Railroad Spinoffs, Labor Standoffs, and the P&LE

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I. INTRODUCTION

Labor protection has been and continues to be a major difference between employment in the transportation industry and other business sectors. Railroad employees adversely affected by their employers' mergers have enjoyed a degree of job protection unequaled in any other industry. Historically, the cost of this protection has been carried by the railroads as a cost of consolidation. However, when Congress created Conrail, some of this burden was shifted to the taxpayer.[1]

Labor protection was originally a voluntary provision worked out between management and labor.[2] Railway labor protection was later imposed by the Interstate Commerce Commission (ICC) and still later by special statutes.[3] Today, many of those statutory arrangements are being challenged as railroads aim to compete with other deregulated modes of transportation.

With the coming of partial deregulation of the transportation industry,[4] support for labor protection has eroded in Congress and throughout the body politic. Observers of labor question why railroad employees enjoy more protection than, for example, displaced auto or steel workers. The reason for special treatment of railroaders and other transport em-

1. *See generally* Thoms, *Clear Track for Deregulation—American Railroads, 1970-1980*, 12 TRANSP. L.J. 183 (1982). Amtrak and Conrail, both federally-sponsored systems, used subsidies payable through the Department of Transportation to provide employee protection for railroaders displaced by the creation of these systems. Thus, employee protection costs were born by taxpayers.

2. *See* Ris, *Government Protection of Transportation Employees: Sound Policy or Costly Precedent?*, 44 J. AIR L. & COM. 509, 516 (1978).

3. For a more detailed version of labor protection and its effect on the airline as well the railroad industry, *see* Thoms and Clapp, *Labor Protection in the Transportation Industry*, 64 N.D.L. REV. 379 (1988).

4. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), (amending 49 U.S.C., §§ 1301-1551 (1958)). This law phased out the Civil Aeronautics Board and allowed new entry and free exit from the airline business, ending the regulatory regime that was keyed to protection from competitors.

ployees is rooted in labor history.[5] Today, however, labor protection does not command a political consensus. New legislation limits the scope and extent of labor protection in the new competitive transportation market.[6]

Particularly important is the effect of labor agreements and labor protection provisions upon the creation of new short line railroads.[7] Since 1980, almost 200 new short line railroads have been formed.[8] The rise of short line railroads, operating over secondary lines spun off by Class I rail systems, brings questions of whether successor railroads are bound by labor protection requirements and may determine the viability of such carriers.[9]

Although labor protection agreements have been found throughout the transportation industry, the focus of this article shall be limited to the relationship of rail labor protection and short line railroad development. The remainder of this article is organized in four sections. In the next section, the historical development of regulatory and legislative labor protection is presented. In section III, the results of an economic analysis which identifies the cost savings attributable to short line operation are provided. The recent Supreme Court decision in *Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association*[10] and related case law are considered in section IV. The final section provides a summary and conclusions.

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5. The reasons are related to the special position of rail labor brotherhoods as the "Kings of Labor" with a great deal more political power than industrial unions in the early twentieth century. The rationale for the labor protection decisions of the ICC was that the welfare of the employees in a public as well as a private interest. *See* Thoms and Clapp, *supra* note 3, at 380.

6. *See* Northrup, *Airline Labor Protection Provisions: An Economic Analysis*, 53 J. AIR L. & COM. 401, 402-406 (1987).

7. There is no clear definition of a "short line railroad". A definition proposed by the Association of American Railroads (AAR) is gaining acceptance. The AAR segments short lines into regional, local, and switching and terminal railroads. A regional railroad is defined to be a non-Class I, line-haul, freight railroad which operates at least 350 mile of road and/or earns at least 40 million dollars in revenue. A local railroad is defined to be a freight railroad which operates less than 350 miles of road and earns less than 40 million dollars. A switching and terminal railroad is a railroad that is not a line haul carrier. In this article, the term "short line" is broadly defined to include regional, local, and switching and terminal railroads. *See also* Thoms, *How Long is a Short Line?*, TRAINS, October 1986, p. 37.

8. Fed. Railroad Admin., U.S. Dept. of Transp, *Deferred Maintenance and Delayed Capital Improvements on Class II and Class III Railroads*, 15 (1989).

9. As will be seen below, the ICC has been exempting short line sales from labor protection requirements since 1982. Railroad unions have supported H.R. 3332, which would extend labor protection provisions to all railroad sales and abandonments, including those to short lines which the ICC now exempts from requiring protective provisions. *See* Northrup, *supra* note 6, at 405.

10. Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n, — U.S. —, 109 S. Ct. 2584 (1989).

II. Regulatory and Legislative Actions

A. *The Origin of Rail Labor Protection Agreements*

"Labor Protection" is a term of art referring to the mitigation of the effects of mergers by transportation companies upon their employees.[11] Such labor protection may mandate that an employer continue a worker's redundant job. At the very least, the employer must ensure that the employee's economic status is not diminished by the merger or consolidation. This may involve payments for moving, retraining expenses, or cash payments.

Labor protection arrangements were first found in the railroad industry as an outgrowth of the short-lived nationalization of the rails during World War I.[12] The Transportation Act of 1920[13] called upon the ICC to create a plan for consolidation of the nation's railroads into a limited number of systems.[14] However, the ICC feared the effect on rail employees by closing switching yards. In addition, profitable railroads opposed the consolidation plans because of proposals to consolidate them with unprofitable railroads.[15] Gradually, the Commission backed away from the Transportation Act's consolidation mandate.[16]

The first statute dealing specifically with labor protection conditions was the Emergency Railroad Transportation Act of 1933 (ERTA).[17] ERTA froze rail employment at the May 1933 level for 3 years.[18] Rather than providing the severance and displacement allowances found in today's labor protection provisions, ERTA had the effect of postponing large-scale layoffs during the worst years of the depression.[19]

In 1934, the ICC began to attach labor protection conditions to those

11. Braniff Master Executive Council v. Civil Aeronautics Bd., 693 F.2d 220, 222 (D.C. Cir. 1982). *See generally* 49 U.S.C.A. § 11347 (West Rev. 1986). The term "labor protection" is found in the statutes authorizing regulatory approval of mergers of carriers as one of the criteria of public interest.

12. The railroads were nationalized for a brief period during World War I and operated as a consolidated system. They were returned to private ownership in 1920, but interest in economies spurred enthusiasm for rail mergers. *See* Ris, *supra* note 2, at 511.

13. Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456, 481 (1921).

14. *Id.* The Ripley Plan, calling for consolidation of the nation's railroads into 19 systems, was never adopted. Consolidation of Railroads, 63 I.C.C. 455 (1921). A subsequent plan, calling for two major systems in the East and three major systems in the West, was adopted eight years later, but never came into force. *See* Consolidation of Railroads, 159 I.C.C. 522, 558, 567 (1929); *see also* Ris, *supra* note 2, at 513-14.

15. *See* Keeler, Railroads, Freight and Public Policy, 26 (1983).

16. *See* Daggett, Principles of Inland Transportation, 584-606 (2d ed. 1934).

17. Emergency Railroad Transportation Act of 1933, Pub. L. No. 73-68, 48 Stat. 211, 214 (1933) (codified as amended at 45 U.S.C. §§ 661-669 (1982)).

