Articles

The Failure of the Teamsters' Union to Win Railroad-Type Labor Protection for Mergers or Deregulation

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Employees in three key transportation industries — railroads, airlines, and urban transit — have enjoyed legislative or administrative regulatory income and job protection in mergers, consolidations, or "abandonments" (closings) which greatly exceed that found in industry generally. Except in a few isolated instances, trucking industry employees and their union, the International Brotherhood of Teamsters ("Teamsters"), have failed to win such benefits even in situations where the trucking company involved was a subsidiary of a railroad.

How and why this has occurred constitute the principal subject of this article. Cases in which the trucking organization is a subsidiary or division of a railroad are first examined, followed by developments resulting from the deregulation of the trucking industry, and then collective bargaining agreements. In conclusion, the economic and political rationales for these developments are analyzed. To provide necessary background, an explanation is first provided of the nature of labor protective provisions ("LPPs"), as developed in the railroad industry and expanded to airlines and urban transit.

I. Development of Railroad Protective Programs

The success of the railroad unions in establishing the concept of LPPs dates from the 1930s. From a high of two million during World War I, employment on the railroads had declined to about one-half that number as a result of the competition of trucks and automobiles and the

impact of the Great Depression. Meanwhile, the industry, which had been faced with overcapacity for many years, was in dire need of consolidation and merger, a fact that had been "recognized and addressed as early as the Transportation Act of 1920."[1]

With the severe downturn during the Great Depression, railroad unions feared that mergers and consolidations would result in substantial unemployment of their members. They, therefore, sought political protection against such action. Initially, the unions were successful in inducing Congress to provide in § 7(b) of the Emergency Railroad Transportation Act of 1933[2] that railroads must "freeze" into their jobs all railroad employees actively employed in May 1933, who might be affected by actions taken pursuant to authority contained in this Act, which was avowedly designed to promote financial reorganization. However, "for a variety of reasons, not the least of which was this 'job freeze,' no significant consolidations took place under this legislation."[3]

A. The 1936 Washington Agreement and its Progeny

The 1933 Act expired by its terms in 1936. At the behest of the railroad unions, legislation was introduced and strongly supported in Congress to continue protection almost as restrictive as that provided by Section 7(b). Anxious to avoid such limitations, and prodded by President Franklin D. Roosevelt, the carriers entered into negotiations with the unions. After protracted bargaining, the so-called "Washington Agreement" was signed on May 21, 1936, between the then twenty-one national railroad unions and carriers representing eighty-five percent of the country's railroads. The agreement covered railway "coordination", which was defined as "joint action by two or more carriers whereby they unify, consolidate, merge or pool" their facilities or operations in whole or in part.[4]

The Washington Agreement "set the tone for railroad labor protec-

1. Daniel J. Kozak, *Labor Protection in the Railroad Industry*, in Herbert R. Northrup & Philip A. Miscimarra, Government Protection of Employees Involved in Mergers and Acquisitions 501 (Labor Relations and Public Policy Series, No. 34, 1989), *citing* The Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920).

Dr. Kozak's study, based in part on his doctoral dissertation (University of Maryland, 1981), and on information supplied by several railroads on their experience in major mergers, is the most thorough and recent study of railroad LPPs now extant.

2. Emergency Railroad Transportation Act of 1933, Pub. L. No. 73-68, 48 Stat. 211 (repealed 1951).

3. Charles H. Rehmus, *Collective Bargaining and Technological Change on American Railroads*, in Harold M. Levinson et al., Collective Bargaining and Technological Change in American Transportation 144 (1971).

4. *Id.* at 145. *See also*, Earl Latham, The Politics of Railroad Coordination 1933-1936 (1959).

tive arrangements for the next fifty years."[5] Its principal provisions provided that employees deprived of employment as a result of coordination receive either sixty percent of their prior earnings for as long as they had worked, up to five years, or a lump sum severance. Those accepting the former also continued to receive such fringe benefits as free transportation, pension credits, and medical benefits. In addition, employees who were downgraded as a result of coordination received an allowance for up to five years to make up for the difference in earnings; and employees who were required to move in order to continue to work received transportation and moving expenses, and compensation for losses on sale of homes. The five-year extent of benefits, unique at the time of adoption and rarely matched elsewhere since, was based upon a contemporary estimate of the time when employees could expect to return to the railroad active work force.[6]

First by administrative action, which was upheld by the U.S. Supreme Court,[7] and then pursuant to legislation beginning with the Transportation Act of 1940,[8] the Interstate Commerce Commission ("I.C.C.") began awarding LPP benefits as a condition of all mergers, consolidations, and abandonments. Standard six-year packages were developed: New York Dock[9] type for mergers, consolidations, and acquisitions of control; Oregon Short Line[10] conditions for abandonments; Mendocino Coast[11] conditions in lease transactions; and Norfolk and Western Conditions[12] for lease and trackage rights transaction. These provisions, detailed in Appendix I, provide for full incomes during the six

5. Kozak, *supra* note 1, at 502.

6. Rehmus, *supra* note 3, at 145.

7. United States v. Lowden, Trustees of the Chicago, Rock Island and Pacific Railroad Co., 308 U.S. 225 (1939).

8. Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898 (codified as amended in scattered sections of 31 U.S.C. and 49 U.S.C.). For other significant legislation affecting LPPs, *see* The Railroad Revitalization, Regulatory and Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. § 801 (1986)); The Rail Passenger Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (codified at 45 U.S.C. § 501 (1986)); The Regional Rail Reorganization Act ("3R Act"), Pub. L. No. 93-236, 87 Stat. 985 (1974) (codified at 45 U.S.C. § 701 (1986)); The Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1982) (codified at 49 U.S.C. § 10101 (1986)); and the Northeast Rail Service Act ("NERSA"), Pub. L. No. 97-35, 95 Stat. 357 (1981).

9. New York Dock Ry. — Control — Brooklyn E. Dist. Terminal, 360 I.C.C. 60 (1979), *aff'd*, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

10. Oregon Short Line R.R. and Union P.R.R. — Abandonment Portion of Goshen Branch between Firth and Ammon, Bingham and Bonneville Counties, Idaho, 330 I.C.C. 666 (1980).

11. Mendocino Coast Ry. — Lease and Operate — California Western R.R.,354 I.C.C. 7321 (1978), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom.* Railway Labor Exec. Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982).

12. Norfolk and W. Ry. — Trackage Rights — Burlington N.R.R. 354 I.C.C. 605 (1978, *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom.*, Railway Labor Exec. Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982).

years. To be eligible for such statutory benefits, employees must show that their worsened position has been caused by a "transaction" directly related to a merger or other "coordination". Ordinary layoffs, downgradings, or other such actions are not covered.

For an interim period, a much more liberal package became common in major rail mergers, including the merger of the Pennsylvania and New York Central railroads in 1968. Because of the political power of the railroad unions in blocking merger applications at the I.C.C., the Penn Central merger proponents agreed to "lifetime attrition protection"[13] of the labor force as a means of gaining union support. This was both preceded and followed by a series of major mergers which provided the same extravagant protection that guaranteed lifetime protection even for employees who were in their twenties and thirties.[14] Moreover, when the Penn Central merged operation went bankrupt, such benefits were incorporated into law.[15] As discussed later, however, the costs of such benefits proved too great even for the United States Treasury, and were drastically modified in the early 1980s. Since then, the standard conditions listed above have been the rule.

B. Transfer of LPPs to Airlines and Urban Transit

In 1936, Congress placed the fledgling airline industry under the Railway Labor Act. The airlines, having expanded employment in most years since 1936, were thereby confined to the rules, regulations, bargaining units, and other labor relations practices of the railroad industry, where employment has been declining for the last seventy-five years.[16] In 1938, Congress established a comprehensive scheme for airline industry regulation and a special agency, the Civil Aeronautics Board ("CAB"), to administer it.[17] Not surprisingly, the CAB emulated the I.C.C. in many of its administrative actions.

Like the I.C.C., the CAB, acting on broad grants of power from Con-

13. "Lifetime attrition protection" provides the individual worker with LPP coverage throughout work life except in cases of retirement, resignation, or discharge for cause.

14. These mergers were those of the Virginian and the Norfolk & Western (1959); the Norfolk & Western and the Nickel Plate, with the lease of the Wabash (1964); the Baltimore & Ohio, the Western Maryland, and the Chesapeake & Ohio (1967); the Great Northern, the Northern Pacific, the Chicago, Burlington, & Quincy, and the Spokane, Portland & Seattle into the Burlington Northern (1970); and the Illinois Central and the Gulf, Mobile, & Ohio into the Illinois Central Gulf System (1972).

15. Kozak, *supra* note 1, at 511. The law involved was the 3R Act, Pub. L. No. 93-236, 87 Stat. 985 (1974) (codified at 45 U.S.C. § 701 (1986)).

16. For an analysis of these rules and regulations, and their impact upon both the railroad and airline industries, see Herbert R. Northrup, *The Railway Labor Act — Time for Repeal?*, 13 Harv. J.L. & Pub. Pol'y 441 (1990).

17. Civil Aeronautics Act, ch. 601, 52 Stat. 973 (1938).

gress rather than on specific authority, imposed LPPs almost as a condition of approving mergers, acquisitions, and certain other business transactions. It did not, however, extend protection beyond five years and did not impose LPPs in a few cases where the costs were deemed so high as to negate benefits, or where losses to employees were slight or temporary. Given the high wages paid in the industry, however, the costs could be very high where LPPs were ordered.[18] Following the Airline Deregulation Act of 1978 ("ADA"),[19] the CAB ceased ordering LPPs, and since its demise, the Department of Transportation ("DOT") has failed to order LPPs in any case, although it clearly has the power to do so.

