast railroads, Congress enacted the Regional Rail Reorganization Act of 1973 (hereafter "3R Act"), to preserve the rail service in that region. Penn Central had agreed to lifetime protection for its employees, as had other merging railroads, and for the same reasons. During the course of the hearings on the 3R Act, representatives of labor and the managements of other railroads who had formed a committee to negotiate and submit to Congress for its consideration a statutory provision to replace the Penn Central attrition agreement, testified before the Senate Committee on Commerce. The labor witness testified that in reaching agreement with the railroads on this proposed statutory provision, which became Title V of the 3R Act,[94] labor wished to assure to the corporation to be created [now Conrail] "the widest possible latitude . . . in getting . . . underway" by placing in the statute unprecedented provisions for transfer of employees and work as between all these various preexisting [railroad] corporations."[95] The provisions referred to became Section 503 of Title V of the 3R Act.[96]

Graham Claytor, then president of the Southern Railway System and a management witness, when questioned as to the reason for such extensive protection being accorded employees by the proposed Title V, testified that, in return for that protection, the railroads involved had been given "the right to trasfer [sic] people within their craft outside of their seniority district"; that "this is terribly important as a practical matter . . . .[w]ork can be transferred freely . . . you may close a shop here and concentrate all the work in another shop there." Mr. Claytor further stated that the freedoms to transfer work and employees "were the principal items that we [the railroads] . . . felt, principal reasons that we felt this agreement made . . . this new corporation [Conrail] a viable thing . . . ."[97] Significantly therefore, the relief granted Conrail's management from provisions in collective bargaining agreements (CBAs) was part of a special *agreement* between management and labor which was enacted into law by the Congress. Obviously, at the time the 3R Act was enacted,

93. Regional Rail Reorganization Act of 1973, Title V, Pub. L. No. 93-236, 87 Stat. 1012 (codified at 45 U.S.C., sections 701-797 (1988)).

94. 3R Act, Title V, Pub. L. No. 93-236, 87 Stat. 1012 (repealed). This protection was later modified by Congress in the Staggers Rail Act of 1980 and the Northeast Rail Service Act of 1981.

95. *Hearings before the Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, on S. 2188 and H.R. 9142*, 93rd Cong. 952-53 (1973) (Testimony of William G. Mahoney) [hereinafter "*Hearings before the STS*"].

96. 3R Act, Pub. L. No. 93-236, Title V, 87 Stat. 1014 (1973) (codified in scattered sections of 45 U.S.C., §§ 701-797 (1988).

97. *Hearings before the STS supra* note 95, at 972-73.

no one in the railroad industry or in the three branches of government thought that modification of employee CBA rights by transfer of employees from one agreement to another or by consolidation of seniority rosters could be accomplished by compulsory arbitration, an ICC order, or by any means other than by voluntary negotiation between management and labor. The industry has never requested the Congress to provide it with such authority.

In February 1976, the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter "4R Act"],[98] was signed into law. Section 402(a) of that Act amended former Section 5(2)(f) of the Interstate Commerce Act by inserting near the end of that provision the following sentence: "Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."

In Section 802 of the 4R Act, Congress enacted a new abandonment procedure for rail carriers. While prior to that amendment, the decision whether to impose protective conditions rested within the sound discretion of the Commission,[99] the new abandonment provisions made the imposition of employee protective provisions mandatory.[100] Moreover, that amendment also specified the minimum levels of protection which must be imposed in future abandonment cases: "Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."

These two amendments for the first time expressly incorporated into the Interstate Commerce Act the five specific requirements for the protection of bargaining agreements, representation, retraining and employment rights as established by the Secretary of Labor under the Amtrak statute although most of those rights had always been considered untouchable by the ICC, as well as the railroads[101], except through negotiation. As minimum protection for employees, the amendments required the Commission to combine the more beneficial employee protections contained in the *New Orleans* conditions with those provided in Appendix C-1.[102] To meet the requirements imposed upon it by the 4R Act, the

98. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified in scattered sections of 15, 31, 45, and 49 U.S.C.).

99. *See generally*, ICC v. Railway Labor Executives' Ass'n, 315 U.S. 373 (1942).

100. 49 U.S.C. § 10903(b)(2).

101. *See supra* note 93. *See also* Claytor Testimony *supra*, p. 258.

102. New York Dock Ry. v. United States, 609 F.2d 83, 94 (2nd Cir. 1979). In RLEA v. ICC, 930 F.2d 511, 517 (6th Cir. 1991) the Court held that Congress deliberately chose not to incorporate the protections established under Urban Mass Transit Act, but "directly incorporated" the protections of C-1.

ICC developed the *New York Dock* conditions[103] including a specific prohibition against interference with employees' Railway Labor Act and collective bargaining agreement rights. These conditions required:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.[104]

From the date it promulgated its *New York Dock* conditions (February 11, 1979) to the date of its decision in DRGW (October, 1983), the Commission and *New York Dock* arbitrators interpreted and applied those conditions as they had its predecessors, that is, they uniformly recognized and adhered to the rule that employee collective bargaining agreement rights were not to be affected.

Between 1983 and 1995, the ICC presented a public image of nonactivity in virtually every area of its responsibilities except that dealing with the protection of employee interests.[105] There were calls for eliminating the Commission and the Interstate Commerce Act altogether as being unnecessary. The Congress, however, decided not to eliminate all of the functions of that agency but to severely curtail the jurisdiction the ICC then had over all forms of surface transportation.[106] In 1995, the agency itself was "terminated"[107] and a new agency was created as an independent agency within the U.S. Department of Transportation.[108] The new law neither expanded nor contracted the coverage of employers and employees by the Railway Labor Act and other railroad labor laws.[109] The new Surface Transportation Board, as it was named, became the successor to the ICC on January 1, 1996, with the same members and address, but with its staff reduced. Its duties were far fewer than those of its predecessor in terms of regulating transportation industries, but Congress made no changes in the substantive protections it had provided employees of Class I carriers involved in merger, control, lease, and other

103. *Id. See also* New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979).

104. 360 I.C.C. at 84 and 99. *See also* ICC's statement in its original *New York Dock* decision that a special provision to protect subcontracting agreements was unnecessary because of the existing broad contract preservation language of Art. I, § 2. *Id.* at 73.

105. *See infra* Section V.

106. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 804 (codified at 49 U.S.C. § 14501, *et seq.*).

107. *Id.*

108. *Id.* at 109 Stat. 932-33.

109. *Id.* at 109 Stat. 808.

financial transactions or in abandonments.[110] It did modify protections for employees of Class II and Class III carriers[111] (in transactions involving such carriers) to "one year of severance" pay to be reduced by the amount of earnings an affected employee receives from "the acquiring carrier during the 12-month period immediately following the effective date of the transaction."[112] The Congress also excluded employees of Class III carriers from protection.[113] A provision was added, however, that prohibits a transaction involving a Class II carrier and one or more Class III carriers from "having the effect of avoiding a collective bargaining agreement or shifting work from a rail carrier with a CBA to a rail carrier without a CBA."[114]

The employee protections in abandonment cases under the Interstate Commerce Act as amended by the 4R Act remained unchanged.[115]

There is no indication in the entire history of Congressional handling of the subject of employee interests that Congress intended to authorize the ICC or its successor to involve itself in the area of labor relations and collective bargaining agreements. To the contrary, Congress refused to permit such involvement when it created the Railway Labor Act in 1926 and even when Congress considered the consolidation of labor agreements to be essential to the resurgence of rail service in the Northeast[116] and, in its latest enactment (the "ICC Termination Act of 1995")[117], when Congress removed monetary protections from employees on Class III railroads and encouraged virtual regulatory freedom in the consolidation of Class II and III carriers.[118]

Railroads have been subject to federal regulation for more than 100 years,[119] and during virtually that same period Congress has also regulated to some extent railroad labor relations.[120] And although rail regula-

110. *Id.* at 109 Stat. 824, 842-43.

111. Carriers by railroad are classified by the ICC/STB in accord with their annual revenues: Class I, $250 million or more; Class II, between $20 million and $250 million; and, Class III, $20 million or less. 49 CFR Pt. 1201-A, 1-1.

112. 49 U.S.C. § 11326(b).

113. 49 U.S.C. § 11326(c).

114. 49 U.S.C. § 11324(e).

115. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 824 (codified at 49 U.S.C. § 14501, *et seq.*).

116. Congress rejected a proposed amendment to the RLA which would have empowered the ICC to reject CBAs which the ICC considered as not to be in the public interest. *History of the Railway Labor Act,* 1988 A.B.A. SEC. LAB. & EMP. REP. 89-90; *see also*, S. 606, 69th Cong. 5-6 (1926); as to its refusal to compel consolidation of CBAs in the creation of Conrail, *see supra* text accompanying notes 94-98.

117. *See supra* note 115.

118. *See supra* text accompanying notes 111-114.

119. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified at 49 U.S.C. § 1, *et seq.*).

120. *See supra* note 10.

tion became more extensive after the railroads were returned to private ownership by the Transportation Act of 1920,[121] Congress consistently refused to authorize the ICC to exercise any control over labor relations matters, even though that control had been proposed on several occasions.[122] The legislative records of the enactment of employee protection provisions from 1933 to 1995, as well as the language of the enactments themselves, contain no suggestion by Congress or anyone else that those protective provisions could be used to override any of the rights protected or conveyed by the Railway Labor Act or collective bargaining agreements or any statutory or contractual provisions.[123] As just discussed, the actions of the ICC and the railroads during this period affirm the absence of any such intent.

III. The Congress and Deregulation

In the late 1950's, the 1960's and 1970's it was widely held—and not without reason—that the railroad industry was being stifled, if indeed not strangled, by regulations imposed by the federal and state governments. Abandonments of unprofitable railroad lines, mergers, and control cases sometimes took years to process and required the employment of scores of transportation experts in various specialities along with a virtual army of lawyers. Passenger train service, always a money-losing operation, was extremely difficult to discontinue because jurisdiction was retained by state, not federal, agencies. A railroad wishing to discontinue the operation of a passenger train was required to obtain authority from each state in which the train operated. On occasion, a state agency would simply refuse to permit discontinuance regardless of the merit of the railroad's case.

The first effort to relieve that oppressive situation—although it was not considered "deregulation" at the time—is found in the swiftly enacted Transportation Act of 1958.[124] In 1958, the railroad industry persuaded Congress of the merit of transferring passenger train discontinuance authority away from the states.[125] Congress responded by including provisions in the 1958 Transportation Act which not only trans-

121. Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920).

122. *See infra*, pp. 269-271.

123. Until 1983, the ICC repeatedly agreed with this position despite the continued presence since 1920 of the predecessors of § 11341(a) [now § 11321(a)] on which ICC/STB now relies as exempting railroads from CBA obligations. In considering the "ICC Termination Act" two members of Congress, without analysis or discussion, echoed the post-1983 holding of the ICC/STB that it can override CBAs virtually at will. *See* 141 Cong. Rec. S19076 (daily ed. Dec. 21, 1995); 141 Cong. Rec. H12306 (daily ed. Nov. 14, 1995).

124. Transporation Act of 1958, Pub. L. No. 85-625, 72 Stat. 568 (1958) (codified as amended in scattered sections of 49 U.S.C.).

125. Among the statistics presented to Congress by the railroads was the claim that 15% of

ferred jurisdiction over interstate passenger train discontinuances from the states to the ICC, but also provided railroads with a unique right of appeal to the ICC from state agencies which had denied, failed to act, or delayed action upon applications to discontinue wholly intrastate trains (The public had no similar right or appeal if the state approved a railroad's appliction.).

The Congress also shifted the burden of proof in interstate train discontinuance cases from the applicant railroad to the public by permitting the railroads to abandon their trains upon filing a 30-day notice with the Commission, unless the Commission, after investigation, concluded that the continuation of the train's operation was required by the public convenience and was not unduly burdensome to interstate commerce.[126]

The 1958 Act resulted in an immediate and continuing deterioration in the quality and quantity of rail passenger service throughout the country.[127] By 1970, it was clear that this country had to choose between no rail passenger service at all or an underfunded attempt at revivifying its lifeless carcass. The attempt at resurrection was chosen and resulted in the creation of Amtrak through the enactment of the Rail Passenger Service Act of 1970.[128]

A few years after Amtrak began its first tentative steps as a passenger railroad, Congress decided it was time to consider reforming the law and the procedures governing the air carrier industry. It could not be denied that the regulation of this industry required reformation. The Administration of President Gerald Ford opposed outright deregulation of the industry and pressed for enactment of a regulatory reform act. When President Carter took office, and the chairmanship of the Civil Aeronautics Board passed from John Robson to Alfred Kahn, "regulatory reform" was discarded in favor of "deregulation" that was as total and complete as its advocates could make it. The result was the Airline Deregulation Act of 1978.[129]

While consideration was being given to regulatory reform in the air carrier industry, Congress also undertook consideration and enactment of the Railroad Rehabilitation and Regulatory Reform Act of 1976 [4R

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the passenger train discontinuance applications, both interstate and intrastate, presented to state agencies were denied for political reasons. S. Rep. No. 1647 (1958).

126. *Supra* note 125, at 571-72.

127. The Commission repeatedly held railroads to have deliberately destroyed the quality of their passenger service in order to drive passengers away so they might abandon that service and invest in more profitable operations. *See e.g.*, Adequacies—Passenger Service—Southern Pacific Company Between California and Louisiana, 335 I.C.C. 415, 439-40, 453-56 (1969).

128. Rail Passenger Service Act, Pub.L. No. 91-518, § 101, *et seq.*, 84 Stat. 1328 (codified at 45 U.S.C. § 501, *et seq.*). The protections imposed by Congress to protect employee interests in the implementation of this statute were discussed *supra*, pp. 255-257.