18. *Id.*

19. Labor unions had pushed for this legislation to protect its members from unemployment; it was passed as an emergency measure. *See* Ris, *supra* note 2, at 519-520.

mergers it did approve.[20] Faced with the reality of ICC conditions mandating labor protection and the expiration of ERTA, a conference of railroads and unions held in Washington in 1936 crafted the Washington Job Protection Agreement. This agreement became the basis for most modern labor protection conditions in railroad and airline consolidations. Obviously, the railroads would prefer having no labor protection conditions at all, since the burden of compensating the laid-off workers rests with the carriers. However, both the railroads and their unions preferred to work out their own agreement, rather than have one imposed upon them. The Washington Agreement provided for compensation for dismissed employees, allowances for those displaced from higher positions, moving expenses entailed in taking jobs in new locations, and retention of fringe benefits.[21] Eighty-five percent of the nation's railroads signed the Washington Agreement.[22]

Labor and management, working together, could always establish labor protection provisions on their own. Until 1939, however, a question remained as to the ICC's authority to impose labor protection conditions under its mandate, which required consideration of the public interest in mergers.[23] In that year, the Supreme Court ruled, in *United States v. Lowden*,[24] that the ICC could require labor protection along the lines of the Washington Agreement without specific statutory authority.[25] This decision allowed the ICC to begin to impose conditions modeled upon the Washington Agreement.

B. *ICC Mandated Labor Protection*

When Congress considered the Transportation Act of 1940,[26] its major concerns were the depression and unemployment.[27] Merger plans then before the ICC would possibly affect 200,000 to 400,000 railway

20. St. Paul Bridge & Terminal Ry. Control, 199 I.C.C. 588, 595-96 (1934).

21. Washington Protection Agreement, 80 CONG. REC. 7661-62 (May 21, 1936).

22. *See* Chicago, R.I. & P. Ry. Trustees Lease, 230 I.C.C. 181 (1938). *See also* Ris, *supra* note 2, at 516.

23. Chicago, R.I. & P. Ry., 230 I.C.C. at 187. It was determined by the ICC that the "public interest" included railway workers as involved members of the public with a vital interest in the continuation of certain operations of the railroads.

24. U.S. v. Lowden, 308 U.S. 225 (1939). This case involved a railroad merger, wherein the ICC required labor protection provisions as a condition of the merger. Opponents of labor protection stated that the ICC had no statutory authority. The Court stated that requiring labor protection could be considered as part of the statutory merger criteria of "public convenience and necessity." Congress later gave the ICC specific statutory authority.

25. U.S. v. Lowden, 308 U.S. 225, 238 (1939).

26. Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898 (1941) (codified as amended at 49 U.S.C. §§ 10101-11914 (1982)).

27. *See* Ris, *supra* note 2, at 519-520. Ris states, *inter alia*, that "[a]ny discussion of the legislative history behind the 1940 Act cannot overemphasize the importance of the Depression

jobs. Most of these jobs were held by men between the ages of 45 and 60, whose chances of reemployment were slim. In contrast, the railroads viewed mergers as an important means of reducing operating costs.[28]

The Transportation Act of 1940 required that the Interstate Commerce Commission approve railroad mergers or consolidations.[29] The Transportation Act of 1940 also established a statutory obligation on the ICC to provide labor protection in merger cases.[30] The Interstate Commerce Act[31] (title I of the Transportation Act of 1940) required a fair and equitable arrangement which would result in no employee being placed in a worse position for up to four years.[32] The exact length of time depended upon the railroader's length of services with the merging carrier.[33]

In a series of rail merger cases, the ICC mandated certain standards for employee protection. Because the leading such case arose from the 1952 consolidation of the passenger stations in New Orleans, these requirements became known as the "New Orleans conditions."[34] The issue for the ICC in the *New Orleans Union Passenger Terminal Case*[35] was what job protection should be afforded railroad workers affected by railroad mergers. The ICC determined that railroad workers should receive the labor protection provisions as set forth in the Washington Agreement.[36]

The New Orleans conditions mandated that an employee furloughed as a result of a merger would receive a monthly dismissal allowance equal to his average monthly compensation before the merger. This compensation was to be paid over a four year protection period. Employees bumped to a lower-paying job would receive a monthly allowance to make up the difference between the old and the new wage. Other New Orleans conditions included reimbursement for moving costs and recovery for losses from the sale of homes.[37]

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in formulating Congressional policies. The worst economic crisis in the nation's history was superimposed upon a government policy promoting unification of railroads." *Id.* at 519.

28. *See generally* KEELER, *supra* note 15, at 124-28.

29. 49 U.S.C. § 11343 (1980).

30. 49 U.S.C. § 11347 (1982).

31. Interstate Commerce Act of 1940, ch. 722, § 5(2)(f), 54 Stat. 898, 906-07 (1941); *see also* 49 U.S.C. § 11347 (1982).

32. *Id.*

33. *Id.*

34. New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952). Construction of a consolidated rail terminal in New Orleans involved the abandonment of several older stations and a considerable amount of track. ICC treated this as a merger case and imposed labor protection on the participating railroads.

35. 282 I.C.C. 271 (1952).

36. *Id.* at 281.

37. *Id.* Such compensation was important, because when railroad division points are elimi-

Two limitations to the Washington Agreement conditions were made by the ICC in *New Orleans*. First, employee benefits were reduced to the extent that the employee received compensation from other employment or unemployment insurance.[38] Second, employees adversely affected by a consolidation before May 17, 1952 (four years from the date of the ICC's order approving the merger) were to receive as a minimum the major protection afforded by the Oklahoma conditions.[39]

The Oklahoma conditions differed from the Washington Agreement in two ways. First, employees received 100 percent protection under the Oklahoma conditions while under the Washington Agreement the level of payment was contingent upon years of service.[40] Second, the Oklahoma conditions continued for four years from the date of the ICC's order while payments under the Washington Agreement went into effect from the date of the adverse effect and continued for a maximum of five years.[41] If the total compensation received under the Oklahoma conditions was less than that under the Washington Agreement, the employee was to receive the compensation according to the Washington Agreement.[42] Thus, the New Orleans conditions judicially enacted many of the labor protection provisions for railroaders affected by mergers.

From 1956 to 1971 there was a steady stream of merger applications before the ICC.[43] With the ICC adopting a more lenient policy towards mergers, there were many reasons why long-time competitors decided to merge. Prominent among them were the economies of scale resulting from a larger system, the economics of running long freight trains over long distances in the diesel age, the elimination of duplicate facilities, and attempts to better meet truck competition.[44]

Assuming that the ICC would require labor protection anyway, many of the post-1956 mergers included voluntary labor protection agreements arranged between the carriers and unions. This type of agreement was viewed by rail management as insurance for the withdrawal of labor's opposition to the merger before the ICC and the courts. In the Norfolk & Western, Penn Central, and Burlington Northern mergers,[45] the carriers

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nated due to mergers, homes decrease in value and become a glut on the market. Through no fault of his own, the worker has to move and sell his house for the convenience of the railroad.

38. *Id.* at 282.

39. *Id.*

40. *Id.* at 275.

41. *Id.*

42. *Id.*

43. KEELER, *supra* note 15, at 36.

44. *Id.* at 124-128.

45. Norfolk & W. R.R.-New York, C. & S.L. R.R.-Merger, 331 I.C.C. 22, 41-42 (1967); Pennsylvania R.R.-New York C. R.R.-Merger, 327 I.C.C. 475, 543-46 (1967), *see* 398 U.S. 486 (1967); Great N.P. & B.L.-Great N. Ry.-Merger, 331 I.C.C. 228, 276-279 (1967). The first two

agreed to reduce jobs only by "attrition"[46], meaning not replacing retirees or those who quit the railroad. In effect, this guaranteed some employees lifetime jobs.

C. *Statutory Labor Protection*

In addition to the labor protection provisions of the Interstate Commerce Act, Congress has mandated labor protection in several special statutes. These include the labor protection provisions attached to the creation of Amtrak and Conrail, and provisions attached to the Milwaukee Road and Rock Island reorganizations. As a result, the ICC has modified the job protection it provides in merger cases.