The Airline Deregulation Act[20] found Congress rejecting the standard railroad LPP, but § 43 did establish an Employee Protection Plan ("EPP") composed of two parts. Section 43(e)(2) required that the CAB (and the DOT as its successor) determine whether complaining employees had been harmed because of a "qualifying dislocation,"[21] and if so provided certain benefits. This section of the law, which expired in 1988, never resulted in the payment of benefits and is still in litigation. Additionally, § 43(d)(1) provided that employees displaced by deregulation were to be listed and given priority for industry employment until October 1988. This did result in some laid-off employees receiving jobs.[22]

The urban mass transit industry in the United States suffered massive decline from World War II to the early 1970s. Following the passage of the Urban Mass Transportation Act of 1964,[23] the industry was converted from an overwhelmingly privately owned series of enterprises to an industry in which public ownership was almost universally established. Despite huge injections of federal, state, and municipal funds for capital improvements, as well as substantial subsidy of operating costs, no major urban transit system since the passage of the 1964 Act has operated profitably.[24] One reason for this has been the existence and administration

18. For a detailed analysis of LPP experience in the airline industry, *see* Herbert R. Northrup, *Airline Labor Protective Provisions: An Economic Analysis*, 53 J. OF AIR L. & COM. 401 (1987); updated as *Labor Protection Provisions in the Airline Industry*, in NORTHRUP & MISCIMARRA, *supra* note 1, at 555.

19. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

20. *Id.*

21. The ADA defined a "qualifying dislocation" to receive benefits as either a bankruptcy or a "major contraction in employment" for which a substantial cause was the new regulatory structure provided by the ADA.

22. Because the Teamsters attempted to secure benefits similar to the EPP when trucking was deregulated, as described later, a more complete account of § 43 benefits is set forth in Appendix II.

23. Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (1964).

24. For an analysis of this situation, *see* (among many studies), Simon Rottenberg, *Protection of Employees in the Public Acquisition and Operation of Urban Mass Transit*, in NORTHRUP

by the U.S. Department of Labor of § 13(c) of the Act.[25]

The labor protection requirements involving mergers and acquisitions written in § 13(c) were not deemed significant by transit industry representatives interviewed by the author in August 1991. Such mergers and acquisitions do not occur frequently, but usually only when a public authority takes over an area's facilities and acquires a number of formerly private and/or public concerns. In such situations, it has been customary to accept all employees involved as employees of the new public employer in order to conform with § 13(c).

Urban mass transportation management is inhibited by the knowledge that any employees downgraded or dismissed will remain on the payroll for up to six years or receive very handsome severance arrangements. This fact, coupled with the fear that the U.S. Department of Labor will delay or cancel grants, or that politician-friends of organized labor will threaten managements own job security, encourages management's acceptance of the status quo. In turn, this contributes to continued deficits despite the huge public financial subsidies which characterize the industry.

In urban mass transportation, therefore, LPPs based upon railroad developments serve only to maintain both employment and costly methods of operation, rather than to compensate employees being deprived of jobs.

II. Situations in Which Trucking Workers Gained LPPs

Trucking employees have been awarded railroad-type LPPs under

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& Miscimarra, *supra* note 1, at 601. Data for the industry are found in the American Public Transit Association's Transit Fact Book, which is published annually and includes statistics and other information about the industry. In 1992, for example 57.6 % of the industry's operating revenues were received from federal, state, and local government sources. Transit Fact Book 15 (1993).

25. Section 13(c) reads as follows:

> It shall be a condition of any assistance under section 3 of this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights and benefits (including continuation of pension rights and benefits) under existing collective agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. 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 of February 3, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangement.

three conditions: when they were employed directly by a railroad and treated as railroad employees, when legislation required such payments, and when a court ordered such payments. These situations are rare, but examples of each exist.

A. Trucking Workers As Railroad Employees

The 1970 mergers that created the Burlington Northern system brought under one company the former Chicago, Burlington, & Quincy; the Great Northern; the Northern Pacific; and the Spokane, Portland, and Seattle railroads.[26] At the time of the merger, the Great Northern; the Chicago, Burlington, & Quincy; and the Northern Pacific railroads all had trucking affiliates. The different handling of these motor carrier affiliates illustrates differences in LPP eligibility of trucking personnel who are employed directly by the railroads, in contrast with those who are employed by motor carrier subsidiaries operating separate trucking businesses.

The Great Northern motor carrier operation did not operate as a separate trucking company, but rather as part of the operating department of the railroad. Moreover, the Great Northern trucking operations were limited to providing substitute freight motor carrier service for rail service when the Great Northern abandoned some of its smaller branch lines, particularly in Montana. The employees of the Great Northern trucking operations were, therefore, considered railroad employees and were covered by the Railway Labor Act and the Railroad Retirement Act. The Great Northern trucking employees were included in the I.C.C. order approving the merger and were, like other railroad employees, granted the lifetime attrition benefits that were then becoming common for major railroad mergers. On May 15, 1971, and February 15, 1972, respectively, the Burlington Northern signed agreements with the Teamsters and the International Association of Machinists, the unions representing the employees of the former Great Northern's trucking operations, providing for the merger protection agreed to by the parties and prescribed by the I.C.C.[27]

The motor carrier affiliates of the Chicago, Burlington & Quincy and the Northern Pacific, Burlington Truck Lines and Northern Pacific Transport, respectively, in contrast to that of the Great Northern, were separately operated facilities and engaged in the general motor common carrier business serving many customers. Their employees were not considered railway employees and were not covered either by the Railway

26. *See* Great N.P. and Burlington Lines - Merger, 331 I.C.C. 228, *aff'd*, United States v. United States (I.C.C.) 296 F. Supp. 853, (D. D.C. 1968); *and aff'd sub nom.*, United States v. I.C.C., 396 U.S. 491 (1970).

27. May 15, 1971 and Feb. 15, 1972 agreements on file with author.

Labor Act or the Railroad Retirement Act, but rather by the National Labor Relations Act ("NLRA") and the Social Security Act. Burlington Truck Lines was actually a major less-than-truckload ("LTL") carrier with considerable unrestricted operating authority even prior to deregulation, and was a party to the National Master Freight Agreement with the Teamsters' union. Employees of these two subsidiaries were not perceived as being eligible for LPPs, and did not receive such protection either by order of the I.C.C. or by agreement when they were merged into a new entity, BN Transport ("BNT"), which by 1980 was number eighty-six on the list of the largest 100 motor carriers.[28] The legal and historical bases for this distinction among trucking employees of railroad company motor carrier affiliates are discussed in connection with several cases reviewed below.

B. Inclusion of Penn Truck in the 3R Act

The Regional Rail Reorganization Act of 1973 ("3R Act"),[29] was designed to restructure the railroads of the Northeast following the bankruptcy of the Penn Central. The Act included extremely costly lifetime employment provisions.[30] Penn Central, merged by law with other Northeast railroads under the Conrail name, at that time owned a motor carrier subsidiary, Penn Truck. Although the employees of Penn Truck were not railroad employees; were covered by the NLRA, not the Railway Labor Act, and the Social Security Act, not the Railroad Retirement Act; and were represented by the Teamsters;[31] § 501(2) of the 3R Act artificially defined them as railroad employees and made them eligible for the lifetime attrition benefits written into the Act. As of January 31, 1981, Penn Truck employees had received $19.7 million in LPP payments, or 6.2 % of the total payout funded by the 3R Act.[32]

Penn Truck employees allegedly profited substantially as a result. Apparently, a considerable number of these laid-off employees obtained jobs with other motor carriers. They then received not only the wages paid by their new employers, but additionally, their Conrail wages less fifty percent of their earnings from the non-Conrail employment. This, in addition to other abuses inherent in the 3R Act, led to that law's modifi-

28. *The Top 100 Carriers in 1980 and Now*, Transport Topics, August 5, 1991, at 28. For a shorter list of leading carriers, *see* Table 1 *infra*.

29. 3R Act, Pub. L. No. 93-236, 87 Stat. 985 (1974) (codified at 45 U.S.C. §701 (1986)).

30. Kozak reported expenditures of $319.1 million from April, 1976 through August, 1978 as a result of this provision. See Kozak, *supra* note 1, at 519.

31. Telephone interview, William McCain, Director, Labor Relations, Conrail (July 29, 1991).

32. Kozak, *supra* note 1, at 52.

cation by the Staggers Rail Act of 1980.[33] Among such amendments was "relaxation of the prohibition on offering employees jobs in other crafts for former marine service employees and Penn Truck Line employees whose positions were permanently abolished . . . ."[34] When such modest changes failed to stem the cost of § 501(2), Congress abolished the section in the North East Rail Service Act ("NERSA"),[35] which substituted severance pay for § 501(2)'s elaborate and costly LPP provisions. This terminated the only known LPP created by legislation that specifically included employees of a railroad-owned motor carrier which operated a general common carrier business.

C. The Frisco Trucking (*Cosby*) Decision

In 1980, the I.C.C. approved the merger of the San Francisco-St. Louis Railway Company ("Frisco") into the Burlington Northern.[36] The Frisco had a small trucking subsidiary, the Frisco Transportation Company ("FTC"). In 1981, FTC ceased operation. Three years later, upon appeal in *Cosby v. I.C.C.*,[37] the Eighth Circuit determined that the employees of FTC were "railroad employees," that FTC's motor operations were "auxiliary and supplemental" to Frisco's rail operations, and that Burlington Northern and Frisco executives' representations and assurances to "railroad employees" concerning LPP coverage included FTC employees. The Court, therefore, ruled that FTC employees were entitled to LPP protection as were railroad employees involved in the merger.[38] To sum up, the Court based its decision upon the following considerations:

1. FTC's operations were generally restricted to service which was auxiliary or supplemental to the Frisco's rail service;[39]
2. FTC was intimately tied to the railroad's main transportation function;[40] and
3. There was no evidence in the record that the skills of FTC's employees

33. Staggers Rail Act of 1980, Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. § 801 (1986).

34. Daniel J. Kozak, *Employee Job and Income Protection in the Railroad Industry*, (1981) (Ph.D. Dissertation, University of Maryland), at 223. The maritime employees were those employed by the railroad primarily to handle the transfer of rail cars to New York City from New Jersey.

35. *Id.*

36. Burlington Northern Inc., — Control and Merger — St. Louis-San Francisco Ry., 360 I.C.C. 788 (1980); *aff'd sub nom.*, Missouri-Kansas-Texas R.R. v. United States, 632 F.2d 392 (5th Cir. 1980), *and cert. denied.*, 451 U.S. 1017 (1981).

37. Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984), *cert. denied,* Burlington Northern R.R. v. Cosby, 471 U.S. 1110 (1985).