129. 49 U.S.C. § 40101, *et seq.*

Act]. That statute, signed by President Ford on February 5, 1976,[130] provided the first steps toward railroad industry deregulation by reforming the procedures employed by the ICC to review applications involving abandonment, extension, and acquisition of rail lines and the consolidation of railroads through merger, control, lease, or acquisition of assets. In each of those areas, as it loosened or removed regulations governing railroads, Congress expanded and strengthened the protections provided employee interests.[131]

The 4 R Act was followed four years later by the Staggers Rail Act of 1980, which provided for partial deregulation of the railroad industry.[132] In the Staggers Act, Congress did not affect the increased protections it had afforded employees in the 4 R Act, and, indeed, it attached additional specific mandatory or discretionary employee protection provisions to each section of the Act in which it relieved railroads of specific ICC regulations.[133]

Recently the Congress further reduced regulation of the railroad industry by enactment of the somewhat inappropriately named "ICC Termination Act of 1995,"[134] but again did not affect railroad employee rights.[135]

IV. The ICC and the Protection of Employee Interests

The protection of the interests of employees adversely affected by ICC approval of railroad applications was not new in 1940 when the Congress mandated such protection. Since 1934, the Commission had recognized that the impact of an ICC-approved transaction upon employees was an integral part of the public interest to be considered in deciding whether to approve a transaction.[136] It imposed employee protective

130. *See supra* notes 99-106 and accompanying text.

131. 49 U.S.C. §§ 10326(a) and 10903(a)(2) (1978).

132. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified as amended in scattered sections of 49 U.S.C.).

133. 49 U.S.C. § 10505 (relief from all ICA requirements and ICC regulations except (1) employee protection and (2) prohibited intermodal ownership); 49 U.S.C. § 10706 lessened the need for rate bureaus but required Section 11347 employee protection; 49 U.S.C. § 10901 (construction of rail lines, discretionary employee protection); 49 U.S.C. § 11123 (limitations on issuance of car service, orders, required hiring of employees who had performed that work); 11 U.S.C. § 1170 (bankruptcy courts bound by Section 11347); Section 228 (liberalized merger provisions but left Section 11347 untouched; 49 U.S.C. § 10910 (sales of lines to "financially responsible persons for feeder line development, required use of employees who normally would have performed the work); 49 U.S.C. §§ 10903, 10904 (liberalized abandonment provisions, but required Section 11347 protection).

134. 49 U.S.C. § 10101, *et seq.* (1994).

135. *See supra* notes 107-119 and accompanying text.

136. St. Paul Bridge & Terminal Ry.—Control, 199 I.C.C. 588, 596 (1934). See also the ICC's first *Burlington Northern Merger* decision which rejected the merger because of its adverse ef-

conditions upon carriers which had to accept those conditions if they wished to implement their approved transactions.[137]

The ICC's 1934 decision in the *St. Paul Bridge* case was based upon the conclusion that its authority to approve a merger or consolidation upon just and reasonable terms and conditions included conditions for the protection of the interests of employees.[138] The Supreme Court agreed.[139]

Following the *St. Paul Bridge* case, the ICC was asked to impose protective conditions in a rail line abandonment case, but refused to do so, concluding that the statutory criterion for abandonments (public convenience and necessity) was narrower than the criterion established for mergers and consolidations (public interest).[140] The Supreme Court disagreed. It affirmed the three-judge district court which had reversed the ICC[141], holding that these two criteria should be given the same meaning.[142]

During the decade following the passage of the Transportation Act of 1940, the Commission slowly began to evolve what it deemed to be fair and equitable arrangements to protect railroad employees in the event of consolidations or mergers. At first, the Commission reserved jurisdiction to consider what protections, if any, should be imposed if it subsequently learned that railroad employees had in fact been adversely affected.[143] Then, in *Oklahoma Ry. Trustees—Abandonment of Operations*,[144] a Section 5(2) purchase proceeding, the Commission attached five detailed conditions to its approval which were intended to protect railroad employees. Those conditions were commonly referred to as the *Oklahoma*

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fects upon employees and shippers. Great No. Pacific—Merger—Great Northern, 328 I.C.C. 460, 521, 522, 528 (1966).

137. In Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, 295 I.C.C. 696, 701 (1958), the Commission stated:

> [U]nder section 5 of the Act [now 49 U.S.C. § 11321, *et seq.*] we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction . . . .
>
> Under section 5(2)(f) of the Act [49 U.S.C. § 11326(a)], we are required to impose upon the carriers in each approved transaction conditions for the protection of railroad employees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything . . . .

The permissive character of ICC/STB approval orders has not changed.

138. *See supra* note 68.

139. U.S. v. Lowden, 308 U.S. 225 (1939).

140. Pacific Electric Ry.—Abandonment, 242 I.C.C. 9 (1940).

141. Railway Labor Executives' Ass'n., et al. v. U.S., et al., 38 F.Supp. 818 (D.D.C. 1941) *aff'd sub nom.*, ICC v. Railway Labor Executives' Ass'n., 315 U.S. 373 (1942).

142. *Rail Labor Executives' Ass'n*, 315 U.S. at 376-78.

143. Minneapolis & St. L.R.R.—Reorganization, 244 I.C.C. 357 (1941).

144. Oklahoma Ry. Trustees—Abandonment of Operations, 257 I.C.C. 177 (1944).

conditions. They provided that the period during which the protections were to be afforded the employees "shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our order herein . . .," but for a shorter period if the employee had fewer than four years of service.[145] At almost the same time, the ICC developed the *Burlington* conditions for imposition in abandonment cases.[146] These protective arrangements were based upon the compensatory provisions of the Washington Agreement and were virtually identical except that, unlike *Burlington*, the *Oklahoma* conditions did not require an employee to relocate to retain protection (unless he was required to do so by a collective bargaining agreement).

In 1946, the Commission issued its decision in the *Chicago & N.W. Ry.—Merger* case.[147] In that proceeding, rather than impose a specific formula for the protection of employees, the ICC simply imposed a paraphrase of the second sentence of Section 5(2)(f) as a condition of its approval.[148] In subsequent cases, rather than spelling out anew with appropriate name changes the specific provisions imposed to protect railroad employees, the ICC incorporated protective provisions into its orders by reference, titling each formula with the name of the case in which it initially was imposed.

In 1950, a question arose whether the four-year period referred to in the second sentence of Section 5(2)(f) should be regarded as a maximum limitation upon the power of the Commission to impose conditions or only a minimum requirement. The Commission had approved an application under Section 5(2)(f) to consolidate the various rail passenger terminal facilities at New Orleans by the construction of a joint terminal to be called the New Orleans Union Passenger Terminal. The ICC regarded the statutory four-year period as a maximum limitation upon its power. Accordingly, it limited the period of employee protection granted in that case to four years from the date of its order approving construction of the terminal. That limitation would have meant the loss of protection to employees affected by that construction, since the terminal could not be completed within four years from the date of the Commission's order, and the employees would not be affected until the terminal had been

145. Oklahoma Ry. Trustees, 257 I.C.C. at 198.

146. Chicago, Burlington & Quincy R. Co.—Abandonment, 257 I.C.C. 700 (1944).

147. Chicago & N.W. Ry.—Merger, 271 I.C.C. 672 (1946).

148. The sentence read: "In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction shall not result in employees of the carrier or carriers affected by such order being in a worse position with respect to their employment . . . . " Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 899, 906 (1940) (codified in scattered sections of 31 U.S.C. and 49 U.S.C.).

completed.[149]

The ICC's order was appealed to a three-judge panel of the United States District Court for the District of Columbia. The Court upheld the Commission. The case was further appealed to the Supreme Court which reversed the District Court and the Commission.[150] The Supreme Court reviewed the legislative history of Section 5(2)(f) and concluded that the four-year limitation in the statute provided a minimum, not a maximum, period of protection for affected employees.[151]

Upon remand, the Commission imposed, as an employee protective arrangement, the Washington Agreement,[152] modified as to earnings from outside employment. The Commission also required that employees affected within four years from the effective date of the original order receive the protections of the *Oklahoma* conditions.[153] The conditions imposed in this *New Orleans* case, commonly called the *New Orleans* conditions, incorporated by reference both the Washington Agreement and the *Oklahoma* conditions. It became the basic arrangement imposed by the ICC in cases arising under Section 5(2).[154] The conditions have been imposed by the Commission in consolidation,[155] trackage rights,[156] merger,[157] reorganization,[158] and lease[159] cases.

The Commission, however, did not impose the *New Orleans* conditions in all proceedings arising under former Section 5(2). After 1952 it continued to impose the *Oklahoma* conditions in some Section 5(2) cases. However, it consistently imposed the *Burlington* conditions in most abandonment cases under former Section 1(18) of the Act (now 49 U.S.C. § 10903). While it appears that the Commission may have drawn an arbitrary distinction between the types of transactions regulated by former Section 5(2)(a) in determining whether to apply the *New Orleans* or *Oklahoma* conditions[160] it explained its selection process as follows:

149. New Orleans Union Passenger Terminal Case, 267 I.C.C. 763 (1948).

150. Railway Labor Executives' Association v. U.S., 339 U.S. 142 (1950).

151. *Railway Labor Executives Ass's*, 339 U.S. at 155.

152. The WJPA protective period commenced when the employee was first affected.

153. New Orleans Union Passenger Terminal Case, 282 I.C.C. 271, 280-81 (1952).

154. In a decision on remand in Southern Ry.—Control—Central of Ga. Ry., 331 I.C.C. 151, 162 (1967), the Commission described the *New Orleans* conditions as follows:

> We consider the net effect of our decision in the *New Orleans* case was to formulate and impose a separate code of employee protective conditions as a minimum fair and equitable standard, which superimposes the *Oklahoma* conditions upon the provisions of the Washington Agreement.

155. New Orleans Union Passenger Terminal, 282 I.C.C. 271 (1952).

156. Erie R. Co. Trackage Rights, 295 I.C.C. 303 (1956).

157. Louisville & N. R. Co. Merger, 295 I.C.C. 457 (1957).

158. Florida East Coast Ry. Reorganization, 307 I.C.C. 5 (1958).

159. St. Louis S.W. Ry. Co. of Texas Lease, 290 I.C.C. 205 (1953).

160. *See e.g.*, Norfolk & W. Ry.—Trackage Rights—BN, 354 I.C.C. 605, 607 (1978), *reopened* February 23, 1979.

> While there have been certain section 5 proceedings decided after the *New Orleans* case in which we have imposed the *Oklahoma* conditions for the protection of employees, they have been cases in which (1) there was no showing of adverse effect, or (2) measures already taken for the protection of employees had been developed to the point where the *Oklahoma* conditions alone thereafter would satisfy the statutory requirements.[161]

In 1962, a case arose which ultimately required the Commission to delineate carefully and deliberately the Commission's view of its authority under the Interstate Commerce Act vis-a-vis employees' rights under that Act, under the Railway Labor Act, and under collective bargaining agreements.

Dissatisfied with the *New Orleans* method of adopting by reference two other protective arrangements, the Commission decided to codify the standard protective formula by combining the protective features of each of the sources into a single definitive arrangement. On November 7, 1962, the Commission issued its decision in *Southern Ry.—Control—Central of Ga. Ry.*,[162] in which it stated that it was imposing the *New Orleans* conditions, with a modified arbitration procedure, as an employee protective arrangement. However, instead of incorporating those conditions by reference as it had in the past, the ICC attached an appendix to its order detailing a formula of protective provisions that it intended be a codification of the *New Orleans* conditions. Unfortunately, the appended detailed conditions failed to contain some of the essential protections found in the *New Orleans* conditions. The Railway Labor Executives' Association (RLEA)[163] challenged those conditions, and in December 1964, the Supreme Court, without oral argument, remanded the case back to the Commission for clarification of its order.[164] Upon remand, the Commission held a hearing at the request of the railroads. But after listening to the testimony of 206 employee witnesses and numerous management witnesses, it found "a callous disregard by [the railroads involved] for the established rights and interests of the employees".[165] It then unanimously set forth in extensive detail what it perceived to be the Commission's very limited role in labor relations and the limited authority in that area granted it by Congress. The Commission's report state that when it

161. *See supra* note 155, at 163.

162. Southern Ry.—Control—Central of Ga. Ry., 317 I.C.C. 557 (1962).

163. The RLEA is an association of the chief executive officers of railroad labor unions. It was established in 1926.

164. RLEA had challenged the failure of the ICC to include Sections 4 and 5 [notice and negotiation of implementing agreements] and 9 [lump sum separation pay] of the Washington Agreement in its codified provisions, and the Supreme Court's remand referred to those provisions only. *See* Ry. Labor Executives' Ass'n. v. U.S., 379 U.S. 199 (1964).

165. Southern Ry.—Control—Central of Ga. Ry., 331 I.C.C. at 185.

had imposed the *Southern—Central of Georgia* conditions,[166] it fully intended to impose the *New Orleans* conditions with one modification—a compulsory arbitration procedure: "Except for this minor change in the arbitration procedure [making it manadatory and binding], we made no change in the original *New Orleans* conditions."[167]

The Commission then spelled out its views of the law: it concluded it had no authority to supersede collective bargaining agreements; protective conditions were imposed "*upon the carriers. . .to protect* the interests of the employees;" employee rights under collective bargaining agreements, protective agreements (such as the Washington Agreement) and conditions imposed by the Commission were "separate, independent and distinct rights" of employees; the Commission-imposed conditions were "designed to apply after the carriers had arrived at their adjustments of labor forces *in accordance* with the governing provisions of their collective bargaining agreements;" and the transportation and labor laws of the nation must be accommodated to each other, neither being subordinate to the other.[168] These expressions of lack of authority over collective bargaining agreements or of jurisdiction over labor relations matters were consistent with the Commission's statements on that subject long before and well after they were uttered in the *Southern-Central of Georgia* case.