1. *The Rail Passenger Service Act of 1970*[47]

The Amtrak labor protection provisions were mandated by the Rail Passenger Service Act of 1970.[48] This act established the National Railroad Passenger Corporation (Amtrak) to take over the operation of the nation's intercity passenger trains.[49] The act also directed that railroads relieved of their passenger service must provide labor protection to their displaced passenger employees.[50]

Based on the New Orleans Agreement,[51] the act greatly expanded the labor protection provisions for displaced Amtrack employees. For example, the burden of proof was shifted from the worker to the railroad to prove that the assumption of passenger service by Amtrak was not the cause of the employee's displacement.[52] The length of protection was

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cases merged several large carriers in the East, the last merged several Western transcontinental lines into today's Burlington Northern system.

46. "Attrition" has also meant that the carriers would not lay off large numbers of employees. Usually, workers with more seniority bid into jobs. Thus, the senior trainman would then get the job of the departing railroader. *See* Dempsey and Thoms, *Law and Economic Regulation in Transportation*, 303 (1986).

47. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (1970) (codified as amended at 45 U.S.C. § 501 (1982)).

48. *Id.*

49. *Id.* Rail passenger traffic declined as a result of air competition and the completion of the interstate highway system. Over twenty percent of the passenger trains were in dissolution proceedings before the ICC in 1970. Amtrak was created to avoid a national transportation crisis. *See* Thoms and Clapp, *supra* note 3, at 385.

50. 45 U.S.C. § 565(a) and (c) (1982).

51. *See* New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952); *see supra* notes 34-42 and accompanying text.

52. *See* New York Dock Ry. v. U.S., 609 F.2d 83, 89 (2d Cir. 1979), *aff'd* I.C.C. dec., *see* 354 I.C.C. 399 (1978), 360 I.C.C. 60 (1979); New Orleans Union Passenger Terminal Case, 282 I.C.C. 271, 282 (1952). In 1971, pursuant to the statutory authority of the Rail Passenger Service Act, the Secretary of Labor certified a labor protection agreement known as Appendix C-1, which shifts the burden from the employee to the employer to prove the factors of the employee's worsened position. New York Dock, 609 F.2d at 89, 45 U.S.C. § 565 (1982).

increased from four to six years, its base date being the time of employment displacement.[53] A displaced worker was also given the option of receiving a lump-sum settlement in lieu of the monthly dismissal allowance.[54] In addition, moving benefits were further expanded.[55] In no case could the benefits be less than those provided by the Interstate Commerce Act.[56]

The Rail Passenger Service Act labor protection was limited only to Amtrak's assumption of rail passenger service and private carrier's discontinuance of passenger trains. In later mergers and abandonments the ICC based labor protection on the Amtrak provisions and the New Orleans conditions.[57] For example, in *New York Dock Railway v. United States*,[58] labor protection provisions for the merger of two Class III terminal railroads in New York City were based on both the New Orleans conditions and the Rail Passenger Service Act.[59] The Second Circuit expanded the Rail Passenger Service Act protective conditions to include the Appendix C-1 provisions.[60] The Second Circuit, however, denied railroaders double recovery of pyramiding of benefits.[61]

The labor protection provisions established by the Second Circuit have become known as the "New York Dock conditions." In general, they are significantly more protective of rail labor interests than any previously imposed set of conditions.[62] The major difference is the New York Dock conditions include the upgrading of monthly compensation for displaced employees.[63] The New York Dock conditions are now the standard protective conditions imposed by the ICC.

2. *THE REGIONAL RAIL REORGANIZATION ACT OF 1973*[64]

The most extensive and controversial labor protection plan is found in subchapter V of the Regional Rail Reorganization Act of 1973 (3R

53. New York Dock, 609 F.2d at 89.
54. *Id.*
55. *Id.*
56. *Id.* Ris, *supra* note 2, at 521.
57. *See, e.g.*, New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979) (New Orleans Conditions and Rail Passenger Service Act provisions were applied to railyard merger); Oregon S.L. R.R.-Goshen-Abandonment, 354 I.C.C. 584, 595-96 (1978) (New Orleans Conditions and Rail Passenger Service Act provisions were attached in a railroad abandonment case).
58. New York Dock, 609 F.2d 83 (2d Cir. 1979).
59. New York Dock, 609 F.2d at 94-95.
60. *Id.* at 94. For a discussion of Appendix C-1, *supra* note 52 and accompanying text.
61. New York Dock, 609 F.2d at 96.
62. *Id.* at 91.
63. Oregon Short Line Case, 354 I.C.C. 584 (1978); New York Dock Ry. v. U.S., 609 F.2d 83, 94 (2d Cir. 1979).
64. Regional Rail Restructuring Act of 1973, Pub. L. No. 93-236, 87 Stat. 1010 (1974).

Act),[65] the Act which established Conrail. The 3R Act was enacted in response to the bankruptcies of seven eastern railroads.[66] Subchapter V of the 3R Act authorized 250 million dollars for labor protection, reimbursing Conrail and its predecessor railroads for displacement allowances and job protection payments.[67]

The 3R Act imposed labor protection at a level higher than the normal ICC standard; Subchapter V was designed to gain the support of labor for the creation of Conrail. All employees of Conrail and its predecessors were to receive the same labor protection that employees were awarded in the merger of the Penn Central and Erie Lackawanna railroads.[68] All Conrail employees with five years seniority with the predecessor railroad received job protection until age 65.[69] The job protection included a monthly displacement allowance equal to the average 1974 monthly salary (increased to reflect general wage hikes), a severance benefit of up to 20,000 dollars in lieu of continued employment, and certain fringe and relocation benefits.[70]

The 3R Act appropriation for the labor protection was soon spent. An additional 235 million dollars was appropriated in the Staggers Rail Act of 1980.[71] However, it was made clear that when that money was gone, Conrail would have to fund the labor protection costs from its own revenues.[72]

3. *Railroad Bankruptcies and Labor Protection*

Labor protection benefits diminished with the reorganization of the Chicago, Milwaukee, St. Paul & Pacific Railroad and the liquidation of the Chicago, Rock Island & Pacific Railroad.[73] Congress responded with two

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65. *Id.*

66. *See* Dempsey and Thoms, *supra* note 46, at 288-291.

67. 45 U.S.C. § 779 (1976) (repealed 1981).

68. Penn Central Merger and N&W Inclusion Cases, 389 U.S. 486 (1967); Erie R.R. and Delaware, L. & W. R.R.-Merger, 312 I.C.C. 185, 248 (1960) (the mergers included several eastern lines from the territory of New England to Chicago).

69. 45 U.S.C. § 775(c) (1976) (repealed 1981).

70. 45 U.S.C. § 775(b) (1976) (repealed 1981). Although this section of the 3R Act was repealed in 1981, benefits could still be received by railroad employees if they had accrued before October 1, 1981, and if the employee filed a claim within 90 days of the repeal. Act of August 13, 1981, Pub. L. No. 97-35, § 1144, 95 Stat. 669 (1981), (codified at 45 U.S.C. § 771 (1981)).

71. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 509(a), 94 Stat. 1895, 1955 (1980), (codified at 45 U.S.C. § 775 (1980)).

72. *See* Thoms and Clapp, *supra* note 3, at 388.

73. After abandonment of over 2/3 of its system, the Milwaukee was sold to the Soo Line. The Rock Island was liquidated with its tracks either torn up or sold to other railroads. *See* Thoms and Clapp, *supra* note 3, at 389.

restructuring laws that included labor protection terms that were imposed at levels lower than the ICC standard.

The Milwaukee Railroad Restructuring Act[74] provided former employees of the Milwaukee Road the option of receiving either eighty percent of straight-time salary for up to three years or a lump-sum payment not to exceed 25,000 dollars.[75] The Rock Island Railroad Transition and Employee Assistance Act of 1980 (RITA)[76] provided similar reduced benefits for the employees of the Rock Island.

