Approved A W Douville 3-22-88
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:07 a.m./~~p.m.~~ on February 25, 1988 in room 526-S of the Capitol.

All members were present except:
Representatives R.D. Miller - Excused
Mike O'Neal - Excused
Donna Whiteman - Excused

Committee staff present:

Jerry Ann Donaldson - Kansas Department of Legislative Research
Jim Wilson, Revisor of Statutes' Office
Juel Bennewitz, Secretary to the Committee

Conferees appearing before the committee:

Ron Calbert, United Transportation Union
Pat Hubbell, Kansas Railroad Association
Rick Webb, South East Kansas Railroad
Richard Dame, Brotherhood of Locomotive Engineers

Ron Calbert explained the purpose of H.B. 2939 was first right of hire in the event of a non-railroad acquisition. This would not fall under the jurisdiction of the I.C.C. unless the acquiring company desired purchasing more track at a later date. Mr. Calbert proceeded with his testimony in support of the bill, attachment #1.

Representative Bideau had a number of questions, the first being - if the employee were given the right of priority hire, would he continue at the same wage rate. Mr. Calbert's response was negative saying the employee would forfeit previous benefits. The next question was on Section 2 regarding the conclusive presumption of capabilities. The representative cited cases from personal knowledge where the railroad had just cause for the dismissal of the employee and stated concern regarding the language in this section and asked for comments from Mr. Calbert. There were none. The next question was how this applied to railroad retirement. Mr. Calbert responded since railroad retirement is under the I.R.S., the employer would be required to pay it. The last question was whether there were any other federal statutes or case law provisions that give protections similar to this bill. This bill is similar to one that was passed in the State of Maine last year but there are no federal statutes resembling it.

Representative Patrick stated a philosophical concern for the right of a purchaser to make whatever financial and/or management decisions necessary. Mr. Calbert cited the uniqueness of the railroad industry established through land grants, acquisitions and mergers becoming a common carrier or public utility. The representative noted the advent of four lane highways, deregulation of the trucking industry, barge traffic, pipelines, etc. asking if these did not have an impact. Mr. Calbert responded by stating he had seen branch lines "killed off" by the railroads not providing the cars necessary to move commodities to a commercial market and have even subsidized some of the elevators to transport their commodities by truck. Mr. Calbert maintained the railroads have been profitable over the last 10-20 years and named his employer as one.

Pat Hubbell submitted his testimony, attachments #2 and #3 in opposition to the bill. He summarized his testimony by citing the history contained in the I.C.C.'s decision, attachment #3, as it related to the competition in the industry. In response to previous inferences that some of the railroad decisions are made "behind closed doors", Mr. Hubbell referred to a booklet published by the Kansas Department of Transportation (KDOT) listing every branch line in the State of Kansas potentially up for abandonment. This report is published annually by KDOT and there is a governor's advisory committee which meets, discusses and is made aware of which lines are potentially up for abandonment. Both Mr. Calbert and Mr. Hubbell are members of the advisory committee.

MINUTES OF THE House COMMITTEE ON Labor and Industry,

room 526-S, Statehouse, at 9:07 a.m./~~p.m.~~ on February 25, 1988

Attachment #4 is the testimony of Rick Webb in opposition to the bill.

Attachment #5 is the testimony of Richard Dame, Brotherhood of Locomotive Engineers, in support of H.B. 2939.

Chairman Douville cited the Job Training Partnership Act (JTPA) and asked if railroad employees would not qualify for this. He wondered if it would be a duplication of services. Mr. Dame had no knowledge of the act so could not speak to its provisions.

Representative Gjerstad noted Mr. Hubbell's testimony as mainly federally referenced rather than at this bill. She asked if the implication was labor costs would be lower under this bill. The response was yes and for several reasons, one of which would be fewer crew members. Also new owners could hire independent contractors for roadbeds where railroads have union agreements with maintenance of way personnel.

Representative Hensley and Mr. Webb discussed the implications of this bill had it been law at the time his company acquired the railroad. Mr. Webb's statement was that his company wanted the privilege of offering jobs to its own employees first. His contention was this bill would designate to whom the jobs would have been offered.

Representative Mead's inquiry of Mr. Dame was in regard to the average salary of an engineer. The response was that on a main line railroad, it would be $40-50,000.00 per year plus benefits. He then asked Mr. Webb the amount paid by his railroad for the same job. The response was in the high $20,000.00 to low $30,000.00 range plus benefits. He recognized the salaries as not being equal but cited their business as a new business with the hope for growth.