One of the first to express an authoritative opinion on the lack of ICC jurisdiction over labor relations was Joseph B. Eastman, Federal Coordinator of Transportation and Chairman of the ICC. In 1934, Congress was considering amendments to the Railway Labor Act. Section 2 of the pending bill related to the railroads' collective bargaining duties. It contained a provision requiring any U.S. Attorney to prosecute violations of the provisions of the Act upon the application of the employees' union representative. Representative Holmes suggested deleting the union as an applicant to seek prosecution and, instead, to give that responsibility to the ICC. Mr. Eastmand responded: "It certainly should not be the Interstate Commerce Commission, because they have no jurisdiction over labor matters at all and never have had."[169]

Commissioner Eastman's testimony appeared to put to rest the question of ICC jurisdiction in labor relations matters until, some 24 years later, the Chicago and North Western Railway Co. attempted to use Section 5(11)[170] to equip the ICC with authority to immunize railroads from the provisions of the Railway Labor Act and from the railroads' collec-

166. I.e., the faulty Appendix which it was correcting.

167. *Id.* at 164.

168. *Id.* at 168-170; (italics in original; underlining added)

169. *Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce*, 73rd Cong. 54 (1934).

170. Later 49 U.S.C. §11341(a) and now 49 U.S.C. §11321(a). This provision exempts rail-

tive bargaining agreements.[171] In 1958, the C&NW had obtained ICC authority to lease all of the lines of the Chicago, St. Paul, Minneapolis and Omaha Railway ("Omaha"). It returned to the Commission complaining that it had tried and failed to obtain agreements with certain of the unions involved which were necessary to enable it to carry out the approved transaction by integrating C&NW and Omaha properties under the lease. The Commission rejected the request of the C&NW on the ground that it had no authority to grant C&NW's request because its order approving the lease was permissive as to the carriers and required nothing of the employees;[172] Section 5(2)(f)[173] required that certain duties be imposed upon the carriers, but did not authorize the ICC to direct the employees or the unions to do anything;[174] and, Section 5(11) was self-executing and did not authorize the ICC to declare particular laws to be superceded by its orders.[175] Most significantly for the purposes of history of the ICC's view of its authority over labor relations matters was the following holding of the Commission:

> Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction to of the National Mediation Board, which, in effect, is what North Western requests us to do. It is apparent that the Railway Labor Act has *not prevented* the North Western from *effectuating* the transaction authorized by the prior order. That order authorized the lease of North Western of the line of railroad and other properties owned, used, or operated by the Omaha, and *this has been accomplished. The order did not provide any particular method for integration of the physical operations involved*, and, except for the imposition of the above-mentioned conditions for the protection fo employees, did not deal with employer-employee relationships.[176]

In addition to affirming its lack of authority to interfere with labor relations on the railroads, the Commission repeatedly acknowledged its lack of expertise in that area. The statements of Commissioner Eastman before Congress and the ICC in the *Omaha* case, just quoted, as well as in the *Southern—Central of Georgia* case, indicated that until at least 1967, the ICC believed itself to lack jurisdiction over labor related matters.

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roads from all laws which would prevent them from carrying into effect ICC orders approving railroad applications for merger, control, lease, etc. filed under 49 U.S.C. §11343 (now §11323).

171. The railroads unsuccessfully attempted such use of that provision again in 1967 in the Southern Central of Georgia case and in 1981 in the N&W/IT arbitrations, *see infra* pp. 273-274.

172. Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, 295 I.C.C 696, 701 (1958).

173. Later §11347 and now 49 U.S.C. §11326(a).

174. *Id.*

175. Chicago, St. Paul, Minneapolis & Omaha Ry., 295 I.C.C at 702.

176. *Id.* (emphasis added). The nature of the ICC/STB orders today is identical to that of the order imposed in the *Omaha* case in that ICC/STB orders authorize the effectuation of a financial transaction and do "not provide any particular method for integration of the physical operations involved."

The issue did not arise again until 1977 when the Commission expounded at length on its lack of expertise in labor relations, rejecting a request from a union which it perceived as a "matter[ ] relating to labor relations."[177] The Commission repeated this repudiation of its expertise and involvement in labor matters when, in 1982, a union asked it to declare a railroad in violation of the employee protective conditions that the Commission had imposed. On January 26, 1983, the Commission refused to make this declaration, citing its lack of "expertise to place ourselves into the field of collective bargaining or labor management relations."[178]

In years following its decision in the *Southern-Central of Georgia* case, the ICC consistently adhered to its view of the law as expressed in that case as well as its conviction that the *New Orleans* conditions were the "minimum protections which the applicants must provide in order to obtain our approval of the transactions" under former Section 5(2) of the Act.[179]

The *New Orleans, Oklahoma,* and *Burlington* conditions would be supplanted by protective arrangements[180] which had their genesis in a series of legislative events beginning in 1964. In that year, Congress enacted the Urban Mass Transporation Act of 1964. In 1970, the Rail Passenger Service Act creating Amtrak was enacted and in February 1976, the 4R Act was signed into law.[181] As a result of these enactments, particularly the 4R Act, the ICC crafted the *New York Dock* and *Oregon Short Line* conditions with considerable help from the unions.[182] These conditions incorporated the substance of sections 4 and 5 of the Washington Agreement, as adapted into the *New Orleans* conditions and considered vital by the unions, requiring: notice and the execution of implementing agreements prior to a railroad's effectuating a "transaction" (as defined in the conditions) in furtherance of Commission-granted authority;[183] most of the improvements in protection developed by Secretary of Labor Hodgson in Appendix C-1 as required by §11347; and in

177. Leavens v. Burlington N. Inc., 348 I.C.C. 962, 975, 976 (1977).

178. Brotherhood of Locomotive Eng'r v. Chicago & N. W. Transp. Co., 366 I.C.C. 857, 861 (1983).

179. *E.g.,* Central of Ga. Ry.-Consolidation—Central of Ga. R.R., 338 I.C.C. 353, 377 (1971); *see also,* Chicago & N.W. Ry.—Control—Chicago, R.I. & P.R.R., 347 I.C.C. 556, 650 (1974); Seaboard Air Line R.R.—Trackage Rights—Atlantic Coast Line R.R., 312 I.C.C. 797 (1962).

180. *I.e.,* the *New York Dock* and *Oregon Short Line* conditions.

181. *See supra* notes 76-99 and accompanying text.

182. Oregon Short Line R.R. and the Union Pac. R.R. Co.—Abandonment Portion Goshen Branch, Etc., 360 I.C.C. 91 (February 9, 1979); New York Dock Ry.-Control-Brooklyn E. Dist. Terminal 360 I.C.C. 60 (February 9, 1979), *aff'd sub nom.* New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979); *see supra* notes 98-105 and accompanying text.

183. Ironically, it is this protection for which the employees battled so strenously that has been turned inward upon them as a basis for overriding their rights under the Railway Labor Act and their collective bargaining agreements. *See infra,* Section V.

Article I, Section 2, a specific prohibition against interference with an employee's Railway Labor Act and collective bargaining agreement rights established by Secretary Hodgson and therefore required by §11347:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.[184]

In the course of its decision in the *New York Dock* case, the Commission clearly stated that this provision was intended to preserve collective bargaining agreement rights. Rejecting a request by the RLEA to add a sentence in Article I, Section 2 designed to protect employees' agreement rights against the subcontracting of their work, the ICC said:

> Article I, section 2, appears acceptable to all parties. RLEA does propose an additional sentence dealing with the effectiveness of subcontracting agreements subsequent to a transaction; however, the section, as now written, *preserves all existing agreements* and, therefore, the suggested language is redundant and unnecessary.[185]

The Commission had also inserted a provision in its first version of the *New York Dock* conditions to protect employees against deprivation of their rights under so-called protection agreements, such as the Washington Agreement, which they had negotiated with their employers. The RLEA felt that the wording of this provision might be subject to misinterpretation. The Commission adopted the modified language suggested by the RLEA[186] with the following comment:

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184. New York Dock Ry.-Control-Brooklyn E. Dist. Terminal, 360 I.C.C. at 84.

185. *Id.* at 73 (emphasis added); RLEA's proposed sentence read:

> The various agreements dealing with subcontracting, scope rules, and classification of work rules in effect at the time of a transaction, shall contine in effect unless and until changed by agreement between the railroads and labor organizations involved in such transaction, and work performed on such properties shall not be subcontracted except as may be expressly, or by reasonable necessary implication, permitted by said agreements. Disputes concerning subcontracting of work shall be disposed of on the basis of existing collective bargaining agreements between the parties.

Id. at 77.

186. The RLEA's suggested wording appears in Article 1, Section 3, and reads:

> Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided,* that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provision which he so elects, he shall not be entitled to the same type of benefit under the provisions which he

> Our study of the provision suggested by RLEA indicates that it *preserves protections* yet with the required prohibitions against duplication of benefits (see the first proviso) and against pyramiding (see the later portion of the final proviso). We will adopt the proposed provision as we feel it is an apporpriate clarification of the intent of that section.[187]

The Commission's adoption of provisions that preserved employees' existing statutory and contract rights was in conformity with the literal language of the statutory requirement and consistent with the stated purpose of Secretary of Labor Hodgson in placing those protections in Appendix C-1. Secretary Hodgson, when challenged that his Section 3 actually deprived employees of benefits of other protective agreements that applied to them, said, in his affidavit filed with the U.S. District Court: "[S]ection 3 specifically preserves the rights of an employee under other protective agreements, although it does prohibit the pyramiding and duplication of benefits."[188]

Two years following the introduction of the *New York Dock* conditions, the ICC authorized the acquisition of the Illinois Terminal Railroad Company ("IT") by the Norforlk & Western Railway Company ("N&W"), conditioning the acquisition upon N&W's acceptance of the *New York Dock* conditions. In July 1981, N&W served notice under *New York Dock* Article I, Section 4 that it intended to unify and consolidate the operations of IT with those of N&W's affiliate Wabash Railroad and that the IT employees would be integrated into the appropriate Wabash rosters and be subject to Wabash collective bargaining agreements. The N&W argued that Section 4 authorized the arbitrator to change the provisions of existing collective bargaining agreements and that such changes were necessary if N&W and IT were to carry out the transaction. The unions objected to the railroads' proposal, and the railroads submitted the matter to arbitration under Section 4. The unions challenged the jurisdiction of the Section 4 arbitrators to modify the employees' agreement rights. Because different crafts with different seniority rights and agreements were involved, the issues were tried in three separate arbitration proceedings at different times by three different arbitrators. All three reached the same conclusion: *New York Dock* Section 4 arbitrators had no jurisdiction to modify employees' collective bargaining agreement rights. Arbitrator Nicholas H. Zumas, who heard the case involving the

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> does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits, and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement for the remainder, if any, of his protective period under that arrangement.

187. New York Dock-Control-Brooklyn E. Dist. Terminal, 360 I.C.C. at 73; (emphasis added).

188. Congress of Ry. Unions v. Hodgson, 326 F.Supp. 68 (D.D.C. 1971)

Brotherhood of Locomotive Engineers and the United Transportation Union, expressly held that *New York Dock* did not authorize mandatory "interest arbitration" (which even the Railway Labor Act had never required) and did not authorize him "to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are 'preserved' under Section 2 [of *New York Dock*]".[189]

The arbitrators in those cases limited their awards to ordering the consolidation of seniority rosters by a method each arbitrator specified. These cases constituted the first time the issue of a railroad's right to modify employee rights under section 4 of *New York Dock* or its predecessors had been raised in such a proceeding;[190] the railroads did not appeal the decisions.

The Commission varied the provisions of the *New York Dock* conditions as they were imposed in lease,[191] trackage rights,[192] and sale[193] cases, but the basic compensatory and perservation-of-rights provisions remained the same.

One year after the N&W/IT awards were issued, the Commission again professed its lack of "expertise to place ourselves into the field of

189. Norfolk & W. Ry. Co. and Illinois Terminal Co. v. Brotherhood of Locomotive Eng'rs and United Transp. Union, Finance Docket No. 29455 (Zumas, Feb.1, 1982) pages 16-18:

> Carriers argued that the Commission's order authorizing the purchase and consolidation of IT by N&W and requiring arbitration of disputes involving the "rearrangement of forces" supersedes any other agreements or laws, including the Railway Labor Act. Central to the position of the Carriers is the question of whether the negotiation and arbitration provisions of employee protection conditions in consolidation cases provide a mechanism that supersedes Railway Labor Act requirements and permits an Arbitrator to transfer work and employees despite any such prohibitions contained in collective bargaining agreements pursuant to the Railway Labor Act.
>
> This Arbitrator is of the opinion that the question must be answered in the negative.
>
> An arbitrator's authority under Article I, Section 4 of *New York Dock*, where the parties are unable to reach agreement, is limited to the determination of employee protections contained in Appendix III [*i.e. New York Dock*], and to provide a basis for the selection of work forces of the employees involved. Article I, Section 4 does not give an Arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or beneftis that are "preserved" under Section 2. It follows that an Arbitrator is not empowered, without mutual agreement of the parties, to substitute, modify or terminate agreement [sic] negotiated pursuant to the provisions of the Railway Labor Act. Carrier's contention that the arbitration process (provided for in Section 4) is an integral part of the collective bargaining process, and, as such, an agreement may be changed (as provided in Section 2) either by negotiation by the parties or by an arbitration award is, in this Arbitrator's view, based on the erroneous premise that the ICC mandated involuntary "interest arbitration" in contravention of the provisions of the Railway Labor Act. No persuasive authority has been presented that supports or warrants such a far-reaching result.