The Rock Island labor protection provisions were further diminished by the bankruptcy court.[77] The court refused to implement the labor protection provisions of RITA because it reasoned that such claims would become a senior claim against the estate of the Rock Island.[78] Since the trustee is obligated to preserve the estate of the creditors, the court concluded that the imposition of labor protection provisions would amount to an unconstitutional taking of the estate.[79]

4. *The Northeast Rail Services Act of 1981*

With the advent of the Reagan administration and a Republican majority in the Senate, attitudes towards subsidies for Amtrak and Conrail and labor protection shifted.[80] The Northeast Rail Services Act (NERSA),[81] part of the Budget Reconciliation Act of 1981,[82] resolved some of Conrail's operational problems.[83] The objective was to improve Conrail's financial picture in anticipation of a future sale.[84] In addition, Conrail was relieved of many of its labor protection costs.[85]

NERSA directed the Secretary of Labor to devise a new labor protection provision that would provide termination allowances not to exceed

74. Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979) (codified at 45 U.S.C. § 901 (1982)).

75. 45 U.S.C. § 909 (1982).

76. Rock Island Railroad Transition and Employee Assistance Act of 1980, Pub. L. No. 96-254, 94 Stat. 399 (1980) (codified at 45 U.S.C. §§ 1001-1018 (1982)). RITA subsistence allowances were not to exceed 20,000 dollars. 45 U.S.C. § 1005(a) (1982).

77. Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982).

78. *Id.* at 463.

79. *Id.*

80. *See* Thoms and Clapp, *supra* note 3, at 390-91.

81. Northeast Rail Services Act of 1981, Pub. L. No. 97-35, 95 Stat. 643 (1981) (codified as amended at 45 U.S.C. §§ 1101-1116 (1982)).

82. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 1131-1169, 95 Stat. 357, 643-87 (1981).

83. *See* Thoms and Clapp, *supra* note 3, at 391.

84. 45 U.S.C. §§ 1102(2), 1103 (1982) (NERSA transferred some of Conrail's commuter service responsibilities in order to provide Conrail the opportunity to become profitable).

85. 45 U.S.C. § 1103 (1982) (providing for employee protection provisions different from those set forth in the Regional Rail Reorganization Act).

25,000 dollars per employee.[86] Employees were to be offered either a permanent position with Conrail or a separation allowance of up to 25,000 dollars.[87] NERSA also specified how Conrail could eliminate certain fireman and brakeman positions.[88] In addition, NERSA mandated the creation of a central hiring roster of former Conrail, Milwaukee Road, and Rock Island employees for preferential hiring by other railroads.[89] Similar labor protection relief was also provided to Amtrak.[90]

D. Conclusion

Government insistence on labor protection is a result of a long history of federal involvement in railroad labor policy, ICC policies encouraging rail consolidation, Congressional concern about unemployment, and politically assute rail unions.[91] However, job protection for railroad employees has been curtailed in recent years. Congress appears to be less fearful of the political power of rail unions.[92] Unfair though it may be, public sentiment appears to regard rail employees as holding sinecures—and public perceptions are often the basis for legislative policy.

It is clear that what Congress gives, Congress may take away. If a Congressional statute gave lifetime job protection to rail employees, Congress may later modify or eliminate such protection by statute as well. For example, the labor protection provisions of NERSA being limited in amount (25,000 dollars) and duration, are much less favorable than that of previous laws.

Further restrictions to labor protection have occurred with the ICC's decision not to require labor protection in short line sales.[93] The economic rationale for short line sales introduces additional factors further complicating rail labor protection. Thus, before reviewing the legal issues revolving around labor protection and short line sales, the economic factors underlying the creation of short line railroads shall be considered.

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86. 45 U.S.C. § 797(a) (1982).
87. *Id.*
88. *Id.* at § 797a(a), (d) (1982).
89. *Id.* at § 797(c) (1982).
90. *Id.* at § 797(d) (1982).
91. *See* Thoms, *What Price Labor Protection?*, TRAINS, June 1982, at 47.
92. Organized labor now contains less than seventeen percent of the work force. *See* Thomas and Clapp, *supra* note 3, at 390.
93. *See Ex Parte* No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901, 1 I.C.C. 2d 810 (1985), *aff'd mem.*, 817 F.2d 145 (Table) (D.C. Cir. 1987).

III. THE ECONOMICS OF SHORT LINE RAILROADS

A. *THE DOWNSIZING OF THE CLASS I RAILROAD*

The merger movement from the 1960s to the 1980s left the country with the largest Class I railroad systems in history. During the past decade, however, Class I railroads as an industry have been shrinking. Beginning in the late 1970s, Class I railroads aggressively reduced their systems through abandonment and short line sales.[94] In 1978, Class I railroads owned 177,710 miles of road. By 1987, the miles of road owned by Class I carriers had fallen to 132,220 miles (a 25.6 percent decrease).[95]

The passage of the 4-R Act[96] and the Staggers Act[97] greatly eased the abandonment process. For example, the Staggers Act imposed stringent time deadlines on the disposition of abandonment cases.[98] Moreover, if the application was unopposed, the Act required the ICC to approve abandonment within 30 days.[99] From 1978 to 1987, the ICC granted certificates of abandonment for 27,971 miles of road (Table 1).

Abandonment has been the traditional means of disposing of excess lines. More recently, Class I railroads have also been downsizing by selling lines to short line operators. From 1978 to 1988, 19,083 miles of road were sold to short lines (Table 1). In part, Class I's prefer the short line alternative because the property can be sold in its entirety without the associated salvage costs and the expense of selling land parcel by parcel.[100]

There are two different strategies motivating the sale of profitable lines: divestment or establishing a low cost feeder line.[101] Divestment was attempted by the Illinois Central Gulf (ICG). After having absorbed the parallel Gulf, Mobile & Ohio, the Illinois Central Gulf then either aban-

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94. A few lines were also taken over by states, which then proceeded to find a designated operator to run them. Twenty-six states have set up rail authorities to purchase otherwise abandoned railroads. *See* LEVINE et al., STATISTICS OF REGIONAL AND LOCAL RAILROADS, 67, 77 (1988). Although New York and West Virginia have also operated railroads, most states have found designated operators for the service. *See* Dempsey and Thoms, *supra* note 46, at 277-281.

95. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 1988, 42 (1988).

96. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976) (codified as amended in scattered sections of 15, 31, 45, & 49 U.S.C.).

97. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified at 45 U.S.C. § 775 (1980)).

98. 49 U.S.C. §§ 10903-06, 10910 (1981).

99. *Id.*

100. Mielke, *Short Line Railroad Creations: Terms of Sale, Impacts on Viability, and Public Policy Implications*, 29 J. TRANSP. RES. FORUM, 138 (1988).

101. *Id.*

TABLE 1. MILES OF ROAD ABANDONED, AND MILES OF SHORT LINE CREATED, 1978-1988

Year	Miles of Road Abandoned	Short Lines Created	
		Miles of Road	Number
1978	2,417	368	8
1979	2,873	284	8
1980	2,321	1,578	12
1981	1,352	587	10
1982	5,151	1,470	24
1983	2,454	341	15
1984	3,083	1,506	26
1985	2,343	2,620	27
1986	1,417	3,551	31
1987	1,703	6,674	46
1988	2,857	104	5
TOTAL	27,971	19,083	212

SOURCE: Levine et al., STATISTICS OF REGIONAL AND LOCAL RAILROADS, 49, 51 (1988).

doned lines or turned them over to short lines.[102] The ICG's goal was to streamline its system through short line sales to create a core system of lines between Chicago and New Orleans and make the system an attractive acquisition.[103]

Other railroads are seeking to establish low-cost feeder systems. Feeder line sales are motivated by a desire to:

> 1) eliminate the burdens of ownership (high operating and maintenance costs, etc.), 2) recover some economic value from the line (sales price), and 3) preserve the benefits associated with ownership (access to traffic originated or terminated on the lines).[104]

Whether the sale is motivated by divestment or as a feeder line, the question remains why can a short line railroad successfully operate failed Class I lines? One reason is local ownership and management.[105] Another is better service to community needs.[106] However, a major reason

102. Since 1975, twenty regional and local railroads totaling 3995 miles of road have been spun-off by the Illinois Central Gulf. LEVINE et al., *supra* note 94, at 56.