In view of the wide variation in the salaries, the representative asked if, in Mr. Dame's opinion, an engineer would go to work for an employer such as Mr. Webb after earning wages and benefits paid on a main line railroad. The response was that was the point of the bill, the employee having the option to choose.

The meeting was adjourned at 9:58 a.m. The next meeting of the committee will be March 1, 1988, 9:00 a.m. in Room 526-S.

HOUSE COMMITTEE ON
LABOR AND INDUSTRY

Guest List Date February 25, 1988

Name	City	Representing
Pat Hubbell	Topeka	Kansas Railroad Assn.
Rich Dame	Hoisington	B. L. E.
Ron Calbert	Newton	U. T. U.
Harry D. Helser	Wichita	K. AFL-CIO
Mark A. Blazer	Coffeyville	S.E.K. Railroad
Rick Webb	"	" "
Bill Mead	Great Falls, Va.	Self

R. E. (RON) CALBERT
DIRECTOR CHAIRMAN

united transportation union

OAK STREET PLACE SUITE A
130 EAST FIFTH STREET
P.O. BOX 726
NEWTON, KANSAS 67114-0726
TELEPHONE (316) 283-8041

KANSAS STATE LEGISLATIVE BOARD

Statement Re: House Bill No. 2939

An Act Enacting the Railroad Employees Equity Act

Presented to: House Labor and Industry Committee

February 25, 1988

Mr. Chairman, and members of the Committee, thank you for this opportunity to appear before you today concerning House Bill No. 2939, an act enacting the railroad employees equity act. I am Ron Calbert, Director/Chairman of the Kansas State Legislative Board, **United Transportation Union.** Mr. Chairman, I am authorized to speak for our some seven thousand (7,000) active and retired railroad employees and their families who reside in Kansas.

Mr. Chairman, I appear here today in support of House Bill No. 2939. The purpose of this bill is to establish the Railroad Employee Equity Act. Under this act, a schedule of hiring priorities for railroad employees and a cause of action for deprivation of rights under the Act are created. This bill also establishes a new career training assistance program for qualifying unemployed railroad personnel. The wording in House Bill No. 2939 is the same as in L.R. No. 2580, a bill that became law in the state of Maine in 1987.

In 1980, rail labor and management joined forces to support and pass into law the Staggers Act, the deregulation of the railroad industry. The Staggers Act allowed railroads to shed unprofitable branch lines and

HOUSE LABOR & INDUSTRY
Attachment #1
2/25/88

compete with other forms of transportation. However, the Interstate Commerce Commission allows railroads to sell, through back door arrangements, large segments of track - not just short lines - while refusing to enforce customary labor protections. The Interstate Commerce Commission's position in these cases must be corrected, or the nation's rail transportation system will suffer as roads are fragmented and employees will continue to be hurt as rail management seeks to shed union contractual obligations through sell-offs.

Over a period of years, the Interstate Commerce Commission has imposed several different employee protective conditions regarding trackage rights, merger, control cases and abandonments. These protective condition agreements began in 1936 with the Washington Job Protection Agreement, followed by the Oklahoma, New Orleans, Burlington, New York Dock, and Oregon Short Line Conditions. Attached is a photocopy of the Interstate Commerce Commission's Docket No. AB-52 (Sub-No. 57), wherein the Atchison, Topeka and Santa Fe Railway Company has filed a notice of intent to abandon or to discontinue service on a line of railroad known as the Leavenworth Subdivision. As you can see on the attachment, this intended rail line abandonment encompasses a distance of only 23.85 miles; yet the interest of railroad employees will be protected by the employee protective conditions prescribed by the Interstate Commerce Commission in Oregon Short Line Railroad Company, Abandonment, 360 I.C.C. 91 (1979). (See attachment.)

Since the Staggers Act has been passed, the Interstate Commerce Commission has done nothing to carry out its public interest responsibilities, but instead has done everything to assist the holding companies who own the railroads to get out of the railroad industry.

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They have accomplished this by allowing these companies to sell off regional railroads of up to 1,800 miles of trunk line carriers' main line tracks.

The Class I railroads are not trying to save endangered rail links (or short lines). I call your attention to the Montana Rail Link, a short line railroad which was created in the state of Montana by the Burlington Northern Railroad, and is currently leasing more than 800 miles of track from the Burlington Northern Railroad. Though the railroad line functions, as it did before, as a main line route for Burlington Northern trains through Montana and Idaho, the Montana Rail Link has the right to operate with smaller crews and without work rules. In addition, the Interstate Commerce Commission has stated that it will allow the Soo Line to sell some 1,800 miles of its Lake States Division to Wisconsin Central Limited. It is extremely difficult to understand how these lines of rail - among numerous others - can be justified as being short lines or branch lines.