38. *Id.* at 1084.

39. *Id.* at 1081.

40. *Id.*

were transferable to general motor carrier services.[41]

The *Cosby* decision placed great emphasis on statements made by high-ranking Burlington Northern officials before the I.C.C. which the court assumed constituted representations or assurances that all employees would receive LPP protection in the merger.[42] The Court, therefore, ruled that, regardless of whether they could be considered railroad employees, FTC employees were entitled to rail LPP benefits on equitable grounds, and that "it was an abuse of discretion not to grant the FTC employees the same protective conditions granted to *Frisco's other railroad employees*."[43]

Other evidence, however, demonstrates that what Burlington Northern officials meant by their statements is that *all railroad employees as traditionally and customarily defined* would receive such protection. In fact, the verified statements[44] of Louis W. Menk, Chairman of the Burlington Northern, Richard C. Grayson, Chairman of the Frisco, Michael M. Donahue, Burlington Co-Chairman of the merger unification study, and Clyde M. Illg, Assistant Vice-President and chief labor relations negotiator for the Burlington, whose responsibilities "included all of the various areas of negotiation and administration of labor agreements, including job protection," never mentioned the FTC, the BNT, or motor carrier employees in their statements, either generally, or in the sections of the statements dealing with LPPs and the estimated costs thereof.[45] In addition, Messrs. Menk, Grayson, Donahue, and Al Egbers, who was Vice-President-Labor Relations and Illg's superior, and who was responsible for reviewing and editing Illg's statement, testified during their depositions for a subsequent arbitration that the verified statements referenced above dealt exclusively with railroad employees, not motor carrier employees, and that the *Cosby* court misinterpreted the scope and intent of these statements.[46]

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41. *Id.*

42. *See id.* at 1082-84.

43. *Id.* (emphasis added).

44. "Verified statements" are notarized presentations which are submitted to the I.C.C. by the parties in lieu of direct testimony. At the hearings which follow, the authors of these statements are then subject to cross and redirect examination. Many government agencies use this procedure in order to reduce the time and expense of hearings.

45. The verified statements of Louis M. Menk, Burlington Northern Chairman, R.C. Grayson, Frisco Chairman, M.M. Donahue, Burlington Northern Vice-President, and C.M. Illg, Burlington Northern Assistant Vice-President, were acquired for this study from the Burlington Northern in their original notarized form. They are dated on various days of December 1977.

46. *See Deposition of Egbers*, BNT Arbitration, New York Dock Protection, I.C.C. Fin. Docket No. 28583, St. Paul, Mn., (Oct. 27, 1992), Tr. at 10 and 149; *Deposition of Donahue, idem.*, St. Paul, Mn., (Oct. 29, 1992), Tr. at 114 and 117; *Deposition of Menk, idem*, Carefree, Az., (Jan. 11, 1994), Tr. at 10; and *Deposition of Grayson, idem*, Carefree, Az., (Jan. 12, 1994), Tr. at 12.

It is likewise clear, as discussed below in connection with cases which are at odds with the *Cosby* decision, that the Eighth Circuit's analysis appears to run counter to the historical framework and legislative intent of the Interstate Commerce Act in including a railroad trucking operation's employees as "railroad employees." Nevertheless, the *Cosby* decision has had a profound and costly impact, as discussed *infra*, following a review of other judicial decisions.

III. Judicial and Administrative Decisions Contrary to *Cosby*

In contrast to *Cosby*, other cases have found that employees of railroad trucking subsidiaries are not "railroad employees", and that Congress did not intend for such trucking employees to be covered by railroad labor and social legislation.

A. The Missouri Pacific Case

In 1977, Texas and Pacific Motor Transport ("TexTruck"), the trucking subsidiary of the Texas and Pacific Railway Company, was merged into Missouri Pacific Truck Lines ("MoTruck"), the trucking subsidiary of the Missouri Pacific Railroad Company, after the Missouri took over Texas and Pacific Railway. In 1978, the U.S. Internal Revenue Service ("IRS") ruled that the merged motor carrier was covered by the Railroad Retirement Act, and sued to recover the difference in taxes between social security taxes and the higher railroad retirement taxes, plus interest and penalties. This was the test case involving the trucking subsidiaries of all major railroads that had such operations, including BNT. On appeal, the U.S. Court of Claims found for the railroad, and this decision was affirmed by the Court of Appeals, Federal Circuit.[47]

This case is significant because the Court of Claims opinion reviewed the basic railroad labor and social laws, the Railway Labor Act as amended in 1934, the Railroad Retirement Tax Act, the Railroad Unemployment Insurance Act, the Federal Employers Liability Act, and the pertinent sections of the Interstate Commerce Act.[48] It noted that employees of the trucking subsidiaries were not subject to railroad legislation, for example, being covered instead by the NLRA, the Social Security Act, and state unemployment and workers' compensation legislation, and were unionized on an industrial, not craft basis, by the Teamsters, a non-railroad union.[49] Both trucking subsidiaries serviced companies other than their rail owners.

47. Missouri P. Truck Lines, Inc. v. United States, 3 Cl. Ct. 14 (1983); *aff'd*, 736 F.2d 706 (Fed. Cir. 1984).

48. *Id.* at 16.

49. *Id.* at 17.

Utilizing such information, and the legislative history of the Railroad Retirement Act, the claims and appellate courts determined that the trucking subsidiaries' employees were not railroad employees. Consequently, the IRS withdrew the deficiency assessments which it had levied against railroad-owned trucking carriers.

B. Kansas City Southern Case

A second and key case finding that employees of railroad subsidiary-owned motor carriers are not "railroad employees" arose from the sale of the Southern Pacific Railroad to the Rio Grande after the I.C.C. rejected the proposed merger of the Sante Fe and the Southern Pacific. The Kansas City Southern filed objections, but the I.C.C. approved the merger. The I.C.C. also rejected the request of the Teamsters' union to impose LPPs on Southern Pacific's motor carrier subsidiaries, Pacific Motor Carrier Trucking and Pacific Motor Transport Company.[50] The Commission stated:

> The statute, formerly section 5(2) of the Interstate Commerce Act, required only that the interests of *railroad* employees be protected. The 1978 recodification of the Act, while eliminating the specific reference to railroad employees . . . may not be read to change substantively the law it replaced.[51]

The I.C.C. declined also to impose LPP conditions for the motor carrier employees by utilizing its discretionary powers pursuant to § 11344 of the Interstate Commerce Act, which permits the I.C.C. to order LPPs for "other" (non-railroad) employees. The I.C.C. decision noted that the Rio Grande did not contemplate any changes in the motor carrier's operations. The Teamsters' union then intervened in the appeal proceeding brought by the Kansas City Southern in the Fifth Circuit, requesting that LPPs be provided for the motor carrier employees.[52]

The Fifth Circuit carefully reviewed the issue of LPPs for trucking subsidiaries. It supported the I.C.C.'s interpretation of § 11347 replacing § 5(2)(f) as a recodification rather than a substantive change, stating that § 11347 did "not mandate labor protective conditions for employees of motor carrier subsidiaries of a merging railroad."[53] This was at odds with *Cosby*, wherein it was stated:

> If Congress meant for section 11347 to apply only to employees who worked for rail carriers and not all the employees affected by the merger, the clear-

50. Rio Grande Industries — Control — Southern Pacific Transportation Company, 4 I.C.C.2d 834 (1988).

51. *Id.*

52. Kansas City Southern Industries, Inc. v. Interstate Commerce Commission, 902 F.2d 423 (5th Cir. 1990).

53. *Id.* at 438.

> est way to express this restriction would have been to leave the relevant language in section 5(2)(f) as it was.[54]

The Fifth Circuit, however, noted that this segment of the *Cosby* decision was dictum, as was the following statement of the Eighth Circuit in the *Cosby* case: "We need not resolve this question of interpretation because we believe, in the circumstances of this case, that the [motor carrier subsidiary's] employees are 'railroad employees' within the meaning of the Act."[55] The Fifth Circuit, therefore, sustained the I.C.C.'s ruling as "sufficiently rational" to stand.[56]

C. Union Pacific-Missouri Pacific Merger

A third set of cases affirming that trucking subsidiary employees are not railroad employees, and in this case are not covered by the I.C.C.'s requirement to grant LPP coverage, commenced in 1982 when the I.C.C. approved the Union Pacific's takeover of the Missouri Pacific, and this decision was affirmed by the courts.[57] Employees of the motor carrier subsidiaries of both railroads then persuaded the I.C.C. twice to reopen the case on the grounds that they did not receive the LPP protection mandated by the I.C.C.'s approval order, and cited the *Cosby* case in support of their position.[58]

In the proceeding that followed, the Union Pacific declared that a lost contract, not a merger, had caused layoffs, and that in any case, the motor carrier employees were not covered by the LPP order. The railroad also emphasized that the statement of the court in the *Cosby* case to the effect that employees of trucking subsidiaries of railroads were automatically entitled to LPP coverage was only dictum and had been rejected by the I.C.C. and the Fifth Circuit.

The I.C.C. ruled that "the labor protective conditions imposed in . . . [its previous merger approval] were not for the benefit of . . . [trucking employees]."[59] It also saw "no basis for imposing such protection now."[60] It found that employees of the motor carrier subsidiaries were not railroad employees, and that there was no mandatory protection in the Inter-

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54. *Cosby*, 741 F.2d at 1080.

55. *Kansas City S.R.R.*, 902 F.2d at 437 (quoting Cosby, 741 F.2d at 1080).

56. *Kansas City S.R.R.*, 902 F.2d at 438.

57. Union Pacific Corp., Pacific Rail System Inc., and Union P.R.R. — Control — Missouri Pacific Corp., and Missouri P.R.R. 366 I.C.C. 459 (1982), *aff'd sub nom.* Southern P. Transp. Co. v. I.C.C., 736 F.2d 708 (D.C. Cir. 1984), *and cert. denied*, 469 U.S. 1208 (1985).

58. McPherson v. Union Pacific Motor Freight Co., I.C.C. Fin. Docket No. 30000, Sub-No. 45, 1987 I.C.C. LEXIS 372 (April 3, 1987). The I.C.C. later reopened the proceeding, and reaffirmed its opinion and order (Order of April 12, 1989).