190. *See infra* note 225.

191. Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980).

192. Norfolk & W. Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978).

193. Wilmington Term. R.R., Inc.—Purchase and Lease—CSX Transp., Inc., 7 I.C.C.2d 60 (1990).

collective bargaining or labor management relations."[194] But ten months after that reaffirmance of its historical position, the ICC would reverse its 96-year history of non-intrusion into labor matters. It would do so without reference to that history.

V. The ICC as Labor Relations Expert

At the beginning of 1983, the Commission had remained consistent in its avoidance of any involvement in labor matters when reviewing transactions placed before it for approval. It had restricted its activities to the imposition of conditions upon carriers for the protection of employee interests and had repeatedly held that the conditions were, indeed, imposed upon carriers, not employees, their "purpose being *to protect* the interests of the employees, some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act."[195] Near the end of 1983 however, the Commission's well-documented 50-year old view of the law governing its authority changed when abruptly it held itself to have "extensive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements."[196]

Almost a year before the Commission had last protested its lack of expertise in the *Brotherhood of Locomotive Engineers* case, *supra*, it approve the consolidation of the Union Pacific Railroad Company ("UP") and the Missouri-Pacific Railroad Company ("MP") under the common control of a holding company. The ICC, however, conditioned the approval upon the grant of trackage rights by MP to the Denver and Rio Grande Western Railroad ("DRGW") and the Missouri-Kansas-Texas Railroad Company ("MKT") to operate over certain MP lines.[197] The ICC then approved the proposed trackage rights agreement submitted by DRGW and MKT subject to a determination of fair compensation to MP and the so-called *Mendocino Coast* employee protective conditions.[198]

After consummation of the UP-MP control transaction, DRGW began operating over the designated tracks of MP with DRGW crews. The

194. Brotherhood of Locomotive Eng'r v. Chicago & N. W. Transp. Co., 366 I.C.C. 857, 861 (1983).

195. Southern Ry.—Control—Central of Ga. Ry., 331 I.C.C. 151, 169 (1967); (emphasis in original).

196. Denver and Rio Grande W. R.R. Co.—Trackage Rights—Missouri Pac. Ry. Co., Finance Docket No. 3000 (Sub-No. 18) (October 19, 1983) (not printed).

197. Union Pac.—Control—Missouri Pac., W. Pac., 366 I.C.C. 459 (1982).

198. Norfolk & W. Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653, 664 (1980). These conditions are imposed by the ICC in trackage rights/lease cases and are identical to *New York Dock* except they require a 20-day notice instead of a 90-day notice and permit the carrier to proceed with its proposed changes after 20 days.

Brotherhood of Locomotive Engineers ("BLE") objected on the ground that the engineers it represented on MP had the exclusive right by contract to operate trains onver MP lines and the ICC had no jurisdiction over UP-MP/BLE contracts. BLE file a petition for clarification with the ICC requesting reaffirmation of its oft-stated position that the Commission's decision did not affect labor relations or interfere with collective bargaining agreements. The BLE was in for a surprise. The ICC simply denied the requested relief without substantive comment. BLE, now joined by the United Transportation Union ("UTU"), sought reconsideration of that decision. UTU argued that the ICC's jurisdiction over railroad consolidations did not authorize it to immunize railroads from the requirements of the Railway Labor Act or to approve unilateral railroad changes in collective bargaining agreements.

A reading of the Commission's decision on reconsideration[199] conveys the impression that the ICC had never before addressed the issue of its expertise in, or authority over, labor relations, and that modification of labor agreements by ICC orders had been an accepted practice by the Commission since its creation. Nowhere in the opinion is there any reference whatsoever to any of the Commission's decisions discussed above, although both unions emphasized that the ICC's denial of BLE's petition for clarification was inconsistent with the ICC's historic policy of not injecting itself into labor disputes.

Despite the fact that the trackage rights agreements clearly contravened the provisions of the MP/BLE collectively bargained contract which restricted work over MP tracks to MP employees, the Commission held that the trackage rights agreements did not involve a change in UP/MP employees' working conditions because DRGW had testified that fewer employees would be displaced if the trackage rights were granted than if they were denied;[200] because the trackage rights agreements stating that DRGW and MKT crews would perform the work were agreements between the railroads, and the labor parties had not proved they had a right to participate in their negotiation;[201] and because the unions did not suggest that their collective bargaining agreements or the Railway Labor Act protected the employees they represented after the trackage agreements went into effect.[202] For the first time the Commission took the position, contrary to its earlier practice, that 49 U.S.C. §11341(a)

199. *See supra* note 11 and accompanying text.

200. The relevancy of this reasoning is obscure.

201. A reason which would appear to confirm the unions' right to the perservation of their contracts. *See Omaha, supra* note 137 and Texas & N.O.R. Co. v. Brotherhood of R.R. Trainman, 307 F.2d 151, 159-60 (5th Cir. 1962).

202. Yet the basis for the unions' claim was their contract right to perform work on MP tracks before *and after* the trackage rights agreement went effect.

overrode collective bargaining agreements and working conditions: where those agreements and conditions "conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."[203] The ICC's long-time holding that the conditions were imposed upon carriers to protect employees[204] was now disavowed by implication.

It seemed to the unions that the Commission had irresponsibly reversed its consistent, historic position without acknowledging that fact; that the ICC had arbitrarily and abruptly swept aside the statutory and collective bargaining agreement rights of employees guaranteed them by the Railway Labor Act; and, had rendered a nullity the employees' right to preservation of "rates of pay, rules, working conditions and other rights, privileges and benefits" as required by Section 11347 by holding that those rights must "give way to the implementation of the transaction."

The Commission's decision was appealed to the U.S. Court of Appeals for the D.C. Circuit which vacated and remanded it to the Commission.[205] The Court held that the ICC gave "no justification for a view that waiver of the Railway Labor Act [was] necessary to effectuate the [trackage rights] transactions at issue."[206] The Court relied upon and quoted from the Fifth Circuit's decision in the *City of Palestine, Texas v. United States*.[207] There, the City had a contract with the MP to maintain 4.5% of its entire workforce in Palestine. As an element of its merger with the Texas & Pacific Railway Company, MP asked the ICC to relieve it from the requirements of that agreement. The ICC ruled that it had the power to abrogate the agreement because "of the agreement's unduly burdensome effect on MoPac and on interstate commerce." The D.C. Circuit relied upon the following quotation from *City of Palestine*:

> The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved***transaction. In its grant of

203. Denver and Rio Grande W. R.R. Co.—Trackage Rights—Missouri Pac. R.R. Co., Finance Docket No. 3000, p. 6 (Sub-No. 18) (October 18, 1983) (not printed).

204. *See supra* notes 166-179, 196 and accompanying text.

205. Brotherhood of Locomotive Eng'r v. ICC, 761 F.2d 714, 725 (D.C. Cir. 1985):

> We thus vacate the 1983 orders and remand the case to the Commission. The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise it exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

206. *Id.*

207. City of Palestine, Texas v. United States, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

> approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency *unless those laws or contracts interfered with carrying out an approved merger.*[208]

The next question, of course, became when, as a matter of statutory application, was the "carrying out" of a merger considered as having been completed.[209] As the unions were soon to learn, the answer would be "never".

The Circuit Court's decision was appealed to the Supreme Court, where five Justices decided to side-step the issues presented and dismiss the case on a technical deficiency: the time for filling an appeal from an ICC decision, although tolled by a petition for reconsideration, is not tolled by a petition for clarification which the ICC had ruled on in that case. The Court held that the appeal to the Circuit Court had been filed too late and that Court therefore had no jurisdiction. The Court then vacated the Circuit Court's decision and remanded it with instructions to dismiss for a lack of jurisdiction.[210]

It took four years of continuous litigation for the issue to be returned to the Supreme Court, and the Court again refused to confront it. During this time, the Commission continued to broaden its intervention in the area of railroad labor relations. In *DRGW*, the Commission had relied on its view that a trackage rights agreement, even one that overrode the contract rights of employees to perform certain work, was an agrement between railroads and not a labor agreement. Therefore, said the ICC, it could not affect working conditions within the meaning of Section 11347. As time passed, the ICC determined it could intervene not only to override agreements, but also to modify them, and it could do so even when no contracts between carriers were involved.

Shortly after the *DRGW* case had been decided by the Circuit Court, the Commission published its decision in the *Maine Central* case.[211] In that case, the ICC had exempted Maine Central from the requirements of the Interstate Commerce Act in leasing to the Georgia Pacific Corporation four specific lines of railroad near Woodland, Maine. Georgia Pacific had contracted with the Springfield Terminal Company to operate the lines and would pool its existing traffic with that obtained by Maine

208. Brotherhood of Locomotive Eng'rs, 761 F.2d at 724 (quoting City of Palestine, 559 F.2d at 414).

209. The court here viewed the term "carrying out" the approved transaction in the same sense as the Commission had used the term "effectuating" in the *Omaha* case in 1958. *See supra* notes 173-177 and accompanying text.

210. Interstate Commerce Commission v. Brotherhood Locomotive Eng'rs, 482 U.S. 270 (1987).

211. Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343, Finance Docket No. 30522 (Sept. 16, 1985) (not printed), *aff'd per curiam*, Railway Labor Executives' Ass'n v. ICC, 812 F.2d 1443 (D.C.Cir. 1987) (Table).

Central.[212] The ICC imposed the *Mendocino Coast* conditions on the leasing aspect of the case, but not its pooling aspect, because the Commission felt it was not required to protect employee interests in pooling cases.

The UTU sought reconsideration by the ICC, contending that because of the interrelated nature of the case, the *New York Dock* conditions should be imposed and applied to the pooling arrangements as well as the leases. The UTU pointed out that the Maine Central Railroad was a party to the Washington Agreement which covered pooling, and the Commission's decision could be read as denying to employees rights they had under that agreement, including negotiation and execution of implementing agreements before the carriers made any changes to affect them. The ICC rejected the UTU arguments, stating that prior to 1976, it had imposed the *Oklahoma* conditions in lease cases and *Mendocino Coast* was simimlar to *Oklahoma* in not requiring an implementing agreement before a carrier implements its approved transaction. The Commission, however, went a giant step further and held that "[i]t is that [ICC] order, not the RLA or WJPA, that is to govern employee-management relations in connection with an approved transaction."[213]

The Commission's decision regarding its supervening authority over employee rights under negotiated protective agreements, as well as the RLA and collective bargaining agreements, appeared to be based upon authority provided it by 49 U.S.C. §11347 alone, for at one point it said that the "preemptive power of Section. . .[11341(a)], [is] not an issue here."[214] However, the decision closes by saying that the result requested by UTU was "unacceptable and inconsistent with section 11341." In any event, the Commission had made it clear that whether Section 11341 or Section 11347 applied in a given case, it considered itself authorized to override any employee statutory or contractual rights which impeded a railroad in implementing a transaction that the agency had approved. Its decision was appealed to the D.C. Circuit, but was *affirmed per curiam.*[215]

In August 1986, CSXT served notice on the Brotherhood of Railway Carmen ("BRC") that the SCL[216] freight car heavy repair shop in Waycross, Georgia, would be closed on December 31, 1986, and that the

212. The ICC/STB may not exempt a carrier from employee protective conditions which absent the exemption, would be required to be imposed. 49 U.S.C. §10502 [formerly §10505].

213. Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343, at 6.

214. This conclusion may have been reached because the case involved an exemption from 49 U.S.C. §10505 to which Section 11341(a) does not apply. *See* Railway Labor Executives Ass'n v. Uinted States, 987 F.2d 806, 812-13 (D.C.Cir. 1993).

215. Railway Labor Executives, 812 F.2d 1443 (D.C.Cir. 1987) (Table).

216. The SCL System had become a part of the CSXT System as of result of ICC approval of the common control of the SCL and Chessie System by the CSX Corporation in CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus., 363 I.C.C. 521 (1980).

freight car heavy repair work as well as certain storeroom work at Waycross, would be transferred to the C&O's[217] Raceland, Kentucky, repair facility and made subject to the C&O collective bargaining agreement. CSXT proposed to abolish 121 positions in the carman craft at Waycross and to establish 99 positions in the carman craft at Raceland. All of the carman craft employees were subject to a collective bargaining agreement with CSXT, and about one-half of those employees were also entitled to the protections of the "Orange Book" protective agreement between the union and the SCL which prohibited the transfer of the work and the protected employees beyond the property of the SCL, *i.e.,* to Raceland.[218]

About two weeks after CSXT's intended transfer, Norfolk Southern notified the Amercian Train Dispatchers' Association ("ATDA") of its intention to transfer all work of locomotive power distribution and assignment from the N&W at Roanoke, Virginia, where employees were represented by ATDA, to the Southern in Atlanta, Georgia, where the employees performing that work were unrepresented, being considered by Southern to be management personnel. Norfolk Southern said the N&W employees would be "considered" for work in Atlanta.[219]

The parties were unable to reach agreement under section 4 of the *New York Dock* conditions in either case. The respective disputes between the parties were submitted to arbitrators. The BRC and the ATDA disputed the jurisdiction of the arbitrators to change the wages, rules, or working conditions or employees or to eliminate any of their existing Railway Labor Act or collective bargaining agreement rights. Regarding the separate Orange Book protection applicable to half of the affected carman employees at Waycross, BRC argued that the abitrator had no jurisdiction to modify any of the substantive rights provided employees by that agreement, and that "section 3 of the *New York Dock* conditions absolutely preserves workers' rights and benefits under existing protection agreements."[220]

On behalf of the N&W employees it represented, the ATDA argued

217. C&O had been part of the Chessie System.

218. The "Orange Book", so-called from the color of its cover, was negotiated during the much earlier merger of the Atlantic Coast Line Railroad and the Seaboard Air Line Railroad which became the SCL. It guaranteed employees income for the remainder of their working lives and also guaranteed that neither they nor their work would be transferred beyond the boundaries of the SCL System, Inc. In exchange for those protections, SCL was granted the right to transfer work and employees within the merged ACL-SAL (*i.e.,* SCL) system but not beyond it.