Let's say the railroad that runs by your elevator sends a representative to your door with a proposal. If you expand your loading operation and build your own three-fourth mile of track, the railroad will give you exclusive right to load unit trains in a fifty mile radius at reduced shipping rates. You agree to sign a contract and spend a great deal of money upgrading your facility.

A year later you see that the elevator down the street is starting to expand. You inquire and find out that elevator has signed a similar contract. You then take the railroad to court for violating your contract and you win. You win because you and the railroad both agreed to the exclusive right provision in your contract. A deal is a deal.

Now let's look at what happens to railroad workers. Railroad workers sit down with management and both sides agree to a three year contract covering railroad workers. The ink is barely dry on the paper when the

railroad workers find out that the rail lines on which they have been working have been sold or leased to a non-railroad company. Perhaps they were sold to a railroad subsidiary, which is popular. Or another popular trend is to sell lines to corporate officers. Whoever buys the lines, the effect is the same - the employees are thrown out of work and the newly signed contract is void. This time, instead of a court law, we have the Interstate Commerce Commission that makes judgment in such matters. The Interstate Commerce Commission has taken the position that we do not care who rail lines are sold to, leased to, or given to - the labor contracts are void.

So while in almost every other facet of life a contract is an agreement that must be adhered to, it is different when it comes to rail line sales and contracts between workers and their railroads. A deal no longer is a deal, and thousands of railroad workers across this country have suffered because of it.

The purpose of House Bill No. 2939 is to establish the Railroad Employee Equity Act. Under this Act, a schedule of hiring priorities for railroad employees would be provided. This schedule would give the effected employee the first right of hire from the acquiring non-railroad company, as well as a cause of action for deprivation of hiring rights. House Bill No. 2939 also establishes a new career training assistance program for qualifying unemployed railroad personnel, and sets out the qualified institution, the qualifying employee, and the amount of monetary assistance that the new operator will provide (see Section Four of the bill).

We are not asking for labor protection that has been offered to rail labor over the years by the Interstate Commerce Commission. Rather, we

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are asking the Kansas Legislature to give railroad workers the first right-of-hire in short line sales or leases. In addition, in situations where there are not enough jobs to go around, we ask that the acquiring company retrain the unemployed railroad worker who may seek this assistance.

Thank you again, Mr. Chairman, for furnishing me the opportunity to appear before your Committee in support of House Bill No. 2939 and express the concerns of the Kansans that I represent. I will attempt to answer any questions at this time.

HOUSE LABOR & INDUSTRY
Attachment #1
2-25-88

Docket No. AB-52 (Sub-No. 57)

NOTICE OF INTENT TO ABANDON
OR TO DISCONTINUE SERVICE

The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") gives notice that on or about March 15, 1988 it intends to file with the Interstate Commerce Commission, Washington, D.C. 20423, an application for a certificate permitting the abandonment of a line of railroad known as the Leavenworth Subdivision, Kansas City Division, extending from Mile Post 0.0 at Wilder Junction to the end of the line at Mile Post 23.85 near Leavenworth, a distance of 23.85 miles, all in Johnson, Wyandotte and Leavenworth Counties, Kansas. The line for which the abandonment application will be filed includes the following stations:

Station	Mile Post
Bonner Springs	1.5
Lansing	16.8
Wadsworth	18.5
Leavenworth	22.0

The reasons for the proposed abandonment are that the line is operated at a substantial deficit, that prospects for increased revenues are extremely poor and that the line's shippers have adequate transportation alternatives.

This line of railroad has appeared on the system diagram map in category 1 since June 30, 1986.

The interest of railroad employees will be protected by the conditions prescribed by the Interstate Commerce Commission in Oregon Short Line R. Co. Abandonment, 360 I.C.C. 91 (1979).

Any interested person, after the application is filed on March 15, 1988, is entitled to file with the Interstate Commerce Commission written comments concerning the proposed abandonment or protests to it.

Protests must contain the following:

(1) Protestant's name, address and business.