59. *Id.* at *8.

60. *Id.*

state Commerce Act for such non-rail employees.[61] The I.C.C. did note that it had discretionary authority to impose LPPs in such cases pursuant to § 11344, but declined to do so in part because there had been no request therefor at the earlier merger hearings.[62]

Eight of the affected trucking employees then appealed to the Tenth Circuit, which affirmed the I.C.C.'s ruling.[63] The court noted that § 11347 of the Interstate Commerce Act, as amended, entitles "employees who are affected by" an approved merger or consolidation to LPPs, but does not define employees as did its predecessor clause, § 5(2)(f), which used the phrase "railroad employees."[64] When § 5(2)(f) was repealed in 1978 and § 11347 substituted, however, the committee reports accompanying the amendments stated that the Act was being recodified for "clarity," and that changes in substance were not intended.[65]

The Tenth Circuit agreed that the Eighth Circuit in *Cosby* had ruled that motor carrier subsidiary employees were covered by § 11347, but also that the Fifth Circuit in *Kansas City Southern* had ruled that Congress's intent was clearly to the contrary.[66] Moreover, the Tenth Circuit seemingly identified what it perceived to be a flaw in the *Cosby* analysis. In *Chevron U.S.A. v. National Resources Defense Council*,[67] the U.S. Supreme Court ruled that when a court is reviewing an agency's construction of a statute that it administers, the court must conduct a specific two-step analysis, but that in *Cosby* the *Chevron* analysis was not done.[68]

The Tenth Circuit, which in an earlier opinion had ruled that the

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61. *Id.* *9-10.

62. *Id.* at *11.

63. Rives v. I.C.C., 934 F.2d 1171 (10th Cir. 1991).

64. *Id.* at 1174.

65. *Id.* In its opinion, the Tenth Circuit quoted the following excerpt from the House of Representatives committee report accompanying the bill to recodify the Interstate Commerce Act:

> *Substantive change not intended* — Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantially unchanged.

Rives, 934 F.2d at 1175, n.3, (quoting H.R. Rep. No 1395, 95th Cong. 2nd Sess., at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018.

66. *Id.* at 1174.

67. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

68. Bound by the *Chevron* approach, the Tenth Circuit found:

> The language in former § 5(2)(f) mandated protection only for "railroad employees" and the legislative reports accompanying § 11347 state that the recodification intended no substantive changes in existing law. Restricting § 11437's mandatory projections to rail carrier employees provides certainty and a logical limit to the scope of employees protected by §11347. Also, a reading as expansive as that petitioners request would

recodification did not change the meaning of the Act,[69] therefore, came down squarely on the side of the Fifth Circuit, finding that the intent of Congress was not unambiguous, and that the I.C.C.'s interpretation had been a "permissible and rational construction of the statute."[70]

Claiming a conflict between the rulings of this case and that of the Eighth Circuit in the *Cosby* one, the plaintiffs in the *Rives* case petitioned the Supreme Court to grant certiorari, which was denied.[71]

D. Union Pacific-Overnite Case

The Overnite Transportation Company, headquartered in Richmond, Virginia, is one of the ten largest LTL trucking concerns, and has been for many years the largest nonunion LTL company.[72] It was purchased by the Union Pacific, and the acquisition was approved by the I.C.C. in 1987.[73] The I.C.C. imposed the standard LPP conditions for Union Pacific railroad employees but no other labor conditions. The United Transportation Union ("UTU") intervened, and requested that LPPs be imposed for Overnite's employees as a matter of public interest. The I.C.C. commented: "It is well settled that, absent special circumstances not present here, section 11347 prescribes labor protection only for employees of railroads participating in the involved transaction."

IV. The Case for LPPs from BN Transport's Sale and Bankruptcy

Deregulation, recession, and a costly purchase of another carrier[74] caused BNT, the Burlington Northern's motor carrier, to suffer substan-

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render superfluous the I.C.C.'s use of discretionary authority of 49 U.S.C. § 11344 to give labor protection for *other* employees affected by a consolidation.

Rives, 934 F.2d at 1174 (footnote omitted).

69. Atchison, Topeka & Sante Fe Ry. v. Lennen, 732 F.2d 1495 (10th Cir. 1981). Here the Court held that recodification of the Interstate Commerce Act in 1978 "was not intended to change the law," and that any substantive conflicts between the original language and the new language must be resolved "in favor of the original language." *Id.* at 1497.

70. *Id.* at 1175.

71. Rives v. I.C.C., 112 S.Ct. 1559 (1992).

72. Recently, the nonunion status of Overnite has been dented as the Teamsters union ("IBT") has won National Labor Relations Board elections at five Overnite service centers. *See Overnite Workers Vote for IBT Representation*, Daily Lab. Rep. (BNA), No. 245, at A-13 (Dec. 23, 1994); and Overnight workers in Minneapolis and Sacramento Vote for IBT representation, *id.*, No. 22, at A-8 (Feb. 2, 1995).

73. Union Pacific Corp. and BTMC Control — Overnite Transportation Co., 4 I.C.C.2d 36 (1987).

74. BNT purchased a regional carrier at an inflated price just before the Motor Carrier Deregulation Act of 1980 was passed, which would have permitted it to operate in these areas without the purchase.

tial operating losses beginning in 1982.[75] In 1984, Burlington Northern officials concluded that BNT's return to profitability was unlikely because of poor market share and high fixed overhead costs. Moreover, the IRS was then attempting to assess BNT and all other railroad-owned motor carriers with Railroad Retirement Act taxes in place of the Social Security Act taxes which these motor carriers were paying. Since the former taxes were substantially higher, this proposed assessment would have subjected BNT to a further competitive disadvantage against non-railroad motor carriers if the IRS had been successful in subsequent litigation,[76] and would have increased BNT's losses, then averaging close to $800,000 per month.[77]

Also in 1984, BNT's management was approached by a representative of Avery Eliscu and Leonard Lewensohn — whose company had previously purchased Sante Fe Trails Transport ("SFTT"), the then largest railroad-owned motor carrier — expressing an interest in purchasing BNT and combining it with SFTT. In August 1984, this sale was consummated after BNT management assessed this purchase offer against two others and the costs of simply shutting down BNT.[78]

Unfortunately, the combined SFTT-BNT operation continued to suffer losses. Within one year after the purchase, it was forced to file for bankruptcy and was permanently shut down. This, in turn, led to rulings by the I.C.C. in 1987 and 1988, which held, based upon the *Cosby* decision, that BNT employees were within a generic class potentially eligible for LPPs if it were found that the shutdown of BNT was caused by the merger of the Burlington Northern and the St. Louis-San Francisco ("Frisco") railroad.[79] The I.C.C. remanded the issues to arbitration for determination as to causation, if any, and for determination of factual issues, stating in its decision:

> We have not found that any particular employee was adversely affected, or that any adverse effect that might be alleged was a result of a "transaction" directly related to the merger and control authorized in this proceeding. It is not necessary that an employee be adversely affected to be included in a class of protected employees. Inclusion in a class does not lead to entitle-

75. The author has reviewed the operating statements of BNT and can attest to the sizable losses which were being incurred during this period.

76. As described *supra* in relation to the *Missouri Pacific Truck Lines* case, the IRS was unsuccessful in this endeavor.

77. This loss of approximately $800,000 per month was at the time of the sale, in the summer of 1984. *See* the letter of R.F. Beagle to Withdrawal Liability Department, Central States, Southeast and Southwest Areas Pension Fund, May 26, 1988.

78. *See id.* for an explanation of the rationale for selling BNT to SFTT controlled by Eliscu and Lewensohn.

79. Burlington Northern Inc. — Control and Merger — St. Louis-San Francisco Ry. I.C.C. Fin. Docket No. 28583 (Sub-No. 1) (October 28, 1987), (June 10, 1988).

> ment to protection until an employee has been adversely affected, and then only if the adverse effect is a result of a "transaction" directly related to the merger, control, or other authorization.[80]

Since the I.C.C. did not find that any particular employee was adversely affected, or that any adverse effect was the result of a "transaction" which was directly related to the Frisco-Burlington Northern merger, the arbitrator was requested to determine among other matters, first, whether any BNT employee-claimant was a railroad or a motor carrier employee, and second, whether said claimant was adversely affected by a covered transaction. The arbitrator was also to decide whether the claims were timely, and whether the claimants were in fact affected by other economic conditions, such as the business cycle or the dislocation of the industry as a result of deregulation, rather than by the Frisco-Burlington Northern merger. Thus, in order to receive benefits each claimant would be required to show "causation and other issues relating to the merits of individual claims."[81]

Because the liability of Burlington Northern Railroad could have been as much as $250 million if the claims put forth had been sustained, the arbitration case was taken very seriously. Depositions were requested of more than 300 claimants over a two-year period. Those that declined to answer interrogatories were dropped from the case by the arbitrator, as were management employees above the rank of "subordinate officials" (foremen and lower managers), who have not ordinarily been considered eligible for LPPs,[82] and others, such as those who were not employed at key eligibility dates.

The net effect was to reduce the maximum liability to approximately $80 million, still a sizable figure, and at the same time greatly discourage the plaintiffs, who were not supported by a union or other organization. Additionally, the carrier was able to provide substantial evidence that the failure of BNT was a consequence of deregulation and the severe recession of the early 1980s, as discussed *infra*. As a result, settlement was

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80. *Id.* (June 10, 1988), at 3. The merger referenced in the above quotation refers to the Frisco-Burlington Northern merger, and particularly, the mergers of the trucking subsidiaries approved by the I.C.C. in 1980.

81. Burlington Northern Inc. — Control and Merger — St. Louis-San Francisco Ry., I.C.C. Fin. Docket No. 28583 (June 10, 1988), at 3.