219. The Norfolk and Western Railway Company and the Southern Railway Company were joined under the common control of Norfolk Southern Corporation as a result of ICC approval in Norfolk S. Corp.-Control-Norfolk & W. Ry. Co. and S. Ry. Co., 366 I.C.C. 173 (1982).

220. *See* text accompanying notes 187-188, *supra.*

that the ICC could not eliminate the agreement rights or the collective bargaining rights the employees has established with ATDA representation through the device of removing them and their work to a railroad where they would have no contract and no representation. The *Carmen* arbitration award was issued in March 1987, followed by the *ATDA* award in May 1987.

Holding that an arbitrator under section 4 was a "quasi-judicial extension of the ICC" and therefore "must strictly follow the ICC's interpretation of its own authority", the *Carmen* case arbitrator followed the ICC's decision in the *DRGW* case and stated that "[a]ccording to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation." The arbitrator then held that CSXT could transfer work and employees from the CSXT and the SCL agreement to the C&O and the C&O agreement because to permit the preservation of the CSXT employees' agreement rights, including their Orange Book guarantee that their work would not be transferred, "would for all practical purposes block. . .[that particular] transaction," that is, the 1986 transfer of SCL work and employees to the C&O.

The arbitrator, however, felt that some of the Orange Book rights of the employees could be protected without impeding the completion of the transfer. He found that without the right granted by the employees in 1962 to the then newly-merged SCL to "transfer work and workers throughout the merged (SAL-ACL) system. . .the point seniority terms of the [collective bargaining] working agreement would have restricted the Carriers from moving employees."[221] The arbitrator concluded that the Orange Book prohibited the movement of work and workers beyond the limits of the former SCL property and therefore would bar "transfers of work and employees to the C&O at Raceland, KY." He held that employees' rights "must be subordinated to the Carrier's right to engage in the authorized *New York Dock* transaction"[222] by permitting the transfer of their work; but, he prohibited the transfer of the "Orange Book" employees because he made the *factual* finding that recognition of that particular agreement right of the employees would "only slightly impair the transaction", *i.e.*, the transfer of work and employees.

Some two months following issuance of the *Carmen* award, the decision and award in the *ATDA* case was issued. The arbitrator in that case,

221. Here the arbitrator acknowledges a railroad's inability to move work or employees without voluntary agreement. The agreement he refers to had been negotiated over 20 years before the ICC first ruled that its orders effectively authorized transfer of work and employees from one collective bargaining agreement or one railroad property to another.

222. The arbitrator, following the ICC's rulings, viewed the 1986 transfer of work as itself having been authorized by the Commission rather than having been simply a *result* of the 1980 underlying statutory transaction (the control) authorized by the Commission.

former National Mediation Board Chairman Robert O. Harris, noted that between "1981 and 1983 at least five arbitrators [had] ruled that the ICC did not desire that changes of rates of pay, rules or working conditions, or of representation under Railway Labor Act, occur through arbitration under Section 4 of the *New York Dock* conditions." He then proceeded to quote extensively from the Commission's 1985 *Maine Central* decision to the contrary. Mr. Harris also quoted that portion of the Commission's decision in the *Maine Central* case in which it had made clear its intent to use section 4 of the *New York Dock* conditions to compel arbitration or new collective bargaining agreements:

> Such a result [goverance of labor relations by ICC orders] is essential if transactions approved by use are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transaction.[223]

Holding that he derived this authority from the ICC and the "it is clear that the ICC believes that its order supersedes Railway Labor Act protection", the arbitrator held that the N&W could transfer the work and the employees to the Southern at Atlanta.[224] He imposed the implementing agreement proposed by the N&W transferring the work and the employees to Southern without their existing agreement or representation rights as the employees performing locomotive power on the Southern portion of Norfolk Southern property had no agreeement and were not represented.

Both awards were appealed to the Commission. In the *Carmen* case, the Commission held that the arbitrator had correctly interpreted the Commission's view of its authority that Section 11341(a) overrode the Railway Labor Act and collective bargaining agreements and affirmed the arbitrator on that point. However, the Commission concluded that the arbitrator had committed "egregious error" in holding that the employees covered by the Orange Book could not be required to transfer to Raceland, KY. The "slight impairment of the transaction" found by the arbitrator was held to be an unacceptable "standard" as it would "permit[ ] a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction" and thereby "effectively undercut the Commission's authorization of the transaction here."[225] The

223. In *Maine Central* the ICC made no attempt to square this language with section 11347's requirement that employees' working conditions be preserved. *See supra* pp. 259-260.

224. In the course of his opinion Arbitrator Harris stated that "[p]rior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised in a section 4 proceeding." Such changes had been made, of course, but by agreement as noted *supra* note 92.

225. Here the ICC held that it not only approved for purposes of statutory immuity the

Commission concluded that the evidence did not support the arbitrator's factual finding of "slight impairment" of the transaction.[226] It reversed that finding and remanded the case to the arbitrator for a further review consistent with the Commission's decision.

In reviewing the *ATDA* award, the Commission relied upon its decision in *Maine Central* and affirmed the arbitrator's holding that the terms of its 1982 order approving the Norfolk Southern control of N&W and Southern "and specifically the compulsory, binding arbitration required by Article I, Section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements," and that any "action taken under our control authorization is immunized from conflicting laws by section 11341(a)."[227]

The unions sought review of the Commission's decisions in the Court of Appeals, which heard the cases simultaneoulsly and issued a consolidated opinion.[228] The Court of Appeals held that "Section 11341(a) of the Act [did] not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees".[229] The Court reversed the ICC's decision and remanded the cases "with respect to the ICC's RLA holding in order that the agency may determine whether further proceedings are necessary."[230] The Court of Appeals felt it unnecessary to address the issues presented by the unions in light of its threshold interpretation of Section 11341(a).

Nine days after the Court of Appeals issued its decision, the Commission issued its next decision showing how it wished to apply and interpret Section 11341(a) in a case involving the purchase by a shortline

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express "transactions" the Congress authorized it to approve in §11343 but also "approved" by implication all actions taken as a result of those transactions regardless of when they might occur. In the *New York Dock* conditions, the ICC had defined the *results* of approved §11343 transactions as "transactions" to which *New York Dock* and its other conditions would apply. The effect was to confuse the specific statutory transactions which Congress listed as subject to authorization by the ICC with carrier activities *resulting* from ICC approval which ICC had no statutory authority to approve simply because of the use of the term "transactions" to describe two entirely disparate concepts. *See Omaha, supra* pp. 269-270.

226. The only evidence relied upon by the Commission to reach its conclusion were general statements relating to reductions in cost savings and operating efficiencies which were not quantified.

227. The issue whether the employees' pre-existing right to representation by the ATDA was preserved by *New York Dock*, Article I, Section 2 and 49 U.S.C. §11347, was not addressed by the ICC nor was the Commission's purpose in crafting Article I, Section 3 of those conditions which purportedly preserved the Employees' Protective Agreement ("Orange Book") rights. *See supra* notes 186-188 and accompanying text.

228. Brotherhood of Ry. Carmen v. ICC, 880 F.2d 562 (1989), *rev. and rem. sub. nom.,* Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117 (1991).

229. Brotherhood of Ry. Carmen, 880 F.2d at 574.

230. *Id.*

railroad of 102 miles of CSXT line in Florida.[231] The Commission held that it did "not dispute the validity" of the Court of Appeals holding in *Carmen*; that *it had never* "relied upon. . .§11341(a). . .to require that agreements be modified"; and that its authority to override collective bargaining agreements was derived from Section 11347.[232]

The Commission's *Carmen* decision following remand from the Court of Appeals[233] adhered to that court's ruling that it was not authorized by Section 11341(a) to override provisions of collective bargaining agreements, but concluded that such authority was unnecessary in any event since that authority had been afforded the Commission by Congress' inclusion of the employee protective provisions of section 5(2)(f) in the 1940 Act[234] (later §11347 now §11326(a)) and held that section 11341(a) empowered the ICC "to exempt mergers and consolidations from the RLA at least to the extent of our authority under section 11347."[235]

The Commission did "concede that our assertion of this power is fairly recent, as both RLEA and the *Carmen* court assert."[236] It admitted that its decisions in 1983 (*DRGW*) and 1985 (*Maine Central*) had contributed to a deterioration of labor-management relations which had not theretofore existed in this area.[237] The Commission noted that"a relatively harmonious working relationship. . .when implementing ICC-approved consolidations" had existed for almost forty years prior to its 1983 and 1985 decisions and the inclusion of Section 2 in *New York Dock* in 1979.[238]

The Commission interpreted Section 2 of *New York Dock* as providing employees with "the opportunity to bargain collectively over their basic and continuing conditions of employment, as contemplated by the

231. Brandywine Valley R.R. Co.—Purchase—CSX Transp., Inc., Lines in Florida, 5 I.C.C.2d 764 (1989).

232. Brandywine, 5 I.C.C.2d at 772 n.5. After the railroads appealed the Circuit Court's *Carmen* decision to the Supreme Court and certiorari had been granted, the ICC changed its position and disputed the validity of the Court of Appeals' decision, contending that its "absolute authority" over labor management relations in cases subject to Section 11343 of the Act was derived both from Section 11341(a) and Section 11347.

233. CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc., 6 I.C.C.2d 715 (1990). The issuance of this decision preceded the Supreme Court's grant of certiorari in that case.

234. *Id.* at 750-51.

235. *Id.* at 754.

236. *Id.* at 755.

237. *Id.* at 745-746.

238. *Id.* at 745. The ICC's conclusion that the 1979 inclusion of Section 2 of the *New York Dock* conditions (set forth at p. 272, *supra*), as required by section 402(a) of the 4R Act, had contributed to the labor unrest that began in 1983 was based upon an assumption that Section 2 had added something new to the law instead of simply confirming the law as it had always been interpreted and applied to that time.

RLA", but permitting modifications of collective bargaining agreements "when necessasry to complete an approved merger or consolidation."[239] To support that interpretation, the ICC was compelled to rely solely upon speculations and assumptions of what "must have happened": the 1940-1980 arbitrators "*must have defined* them [the terms 'selection of forces' and assignment of employees' in *New York Dock* and the Washington Agreement] broadly enough to include contract changes involving the movement of work (and *probably* employees) as well as adjustments in seniority";[240] "[i]t *appears* that arbitrators, management and labor developed approaches in the 1940-80 period for resolution of the inevitable conflicts with CBAs that permitted the carrying out of the transaction while maintaining labor peace";[241] between 1940 and 1980 "the disruptive effect on labor *appears* to have been successfully handled through WJPA-type negotiation and arbitration";[242] "[m]ost of the changes were *presumably* made through WJPA (or *New Orleans*) negotiations, with only the more difficult issues being decided by an arbitrator";[243] while the scope of the terms "selection of forces and assignment of employees" is "not well-defined. . .[i]t *must extend beyond* the mere mechanism for selection or assignment of employees, *and include* the modification of certain *important* contractual rights";[244] "[w]e *assume* they [labor and managment] did what was necessary to premit the carrying out of the merger, including. . .those projects that were direct results of the merger";[245] "[w]e *believe* that arbitrators have successfully followed this narrow and difficult path in the past. . .".[246]

The evidence upon which the ICC has based its speculations as to what "must have happened" between 1940 and 1980, consisted of a list submitted by CSX of 95 labor/management agreements relating to transfers.[247] The Commission did acknowledge that the list "cover[ed] a later

239. CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc., 6 I.C.C.2d 715, 749 (1990). *But see supra* pp. 271-272.

240. *Id.* at 721, (emphasis added). But it cited no such decisions of arbitrators.

241. *Id.* at 721-22. The "approach developed" was the negotiation of protection agreements granting to managment the right to transfer work and employees in return for lifetime protection for the employees. *See supra* note 92.

242. *Id.* at 740; (emphasis added). The only "WJPA-type negotiation and arbitration" which occurred during this period was the decision in WJPA Docket No. 141 in which the arbitrator rejected Southern's defense of §5(11)[§11341(a)] against employees' WJPA claims.

243. *Id.* at 741; (emphasis added). The ICC cited no such arbitration decisions.

244. *Id.* at 742; (emphasis added). This single bald speculation is elevated in later ICC decisions to a finding and still later, as precedent for ICC action in this area.

245. CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc., 6 I.C.C.2d 715, 743 (1990).

246. *Id.* at 753; (emphasis added). *See supra* note 224 where Arbitrator Harris noted that the issue of a carrier changing rates of pay, rules, or working conditions "had never been raised in a section 4 proceeding" before 1981.

247. *Id.* at 743.

period" and was referred to only for "some guidance",[248] but, as Commissioner Lamboley's dissent noted,[249] those agreements afforded no assistance on the issue whether employees or unions had ever been *required* to arbitrate contract modifications or elimination prior to 1981. Of the 95 agreements listed, only nine were arbitrated, and none of thsoe indicated whether they were voluntary or compulsory arbitrations.