103. *See* Mielke, *supra* note 100, at 140. Apparently the divestment strategy was successful. In March 1989, the ICG was sold to the Prospect Group and its name changed to the Illinois Central Transportation Company (the "Main Line of Mid-America" is back to its original name, the name on the engine that Casey Jones rode to glory.)

104. *Id.* at 141.

105. *See Ex Parte* 392, 1 I.C.C. 2d at 813.

106. *Id. See also* Dooley and Rodriguez, *Rail Service Levels for Grain Shippers Under Class I and Short Line Ownership*, 29 J. TRANSP. RES. FORUM, 86 (1988); *see* Interstate Commerce Commission, *A Survey of Shipper Satisfaction with Service and Rates of Shortline and Regional Railroads*, (1989).

for the rush to short lines railways is that operators see a chance to reduce operating costs—in particular labor costs.[107]

Little research is available which addresses the effect that short lines have upon railroad operating costs. As part of the North Dakota Rail Services Planning Study, the costs of operating a set of light density branch lines under Class I ownership and as a short line railroad were estimated.[108] After briefly reviewing the costing model, the results of the case study will be analyzed.

B. *The Short Line Costing Model*

The costing method consisted of two principle steps. First, methodologies for estimating both Class I carrier costs on light density lines and short line railroad costs were developed and translated into computer models.[109] Second, the models were applied to a network of light-density lines in North Dakota.[110]

The model employs a systems approach or perspective. System costs and revenues were estimated for the rail network under two different scenarios. Under the first scenario, the network of lines was analyzed as a light density subsystem of the Burlington Northern's (BN) network. In the second scenario, the same set of lines was analyzed as the short line component of a feeder system.

System costs were defined to consist of two basic components, on-line and off-line costs. On-line costs comprise the operating, capital, and opportunity costs associated with serving and maintaining the set of light-density lines, and on-line costs consist of both variable and fixed components. Off-line costs reflect the variable expense associated with moving the traffic generated from the light-density network over other parts of the Class I carrier's network.

Under the BN scenario, on-line costs were calculated to reflect the train operating and work-rule environment, and fixed cost characteristics of a Class I carrier. Under the short line scenario, on-line costs were estimated to reflect the potential labor economies and scale of operation of a short line railroad. Under both scenarios, system costs are the sum of the on-line fixed and variable costs and the off-line variable costs.

System revenues are the revenues generated by the traffic originat-

107. *Ex Parte* 392, 1 I.C.C. 2d at 815. If labor protective conditions are imposed, the economic justification for the transfer of a line is diminished if not negated.

108. *See* Tolliver, Dooley, and Zink, *Short Line Operation of Light Density Rail Networks: Economics and Public Policy*, 28 J. Transp. Res. Forum, 277 (1987).

109. *See* Tolliver, *Report on Rail Services Planning Study Light Density Railroad Costing Methodology*, (Upper Great Plains Transportation Institute Staff Paper No. 84, 1987).

110. A network of lines similar to the light density lines subject of the analysis was sold by the Burlington Northern to the Red River Valley & Western in July 1987.

ing or terminating on the network of lines. System revenues were determined for each scenario by multiplying the Class I carrier's rates for each commodity, market, and service level by the volume of traffic. System revenues are compared to system costs under each alternative to determine the operating profit or loss.

The estimation of on-line costs for the BN consisted of a three-step process.[111] First, a series of unit costs were calculated from the accounting and operating data contained in BN's 1986 R-1 report.[112] Second, annual levels of activity or "service units" were estimated for the network of lines through the use of an operating model. Third, the annual service units were multiplied by the unit costs to yield on-line expenses. In each case, an expense item (e.g. locomotive fuel) was divided by an output measure (e.g. locomotive hours) to produce a unit cost (e.g., fuel per locomotive hour). In addition to the R-1 unit costs, a normalized maintenance of way and net liquidation value were calculated per mile of track. These unit costs reflect the light-density nature of the set of line segments and regional considerations such as the value of land.

In calculating the BN service units, the network of lines was organized into way train routes based on existing classification points and BN timetables. Discussions with short line management provided similar information for the short line. Mileages from each station to the classification yard, as well as round trip way train miles were estimated from timetables and distance tariffs. Two types of way train service were modeled, assigned or scheduled way train service and unassigned or on-demand service. Large multiple-car and trainload consignments were assumed to receive unassigned way train service. Single car and small multiple-car shipments were assumed to be spotted and pulled during assigned way train service. The frequency of scheduled way train service for each route was obtained from BN trainmasters.[113]

The general methodology for developing short line operating costs was to adjust Class I operating costs on a unit cost basis to reflect the expected differences in labor costs and operating characteristics of a smaller, more flexible railroad. Information was provided by a survey of short line railroads and personal interviews with short line management, BN officials, and rail labor representatives.

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111. The on-line unit costs used in this study closely follow the cost categories and definitions prescribed by the ICC in *Ex Parte* No. 274 (Sub. No. 11), Abandonment Regulations-Costing, 3 I.C.C. 2d 340 (1987).

112. Most of the operating unit costs were calculated from BN's R-1 Annual Report to the I.C.C., using Schedule 755 (Operating Statistics), Schedule 415 (Equipment Expenses), and Schedule 410 (Railway Operating Expenses).

113. The frequency of service was assumed to be the same for both the Class I and short line operation. Further research indicates that the frequency of service increases with short line ownership. *See* Dooley and Rodriguez, *supra* note 106, at 91.

C. *Case Study Results*

Costs were estimated for nine components of rail operations. These are train crew, locomotive, freight car, transportation, maintenance of way, administrative, property taxes, opportunity cost on net liquidation value, and other costs.[114] Cost components of the analysis wer aggregated and compared for the BN and short line systems. Large differences in absolute and percentage terms were noted for several of the major cost categories. Results of the model are presented in Table 2.

TABLE 2. COST COMPARISON OF BURLINGTON NORTHERN RAILROAD AND SHORT LINE RAILROAD BY COMPONENT OF COST OF OPERATION[a]

Cost Component	Burlington Northern Railroad	Short Line Railroad	Percent Difference
Train Crew Costs[b]	2,221,350	543,716	−75.5
Locomotive Costs[c]	1,187,996	1,369,562	−15.3
Car Costs[d]	1,087,633	993,906	−8.6
Transportation Costs[e]	582,635	336,289	−42.3
Maintenance of Way Costs	2,338,000	1,990,640	−14.9
Administrative Costs	104,203	434,000	+316.5
Property Taxes	303,270	303,270	—
Opportunity Costs on Net Liquidation Value	2,337,905	1,479,687	−36.7
Other Costs	61,799	250,000[f]	—
Total On-branch Costs	10,224,792	7,701,072	−24.7
Total Off-branch Costs	12,305,560	12,305,560	—
Total Revenue	22,741,824	22,741,824	—

[a] Costs were estimated assuming a 15.8 percent cost of capital for freight cars, for locomotives, and fixed roadway expenses for the BN and a 10.0 percent cost of capital for the short line.
[b] Includes wages, fringe benefits, alimony and crew overnight costs.
[c] Includes locomotive repairs, depreciation/rentals/leases, return on investment, servicing, fuel, overhead, and machinery.
[d] Includes car-day and car-mile costs.
[e] Includes train inspection/lubrication, dispatching, crossing protection and signal/interlockers costs.
[f] Includes opportunity cost on working capital and insurance costs.