82. There are numerous arbitrations on this issue. A key one is by Arbitrator Jacob Seidenberg, Matter of Arbitration between B.J. Maeser, T.P. Murphy, E.M. Sengheiser, and K.W. Shupp and the Union Pacific Railroad Co., Missouri Pacific Railroad Co., Pursuant to New York Dock Conditions Imposed by the Interstate Commerce Commission in I.C.C. Fin. Docket No. 30,000 (Dec, 17, 1987). The only exceptions found were when the carrier covered management employees voluntarily, which was done in the merger that created the Burlington Northern Railroad, or when specific legislation covered them, as it did in the Milwaukee Railroad Restructuring Act of 1979, § 3(4).

achieved in the fall of 1994, on terms that were very favorable for the company.[83] The I.C.C. approved the settlement and dismissed the case "with prejudice" on December 5, 1994.[84] Whether this case closes the use of the *Cosby* case as precedent for other claims remains to be seen. Certainly, *Cosby* has found no following in other federal circuit courts.

V. Deregulation and LPP Attempts

The passage of the Motor Carrier Act of 1980,[85] which deregulated the over-the-road trucking industry, drastically altered the industry structure and its unionization.

A. Industry Structure and Unionization

Common carriers of a general goods type are divided into two segments, less-than-truckload ("LTL") and truckload ("TL"), which underwent different structural changes.

LTL companies consolidate shipments from various sources into a truckload and carry them to the same or nearby destinations, or to several destinations where they are unloaded and re-loaded at terminals for their respective destinations. The LTL business requires substantial investment for terminals; local trucking facilities for delivery; computer facilities for scheduling, order taking, billing, etc.; telecommunications facilities; as well as for large trucking equipment. As a result, entry into this branch of trucking operations is limited by the requirement for extensive investment.

The number of LTL motor carriers has actually declined since the passage of the Motor Carrier Act of 1980, which deregulated the industry. Between 1980 and 1991, a study by an industry magazine found that forty-three of the 100 largest motor carriers closed, or are otherwise no longer in business. Another fourteen survived by merging, by being taken over, or by selling out to another carrier; and two remained in business but ceased LTL operations. All but ten of the carriers that closed, merged, or dropped LTL business were LTL operations.[86]

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83. The exact terms of the settlement have not been divulged, but conversations with various parties indicate that it involved payments to approximately 570 claiments by the carrier totaling about one million dollars, and an additional amount of about $700,000 for costs and attorneys' fees. Assuming that these figures are reasonably accurate, the settlement was, therefore, less than one cent on the dollar amount claimed.

84. Burlington Northern, Inc, — Control and Merger — St. Louis-San Francisco Railway Co., I.C.C. Fin. Docket No. 28583 (Sub-No. 26) (Dec. 5, 1994).

85. Pub. L. No. 96-296.

86. These data are found in Transport Topics, Aug. 5, 1991, at 28.

Convenient summaries of the motor carrier industry's structure and the impact of deregulation thereon are found in Nicholas A. Glaskowsky, Jr., Effects of Deregulation on Motor Carriers (2d ed. 1990), a study that basically opposes deregulation, and in Clifford

A similar study issued in 1993 by Trucking Management, Inc., which represents several of the largest LTL unionized carriers, is partially summarized in Table 1. This study reported that:

> In the 1970s, around 200 carriers a year closed their doors; from 1980-89, over 11,500 failed. There were 2000 closings in 1991 alone.
>
> In 1979, 65 of the top 100 carriers were identified as primarily LTL. Of those 65, more than two-thirds had ceased operations by 1991. In fact . . . only eight LTL carriers of the top 50 trucking companies from 1965 have survived deregulation . . . All the companies that failed were unionized carriers . . . .[87]

These dramatic results have been caused by the elimination of barriers to entry; greater price competition; elimination of restrictions on where and in what service carriers may operate; mergers of motor carriers; bankruptcies of weaker ones; expansion of some of the larger, better managed concerns; and transfer of some former LTL business to TL carriers, or to United Parcel Service's expanded small package operation.

The TL sector of the motor carrier industry is quite different in terms of investment requirements. For the small entrepreneur, there is no need for terminals, local delivery equipment, or elaborate computer and telecommunications facilities. One can go into the TL business by leasing one or more rigs, taking business to deliver a truckload of goods from destination A to destination B, and hoping to have a load for the return trip. This easier entry in the TL sector compared to the LTL has resulted in a substantial increase in the number of carriers, while industry concentration has increased in the LTL sector. Meanwhile, as the percentage of trucking companies with annual revenues under one million dollars has risen, net load factors and profit margins have declined, and high rates of turnover for small companies, as well as numerous bankruptcies, have occurred.[88]

Because of the large number of small carriers and the lack of terminals as focal points of operation, the TL sector, unlike the LTL one, is predominately nonunion. Deregulation's elimination of barriers to entry and other changes had a profound impact on unionization. As Figure 1 shows, "[by] 1991, union employment in trucking was 40 percent below its

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WINSTON, ET. AL., THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION, (1990), a work that supports deregulation. *See also*, Nancy L. Rose, *Labor Rent Sharing and Regulation: Evidence from the Trucking Industry*, 95 J. POL. ECON. 1146 (1987); and Barry T. Hirsch, *Trucking Regulation, Unionization and Labor Earnings: 1973-85*, 23 J. HUMAN RESOURCES 296 (1988).

87. THE STATE OF THE LTL TRUCKING SECTOR 10 (1993).

88. Glaskowsky, *supra* note 86, at Chapter 6. It should be noted that the largest and most successful TL carriers also invest heavily in the latest computer, software, and telecommunication equipment in order to provide rapid, reliable service. For an account of how a leading TL carrier handles just-in-time pick-up and delivery for large TL customers, *see* Myron Magnet, *Meet the New Revolutionaries*, 125 FORTUNE, February 24, 1993, at 12.

TABLE 1
MOTOR CARRIERS THAT REMAIN FROM THE TOP 50 IN 1965

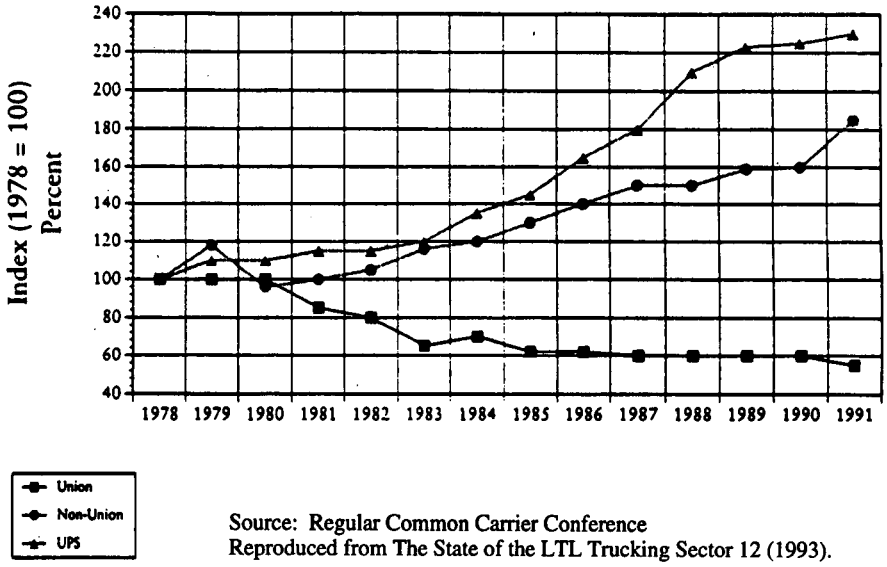
Rank	1965	1993
1	United Parcel Service	United Parcel Service
2	Consolidated Freightways	Consolidated Freightways
3	Roadway Express	Roadway Express
4	Associated Transport	
5	Pacific Intermtn. Express	
6	McLean Trucking Co.	
7	Interstate Motor Freight	
8	Spector Freight System	
9	Denver Chicago Trucking Co.	
10	Pacific Motor Trucking	
11	Harris Freight Lines	
12	Transamerican Freight Lines	
13	Yellow Transit Freight	Yellow Transit Freight
14	Gateway Transportation	
15	T.I.M.E. Freight	
16	Transcon Line	
17	Eastern Express	
18	Anchor Motor Freight	
19	Ryder Truck Lines	
20	Garrett Freightline (ANR)	
21	Western Gillette, Inc.	
22	Associated Truck Lines	
23	IML	
24	Norwalk Truck Lines	
25	Red Ball Motor Freight	
26	Navajo Freight Lines	
27	Jones Motor Co.	
28	Wilson Freight Lines	
29	United Buckingham Freight	
30	Brach Motor Express	
31	Kramer-Consol. Frt.	
32	Illinois Calif. Express (ICX)	
33	Watson-Wilson Trans. Sys.	
34	Hemingway Transport	
35	Overnite Transportation	Overnite Transportation
36	Strickland Transportation	
37	Cooper-Jarrett	
38	Carolina Freight Carriers	Carolina Freight Carriers
39	Gordón Transport	
40	Midwest Emery Freight Sys.	
41	Akers Motor Lines	
42	Terminal Transport	
43	All States Freight	
44	Johnson Motor Lines	
45	East Texas Motor Lines	
46	Mason and Dixon Lines	
47	Leeway Motor Freight	
48	Ringsby Truck Lines	
49	Arkansas Best Freight Sys.	SBF Freight System
50	Pilot Freight Carriers	

* Auto Transport carrier, not an LTL carrier
Source: Traffic World
Reproduced from The State of the LTL Trucking Sector 11 (1993).

FIGURE 1

Union Decline in Trucking 1978-1991

Number of Employees



Source: Regular Common Carrier Conference
Reproduced from The State of the LTL Trucking Sector 12 (1993).

1978 level, while non-union employment grew over 80 percent."[89] In round numbers, this meant a loss to the Teamsters of as many as 200,000 dues-paying members.

B. ATTEMPTS TO GAIN LPPS UNDER DEREGULATION

The Teamsters lobbied strenuously to have LPPs, or at least protection similar to what was afforded to airline employees in that industry's deregulation law, included in the Motor Carrier Act of 1980, but did not succeed. The 1980 Report of the House of Representatives Committee on Public Works and Transportation dealing with H.R. 6418, which became the 1980 Act,[90] did examine the LPP issue. It stated that the Committee had considered that the legislation would cause loss of jobs, and that this contingency "was dealt with by the creation of a list of available job openings to be supplied by regulated carriers to the Department of Labor."[91]

89. THE STATE OF THE LTL TRUCKING SECTOR 12 (1993).

90. HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, H.R. REP. NO. 1069, 96th Cong., 2nd Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 1980 WL 13094 (Leg. Hist.).