As noted by Commissioner Lamboley in his dissent, the Commission had ignored the meaning it had given Section 2 when it created the *New York Dock* conditions:

> When adopting §2, the Commission noted that it "appears acceptable to all parties" and rejected a labor proposal addtion relating to [preserving] subcontracting agreements, stating that "the section, as now written, preserves all existing agreements and, therefore, the suggested language is redundant and unnecessary."[250]

The remand decision did not address the provisions of Section 3 of *New York Dock* which preserved to employees covered by protective agreements the rights and benefits provided by those agreements and afforded employees the option to choose between benefits of an applicable protective agreement (the Orange Book) and those provided by the conditions imposed by the Commission.[251]

As the Commission was rendering its remand decision, the Supreme Court took up the appeal by the railroads from the Court of Appeals *Carmen* decision. The ICC then joined the railroads in their appeal. On March 19, 1991, the Court issued its decision reversing the Court of Appeals and remanding the case to that court.[252]

The Supreme Court again refused to confront the issue of the effect of the Section 11347 requirement for the preservation of "rates of pay, rules, working conditions and other rights. privileges and benefits" although it was fully aware of the parties' positions on those issues.[253] Instead, the Court took what was, for it, the very unusual step of basing its decision upon assumptions. The Court assumed, but did not hold, that the requirements of Section 11347 and the "necessity" requirements of Seciton 11341(a) had been met and addressed itself only to the issue of whether Section 11341(a), in a proper case,[254] could immunize a railroad from the provisions of the Railway Labor Act and from collective bar-

248. *Id.*

249. *Id.* at 764 n.55.

250. *Id.* at 763 (quoting *New York Dock*, 360 I.C.C. at 73.)

251. New York Dock Ry.—Control—Brooklyn E. Dist. Terminal, 360 I.C.C. 60, 84-85 (1979); *see supra* pp. 272-273.

252. Norfolk & W. Ry. Co., v. Am. Train Dispatchers' Ass'n, 499 U.S. 117 (1991).

253. *See* dissent of Justices Stevens and Marshall, 499 U.S. at 134-143.

254. The Court did not decide that the cases before it were proper for the application of

gaining agreements executed pursuant to those provisions. The Court remanded the case to the Court of Appeals for "proceedings consistent with" its decision.

At the time *Dispatchers* was remanded to the Court of Appeals, there was pending before that Court a number of appeals from the Commission involving Sections 11341(a) and 11347. The ICC decisions involved in the appeals were consistent in that each overrode employee statutory or contractual rights, but their rationales for doing so were not so consistent.

In reviewing the *Carmen* and *ATDA* arbitration awards prior to the Court of Appeals decision, the ICC's primary claim of authority to override employee rights had been grounded in Section 11341(a). But immediately after that Court's decision, the ICC agreed with the validity of the Court's ruling, it disavowed ever having relied on section 11341(a) and it placed its full reliance on Section 11347 as the source of its authority. Then, following the Supreme Court's grant of the railroads' petitions for certiorari in that case, the Commission adopted its present position that both Section 11341(a) and Section 11347 independently provided it with the authority to modify or eliminate employee contract rights.

In addition, then, to the *Carmen* and *ATDA* cases remanded by the Supreme Court, that Court had pending before it an additional eight separate appeals from the ICC. On July 11, 1991, the Court, on its own motion, issued an order in those cases requiring the ICC to show cause why all of them should not be remanded back to it in light of the Supreme Court's decision in *Dispatchers'*, stating that "[s]uch a remand will enable the Commission to develop a coherent position on the issues remaining after the Supreme Court's decision." The ICC responded to the Court's order, and as a result all of the remaining pending cases,[255] except one, were remanded to the Commission by the Court's order dated September 17, 1991.

Upon remand, the Commission requested comments from the parties and the public. These comments were filed in March 1993. The ICC issued a decision in one case, but did nothing further in the remaining cases before the agency was terminated by Congress on December 31, 1995. At this writing,[256] its successor, the Surface Transportation Board, had done nothing with them.

In the one case that was not remanded, the Court of Appeals noted that the issue whether "§11357 limits the ICC's power to modify a CBA"

Section 11341(a)'s immunizing effects as "neither the conditions of approval [public interest], nor the standard for necessity is before us today." 499 U.S. at 134.

255. One had been settled in the interim by the union and the railroad involved.

256. July 25, 1997.

had been "expressly reserved by the [Supreme] Court in *Norfolk and Western", i.e., Dispatchers*.[257] The Court went on to hold:

> The statute clearly mandates that "rights, privileges and benefits" afforded employees under the existing CBAs be preserved. Unless, however, every word of every CBA were thought to establish a right, privilege or benefit for labor—an obviously absurd proposition—§565 (and hence §11347) does seem to contemplate that the ICC may modify a CBA.[258]

The Court concluded that, at the level of generality it had just announced, the ICC's interpretation "seems eminently reasonable".[259]

The Court then held that the Commission had "not. . .addressed the meaning, and thus the scope, of those 'rights, privileges and benefits,' that must be preserved, nor has it determined specifically whether the CBA provisions at issue here are entitled to statutory protections under that rubric."[260] It remanded the case "for the ICC to make that determination in the first instance."[261]

The Court also addressed the issue when it might become "necessary" to modify a CBA to effectuate a proposed transaction:

> In this case the Commission reasonably interpreted this standard to mean "necessary to effectuate the purposes of the transaction." If the purpose of the lease transaction were merely to abrogate the terms of the CBA, however, then "necessity" would be no limitation at all upon the Commission's authority to set a CBA aside. We look therefore to the purpose for which the ICC has been given this authority. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. Viewed in that light, we do not see how the agency can be said to have shown the "necessity" for modifying a CBA unless is shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the *underlying* transaction (here a lease).[262]

The case was remanded to the Commission where it has remained in a "pending" status.

Rail labor viewed the decisions in *Dispatchers* and *Executives* as governing future action of the Commission as follows:

1. Section 11341(a) permits a carrier subject to its provisions to supersede a CBA provided the public interest, necessity and Section 11347 requirements have been satisfied.

257. Railway Labor Executives Ass'n v. United States, 987 F.2d 806, 813 (D.C.Cir. 1993) ("Executives").

258. *Id.* at 814; (footnotes omitted).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 815; (emphasis added).

2. Section 11347 "mandates that 'rights, privileges and benefits' afforded employees under existing CBAs must be preserved".
3. Section 11347 permits "words", i.e., contract terms, which do not confer "rights, privileges or benefits", to be modified but, only if "necessary".
4. The "necessity" requirement is met when the ICC/STB shows that a public transportation benefit flowing from the merger, control, etc., authority granted by the agency would be unavailable otherwise.
5. The arbitration provisions of *New York Dock's* Article I, Section 4 are strictly limited to selecting the percentage of the work forces involved to perform consolidated work and preparing consolidated rosters to permit employees to assign themselves to the available work.

Executives required the Commission to define what comes within the meaning of the term "rights, privileges and benefits" and then to apply that definition to the facts of the case before it.[263]

The cases remanded by the Court of Appeals had been pending since 1991 and 1993, and the Commission had taken steps to carry out the remand orders, when, in an unprinted decision reviewing an arbitration award unrelated to the remanded cases, the Commisison decided all of the issues pending in those cases. It issued that decision on December 7, 1995;[264] That decision was followed by three more decisions (issued by the Surface Transportation Board) which addressed some of the same issues disposed of by the *O'Brien Award Decision.*[265] In each case all of the issues were decided adversely to the employees.

In *O'Brien*, CSXT had grouped some seven separate ICC finance docket approvals together as authority to transfer employees working under Western Maryland, Richmond, Fredericksburg & Potomac, and C&O railroad contracts to the Baltimore & Ohio Railroad contract.[266] In no case could CSXT link any single finance docket authority to any "transaction" it intended to accomplish. Additionally, all but one of the finance docket approvals has been obtained by exemption under 49 U.S.C. § 10505 to which the immunizing effects of Section 11341(a) did not apply. The one finance docket ot which Section 11341(a) did apply

263. American Train Dispatchers' Ass'n v. ICC, 26 F.3d 1157 (D.C.Cir. 1994)—the one remanded case acted on by the ICC following *Dispatchers*—held that union counsel had conceded that no "rights, privileges or benefits" were involved in that case. 26 F.3d at 1163.

264. CSX Corp.—Control—Chessie Sys., Inc., Etc., Finance Docket No. 28905 (Sub-No. 27) (Arbitration Review) (December 7, 1995) (unprinted) ("O'Brien Award Decision").

265. CSX Corp.—Control—Chessie Sys., Inc., Etc., Docket No. 28905 (Sub-No. 26) (Arbitration Review) (Apr. 29, 1996) (unprinted) ("Harris Award Decision"): Union Pac. Corp., Union Pac. R.R. Co., Etc. —Control—Missouri—Kansas—Texas R.R. Co., Finance Docket No. 30800 (Sub-no. 30) (Arbitration Review) (July 31, 1996) (unprinted) ("Moore Award Decision"); Union Pac. Corp., Etc.—Control—Missouri Pac. R.R. Corp., Etc., Finance Docket No. 30000 (Sub-No. 48) (Arbitration Review) (July 31, 1996) (unprinted) ("Eischen Award Decision").

266. Formerly independent railroads that are now part of the CSXT.

did not involve any of the employees or properties on which CSXT desired to make changes, except perhaps RF&P. The unions noted that when employees make claims under employee protective conditions, they are required to identify the particular finance docket transaction in which the conditions were imposed and show that they were affected by actions taken pursuant to that specifically approved transaction.[267] The *O'Brien Award Decision* therefore effectively held that a railroad wishing to employ the *New York Dock* conditions would not be subject to the same restriction requiring identification of a specific Finance Docket transaction as would employees seeking to invoke those conditions.

The ICC held that the arbitrator had found "linkage" between the finance dockets and the CSXT proposed changes[268] and that this finding "was not egregious error";[269] that the fact that the Section 11341(a) exemption did not apply to the finance docket authority relied upon by CSXT was immaterial because the proposed changes could be traced back to the original B&O - C&O control case of 1963 upon which CSXT *had not relied* for its authority, but to which Section 11341(a) did apply;[270] and, in any event, "the basis for a carrier's action [no longer] must be found in a single Commission-approved transaction", but can now be based on "a series of them"—"[i]t does not matter whether these conditions were imposed in one transaction or several."[271]

It would seem that the Commission has held that railroads need not show a cause-and-effect relationship between any particular finance docket approval and any change they propose to make and that a carrier may reach back in time as much as 33 years if it must in order to find Section 11341(a) exemption authority on which to base its proposed changes in employees' Railway Labor Act and CBA rights. While in former years the Commission was totally averse to interfering in the labor relations of railroads, it now seemed to rail labor that the ICC could not find enough ways to relieve railroads of their obligations to their employees.

In *O'Brien,* the ICC also struck down the parties' agreement in a prior implementing contract executed under Section 4 of *New York Dock* to modify that contract only "in accordance with the procedures of the Railway Labor Act". The unions had contended that the railroads, hav-

267. Atlantic Richfield Co. & Anaconda & Pacific R. Co. and Tooele Valley R. Co., Finance Docket No. 28490 (Sub-No. 1) (Arbitration Review) (Mar. 2, 1988) (unprinted), at page 8:

> BAP next seeks a finding that *New York Dock* benefits are limited to displacements or dismissals caused by the control transaction only. We so find.

268. No attempt was made to identify the "linkage".

269. CSX Corp.—Control—Chessie Sys., Inc. (slip op. at 8).

270. CSX Corp.—Control—Chessie Sys., Inc., Finance Docket No. 2805 (Sub-No. 27) (slip op. at 8) (Arbitration Review) (Dec. 7, 1995) (unprinted).

271. *Id.* at 8,9.

ing agreed to that restriction, could not use *New York Dock* to modify or eliminate those contract obligations. The Commission upheld Arbitrator O'Brien's holding that this agreed-to requirement to follow Railway Labor Act procedures was ineffective because "neither party had any reason to view this [RLA restriction] language as restricting CSXT's ability to implement future operational changes, an ability that CSXT would not readily have given up."[272] This holding of the ICC would indicate that language in future (and current) *New York Dock* Section 4 implementing agreements that restrict future modifications of their provisions to Railway Labor Act procedures would have no effect if the railroads decide to modify or eliminate them by service of another *New York Dock*, Section 4 notice.

In its *O'Brien Award Decision*, the Commission also disposed of the issue remanded to it by the Court of Appeals in *Executives* involving the preservation of employees' rights, privileges, and benefits. It did so without reference to that case or to the cases pending before it on remand from the Supreme Court. It simply held the standard on which an employee's rights are to be preserved is whether the change the railroad desires to make "is necessary to effect a public benefit of the transaction"[273] and that a "public transportation benefit" is realized when "improvements in efficiency reduce a carrier's costs of service," because the Commission assumed that "such reductions result[ ] in reduced rates for shippers and ultimately consumers."[274]

The Commission identified "rights, privileges and benefits" as relating only to "ancillary emoluments or fringe benefits—as opposed to the more central aspects of the work itself—pay, rules and working conditions."[275] The Commission based this conclusion upon an earlier protective arrangement crafted by the Secretary of Labor for application to employees affected by provisions of the Urban Mass Transportation Act of 1964, 78 Stat. 302, *i.e.*, Section 10 of the so-called UMTA "Model Agreement".[276] The Commission relied upon the protections established

272. CSX Corp.—Control—Chessie Sys., Inc. (slip op. at 12). It is difficult to understand how the ICC could have held that the CSXT would not readily have agreed to the Railway Labor Act restriction when it did not know or inquire into the consideration CSXT had obtained in return for that provision.

273. *Id.* The "transaction" here meaning the resulting particular change the carrier proposes to make as distinguished from the "transaction" the agency is authorized to approve by 49 U.S.C. §11343 [now § 11323].

274. CSX Corp.—Control—Chessie Sys., Inc., Finance Docket No. 2805 (Sub-No. 27) (Arbitration Review) (Dec. 7, 1995) (unprinted). The decision provides no factual basis for this conclusion.