(2) A statement describing protestant's interest in the proceeding including:

(i) A description of protestant's use of the line;

(ii) If protestant does not use the line, information concerning the group or public interest it represents; and

(iii) If protestant's interest is limited to the retention of service over a portion of the line, a description of the portion of the line subject to protestant's interest

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KANSAS RAILROAD ASSOCIATION

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P.O. BOX 1738
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913-357-3392

PATRICK R. HUBBELL
SPECIAL REPRESENTATIVE-PUBLIC AFFAIRS

MICHAEL C. GERMANN, J. D.
LEGISLATIVE REPRESENTATIVE

Statement of the
Kansas Railroad Association

Presented to the House Committee
on Labor and Industry
The Honorable Arthur W. Douville, Chairman

Statehouse
Topeka, Kansas
February 25, 1988

* * * * * * * * *

Mr. Chairman and Members of the Committee:

My name is Pat Hubbell. I am the Special Representative - Public Affairs for the Kansas Railroad Association. I want to thank you for giving me the opportunity to express the opposition of the Kansas Railroad Association to House Bill No. 2939, "An Act enacting the railroad employee equity act." The title to this bill is very misleading, because the bill's content does very little to address real issues of equity for railroad employees.

Most inequities which exist between railroad employees and employees of other industries are the result of an extensive federal involvement in the business of railroading. Many of

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the inequities which exist today for railroad employees had their birth during World War I, a period of time when the railroads were nationalized. During the period of nationalization the federal government imposed work rules on the industry. Seventy years later, many of the federally-imposed work rules are still in place.

Seventy years of working under the same rules have had dire consequences. Restrictive work rules have played a villainous role in the loss of rail market share, in the loss of rail physical plant, and in the loss of rail jobs. H.B. 2939 does not address the culprit which allows this inequitable situation to exist.

The real culprit in this sad state of affairs is the Federal Railway Labor Act ("RLA") (45 U.S.C. §151 et seq.). The structure of the RLA forecloses any real opportunities for rail employers to negotiate changes in outmoded work rules with their contract employees. Not only is the RLA structurally unsound, it permits secondary boycotts. No other industry must contend with secondary boycotts.

The cause of equity for railroad employees with employees of other industries will not be advanced with the passage of H.B. 2939. A more effective step toward achieving equity for railroad employees could be taken by this Committee if it were to reject H.B. 2939 and recommend to the Kansas Legislature that the Congress of the United States be memorialized to repeal the RLA. Labor-management relations in the rail

industry should be accorded equity with other industries. Their relations should be governed, like other industries, by the provisions of the National Labor Relations Act.

Railroad employees cannot achieve equity with employees of other industries as long as they are forced to participate in the railroad retirement system. Passage of H.B. 2939 will not eliminate this inequity. We urge the Committee to recommend to the Kansas Legislature that it memorialize Congress to scrap the railroad retirement system. Elimination of the railroad retirement system would place the rail industry and its contract employees on an equal footing and an equitable basis with other industries and their employees.

The cost of maintaining the railroad retirement system is astronomical, and no manner of logic can support the differential treatment accorded railroad retirement benefits and social security benefits for purposes of state income taxation. Equity dictates that the railroad retirement system be phased out and be merged into the social security system.

Congress also should be memorialized to scrap the federally-run unemployment system for railroad workers (45 U.S.C. 367 et seq.) and the Federal Employers' Liability Act ("FELA") (45 U.S.C. §51). These federal Acts treat railroad employers and their contract employees in a very inequitable manner. FELA is particularly unfair.

FELA forces rail workers injured on the job to sue their employers to win compensation. By placing the issue of injury

on the job in the context of a lawsuit, injured rail workers lose a substantial part of their claims to legal fees. Efforts at rehabilitation are hindered by the adversarial relationship created by FELA. Equity dictates that both FELA and the federally-run unemployment system for railroad workers be scrapped and be replaced with modern state-run workers' compensation programs and state-administered systems of unemployment insurance.

The preemptive nature of federal law overshadows the underlying issue which H.B. 2939 proposes to address. The Interstate Commerce Commission ("Commission"), in a decision issued on January 28, 1988, expressed its preemptive authority over the subject matter of H.B. 2939 in the following manner:

> ". . . The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines. This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices. . . .
>
> ". . . That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority -- rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over

consolidations, sales and abandonment has been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. . . .

"As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. . . " [Footnotes omitted.] (FRVR Corporation -- Exemption Acquisition and Operation -- Certain Lines of Chicago and North Western Transportation Company -- Petition for Clarification, F.D. No. 31205, pgs. 8-9, January 28, 1988.)

The Commission's decision contains exhaustive background information and a thorough analysis of the issue underlying H.B. 2939. In part, the Commission stated:

"Up until the Staggers Act, the principal means of exit for large 'Class I' railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can product profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor. . . .