The largest decrease in costs came from short line train crew savings. Cost reductions of 1.68 million dollars, or 75.5 percent, were realized as a result of crew size reductions and a lower wage rate. Maintenance of way costs were reduced by 350,000 dollars (15 percent), while transportation costs (other than crew costs) dropped by 250,000 dollars (42 percent). Administrative costs, however, increased sharply by

114. For a detailed discussion of the costs, see Tolliver, *supra* note 109.

over 300 percent. This higher overhead expense proportion makes intuitive sense because of the higher fixed cost nature of short line operations. The larger traffic base characteristic of the Class I carrier is simply not present on the short line network.

Total on-branch system costs for the short line operator were 2.5 million dollars less than for the Class I carrier, a reduction of 24.7 percent. Total off-branch costs and total revenues are identical for both systems. From a profitability perspective, the Class I carrier is barely able to recover total on-branch and off-branch costs at existing traffic levels and specified costs of capital. For the same traffic base, the short line operator earned a profit of 2.7 million dollars.[115]

The model illustrates that major cost differences exist between short line and Class I operations in the areas of train crew wages, locomotive costs, and administration. Short lines have lower labor costs as a result of lower wage rates, fewer fringe benefits, less restrictive work rules, and smaller crew consists.[116]

In summary, the economic analysis presents several important implications for policy makers. First, low rates of return on light density branch lines may lead Class I railroads to abandon lines if they are not sold. The sale of light-density lines to short line operators is an alternative to preserve branch line trackage. In turn, this will provide continued rail service to the shippers on these lines. Second, the development of short line railroads may enhance the economic viability of both Class I and short line operators. Because of lower operating costs, short line operators may be able to earn a higher return on investment than a Class I carrier would on the same light-density network. At the same time, the Class I carriers' earnings should be enhanced if marginally profitable rail line segments can be spun off. Third, the higher profitability of short line operators may mean that more dollars are available and allocated to maintaining the track, roadway, and structures.[117] Thus, short line development may also serve to lessen or eliminate deferred maintenance on light-density lines.

115. An increase in the frequency of service most likely also increases the volume of traffic, and hence revenue. Thus, the revenue projection for the short line should considered to be a conservative estimate. *See* Dooley and Rodriguez, *supra* note 106, at 92.

116. *See* Tolliver and Dooley, *Short Line Rail Labour Costs*, PROCEEDINGS OF THE 23RD ANN. MEETING OF THE CAN. TRANSP. RES. FORUM, 1 (1988).

117. However, a recent report concluded that deferred maintenance and delayed capital improvements are a problem for 57 percent of the short lines. *See* Fed. Railroad Admin., U.S. Dept. of Transp., *Deferred Maintenance and Delayed Capital Improvements on Class II and Class II Railroads*, 47 (1989).

IV. Labor Protection and Short Line Railroads

A. *Ex Parte 392*

Since 1985, the Commission has refused to impose labor protection on acquisition cases other than mergers or consolidations.[118] The Staggers Rail Act gave the ICC the authority to exempt a railroad transaction from the requirements of the Act when ICC regulation is not necessary to carry out the policies of Congress.[119] The fundamental purpose of the exemption process was to allow the ICC to grant exemptions from the act where deregulation would be consistent with the policies of Congress.[120] Under *Ex Parte* 392, the ICC provided an abbreviated procedure for non-carriers to acquire railroads.[121] In addition, labor protective provisions were not imposed in these cases.[122]

The ICC's decision in *Ex Parte* 392 led to an acceleration in the number of short line sales. Frustrated with the failure of years of nationwide labor-management bargaining to reduce labor costs, many of the nation's Class I railroads turned to short line sales. Other railroads tried to lease rail lines to non-union subsidiaries or subsidiary lines which already had a labor contract more favorable to management. For example, Guilford Transportation attempted to lease the entire Boston & Maine, Maine Central, and Delaware & Hudson railroads to the Springfield Terminal, a former trolley line in New England.

In response, rail labor brought two general issues regarding labor protection in short line spinoffs before the courts. First, must a selling carrier bargain about labor protection in an *Ex Parte* 392 sale or alternatively are union agreements binding on the new carriers. Second, may a carrier enjoin a strike over labor protection in an *Ex Parte* 392 sale.

The question of labor protection in short line sales became murky due to conflicting decisions between federal courts of appeal. The Third Circuit held in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Company*[123] that rail unions must be included in the negoti-

118. *See Ex Parte* No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901, 1 I.C.C.2d 810 (1985), *aff'd mem.*, 817 F.2d 145 (Table) (D.C. Cir. 1987).

119. Staggers Rail Act of 1980, Pub. L. No. 96-448, Tit. II, § 213, 94 Stat. 1895, 1912 (1980) (as codified at 49 U.S.C. § 10505(a) (1989)).

120. *See Ex Parte* 392, 1 I.C.C. 2d at 811. *See also* H.R. Rept. 1430, 96th Cong., 2d sess. 105 (1980).

121. *Id.* at 811.

122. *Id.* at 814. "It is our established policy that the imposition of labor protective conditions on acquisitions and operations under 10901 could seriously jeopardize the economics of continued rail operations and result in the abandonment of the property with the attendant loss of both service and jobs on the line." *Id.* at 813.

123. Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R., 845 F.2d 420 (3rd Cir. 1988).

ations of line sales to new operations.[124] This decision directly conflicted with later opinions in the Eighth and Seventh Circuits. The Eighth Circuit Court upheld the Burlington Northern's spinoff of lines to the Montana Rail Link.[125] The Seventh Circuit followed the Eighth Circuit in allowing the Chicago & North Western's attempt to sell its Duck Creek lines.[126] On June 21, 1989, the Supreme Court of the United States decided the matter as far as the Pittsburgh and Lake Erie sale was concerned.[127] However, because of the special facts of that case, many of the issues concerning labor protection in short line sales remain unresolved.

B. The P&LE Case

Pittsburgh and Lake Erie (P&LE) was a steel-hauling short line railroad serving points in Ohio and western Pennsylvania. Once a part of the mighty New York Central System, the "Little Giant" went its own way as an independent line after the formation of Conrail. Part of its business was handling overhead traffic for the Baltimore & Ohio, bypassing B&O's own lines. The B&O began upgrading its own trackage and avoiding the P&LE route with its merger into the Chessie System.

As the fortunes of the steel industry declined, so did those of the P&LE.[128] The railroad's owners found a willing buyer, P&LE Rail Co. (Railco), a subsidiary of Chicago & West Pullman Transportation Corporation. Railco, however, was unwilling to take on the burden of P&LE's labor contracts. While the railroad would remain, only 250 of P&LE's 750 employees would be offered jobs with Railco.

The Railway Labor Executives' Association (RLEA)[129] claimed that this transaction was one affecting rates of pay, rules, and working conditions under the Railway Labor Act.[130] The RLEA indicated its willingness to negotiate all aspects of the matter, including the decision to sell the railroad.[131] The P&LE indicated a willingness to discuss the matter, but noted that bargaining was not required because this was a sales transac-

124. *Id.* at 423.

125. *See* Burlington N. R.R. v. United Transp. Union, 848 F.2d 856 (8th Cir. 1988).

126. *See* Rail Labor Executives' Ass'n v. Chicago & N.W. Transp. Co., 855 F.2d 1277 (7th Cir. 1988).

127. Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n, — U.S. —, 109 S. Ct 2584 (1989).