275. *Id.* at 14. Yet Section 11347 requires preservation of "rates of pay, rules, working conditions and other rights privileges and benefits." *See supra* p. 272.

276. *Id.* at 14-15.

under UMTA even though the U.S. Court of Appeals for the Sixth Circuit had held that Congress had deliberately chosen not to incorporate the UMTA protections, but "directly incorporated protections" of the Rail Passenger Service Act.[277]

The Commission's reliance on this particular provision in another agreement crafted under a different statute, rather than upon the provisions established by the Secretary of Labor under the Rail Passenger Service Act as required by Section 11347, is puzzling in itself, but is doubly so when one realizes that Section 10 of the so-called "Model Agreement" crafted under Section 13(c) of the Federal Transit Act (formerly the Urban Mass Transportation Act) covers only "fringe benefits". Such a fringe benefit provision is also found in Article I, Section 8 of *New York Dock*. The "fringe benefit" provisions of the two protective arrangements require protection of fringe benefit rights, privileges, and benefits "including without limitation, group life insurance, hospitalization," etc. The fringe benefit provision of Section 8 of *New York Dock* has an entirely different purpose and covers an entirely different subject matter than does Section 2, the provision governing ICC action in *O'Brien* and remanded by the Court in *Executives* for Commission definition. The Model Agreement's counterpart to *New York Dock* Section 2, is that Agreement's Section 3. Yet the Commission, instead of comparing Section 2 with Section 3, for reasons it does not mention, decided to compare the disparate provisions of Section 2 with those of Section 10 and found the fringe benefit protection of Section 10 of the FTA (or UMTA) arrangement to be "compelling evidence" that because Section 10 covers only fringe benefits, so *New York Dock* Article I, Section 2, includes only "so-called incidents of employment, or fringe benefits."[278] The Commission also failed to note that Section 11347, by requiring adoption of the Secretary of Labor's protections, specifically identifies certain of the "rights, privileges and benefits" which must be preserved: "*rates of pay, rules, working conditions* and *other* rights, privileges and benefits under existing collective bargaining agreements or otherwise . . . ."[279]

It certainly could be argued with reason that an effect of the Commission's resolution of this issue in this manner is that employees' rights, privileges, and benefits, including rates of pay, rules, and working conditions as secured by collective bargaining agreements, need not be preserved if they impede a carrier in making a change which the railroad *claims* will be cost- efficient, even if that change is to occur as long as 33 years after the ICC approval authority upon which it relies.

277. Railway Labor Executives' Association v. I.C.C., 930 F.2d 511, 517 (6th Cir. 1991).

278. If Section 2 is to cover only fringe benefits and Section 8 already covers fringe benefits, one of those provisions is obviously superfluous.

279. Italics supplied.

The *O'Brien Award Decision* was followed by three decisions reversing awards favorable to the employees.[280] The first of these cases reviewed a decision by Arbitrator Harris who, as a New York Dock Section 4 arbitrator, had held that he had no jurisdiction to modify or otherwise affect an earlier *New York Dock* implementing agreement which the parties had agreed to modify only through the procedures of the Railway Labor Act. The STB cited the ICC's *O'Brien Award Decision* and held that, in referring to the Railway Labor Act, the parties were merely reciting existing law "which provides that RLA procedures apply to modification of rates of pay and rules (*i.e.*, matters which are outside the scope of modification to CBA's which can be made by an implementing agreement), . . ."[281] While the ruling on the parties' restriction to RLA procedures was consistent with the ICC's ruling on the same issue in *O'Brien*, the rationale for the ruling in *Harris* only served to further confuse just what elements of employment are contained within the "rights, privileges and benefits" that must be preserved under Section 11347.

On July 31, 1996, the STB issued two decisions that further muddled the picture of employee rights under the Interstate Commerce Act, as amended. In the first of these, the *Eischen Award Decision*,[282] the STB vacated and remanded the arbitrator's decision which had held that a carrier's proposed merger of two seniority districts was not, standing alone, a "transaction" as that term is defined in *New York Dock* and that therefore the arbitrator had no jurisdiction to hear the case. The STB noted that integration of operations had already occurred and that the case had arisen "because of the UP's attempt to make an *employment* change that the railroad *says* is related to, and necessary to realize the operational *benefits* from, the 1982 acquisition by UP of MP in *Union Pacific—Control.*" (Italics supplied.) The STB also noted UP's basic concession that no change in operations, services or facilities was involved[283] and that UP had stated the issue in the case as involving only the question whether a "change in the status of employees of two consolidated railroads—such as

280. *See cases* cited *supra* note 265.

281. But in *O'Brien* the ICC had appeared to express the view that "pay, rules and working conditions" *are within* the scope of rights which *can* be changed by an arbitrated implementing agreement. *See supra* p. 291.

282. *See cases* cited *supra* note 265.

283. Union Pac. Corp.—Control—Missouri Pac. R.R. Corp., Finance Docket No. 30000 (Sub-No. 48) (slip op. at 2) (Arbitration Review) (unprinted). The Second Circuit in *New York Dock v. U.S.*, *supra*, note 182, held that "transaction", as defined in *New York Dock*, was meant by the ICC "to encompass . . . the same situations that were within the parallel term 'coordination' employed in . . the Washington Agreement" (609 F.2d at 95), *i.e.*, consolidations of railroad facilities or railroad operations or services performed through such facilities. (*See supra*, note 69) Only when a railroad contemplates such a "transaction" which "may cause the dismissal or displacement of any employees, or rearrangement of forces" may it serve the required 90-day notice which activates the *New York Dock* conditions. *New York Dock Ry*, *supra* 360 ICC at 85.

the consolidation of seniority districts—which [does not involve a change in railroad operations, services or facilities and which] results in operating efficiencies and economies is a 'transaction' under the *New York Dock* conditions."[284] Arbitrator Eischen said "no" and rested that conclusion upon the precedent of Arbitrator N.H. Zumas in a case involving the same legal issue as phrased by UP to Eischen.[285] Arbitrator Zumas had held himself to be without jurisdiction because the sole object of Seaboard was to rearrange forces—not to take action pursuant to an ICC order "the *result* of which would be a rearrangement of forces."[286]

The STB said that it would vacate the *Eischen Award* because the Zumas award on which Eischen had relied involved "corporate restructuring" and that the *UP Control* is "no mere corporate restructuring" but "involved the acquisition of control of two large Class I railroads by a third,"[287] and because Eischen allegedly undertook "no analysis of the facts of this case to support his conclusion."[288] The Board also placed great weight upon its conclusion that consolidation of seniority districts was "the sort of efficiency improvement that caused the ICC to approve the underlying merger transaction."[289]

The STB thus rejected Arbitrator Eischen's reliance on precedent, which held that the moving party in a *New York Dock* arbitration "must demonstrate a causal nexus between the merger and the alleged transaction (Eischen, 12):

> By now, it is firmly established that the moving Party in a New York [Dock] matter has the burden of demonstrating a causal nexus between the proposed action and the ICC's merger authorization. Typically, railroads have relied upon the principle in avoiding New York Dock arbitration but the present case presents a mirror image of the typical situation. In this case, the Carrier faces the Organization contention that no causal nexus exists between the proposed merger of the seniority districts in May 1993, and the 1982 merger in which the New York Dock conditions were imposed.[290]

284. Union Pac. Corp.—Control—Missouri Pac. R.R. Corp. (slip op. at 6-7).

285. Seaboard System Railroad/Brotherhood of Maintenance of Way Employes, Finance Docket Nos. 29916, 29985 and 30053, (Nicholas H. Zumas, August 20, 1983).

286. *Id.* at 21; italics in original.

287. Union Pac. Corp.—Control—Missouri Pac. R.R. Corp. (slip op. at 7). The STB Chairmen in separate comments emphasized without explanation that the *Seaboard* [Zumas] case was "based on facts . . . very different from those in this proceeding." Yet the material facts relied on by the two arbitrators would seem to have been identical: *New York Dock* was imposed in both cases; in each case the seniority roster consolidation of two or more formerly independent railroads were ends in themselves; and, neither carrier cited operations or facilities to be consolidated which in turn would necessitate seniority district consolidation thereby activating the protective conditions.

288. *Id.* at slip op. 8.

289. *Id.* at slip op. 9.

290. Eischen also relied upon *Transp. Communications Workers and Missouri Pac. R.R. Co.,*

Eischen then made the factual finding that the record had demonstrated that UP, as the moving party, had not discharged its burden and therefore, had not demonstrated the existence of a "transaction" under *New York Dock*.[291]

Concurrently with its reversal of Eischen, the STB issued a decision reversing another arbitrator, Preston Moore.[292] Arbitrator Moore had found that the circumstances presented to him and to Eischen were the same:

> "An award by Arbitrator Eischen (12-9-94) . . . appears to be squarely in point with this case. Therein Arbitrator Eischen stated: 'This dispute concerns Carrier's attempt to incorporate an existing Union Pacific seniority [sic] into existing Missouri Pacific seniority districts.' The same circumstances exist in this case, with the addition that the Union Pacific is attempting to require some employees who are represented by the IAM to merge with the employees of another carrier and then be represented by BMWE.[293]

Since the material circumstances of the two cases were identical and since he saw no error in *Eischen*, Moore also held that no "transaction" existed and dismissed the railroad's case.

The STB found that Moore had "conducted no analysis at all of the record and made no independent findings of fact" and had "merely relie[d] on the expertise of another arbitrator in a different proceeding with respect to a different transaction."[294] As it had vacated and remanded *Eischen,* so it vacated and remanded *Moore.*

The ICC/STB policy, born with the agency's issuance of its *DRGW* decision in 1983[295] and culminating in its decisions affirming *O'Brien* and reversing *Harris, Eischen* and *Moore,*[296] has placed the railroads in a uniquely dominant position in dealing with their employees' rights under the Railway Labor Act, their collective bargaining agreements, and their established rules and working conditions.

Although the STB has issued apparently contradictory definitions as

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Award No. 1, Case No. 6 (Arbitrator LaRocco, December 18, 1987) and *Missouri Pac. R.R. Co. and American Train Dispatchers' Ass'n*, (Arbitrator Zumas, July 31, 1981).

291. *Id.* at 15. Because the parties in *Eischen* had resolved their dispute, the union moved to dismiss voluntarily the action brought by it against the STB provided the STB would vacate its *Eischen Award Decision.* The STB agreed, the appeal was dismissed, and, the *Eischen Award Decision* was vacated by STB order on February 26, 1997.

292. *See cases* cited *supra* note 265.

293. Union Pac. Corp., Union Pac. R.R. Corp.—Control—Missouri—Kansas—Texas R.R. Co., Finance Docket No. 30800 (Sub-No. 30) (slip op. at 3) (Arbitration Review) (unprinted).

294. *Id.* at 4. If by "transaction" the ICC here means the carriers' proposed actions, they, of course, were the same: consolidation of seniority districts.

295. *See supra* pp. 275-278.

296. *See supra* pp. 289-295.

to the "rights, privileges and benefits" which the statute requires it to preserve,[297] employees can have little doubt that their contract and other rights traditionally held to be beyond ICC/STB jurisdiction or expertise are now in serious jeopardy. The ICC/STB not only has reversed the traditional policy of non-interference in labor relations matters as established both by itself and by the Congress in crafting its national rail transportation and rail labor policies in the Interstate Commerce Act and Railway Labor Act,[298] but also has expanded the railroads' ability to employ this new policy to rid themselves of certain of their obligations to their employees under the RLA and their contracts.

The STB has established a railroad's right to rely upon its 30-plus year old original merger approval upon which the *New York Dock* conditions or a predecessor arrangement was imposed as authority to override the rights of the railroad's employees who may not even have been born when the original merger took place.[299] Since virtually all Class I railroads are the products of mergers which have occurred since 1957, and the STB has ruled that a railroad need not identify any particular approved statutory transaction to invoke the "rights override" provisions of Sections 11341(a) and 11347, but may aggregate any number of transactions approved under Section 11343 so long as a claim can be made that some "link" exists between those aggregated authorized transactions and the carrier's proposed actions, every Class I railroad in the United States is now free to invoke the *New York Dock* conditions as means of modifying its CBA obligations. Once those conditions are invoked and a railroad claims that it will save money (e.g. even the elimination of but one job)[300] by carrying out its proposal, "efficiency" is served and the elimination or modification of employee rights becomes "necessary" in the eyes of the STB. The employees then may be removed involuntarily from the protection of their contract and placed under a different contract with a different bargaining representative or they may be completely deprived of contract protection and any collective bargaining representation depending upon the carrier's discretionary choice in moving its work.

This "necessary" change or elimination of employee rights need no longer be caused by some change in railroad operations, services, or facilities in order to activate the *New York Dock* conditions. After the *Eischen* and *Moore Award Decisions*, a railroad's consolidation of seniority districts and its consequent modification or elimination of employee rights has become a "transaction" without reference to any change in rail-

297. *See supra* pp. 291-292.

298. For a discussion of those policies *see* RLEA v. Pittsburgh & Lake Erie R.R. Co., 845 F.2d 420, 438-446 (3rd Cir. 1988), *rev'd on other grounds*, P&LE v. RLEA, 491 U.S. 490 (1989).

299. *See supra* p. 290.