"The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a

branch line sale process in which labor protection was foreclosed by the statute. In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection. By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay. . . .

"The Commission's policy has been validated by practical results. New railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved. . .." [Footnotes omitted.] (Id., pgs. 1-3.)

The imposition of labor protection conditions on the sale of light-density rail lines was commented on recently by John H. Riley, Federal Railroad Administrator: "This whole idea of imposing mandatory labor protection across-the-board on these divestitures is one of the most foolish proposals -- from a jobs and service perspective -- that I've had the displeasure of having to work with since I've been here. . . ." (Traffic World, Feb. 15, 1988, pg. 27.)

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H.B. 2939 proposes to do what the Interstate Commerce Commission has determined is ill-advised, and what the Federal Railroad Administrator has declared is foolisn. When traffic on a rail line declines to unprofitable levels, the only way to maintain service on that line is to transfer ownership to a shortline or regional rail operator who has lower capital and labor costs. In order to preserve rail service wherever economically viable, public policy should encourage ownership transfers on a free-market basis. Labor protection conditions, as contemplated by H.B. 2939, have no economic logic.

The cause of equity for railroad employees will not be advanced by the passage of H.B. 2939. Greater equity for railroad employees with employees of other industries only can be achieved when Congress decides to scrap the RLA, the railroad retirement system, the federally-run unemployment system for railroad workers, and FELA. We urge you to report H.B. 2939 adversely.

Thank you again for allowing me to present the views of the railroad industry on this proposal. Mr. Chairman, I will try to answer any questions which you or members of the Committee might have.

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EC

SERVICE DATE

JAN 29 1988

INTERSTATE COMMERCE COMMISSION

DECISION

FINANCE DOCKET NO. 31205

FRVR CORPORATION -- EXEMPTION ACQUISITION AND OPERATION -- CERTAIN LINES OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY -- PETITION FOR CLARIFICATION

Decided: January 28, 1988

This decision is issued in response to a petition filed by the Chicago and North Western Transportation Company (CNW) and FRVR Corporation. FRVR is a new corporation formed for the purpose of acquiring and operating certain rail lines of the CNW. Petitioners seek a statement of this agency's views as to our jurisdiction over labor issues arising out of the formation of short-line railroads. The matter has become controversial in the past several years, due to the acceleration in the creation of regional and short-line railroads.

Since partial deregulation under the Staggers Rail Act of 1980[1] nearly 200 short-line and regional railroads have come into existence -- partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.

Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act[2] threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor -- both on the smaller lines and throughout a reinvigorated Class I system -- and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.[3]

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process

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[1] Pub. L. No. 96-448, 94 Stat. 1941-45.

[2] Pub. L. No. 96-296, 94 Stat. 793.

[3] The National Rail Transportation Policy charges the Commission with the responsibility of ensuring the development of a sound rail transportation system, while encouraging fair wages and safe and suitable working conditions for labor. The Commission is also to encourage and promote energy conservation. See 49 U.S.C. 10101a.

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in which labor protection was foreclosed by the statute[4]. In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection.[5] By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications[6] on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.[7] The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to review and correct any unique problems that might arise out of exceptional circumstances.[8]

The Commission's policy has been validated by practical results. New railroad formation quickened,[9] abandonments

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[4] 49 U.S.C. 10905. See Simmons v. ICC, 760 F.2d 126 (7th Cir. 1985).

[5] See e.g., Durango and Silverton Narrow Gauge Railroad Co. - Acquisition and Operation, 363 I.C.C. 292 (1979), aff'd sub nom. Railway Labor Executives' Association v. United States, 697 F.2d 285 (10th Cir. 1983) (Review Board decision noting that imposition of labor protection was discretionary).

[6] See Knox and Kane Railroad Co. - Gettysburg Railroad Co. - Petition for Exemption, 366 I.C.C. 439 (1982).

[7] Ex Parte No. 392 (Sub No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, aff'd sub nom. Illinois Commerce Commission v. I.C.C., 817 F.2d 145 (DC Cir. 1987). This decision is in keeping with the National Transportation Policy of minimizing the need for Federal regulation (49 U.S.C. 10101a(2)), as well as the policies noted in footnote 3 above.

[8] The Staggers Act expanded the Commission's exemption authority. Further, as is stated in the Conference Report, the Commission is actively to pursue exemptions for transportation and is to have a policy of reviewing carrier actions after the fact to correct abuses. See H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 104-105.