128. In the five years before the case, P&LE lost 60 million dollars. P&LE v. RLEA, 109 S. Ct. at 2584.

129. The RLEA is an organization made up of various labor unions representing railroad workers.

130. 45 U.S.C. § 156 (1988). Section 156 (Section 6 of the original act) requires that the party proposing to change rates of pay, rules, and working conditions post notices on the property proposing a bargaining session before such changes can be made.

131. P&LE v. RLEA, 109 S. Ct. at 2589.

tion governed by the Interstate Commerce Act.[132] The company claimed that the Section 6 notices posted by the unions (proposing changes in wages, work rules, and working conditions) were invalid since this transaction was preempted by the ICC.[133]

On August 19, 1987, the RLEA sought to enjoin the P&LE from going forward with the sale of the line.[134] On September 15, 1987, the unions went on strike. The district court denied the railroad's request for an injunction ending the strike, on the grounds that the Norris-LaGuardia Act (NLGA)[135] prohibited most injunctions in labor disputes.

Subsequently, on September 19, 1987, Railco filed a notice of exemption pursuant to *Ex Parte* 392, which exempted Railco from the ICC's labor protection requirements.[136] None of the unions had requested labor protection from the ICC.[137] On October 8, the district court ruled that the ICC's preemption of the issue negated the duty that P&LE had to bargain with the unions over the sale.[138] In addition, the district court held "that the NLGA did not forbid the issuance of an injunction under such circumstances."[139]

The Third Circuit Court of Appeals reversed.[140] The court did not share the belief that the Interstate Commerce Act and the Railway Labor Act were on a collision course. Specifically, the court held that the ICC's intervention did not void the NLGA's prohibition on labor injunctions.[141]

On remand, the district court held that although the railroad did not have a duty to bargain with its employees over the decision to sell the property, it did have to confer with the unions over the sale's effect on the employees.[142] The court went on to rule that the status quo provision of the Railway Labor Act must be satisfied before the sale could be consummated despite ICC approval of the transaction.[143] The court then granted

132. 49 U.S.C. § 10901 (1989). This requires noncarriers (Chicago & West Pullman's Railco subsidiary was not an operating railroad) to obtain ICC approval before buying an existing railroad.

133. P&LE v. RLEA, 109 S. Ct. at 2589.

134. *Id.* at 2590.

135. Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (as codified at 29 U.S.C. § 101 (1982)). This law limits the power of the federal courts to grant injunctions in labor-management disputes, unless Congress has specifically prescribed injunctive relief.

136. P&LE v. RLEA, 109 S. Ct. at 2591.

137. *Id.*

138. *Id.* The District Court for the Western District of Pennsylvania entered an injunction against the strike.

139. *Id.*

140. Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R., 831 F.2d 1231 (3rd Cir. 1987).

141. *Id.*

142. Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R., 677 F. Supp. 830 (W.D. Pa. 1987).

143. *Id.*

the unions' request to enjoin the sale and the Court of Appeals affirmed.[144]

The Supreme Court reversed, and in doing so may have set a precedent for no labor protection in short line sales.[145] The Court, through Mr. Justice White, spoke of the interaction of three statutes: the Interstate Commerce Act (ICA), the Railway Labor Act (RLA), and the Norris-La-Guardia Act (NLGA).[146]

Without disregarding the RLA's duty to bargain or the NLGA's hostility to injunctions, the Court found that the RLA did not authorize an injunction against the proposed sale.[147] Working to harmonize the various statutes, the Court's decision was grounded on several considerations.

The Court first noted that the RLA speaks of a "change in agreements."[148] In this case, however, the sale did not of itself change a labor agreement. Moreover, the original agreement between P&LE and the unions did not contemplate any such sale. As such, the P&LE was under no obligation to serve Section 6 notices upon the unions.

Second, the Court rejected the RLEA's argument that the posting of Section 6 notices by the union required the railroad to preserve the status quo.[149] The majority stated:

> [W]e are convinced that we should be guided by the admonition . . . that the decision to close down a business entirely is so much a management decision that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case. Absent statutory direction to the contrary, the decision of a railroad employer to go out of business and consequently to reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of § 156.[150]

Finally, the Court's construction of the RLA noted the necessity of avoiding conflicts between the RLA and the ICA.[151] The Court found that the ICC has plenary jurisdiction over rail transactions. Nothing in the Railway Labor Act deals specifically with an employer going out of the railroad business. Since the collective bargaining agreement is silent

144. Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R., 845 F.2d 420 (3rd Cir. 1988).

145. Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2584 (1989).

146. *Id.* at 2588.

147. *Id.* at 2597.

148. *Id.* at 2592.

149. *Id.* at 2593-4.

150. *Id.* at 2595-6.

151. *Id.* at 2596.

concerning sale of the railroad, the unions cannot stop the sale by posting notices.

Although the railroad did not have to bargain with the union over its sale of the business, there does remain a limited duty to bargain over the effect of the sale upon employees. The Court did state, however, that obligation ceased when the sale was closed after the ICC's *Ex Parte* 392 exemption became effective.[152] The Court remanded the case to the Third Circuit as to whether or not the Court of Appeals should have lifted the injunction against the strike.

So *P&LE v. RLEA*, which had the effect of halting short line spinoffs, was finally decided for management.[153] However, the *P&LE v. RLEA* holding is limited to the facts of a special situation and is not necessarily applicable to the spinoff of short line railways. There are at least five reasons that *P&LE v. RLEA* may not resolve other cases involving labor protection in short line sales.

First, the P&LE was not a sale involving the spinoff of part of the railroad. The P&LE was being sold intact, as is. In contrast, most short line spinoffs involve the sale of light density branch lines by a Class I railroad to a friendly connecting company.

The fact that this was a proposal by the railroad to get out of the railroad business altogether was very important to the Court.[154] Footnote 17 suggests that a different result may be reached in a partial line sale.[155] In footnote 17, the Court distinguished *Railroad Telegraphers v. Chicago & N.W. R. Co.*[156] and the present case. The Court noted that "a railroad's proposal to abandon certain single-agent stations and hence abolish some jobs was a bargainable issue."[157] It is arguable that *Telegraphers* would control in the case of a partial line sale.

Second, P&LE was not maintaining any contractual or other relationship with the new company.[158] The P&LE stockholders planned to take the proceeds from the sale and exit from the railroad business. In contrast, many of the spinoff short lines are closely affiliated with their parent Class I. It is not uncommon for short lines to rely on a Class I for their freight car supply or services such as tariff filings.

Third, the unions had not requested the ICC for labor protection pro-

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152. *Id.* at 2597.

153. *See* Abbott, *Short Line Sales To Go On Despite P&LE, Say Class Is*, TRAFFIC WORLD, July 31, 1989, at 6. The Pittsburgh & Lake Erie currently has no plans to sell the lines. Management is negotiating with its labor unions to cut its payroll from 650 to less than 275 people.

154. P&LE v. RLEA, 109 S. Ct. at 2594-6.

155. *Id.* at 2595.

156. Railroad Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

157. P&LE v. RLEA, 109 S. Ct. 2595.

158. *Id.* at 2596.

visions (possibly believing the action to be futile under current policies of the ICC).[159] Though they are not required to ask for labor protection, they may so petition.

Fourth, there still is a limited and undefined duty to bargain with unions over the effect of a sale.[160] With a seller that is an ongoing railroad, the employees who worked the discarded lines can displace other employees on the seller's network. Thus, the affect on other current employees may be enough to require full-scale bargaining when a railroad wishes to continue operating but spinoff an unprofitable branch line.