91. *Id.* at 4.

The Report also stated that it was the Committee's intent "to conduct oversight hearings to ascertain the true impact of this bill on industry employment and what action, if appropriate, should be taken."[92] Further, the Committee stated that such oversight would be part of annual hearings.[93]

In further reference to the question of LPPs, the Committee elaborated on § 35 of the proposed Act which directed the Secretary of Labor:

> to publish comprehensive lists of jobs available withregulated carriers and to assist persons previously employed by a regulated carrier to find other employment. It is not the intent of section 35 that any motor carrier be required to hire employees from such lists or that motor carriers be required to refrain from immediately filling any openings. Specifically, no motor carrier shall be required to refrain from filling any openings until such openings are published on the list.[94]

The Committee was also requested to amend the bill to provide labor protection for employees of the trucking industry who might lose their jobs as a result of this legislation. Labor protection provisions have been included in the Airline Deregulation and other acts of Congress according to dislocated employees first hire rights and assistance payments. The Committee elected not to include such provisions at this time.[95]

When H.R. 6418 was debated on the House floor, an amendment was introduced to provide monthly assistance payments to displaced or laid-off employees similar to those provided for (but not as yet ever paid) under the Employee Protection Plan set forth in the Airline Deregulation Act.[96] The proposed amendment was defeated.[97]

Attempts of the Teamsters' union officials to secure the passage of LPP legislation in subsequent years also failed despite testimony at oversight hearings of the unemployment of members of the union.[98] The union's claims that LPPs were needed were offset by the then Undersecretary of Labor, who presented data showing that much of the unemployment was attributable to the severe recession of the early 1980s rather

92. *Id.*

93. *Id.*, at 4 and 11.

94. *Id.* at 47.

95. *Id.* at 47.

96. *See* Appendix II for a discussion of the provision of the Airline Deregulation Act pertaining to employee protection.

97. 126 CONG. REC. H 15637 (daily ed. June 19, 1980).

98. *See, e.g., Oversight of the Motor Carrier Act of 1980, Hearings before the Subcommittee on Surface Transportation*, 97th Cong., 1st Sess. 1090 (1981) (Testimony of R.V. Durham, Director, Health and Safety, International Brotherhood of Teamsters); and *Oversight of the Motor Carrier Act of 1980, Hearings before the Subcommittee on Surface Transportation*, 98th Cong., 1st Sess. 9825, (1983) (Testimony of Jackie Presser, President, International Brotherhood of Teamsters).

than to deregulation, and that the unemployment data presented by the Teamster officials pertained only to unionized employees, but that increased employment of nonunion employees offset some of the union members' unemployment.[99]

It is thus clear that any type of LPP was, and continues to be, rejected as a means of mitigating the impact of motor carrier deregulation. Moreover, the Department of Labor experience, as testified to by the Undersecretary, also showed that the requirement to maintain a list of available unemployed trucking employees and available jobs in that industry was of little consequence. The Department kept such a register through the Employment Service, which listed the openings and applicants in its more than 2000 local offices. The actual volume of job orders and applicants both proved quite low. The Undersecretary attributed the slight utilization of this service to the fact that unemployed union members sought jobs at Teamster hiring halls.[100]

It is also probable that laid-off employees of large unionized LTL firms would not be very interested in working either as owner operators or for small, usually nonunion TL concerns, which, as noted, were proliferating rapidly during this period, and which were probably equally uninterested in employing Teamster members.[101]

VI. The Content of Collective Agreements

A search of Teamster agreements in over-the-road trucking found no railroad-type LPPs. The contracts examined and listed below covered periods from 1985 to 1998.

National Master Freight Agreement
Carolina Freight Agreement
Central States Council
Diamond Transportation
Distribution Trucking
Food Employers of California
Food Haulers of New Jersey
Gateway Freightline (Kroger)
Illinois Trucking

99. *Oversight: Motor Carrier Act of 1980, Hearings before the Subcommittee on Surface Transportation*, 97th Cong., 2nd Sess. 10 (1982) (Testimony of Malcolm R. Lovell, Jr., Undersecretary of Labor).

100. *Id.*

101. During the late 1980s when employment levels were high, there was some concern about a shortage of truck drivers, but this was not so much based upon a market lack of qualified personnel as a failure of the industry to attract personnel when in competition with other industries. *See, e.g.*, Stephen A. Lemay & G. Stephen Taylor, *Truck Driver Recruitment: Some Workable Strategies*, 28 Transp. J. 15 (1988); and R. Neil Southern, James P. Rakowski & Lynn R. Gordon, *Motor Carrier Road Driver Recruitment in a Time of Shortage*, 28 Transp. J. 42 (1989).

Maryland—D.C. Over-the-Road
Schneider Transport
United Parcel Service
Southern Conference of Teamsters Rail-Truck Agreement

A. National Master Freight Agreements

The National Master Freight Agreement includes as participants several of the largest LTL carriers, as well as carriers in other trucking branches; other agreements mimic much of its content. The contract for the period April 1, 1991-March 31, 1994, provided that in case of a merger, consolidation, or similar transaction, seniority of the employees involved shall be negotiated by the employer and the affected local union. A general layoff section provides that laid-off employees be given job preference in their area for up to three years. Other provisions provide expanded seniority rights for employees laid off because of terminal closings, partial closings, or similar events. Where employees must move to hold a position, moving expenses are paid.

This National Freight Agreement did not provide for severance pay, but some Teamster agreements, for example, Gateway Freightline (Kroger), have included such provisions. As already emphasized, however, there were no provisions which provided for continuation of pay to laid-off persons, or to personnel demoted or downgraded as a result of mergers, consolidations, abandonments, or any similar cause for which LPPs are provided under the railroad system.

The 1994-98 agreement, signed after a strike, provided for an expansion of the right of motor carriers to use additional railroad intermodal service in place of motor carriers for long distance transport. To protect drivers who might be displaced, the contract provides that they shall be offered work at other domiciles, and may not be laid off during the term of the contract if they accept such assignment. All bid drivers (those with sufficient seniority to have regular runs) are protected during each dispatch day and all extra board drivers (those who fill in as needed until they acquire sufficient seniority to gain regular runs) during each dispatch week at all affected domiciles. As in other transfers, moving expenses are paid.

B. The Rail Truck Agreement

Of special interest for this study are the "Southern Conference of Teamsters Master Rail-Truck Freight Agreement for the Southwest Area and Supplements & Riders Thereto Covering Road, City, Garage, and Clerical Employees for the Period of April 1, 1988 Through March 31, 1991," and the renewal thereof, 1991-1994. Among the parties to these

agreements with the Teamsters' union for 1988-1991 were Southern Pacific Motor Trucking Company; Missouri Pacific Truck Lines; Kansas City Southern Transport Company, Inc.; Louisiana, Arkansas, and Texas Transportation Company; and Katy Transportation Company. In the period between 1991 and 1994, after a rail merger, Union Pacific Truck Lines replaced the latter two. All the trucking companies are railroad-owned motor transport concerns.

The agreements contain no severance pay provision except a requirement that full pay to date of termination be paid. They do provide that company successors and assigns be responsible for maintaining the agreement, and that employee and family transportation and moving expenses be paid in cases of transfers at the direction of the company or of employees "exercising seniority rights to new positions or vacancies necessitating changes of residence." There is, however, no other provision that could possibly be termed a labor protection provision as the term is utilized in railroad parlance.

VII. The Rationale for LPPs

Although it was not expressed, it is likely that the Teamsters' union failed to win LPPs except in a few exceptional cases because it could not meet the rationale underlying them. It seems clear that trucking lacked the railroads' historic differentiation from other industries, which has been brought to airlines and urban mass transit. Thus, the arguments justifying these very rich benefits have been found inapplicable to trucking even though, as the discussion which follows demonstrates, such rationale is highly debatable for any of the transportation industries.

A. The Rationale for Railroad LPPs

The rationale of LPPs for railroad workers is that they have an unique skill which is not utilized in other industries. It is further maintained that when a railroad ceases operations, such as when a merger between competing railroads occurs, no other avenues of employment are available for displaced railway personnel. Moreover, since the railroads have suffered declining employment for over seventy-five years, opportunities for railroad workers outside the workers' domiciles are very slim.[102] Even if job opportunities existed, the displaced workers would be required to begin any new railroad employment at the lowest job in the craft because the rigid seniority system in the industry is senior-

102. Employment in the railroad industry peaked at approximately two million in 1920, then declined by one-half in the early 1930s. It rose to 1.4 million during World War II, and has since dropped to about 235,000. For data, *see Transportation in America* (ENO Transportation Foundation, Inc., 12th ed. 1994), at 24.

ity district specific. Thus, it is argued that when railroad workers are laid off permanently, or for long periods, ordinary unemployment compensation or severance pay arrangements are insufficient for workers' needs. It is further contended that since government regulates numerous phases of railroad industry behavior and operations, it should also regulate employee relations to ensure that employees are properly treated.

This rationale was developed during the 1920s and continues to permeate the arguments of railroad unions in their quests for LPPs. It is superimposed on the general theory of railway labor relations which have always been based upon a public policy different from that established for other industrial workers, except for airlines, which were cast into the railroad mold by legislation and administrative action during the 1930s and 1940s.

The reasons for the different treatment of railroad workers in nearly all aspects of labor and social legislation seem to have been, in addition to this alleged uniqueness of work: first, that the railroads by the latter part of the nineteenth century were the most significant means of transporting goods, materials, and people over long distances, and vital to the commerce of the country; second, that regulation of the railroads was found constitutional under the interstate commerce clause and, therefore, unlike manufacturing industry, subject to early congressional regulation; and third, that at the turn of the century, the railroad operating crafts had gained power and influence and were able to affect political decisions. When government takeover of the railroads during World War I encouraged the unionization of the non-operating crafts, union power and influence were greatly enhanced. During the 1930s, railroad employment, even though cut by one-half since 1920, stood at one million, and the unions had members in every congressional district.