[9] New Railroad Formation

Year Est.	Number
1982	25
1983	20
1984	31
1985	28
1986	45
1987*	70

* Preliminary figure based on notices filed.

fell,[10] service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.[11] Most observers supported and welcomed the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.[12] The Commission's authority includes the power to impose labor protective conditions through partial revocation,[13] although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent,[14] or where existing contracts specified that line sales were subject to procedural or substantive protection.[15] Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport

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[10]

Miles of Lines Abandoned

Year	Miles
1982	5151
1983	2454
1984	3083
1985	2343
1986	2087
1987	1932

[11] The Commission's Office of Transportation Analysis is engaged in continuing study and research on the effect of the Commission's policy and the short-line/regional phenomenon. This study has included on-site interviews with labor and management, as well as data collection and analysis. This analysis demonstrates that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier. Further, while initial employment levels are below those of the departing carrier, employment on some lines has grown over time as improved service attracts new business to the lines.

[12] See Consolidated Rail Corporation - Declaratory Order - Exemption, 1 I.C.C.2d 895 (1986), cited approvingly, G&T Terminal Packaging Co., Inc. v. Consolidated Rail Corp., CA 84-1173 Slip op. (D.N.J. October 23, 1986). See also legislative history of the Staggers Act in footnote 8 above.

[13] See Maryland Midland Railway, Inc. - Exemption from 49 U.S.C. 11343 and 11301 (not printed), served January 6, 1987.

[14] Cf. Order of Investigation, served May 18, 1987, in F.D. No. 30965, Delaware and Hudson Railway Company -- Lease and Trackage Rights Exemption -- Springfield Terminal Railway Company.

[15] It is the Commission's standard labor protection policy in restructuring proceedings to preserve existing employment contracts insofar as possible, consistent with the merger, consolidation or abandonment authorized. See section 2 of the standard New York Dock conditions, 360 I.C.C. 84 (1979).

system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.[16]

The exemption proposal filed by CNW and FRVR corresponds quite well to our expectations and experience with the use of the Ex Parte 392 (Sub-No. 1) rules. At issue are 208 miles of light density lines in Eastern Wisconsin in the area between Green Bay and Milwaukee. The paper industry is the principal source of traffic and holds the greatest potential for traffic growth on the FRVR line. But to achieve growth means reversing the paper industry's increasing reliance on truck service. A verified statement filed by Petitioners indicates that rail market share of the outbound paper market was 54 percent of the total in 1977, but had fallen to under 20 percent by 1986. The number of motor carriers operating in the region has doubled and price competition is strenuous. The lines of the CNW may now be under additional pressure since its rail competition (which had been the Soo Line operating at relatively standard Class I costs) is a new regional operator, the Wisconsin Central. Wisconsin Central, as organized, has distinct cost advantages that will make long-term competition by CNW almost certainly impossible, absent a substantial improvement in efficiency and productivity.[17]

To work its way out of this predicament, CNW seeks to sell its line to the newly formed FRVR. FRVR has a management team drawn from the Wisconsin area and from within the rail industry, with experience in running a small railroad and marketing rail transportation to the paper industry. It intends to draw its work force from existing CNW employees where possible, and anticipates that it will operate as a union-represented company.[18] Its wage rates will be approximately 85 percent of the Class I standard, and its work rules will give it substantial productivity improvement over the CNW operations. The company also anticipates use of an incentive bonus plan to further productivity. It will own its own engines, operate its own facilities, and rely principally on the CNW for car supply. It has trackage rights over CNW to connect into Milwaukee, and it has connections with other roads at points on the system. The company has already contacted shippers along the lines, and it filed 25 shipper letters acknowledging anticipated support and cooperation with its petition.

CNW estimates that the impact of the sale on its employees will be minimized by FRVR's commitment to the use of former CNW employees. For its part, CNW states that it has employment shortages elsewhere on its system, and that it will make these jobs available to workers affected by the FRVR sale. It anticipates that approximately 20 employees might still be left without employment either on FRVR or the CNW. It has offered a commitment of $30,000 per employee as a separation allowance for any employee unable to secure continued employment with either

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[16] Cf. Northern Pacific Acquiring Corp. and Eureka Southern Railroad Co. -- Exemption F.D. 30555 (Decision served January 8, 1988).

[17] Two petitions to revoke the Wisconsin Central exemption (F.D. No. 31102) are now before the Commission.

[18] Verified Statement of S. P. Selby. Selby states that CNW employees currently working on the affected lines are granted right of first hire selected in accordance with qualifications, work records, fitness and ability, and physical and medical standards. Selby states further that he has met with an officer of the Railway Labor Executive's Association to work out a suitable arrangement for union representation of future employees. V.S., at 3-4.