Finally, the unions' Section 6 notices were served after the P&LE's agreement with Railco had been settled.[161] *P&LE v. RLEA* does not address the case where a union serves a Section 6 notice anticipating a future sale. The Court stated:

> We address the duty to bargain about the effects of the sale only in the context of the facts existing when the unions' notices were served. We do not deal with a railroad employer's duty to bargain in response to a union's § 156 notice proposing labor protection provisions in the event that a sale, not yet contemplated, should take place.[162]

In summary, *P&LE v. RLEA* probably will not be the last word on labor protection for railroad employees in short line situations. Thus, other than allowing the Little Giant to sell its lines, issues surrounding labor protection and short line sales remain unresolved.[163]

C. *Related Issues*

Labor protection is not the only issue facing short line spinoffs. The crew consist issue, which has vexed the rails since 1959, is just now being addressed by the Class I carriers and unions. Crew consist may also be an issue when a new railroad takes over traffic formerly handled by a Class I carrier. Remember that labor contracts have no expiration date on the railroads. Thus, the question arises whether a short line railroad should be considered a successor employer to the original carrier.

Here we see a conflict between the philosophies of the ICA and the RLA. The ICA views public convenience and necessity as the prime consideration in continuing a service.[164] The RLA treats all matters involving employment as subject to the free bargaining of employers and employ-

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159. *Id.* at 2591.
160. *Id.* at 2597.
161. *Id.* at 2597.
162. *Id.* at 2597 n.19.
163. *See* Abbott, *Short Line Sales To Go On Despite P&LE, Say Class Is*, TRAFFIC WORLD, July 31, 1989 at 6. (Class I railroads, prospective short line buyers, and bankers feel that *P&LE v. RLEA* is irrelevant. Future sales may involve negotiations with unions, labor protection payments, or other legal challenges).
164. Dempsey and Thoms, *supra* note 46, at 49.

ees.[165] The ICC may grant a new carrier operating rights as a way of facilitating transportation. However, under the RLA, the National Mediation Board may view the transfer as a way for the railroad to evade the obligations of its collective bargaining agreement.

Particularly interesting are the cases in which directed-service orders are issued by the ICC.[166] These orders are ad hoc notices permitting one carrier to operate over the lines of another. Directed service orders can be issued when a carrier has no cash and is unable to continue operations. This is what has happened with the Delaware & Hudson Railway. Its owner, Guilford Industries, had a policy of leasing its lines to subsidiary Springfield Terminal. The Springfield terminal had a sweetheart contract with its unions allowing small crews. When it was ruled that Guilford was evading its Railway Labor Act responsibilities, Guilford claimed a cashless position and filed for reorganization of the D&H.[167] The ICC directed the New York, Susquehanna and Western to operate over the D&H lines, but with the smaller crews allowed by the NYS&W agreement, apparently with the grudging consent of the unions.

Both labor protection provisions from the ICC and labor agreements involving the carriers and their unions have had a chilling effect on short line sales.[168] It may be that the crew consist issue has to be settled on a carrier-by-carrier basis (as it has been with airlines and motor carriers) rather than by the indirect route of involving subsidiaries, branchlines, and paper corporations.

For years, railroads and their unions have bargained on a national basis. This meant that prosperous and struggling railroads and their unions received the same labor agreement. Today, railroads have attempted to bargain on an individual basis and free themselves from the dead hand of national agreements.[169] There will always be room for short line railroads because of local management, better service, and regional efficiencies. However, labor costs will be less of a factor if Class I railroads and their unions can come to acceptable agreements on their own.

165. *Id.* at 297.

166. Thoms, *Those Directed Service Orders*, TRAINS, Sept. 1981, at 48.

167. RAILFAN & RAILROAD, Sept. 1988, at 30. The ICC has extended the directed service order over the D&H, without solving the question of whether the NYS&W agreement (which provides for reduced crews) or the old D&H agreement (which maintains larger crews) should prevail.

168. Plous, *Rx for Regional Railroading*, RAILWAY AGE, May 1988, at RR7. This seems to have been the fate of both the Guilford and the Burlington Northern schemes for turning over traffic to subsidiaries with less strict labor contracts.

169. Thoms, *Transport Labor in a Deregulated Economy*, Prentice-Hall Industrial Relations Guide, § 42,176 (1986).

V. SUMMARY AND CONCLUSIONS

In summary, the 1980s saw a major downsizing of mainline railroads. While there were extensive abandonments, many other lines that might have been abandoned were sold to new railroads.

The labor protection provisions of the New York Dock standard[170] will continue to be applied in rail merger cases as the standards for mergers and consolidations have not been statutorily changed. However, job protection for railroad employees has been curtailed in recent years.

Further restrictions to labor protection have occurred with the ICC's decision not to require labor protection in short line sales.

The economic analysis concluded that short line operation of Class I light density lines reduced operating costs by almost 25 percent. This was largely the result of short lines being able to operate with smaller crews and relaxed work-rules.[171] Thus, short line operators may be able to earn a higher return on investment than a Class I carrier would on the same light-density network. At the same time, the Class I carriers' earnings should be enhanced if marginally profitable rail line segments can be spun off.

The ICC has the power to impose labor protection provisions in short line sales. However, it has chosen not to, in an attempt to avoid saddling any startup railroads with any additional costs.[172] Currently, rail labor is lobbying Congress to extend the standard six-year labor protection arrangements to short lines. Such a bill would effectively legislate the New York Dock conditions in all short line takeovers. If such a bill is enacted, rail observers fear that short lines will find it difficult to obtain new operators and that capital investors will flee the industry.[173] The Association of American Railroads' public information spokesman, Frank Wilner, writes:

> If rail labor is successful in extending this protection, the economics of regional and short line railroads will be jeopardized, additional rail abandon-

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170. As shown above, the New York Dock standards are the most recent protective conditions imposed by the ICC. They follow the Amtrak standards of 6 years labor protection from the date an employee was adversely affected by the merger. *See* Dempsey and Thoms, *supra* note 46, at 301-303.

171. This does not mean that the railroad is nonunion. Sometimes a short line has an existing union contract that is more favorable to management (for example, it provides for a reduced crew on trains) than the Class I railroad it replaces. That is how the Guilford Transportation combine leased its three railroads to tiny subsidiary Springfield Terminal. The Railway Labor Act protects the right of short line and mainline employees to choose whatever bargaining representative they desire to represent their interests. *See* TRAINS, Feb. 1988, at 3; TRAINS, Mar. 1988, at 10, 20-21; PASSENGER TRAIN JOURNAL, Feb. 1988, at 37.

172. *See* Phillips, *Can they Teach the Elephant to Dance*, TRAINS, March 1988, at 20. (Author speculates that railroad short lines are able to operate efficiently without traditional work rules and adherence to outmoded labor contracts would mean abandonment of a good part of the industry).

173. *Id. See also* Wilner, *A Watershed for Rail Labor?*, TRAINS, Dec. 1987, at 20.

ments most likely will occur, less rail traffic will be available for feeding into trunk lines and more productive jobs will be lost.[174]

In conclusion, many of the issues addressed in *P&LE v. RLEA* remain unresolved because of the unique facts of that case. First, the Pittsburgh & Lake Erie was not a true short line spinoff, but rather the sale of an entire railroad. Second, the P&LE was not maintaining any contractual or other relationship with the new company. Third, the unions had not requested the ICC for labor protection provisions. Finally, the *P&LE v. RLEA* case does not address the case where a union serves a Section 6 notice anticipating a future sale.

Class I railroad management, the unions, and prospective short line buyers hoped that *P&LE v. RLEA* would resolve the uncertainties of labor protection in short line sales. However, much uncertainty remains as the factual differences of a partial line sale could lead to a different result. The resulting uncertainty has led the railroads and unions to negotiate the effects of future sales, which is ironic as this was the original intent of the Railway Labor Act.

174. Wilner, *supra* note 173, at 21. *See also* Ingles, *Strike 2; Is it Hardball?*, TRAINS, Feb. 1988, at 3.