If one examines the jobs of railroad workers, the alleged "uniqueness" appears to be confined largely to engineers and conductors. Signalmen have training in electrical and electronic applications, which surely could be used in other industries. All clerks and office personnel could undoubtedly qualify with minimum training for jobs in other industries. Skilled mechanics in the shops should have little difficulty obtaining positions in many metal industries. Railway carmen do less skilled, possibly unique work, but they could certainly qualify for work in other industries with minimum training. Most maintenance of way workers are laborers or equipment operators. The latter could easily be trained in road construction or other heavy equipment operation.

Insofar as the absence of jobs in the same industry and location is utilized as a rationale to support LPPS, the same thinking could be applied to numerous other industries, such as steel mills, which have experienced tremendous cutbacks; paper mills; and many plants located in one

industry towns. Moreover, given that the railroads emphasize careful selection of operating employees, it is difficult to believe that these employees, if laid off, would not qualify after some retraining for jobs in other industries, in many of which are also found unique jobs.

The arguments for LPPs in the railroad industry thus rest largely on grounds that are not defensible in terms of the "uniqueness" of the jobs or their location. The payment of generous benefits for five or six years, in some cases even for life, to railroad workers laid off because of mergers or consolidations, in fact, results in special privileges to these workers, significant costs to carriers, and a financial burden to the public.

B. Rationale for Airline LPPs

In the airlines, the really unique jobs are those of the pilots. The remainder of the jobs may have some unique aspects, but the training, work, and experience are valuable for employment in other industries. For example, flight attendants' experience in interacting and serving people, reservation clerks' work with computers and data processing, and mechanics' training on complicated equipment give them excellent credentials for other employment. Selection of pilots is very carefully done, and a college education is generally required. The compensation is among the most generous in industry. Special protective measures over and above those accorded employees generally under these circumstances seem questionable public policy.[103]

C. Rationale for Urban Mass Transit LPPs

The primary rationale to provide labor protective provisions to employees of urban mass transit systems was originally that the transfer of these systems to public ownership would threaten unionism and collective bargaining and, therefore, the employment terms and conditions of the employees involved. In 1964, collective bargaining in the public services was relatively rare and weak. Today, however, public employment is much more highly unionized than is the private sector. In 1994 only 10.9% of the private sector labor force was unionized, as compared with 37.8% of public employees. That is more than three times the comparable private employee ratio. That is more than three times the comparable private employee ratio. Clearly, union protection such as that provided by § 13(c) is difficult to justify as necessary for public employees today.[104]

103. *See* Northrup, *supra* note 18, for an analysis of the prodigious cost of paying LPPs to airline employees.

104. Data for union membership are published each year by the U.S. Department of Labor, Bureau of Labor Statistics, in the Bureau's journal, Employment and Earnings, January or February issue.

A second rationale for the protective provisions of § 13(c) relates, as in airlines and railroads, to the alleged special characteristics of the jobs involved. In 1989, 173,029, or 60.6 % of total transit employment, were motor bus operators. "Successful performance in that occupation requires motor vehicle operating skill, a calm and courteous demeanor, good moral character, and capacity to read and to tell time. These are skills commonly possessed by the country's adult populations."[105]

Rail operating workers, office and clerical staff, and maintenance employees are the other major groups in urban transit, each a much smaller percentage of the total work force than are motor bus operators. The first has a profile similar to railroad train operators. What has been already noted about railroad train operators is applicable to their urban mass transit counterparts. Maintenance employees include auto mechanics and lesser skilled personnel, all of whom are in demand by automobile, truck, industrial and construction equipment, farm equipment concerns and sales agencies, as well as by other businesses which utilize such skilled mechanics, helpers, and similar personnel. Office and clerical employees have wide opportunities for alternative employment. Thus, the arguments supporting such special legislation for urban mass transit employees are weak.

D. Rationale for Trucking Industry LPPs

Utilizing the criteria developed to support LPPs for railroad employees, one finds very few grounds for LPP application to trucking industry workers. The industry work force has four main groups: truck drivers, warehouse personnel, auto mechanics, and clerical employees. Truck drivers are, of course, key personnel. Applicants for these jobs must be reasonably strong physically, be able to drive vehicles, and be capable of learning how to maneuver large trucks on the highways, in crowded cities, and in and around company docks. They must be able to meet U.S. Department of Transportation minimum requirements as to age, visual acuity, and other physical requirements, and to pass government physical examinations and tests proving that they have these abilities, and have thereby obtained the appropriate driving licenses. They must also be willing to endure long periods away from home, be able to read and write, have the good character to avoid alcohol and substance abuse that might impair their ability to drive, and act promptly in an emergency. A large segment of the labor force obviously qualifies for such positions after some training.

Warehousemen (dockmen) need somewhat similar qualifications, but are in less critical positions, are not required to be absent from home,

105. Rottenberg, *supra* note 24, at 608.

and do not need to pass tests for government licenses. Again, these attributes are found in a substantial portion, probably a majority, of the labor force. Mechanics need training in their skills, which are, however, widely utilized in a number of industries involving automobiles and heavy equipment. These services are often in short supply, and are therefore in high demand. Clerical employees perform the same functions for trucking companies that they do for many other employers.

Unlike railroad employment, jobs are found in nearly all localities of any size and are not confined to one employer except in small communities. Since deregulation, entrance to the industry for TL shippers has been rather easy; therefore, opportunities exist for those who have lost jobs to gain employment with other carriers, or even to become self-employed as owner-operators. Claimants who are or have been truck divers testified in the recent BNT arbitration that the "driving skills" are readily transferrable from one truck company to another.[106] The former BNT Director of Human Resources also testified that "truck drivers, dockmen, and the clerical workers all had readily transferable skills . . . ."[107] and that more than 90 percent of the BNT labor force possessed transferable skills.[108] Testimony of claimants who formerly occupied these positions clearly affirmed this fact.[109]

Of course, being unemployed results in severe problems. The issue here, however, is whether trucking employees should be granted terms and conditions in excess of those provided to employees in the general labor force who suffer this misfortune. Congress, except for the short-lived Penn Truck experience, the I.C.C. and the courts, except for the Eighth Circuit in *Cosby*, have determined that there is no basis for such special privilege treatment for trucking employees.

E. The Political Factor and the Teamsters

In addition to the factors already enunciated, there was probably a political factor which could have affected the failure of the Teamsters to win at least something akin to the EPP that was written into the Airline Deregulation Act of 1978. Since the difficulties of the late James Hoffa during the 1960s, and until the current union reform regime, the Teamsters union hierarchy supported Republican candidates. The Motor Car-

106. *See, e.g., Deposition of Rodney D. French*, BNT Arbitration, New York Dock Protection, I.C.C. Fin. Docket No. 28583, Seattle, Wa. (February 26, 1982) Tr. at 7.

107. *Deposition of Dennis A. Dahl*, BNT Arbitration, New York Dock Protection, I.C.C. Finance Docket No. 28583, Denver, Co. (Jan. 21, 1992), Tr. at 24-26.

108. *Id.*

109. *See, e.g.*, depositions of claimants in this case, most of whom readily state that requirements for their jobs are quite common, both in other trucking companies and in other industries as well. The depositions include persons in all broad categories of work.

rier Deregulation Act was enacted in 1980, a period in which the Democrats controlled both Congress and the Presidency, as they did in 1978. Yet unlike the situation in 1978 when the ADA was enacted, when motor carrier deregulation was being discussed in 1980, there was no significant surge of congressional friends of unions who came forward to address the Teamsters' quite realistic fear that a key impact of deregulation would be a substantial loss of union membership. Moreover, Teamster election support of Republican candidates in the 1980 election resulted in no return support for the relief which they sought.

It may well be that the Teamsters' belated search for special legislation providing relief in layoffs over and above that enjoyed by workers in non-transportation industries would have failed regardless of the political factor. Nevertheless, the disinterest of major union supporters in Congress to add political muscle to the Teamster proposals appears to have doomed whatever chance that they had of becoming law.

APPENDIX I
SYNOPSIS OF I.C.C. IMPOSED RAILROAD LABOR PROTECTION BENEFITS*

The Interstate Commerce Commission imposes four sets of standard labor protection conditions for different transactions:

(1) *New York Dock* — applies to mergers, consolidations and acquisitions of control;
(2) *Oregon Short Line* — applies to abandonments;
(3) *Mendocino Coast* — applies to leases; and
(4) *Norfolk and Western* — applies to trackage rights.

Except for the notice and negotiation provisions for reaching an "implementing agreement," the substantive benefits of these four sets of conditions are identical. The following is a brief summary of the major provisions of these protective conditions.

I. ELIGIBILITY FOR PROTECTION CRITERIA

A *transaction*, i.e., an ICC authorized action such as a merger, abandonment, lease or trackage rights arrangement, triggers eligibility for protective benefits.

In order to claim protection benefits, an employee must identify a transaction that may have lead to a loss or diminution in earnings. The burden of proof is then on the railroad to show that causes other than a transaction affected an employee.

A *displaced employee* is an employee who is placed in a worse position with respect to his compensation and rules governing his working conditions as a result of a transaction. He still holds a job, albeit at a lower rate of pay, and is entitled to be made whole. A *dismissed employee* is an employee who is deprived of employment as a result of a transaction.

The *protective period* is the six-year period after an employee is adversely affected as the result of a transaction. Employees with less than six years of service are protected for a period equivalent to their actual years of service.

One area of almost constant dispute between the railroads and unions is over the issue of eligibility criteria. The unions typically attempt to link employee furloughs with ICC transactions and the carriers try to demonstrate the opposite. A large body of arbitral precedent has been

* Reproduced by permission from Daniel J. Kozak, *Labor Protection in the Railroad Industry*, in Herbert R. Northrup and Philip A. Miscimarra, Government Protection of Employees Involved in Mergers and Acquisitions. Labor Relations and Public Policy Series, No. 34 (1989), at 637.

built up in recent years requiring the linkage between an adverse effect and an ICC transaction in order to make an employee eligible for protective benefits. Job reductions, per se, do not entitle employees to ICC imposed protection benefits. Collectively bargained labor protection agreements, on the other hand, typically have much looser eligibility criteria for qualifying for protection benefits.