300. *See supra* note 288.

road operations, services or facilities.[301] The many agreements negotiated by the railroads and unions in collective bargaining in which each side gave up something to achieve limited objectives now have little integrity before the STB should a railroad wish to change or eliminate them without returning the consideration the railroad received from the union. While the railroads may alter or eliminate these contracts in the name of efficiency by simply invoking the procedures of *New York Dock*, the employees have no such option; they remain bound to the terms of their agreements.[302]

The U.S. Court of Appeals for the District of Columbia Circuit saw the danger in an ICC that was authorized to modify the wording of collective bargaining agreements even if those modifications did not affect "rights, privileges and benefits" secured to employees. In *Executives* that Court held that such modifications must be shown to be necessary "to secure to the public some transportation benefit" "flowing from the underlying transaction" identified in the railroads' basic merger or control application approved under the ICA "that would not be available if the CBA were left in place, not merely to transfer wealth from employees to employer."[303]

The ICC considered the "necessity" requirement as described by the Court to be met in the *O'Brien Award Decision* by its presumptive conclusion that improvements in efficiency reduce a railroads costs which in itself is a public transportation benefit, because it results in reduced rates for shippers and consumers. The actual quotation is as follows:

> Improvements in efficiency reduce a carrier's costs of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers. The savings realized by CSXT can be expected to be passed on to the public because of the presence of competition. Where the transportation market for particular commodities is not competitive, regulation is available to ensure that costs efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad thereby benefits from these lower costs, so does the public.[304]

Regarding the Court's admonition against transfer of wealth from em-

301. *See supra* note 289.

302. The reference to elimination or modification of contracts is not altogether accurate. The statute and *New York Dock* preserve the employee's *rights* under the contracts, and it is the individual employee's rights that are eliminated or modified when he or she is removed to another, or to no contract.

303. *Executives* at, 815; *see supra* p. 288.

304. CSX Corp.—Control—Chessie Sys., Finance Docket No. 2805 (Sub-No. 27) (slip op. at 13) (Arbitration Review) (unprinted). While this statement may seem theoretically acceptable, the *O'Brien* record contained no evidence on this subject.

ployee to employer, the ICC said:[305]

> The changes sought by CSXT do not appear to be a device merely to transfer wealth from employees to the railroad. Indeed, there does not appear to be a significant diminution of the wealth of the employees. The extent of unionization will not change. The reduction in labor costs will occur through more efficient use of employees and equipment, not by any reduction in current hourly rates and benefits. In order to use employees more efficiently, CSXT will require some employees to work different territories and report to different staging areas. Some employees may have to move. Moving expenses are a benefit under our *New York Dock* compensation formula.

These statements of the ICC/STB are contrary to earlier statements of the Commission which neither it nor the STB have formally disavowed:

> ". . .[S]ection 2 [of *New York Dock*] . . . as now written, *preserves* all existing agreements and, therefore the [RLEA] suggested language is redundant and unnecessary." (Italics supplied.)[306]
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> * * *
>
> ". . . [The] purpose [of ICC conditions] . . . [is] *to protect* the interests of employees, some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act." (Italics in original.)[307]

The ambiguous language of its current statements also reflects a reluctance in that agency to confront the plain language of the governing statute and an intention to establish an ad hoc approach to the STB's statutory obligations. The Court of Appeals had said that changes in contracts could not be made "merely to transfer wealth from employees to employers." The Court said nothing about a transfer of "significant" wealth. And while the ICC appeared to consider the lack of effect upon the "extent of unionization" to be a material factor in the *O'Brien* case, the employees' complete loss of representation and of their contract in the *ATDA/N&W* case[308] was not considered material to the decision in that case.

On March 21, 1997, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision on the unions' appeal from the ICC's *O'Brien Award Decision*.[309] Although the case involved removing CSXT employees from the coverage of Western Maryland, C&O and RF&P agreements to that of the B&O agreements, the Court did not mention

305. *Id.* (footnote omitted).
306. *See supra* text accompanying notes 186-188.
307. *See supra* text and accompanying note 168.
308. *See supra* pp. 281-282.
309. United Transp. Union v. Surface Transp. Board, 108 F.3d 1425 (D.C. Cir. 1997).

that fact but found that the "only contested changes to CBAs are seniority provisions;"[310] that it did not involve "rates of pay, rules or working conditions," but only "other rights, privileges and benefits" required to be preserved by section 11347, and presented the issue of whether consolidation of seniority rosters fell within the proscription against change of "other rights," etc.[311] The Court, citing the principle of judicial deference, upheld the ICC's ruling that it did not. The Court however, confirmed *ATDA*[312] and *Executives*[313] "as holding that 'certain contractual provisions,' that is, those treading upon any rights, privileges or benefits in a CBA, 'are immutable.' 26 F.3d at 1163."[314]

On June 13, 1997, the D.C. Circuit issued its decision in the appeal from the *Harris Award Decision*[315]. The Court held that the STB's reversal of an arbitrator's interpretation of an ambiguous contract provision was acceptable because in that Courts' opinion, the STB could take into consideration the "impact of their (the arbitrators') decision on the STB's administration of the Act.[316]

In its 1991 order, the Court of Appeals remanded a number of cases to the ICC in order to "enable the Commission to develop a coherent position on the issues."[317] Five years later the Court and the employees still await a response to that order. The ICC/STB decisions rendered since 1991, while clearly setting forth the agency's view that employee statutory and contract rights must give way to efficiency in railroad operations,[318] do not yet state consistent or coherent positions in their ratio-

310. *Id.* at 1430.

311. *Id.*

312. American Train Dispatchers Ass'n. v. ICC, 26 F.3d 1157 (D.C. Cir. 1994).

313. Railway Labor Executives' Ass'n v. U.S., 987 F.2d 806 (D.C. Cir. 1993).

314. 108 F.3d at 1430.

315. United Transportation Union v. Surface Transportation Board, No. 96-1201, D.C. Circuit (June 12, 1997).

316. *Id.*, Slip op. 10.

317. *See supra* p. 287.

318. As of this writing, the ICC/STB has uniformly granted each railroad's request to eliminate its obligations under a given collection bargaining agreement, whether the ICC/STB had to do so by affirming or reversing the decisions of its arbitrators. In a recent article in the Journal of Commerce, (June 2, 1997), Frank N. Wilner, an Assistant Vice President of the Association of American Railroads at the time about which he was writing, noted the "zealous pro-management bias" of the ICC in dealing with labor contracts. Writing of a dispute between Guilford Transportation Co., a New England freight railroad, and a member of union he said:

> The Interstate Commerce Commission—with a zealous pro-management bias in those days—sanctioned the lease agreement and referred certain labor issues to binding arbitration. When a neutral arbitrator ruled in favor employees—concluding that existing collective bargaining agreements could no more be scrapped than existing contracts for locomotive fuel—the ICC partially overturned the award. A second arbitration ruling—more to the ICC's liking—provided for a single seniority system, smaller train crews and partial elmination of craft distinctions in assigning work.

The ICC approved the second arbitration ruling.

nales. But regardless of the merit of the ICC/STB decisions rendered since October 1983, the basic question remains unanswered: why did the commission abruptly reverse a historic policy that had been reaffirmed only nine months earlier?[319] The ICC never answer that qustion, nor has the STB.

VI. From Regulator of Railroads to Regulator of Labor

The Interstate Commerce Commission's sudden change of policy cannot be grounded upon Congressional action. No language in the amendments to the Interstate Commerce Act can be cited to support the result reached by the post-1983 ICC/STB decisions. Indeed, as Congress deregulated the industry, it increased and expanded the protections it afforded employees.[320] Nowhere in the legislative history of the 4R Act or the Staggers Rail Act is there any mention of Congressional dissatisfaction with the Commission's lack of jurisdiction over, or expertise in, labor relations matters nor can there be found any indication at all of any affirmative grant to the ICC of jurisdiction to affect CBAs or other rights of employees.

If Congress did not change the Commission's role, why did the ICC take it upon itself to do so? Was it because the ICC believed that, in relieving railroads of the burdens imposed by the Railway Labor Act and collective bargaining agreements, it was carrying out the "spirit" of the Staggers Rail Act to help railroads achieve "revenue adequacy through perceived "efficiencies"? Was it because new ICC Commissioners were appointed by a new Administration with a very different philosophy of government, a philosophy that included within governmental deregulation the deregulation of employers' contractual obligations to their employees? Or was it simply a way of justifying the continued existence of an agency whose *raison d'etre* was being diminished along with the regulations it once administered?[321]

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319. *See supra* text accompanying notes 194-204.

320. *See supra*, 263-264.

321. As the ICC/STB's statutory duties and responsibilities with regard to regulation of surface transport have dwindled, its involvement in labor matters has increased. Prior to 1987 the ICC refused to review disputes arising under the conditions it imposed. (Bell v. Western Md. Ry. Co., 366 I.C.C. 64, 67 (1981); Brotherhood of Locomotive Engineers v. Chicago N.W.T. Co., 366 I.C.C. 857, 859-861 (1983). Since 1987 when it first decided to review arbitration decisions rendered by arbitrators in Chicago & North Western Transp. Co.—Abandonment, 3 I.C.C. 2d 729 (1987) *aff'd sub nom.* International Brotherhood of Electrical Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988), it has issued over eighty decisions involving appeals from arbitrators (fourteen in 1996 alone). Many of these cases have also involved appeals from its decisions to the courts. In all but a very few cases the ICC held against the employee—even to the extent of reversing an employee's award rendered by a Public Law Board established under the Railway Labor Act which the 8th Circuit held to be beyond ICC jurisdiction. (Brotherhood of Locomotive Engineers v. ICC, 885 F.2d 446 (8th Cir. 1989)). In cases involving the loss of employees' CBA or

Whatever the agency's reason for assuming the role of labor relations expert, none of its decisions requiring employees to move from one contract and bargaining representative to another, or to none at all, have addressed the effects such moves have upon the rules, working conditions, or other rights, privileges, and benefits of the individual employees involved. Whatever else may be said of the requirements of Section 11347, it is accepted by all that Section 11347 imposes a duty upon the ICC/STB to preserve some type of employee rights. Yet since 1983, the ICC/STB has consistently acceded to whatever changes in employee rights a carrier wished to obtain. It has never required the railroad to adduce evidence of the effects upon employees' rights of moving them from one collective bargaining agreement to another or to no agreement. Nor has the ICC/STB on any occasion compared the agreements to determine whether "rates of pay, rules, working conditions and other rights, privileges and benefits" or even "ancillary emoluments and fringe benefits" have been preserved.

In the end, the ICC/STB has placed the burden of proof upon the employees to demonstrate that they would be deprived of rights unnecessarily because the railroad's proposal would not result in an increase in efficiency of any kind. Such a burden cannot be sustained.[322] However, employees can demonstrate to arbitrators the specific loss of specific rules, working conditions and "other rights, privileges and benefits" under existing CBAs "or otherwise," including "ancillary emoluments and fringe benefits" and this they undoubtedly will do in future arbitrations.

The courts, of course, have been loathe to interfere with the Commission.[323] Thus far, they have accepted the ICC/STB's generalized conclusions of the lack of employee loss of rights or economic injury as the conclusions of an administrative agency expert in the administration of its governing statute. As a result, over a period of fourteen years the Commission has proceeded, one step at a time, from an override of employee rights because the override was written into a trackage rights agreement between railroads (to which labor was not a party) and was specifically approved by the ICC,[324] to the STB's direct approval of the consolidation of seniority districts which moved employees from one contract and bar-

statutory rights, the results have always been the same: to provide the railroad the relief it requested whether that required affirming or reversing the arbitrator's award.

322. In the *O'Brien Award Decision* the ICC made no explicit finding as to what "ancillary emoluments or fringe benefits" it held to be preserved by Section 11347, would indeed be preserved in that case.

323. Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 387 (1984); United Transportation Union v. Surface Transportation Board No. 96-1201 (D.C. Cir., June 13, 1997, slip. op. 9-10).

324. *See supra* pp. 275-278.

gaining representative to another and which it justified as "necessary" because of the elimination of *one* job, even though the railroad employer conceded that railroad operations were not involved and it was a straight move to modify employee rights by consolidating seniority districts.[325]

The individual employee's loss of statutory and contract rights is a tragedy personal to the employee, but the even greater tragedy is the official adoption by the government of the view that a mere "claim" of a railroad that it may save money by eliminating employee statutory and contract rights is a sufficient "efficiency" to justify the "necessity" of such an act. That determination has created a regime of unprecedented regulation of labor-management relations that has abandoned the traditionally held view that "efficiency of [railroad] service is advanced by the just and reasonable treatment of those who serve."[326] The STB has sanctioned an effectively unilateral right in railroad managements to eliminate employees' CBA rights. This STB policy conflicts with Congress' historical policy of protecting employees' collectively bargained rights in order to safeguard such "collective action [as] an instrument of peace rather than strife."[327]

The managements of the railroads certainly should be experienced enough in their dealings with their employees to realize that their insistence upon returning to the laissez faire tactics of the latter decades of the nineteenth century will only recreate in the latter twentieth century and early twenty-first centuries the same atmosphere of employee mistrust and disaffection that existed one hundred years ago. The railroads, even with the sanction of the Surface Transportation Board, cannot be permitted to walk away from solemn contract obligations solemnly undertaken in good faith by the unions representing their employees. The railroads can reasonably expect the unions to continue to fight vigorously to protect the employees' statutory and contract rights by every available lawful means for as long as it proves necessary to do so. In a labor-intensive service industry such as the railroad industry, everyone, including the shipping public, will be losers if that battle is joined. Railroad actions which evade their collective bargaining agreement obligations and deprive railroad workers of their rights can never provide a foundation for the development of an efficient and responsive railroad industry.

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325. *See supra* pp. 293-294, 296-297.

326. United States v. Lowden, 308 U.S. at 238; *See supra* note 72 and accompanying text.

327. *Texas & N.O. R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 571 (1930); *see also* Zakson, *Rail Labor Legislation 1888-1930*, 390-391, *supra* note 59.