CNW, by exercising seniority, or with FRVR, under the right of first hire.[19] CNW has offered to meet with its unions to discuss this offer and related issues. According to Petitioner, the unions believe that such discussions must proceed under the auspices of the Railway Labor Act (RLA).[20] Bargaining under the RLA requires maintenance of the status quo, and permits resort to strikes, lockouts or other form of self-help if an impasse cannot be mediated. CNW takes the position that such bargaining gives labor the power to defeat the FRVR transaction, and is not required. However, informal discussions have taken place, but no agreements have been reached.

CNW has petitioned for a declaration as to the Commission's view of its role in resolving any labor disputes which may arise in connection with the implementation of this Commission authorized transaction.[21] CNW asserts such an action is required to ensure a smooth implementation of the authorized transaction.

The Railway Labor Executives' Association (RLEA) has filed in opposition to the Petition of FRVR and CNW. RLEA believes that the Commission is without jurisdiction to issue the clarifying decision requested by Petitioners, and that Petitioners' argument on the merits is based on erroneous legal interpretations.

DISCUSSION AND CONCLUSIONS

The first of RLEA's propositions appears to be based on a misapprehension of the nature of a declaratory order. It seems beyond question that the Commission has the authority to issue declaratory opinions.[22] RLEA does not directly address this authority, arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes" -- that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when challenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expressions may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

A part of the present controversy that requires clarification is whether the Railway Labor Act must be

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19 Verified statement of Robert Schmiege.

20 45 U.S.C. 151.

21 Pursuant to our class exemption rules, 49 CFR 1150.31 et seq., the CNW/FRVR exemption became effective December 30, seven days after filing. Petitioners indicated that they intend to defer consummation until the Commission responds to their petition for clarification. A related petition for exemption of a control relationship between FRVR and its parent corporation has also been filed.

22 Pursuant to 5 U.S.C. 554(e), an administrative agency is empowered in its discretion to issue declaratory orders to terminate controversy or remove uncertainty.

accommodated (in RLEA's words, subordinated) to the Interstate Commerce Act in the circumstances of an approved or exempted line sale arising under section 10901 of the ICA. A related issue is the immunity from injunction under the Norris-LaGuardia Act of a strike that threatens to prevent the consummation of a transaction so approved or exempted.

Until quite recently, it had been an established rule that the orders of the Commission approving the merger, sale, or abandonment of a line of railroad were not subject to collateral attack in the courts, and could not be frustrated by employee actions taken under the aegis of the Railway Labor Act or otherwise.[23] "Congress did not intend employees have such power to block consolidations which are in the public interest."[24] However, in a recent Third Circuit proceeding, Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association.[25] (Lake Erie), it has been held that a district court has no jurisdiction to enjoin a strike taken to block an ICC-approved sale. The Court based this holding on a finding that the Norris-LaGuardia Act need not be accommodated to the Interstate Commerce Act. This decision has had an immediate impact on the formation of small railroads,[26] threatening to halt the revitalization of the marginal railroad sectors -- a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

In its opposition response, RLEA takes the position that the Third Circuit Lake Erie decision is correct,[27] and that the Commission should conclude that the Interstate Commerce Act does not supersede the Railway Labor Act or Norris-LaGuardia. RLEA argues that Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R.[28] (Chicago River)and Boys Markets Inc. v. Retail Clerk's Union[29] (Boys Market) -- Supreme Court "accommodation" cases relied on by Petitioners -- are not controlling since they do not address the Interstate Commerce Act, but are limited to situations where aspects of national labor statutes were in conflict.[30] Hence, RLEA is in agreement with the Lake Erie court

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[23] Brotherhood of Locomotive Engineers v. C&NW, 314 F.2d 424 (8th Cir.), cert. denied, 375 U.S. 819 (1963).

[24] Missouri Pacific Railroad Company v. UTU, 782 F.2d 107 (8th Cir. 1986), cert. denied, 107 S. Ct. 3209 (1987).

[25] No. 87-3664, Slip op., October 26, 1987.

[26] The Lake Erie decision has been followed by a Missouri federal district court, Burlington Northern Railroad v. U.T.U., No. 86-5013, Slip op., October 26, 1987.(Missouri, Western District).