II. Preservation of Collective Bargaining Agreements

Section 2 of each of the ICC protective conditions contains a provision preserving "rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits." The history of the language dates back to the Urban Mass Transportation Act of 1964. At the time, as private transit company operations were assumed by public transit authorities, the transit unions were concerned that their collective bargaining agreements would not be preserved through this transition. This preservation of agreement language subsequently was carried over into the Amtrak C-1 protective conditions as the C-1 conditions were based on the UMTA provisions. In turn, the "new" ICC protective provisions resulting from the Rail Revitalization and Regulatory Reform Act of 1976 amendments to the Interstate Commerce Act were based substantially on the 1971 Amtrak C-1 conditions. This preservation of agreement language then was carried over to the ICC protective conditions formulated in the late 1970s.

The rail unions have relied on this provision to argue that employees must carry along their collective bargaining agreements as they are transferred from one railroad to another in a merger, consolidation or lease transaction in lieu of working under the agreement of the railroad to which they are transferred. Although an initial group of arbitration awards in the early 1980s supported the unions' position, subsequent awards have ruled that agreements are not portable as work forces are consolidated.

III. Preservation of On-Property Protection Agreements

Many employees in the railroad industry come under the purview of collectively bargained protection agreements that are unrelated to an ICC authorized transaction. Often these agreements provide benefits for longer than a six-year period or contain looser eligibility criteria for qualifying for benefits (e.g., lifetime protection agreements guarantee income maintenance until an employee retires, resigns or is dismissed for cause). For employees covered by such protection agreements and who are also affected by an ICC authorized transaction, the ICC protection conditions

allow such employees to elect benefits under their on-property agreement in lieu of the ICC protection benefits.

IV. Notice, Negotiations, and Implementing Agreements

Section 4 of each of the ICC protective conditions contains detailed procedures for serving notices, conducting negotiations, reaching implementing agreements, and submitting issues to arbitration if an implementing agreement is not reached. The New York Dock and Oregon Short Line Conditions require a thirty day negotiation period after notices are served. In an agreement is not reached within this period, either party may submit the dispute to arbitration. However, the transaction cannot be implemented without an agreement or arbitration decision. Although this process is designed to be completed in 90 days, New York Dock transactions usually take a minimum of 180 days and often longer to move to finality where arbitration is involved.

Mendocino Coast and Norfolk and Western transactions, on the other hand, provide for a twenty day negotiation period after service of a notice. At the end of twenty days, the railroad is free to consummate the lease or trackage rights transaction notwithstanding the absence of an implementing agreement. If an agreement is not reached subsequently, the matter can be referred to arbitration.

The scope of arbitration under Section 4 of the ICC protective conditions is limited to the selection of forces issues. The parties attempt to agree on how work forces are intermingled in a consolidated operation. If an agreement is not reached, then the arbitrator determines the appropriate selection of forces.

V. Protective Allowances

There are three types of protective allowances under ICC protective conditions. They are: (1) *displacement allowances;* (2) *dismissal allowances;* and (3) *separation allowances. Displacement allowances* are designed for employees who are forced to accept a lower paying position as a result of an ICC transaction. It is a make whole provision that provides for difference in pay between the old an new positions. *Dismissal allowances* are designed for employees who are deprived of employment as a result of a transaction. If employees cannot exercise their seniority to hold another position or are not offered comparable positions, the railroad must provide full income maintenance for six years, or in the case of employees with less than six years service, for a period of time equivalent to their actual years of service. Finally, *separation allowances* are available for employees who are deprived of employment. In lieu of electing

protection for up to six years but being available for recall, employees can elect to resign and accept a lump sum severance allowance.

The displacement and dismissal allowances are based on a "test period" of the last twelve months in which the employee had railroad income immediately preceding the month in which an employee was adversely affected by an ICC transaction. This figure is divided by twelve to produce a monthly guarantee. Separation allowances are based on an employee's daily rate of pay multiplied by 360 which produces a typical severance allowance of between sixteen and seventeen months of pay. Fringe benefits also are preserved for those employees collecting a dismissal or displacement allowance.

VI. Moving Benefits

Employees who are required to change their point of employment as the result of an ICC authorized transaction are entitled to moving and relocation benefits. Such benefits include actual relocation costs, traveling expenses of himself and members of his family, living expenses for himself and members of his family, his own actual wage loss not to exceed three days, and any loss on sale of his home. Because of the administrative costs and burden of monitoring these benefits, many railroads in recent years have agreed to pay a one time lump-sum relocation benefit in lieu of the aforementioned moving and relocation benefits.

APPENDIX II

The Airline Deregulation Act of 1978 ("ADA") established two benefit programs: benefits for "dislocation," and employee preferences for employment if dislocated. Together these benefits comprised the Employee Protection Plan ("EPP").

ELIGIBILITY AND MONETARY BENEFITS UNDER THE EPP

The benefit schedule set forth in § 43 (e)(2) of the ADA defined a qualifying dislocation to receive benefits as either a bankruptcy or a "major contraction in employment" for which a major cause was the new regulatory structure provided by the ADA. "Major contraction" was further defined as "a reduction by at least 7.5 percent of the total number of full-time employees on an air carrier within a 12-month period." Furthermore, only those employees who had at least four years of seniority at the time of the passage of the ADA and worked then for an airline that was certificated by the Civil Aeronautics Board ("CAB") were eligible. This eliminated the eligibility of employees from airlines spawned after the ADA became effective, which merged or ceased operations, such as People Express, Muse, and Air Florida. Moreover, the EPP benefit provisions were effective under the law only for a ten-year period and, therefore, expired in October 1988. Employees of Eastern Air, Pan American, and Midway, which ceased operations, or Trans World, which sold major portions of its operations, all in 1991-1992, were thus not eligible for any EPP benefits except for those employees who suffered "major layoffs" prior to October 1988.

Benefits under the EPP could have provided the payment of the displaced employees' prior wages for up to six years. The Secretary of Labor, however, was required to determine what percent of prior wages would be paid as benefits. Actually, no employee protection benefits whatsoever have been paid as a result of the law. Any implementation of the law was delayed till 1987 because of litigation questioning its constitutionality.[110] The Secretary of Transportation, who took over the CAB's function, determined originally in the test case involving Braniff Airlines[111] that deregulation was not the "major cause" of the layoffs associated with this carrier's bankruptcy and demise. In a case brought by the Air Line Pilots Association ("ALPA"), however, this decision has been reversed and remanded by the U.S. Court of Appeals, District of Colum-

110. *See* Alaska Airlines, Inc. v. Brock, 107 S. Ct. 1476 (1987).

111. Airlines under the name of "Braniff" have gone bankrupt three times. Each such airline was a different corporate entity which acquired the name, but had no relationship to others of the same name.

bia.[112] Since Congress has never appropriated any funds for these benefits, it is not clear whether benefits will be paid if the Department of Transportation alters its policies and the courts approve.

Industry Re-employment Rights

Section 43 (D)(1) of the ADA provided an additional right to airline employees under the same restricted eligibility rules as in the benefits section. Such employees, if qualified, are accorded preferential right by any airline seeking new employees. This section was also delayed in implementation by litigation, but was finally implemented on June 9, 1986.[113] Airlines were required to report openings to an office in the New York State Department of Labor, with which the U.S. Department of Labor has contracted to administer this requirement. The New York Department puts these orders on line daily and on microfiche regularly, and keeps the listings open from one month to one year. The U.S. Department of Labor determines whether laid-off employees are eligible for the preferential treatment. It has ruled, for example, that employees who have preferential hiring rights cannot displace an applicant hired under a consent affirmative action decree.[114] Additionally, litigation has confirmed that rights established by the EPP do not go beyond preferential hiring, and that no such rights have been created for upgrading and other movements beyond hiring.[115]

Neither the ADA nor the regulations require any public record keeping. There is, therefore, no maintained record of placements under the EPP. According to the personnel administrating the EPP, some airlines report all vacancies faithfully, some leave the reporting to regional or local management which may or may not report, and some do no reporting at all. The ADA provides no authority for the Department to enforce, or to seek enforcement, of the reporting requirement. Anyone feeling aggrieved must, therefore, seek judicial enforcement. This course was pursued by flight attendants who were replaced after striking Trans World Airlines in 1986. They were ruled eligible for preferential treatment and consequent back pay because the carrier had refused to furnish notices of their right to such hiring at other carriers.[116] Back pay was won in another case by a pilot, who lost his job in a bankruptcy, when

112. Air Line Pilots Association v. Department of Transportation, 3 F.3d 449 (1993).

113. *See supra* note 1.

114. Information on this program, where not otherwise indicated, is based upon telephone interviews with U.S. and N.Y. labor departments personnel, August 15, 16, and 20, 1991.

115. Hulsey v. USAIR, Inc., 868 F.2d 1423 (1989); *cert. denied.*, 493 U.S. 892 (1989).

116. Long v. Trans World Airlines, 913 F.2d 1262 (7th Cir. 1990).

Piedmont Air refused to hire him.[117] In a third case, the court ruled that the Colorado two-year statute of limitations applied for bringing a case under the ADA rather than the six-month limitation of the National Labor Relations (Taft-Hartley) Act, as amended, and that hence, a laid-off pilot was wrongly denied preferential treatment for hiring by United Air Lines.[118]

There have been other cases brought by individuals, but no other successful litigations were found. All such actions have apparently either been settled prior to any hearing, or dismissed for want of jurisdiction, timeliness, or other procedural reason.[119]

In addition to the Trans World, Piedmont, and United litigants, those laid off as a result of Braniff's first bankruptcy, or as a result of Continental's first bankruptcy or replaced in that carrier's strike, and those formerly employed by some small carriers that ceased operations before October 1988, such as New England Air, are presumably eligible under the EPP preferential hiring requirement. Since those who lost jobs after October 1988 are not eligible, those who benefit from this provision are a diminishing number as time passes.

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117. McDonald v. Piedmont Aviation, Inc., 930 F.2d 220 (2nd Cir. 1991); *cert. denied.*, 112 S.Ct. 441 (1991).

118. Bowdry v. United Airlines, Inc., 956 F.2d 999 (10th Cir. 1992); *cert. denied, sub. nom.*, United Airlines, Inc. v. Hart, 113 S. Ct. 97 (1992).

119. Interview, legal department, major airline carrier, September 18, 1991.