[27] The Lake Erie decision left open the issue of whether bargaining under the Railway Labor Act was necessary. The case was remanded to the district court on the RLA issue. The district court held the RLA applicable to the proposed sale and enjoined consummation of the transaction pending compliance with that act, finding that the Interstate Commerce Act does not operate to relieve the parties from their RLA obligations. Railway Labor Executives' Assoc. v. Pittsburgh & Lake Erie Railroad, No. 87-1745 Memorandum Opinion (Wes Dis. PA., No. 24, 1987). The case is back in the Third Circuit on appeal.

[28] 353 U.S. 30 (1957)

[29] 398 U.S. 235 (1970).

[30] Thus, in Chicago River an injunction against a strike was sustained where necessary to protect the Railway Labor Act's requirement that "minor" grievances be submitted to arbitration. In Boys Markets the court reached a similar conclusion under the

that statutory preemption of the Norris-LaGuardia no-injunction principle is limited to the need to accommodate other labor statutes. Without conceding its legitimacy, RLEA recognizes certain precedent to the effect that ICC authorization of a transaction under the merger provisions (49 U.S.C. 11343) will automatically relieve a carrier from the necessity of compliance with the Railway Labor Act to the extent necessary to go forward with the approved transaction. However, RLEA argues that this precedent has no relevance to 49 U.S.C. 10901 line sales. Unlike line sales, merger orders are provided explicit preemption authority in 49 U.S.C.11341[31] and, as income protection and dispute resolution mechanisms are mandatory in merger proceedings,[32] labor is not "left out in the cold." [33] According to RLEA these are critical distinctions.

The broad issue presented by the CNW-FRVR Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission. Every court that had ruled on this precise issue prior to the Lake Erie decision had answered yes.[34] By so doing, courts have recognized the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system, (including the need for fair and equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system. The ICC has inherent powers to impose labor protection where necessary to ensure labor equity,[35] including the power to impose income guarantees and comprehensive schemes for alternative dispute resolution -- mechanisms which may include notice, negotiation, a status quo requirement and arbitration. From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in

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Labor Management Relations Act.

[31] A carrier or corporation participating in a transaction approved or exempted by the Commission under subchapter III of Chapter 113 "is exempt from the antitrust laws and from all other laws ... as necessary to let that person carry out the transaction ..." By its terms, this section does not apply to line sales under Chapter 109.

[32] 49 U.S.C. 11347.

[33] RLEA cites to language in Missouri Pacific R. Co. v. United Transportation Union 782 F.2d 109 (8th Cir. 1986). This case held that a railroad is exempted under ICA Section 11341(a) from the Railway Labor Act in connection with a transaction approved under 49 U.S.C. 11343. Labor emphasizes that the court there reasoned that inferring preemption of the RLA was reasonable because mandatory labor protection is applied 782 F.2d, at 112. There are chronological problems with placing much reliance on the reasoning. The preemption provision was first enacted in 1920, mandatory labor protection in 1940.

[34] See Missouri Pacific R. Co. v. United Transportation Union, supra; Brotherhood of Locomotive Engineers v. C&NW, 314 F.2d 424 (8th Cir.), cert. denied 375 U.S. 819 (1963). Cf. ICC v. Locomotive Engineers, 55 USLW 4771 (June 9, 1987) (Concurring Opinion of Justice Stevens, joined by Justices Brennan, Marshall and Blackmun).

[35] United States v. Lowden, 308 U.S. 225 (1939); ICC v. Railway Labor Assn., 315 U.S. 373 (1942).

the rail industry. The Transportation Act of 1940[36] was a legislative affirmation of the Commission's authority to impose labor protection, mandating the use of labor protection in mergers and consolidations.[37] The Railroad Revitalization and Regulatory Reform Act of 1976[38] mandated labor protection in trackage rights, lease transactions, and abandonments. The Staggers Rail Act of 1980 made labor protection mandatory in connection with the abolition of rate bureaus (Section 219 (g) and feeder line sales - section 401), as well as giving the Commission explicit discretion to impose protective conditions on reciprocal switching and on the construction of new rail lines. For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

It is primarily due to the policy decision to withhold such protections taken in Ex Parte 392 (Sub-No. 1) (and in earlier individual proceedings) that the Commission's authority is under challenge. However, the Commission's policy determinations have been repeatedly sustained, and the existence of our jurisdiction may not hinge on the policy choice made.

In the first place, labor has not been left out in the cold. Affected parties were free to participate in the Ex Parte rulemaking, and are free to petition for its reopening. Indeed, aspects of the rulemaking are now under reconsideration in a reopened proceeding.[39] Further, in individual cases through the revocation process parties are given the opportunity to show that the policy norms of the Ex Parte rulemaking ought not apply. Full participation before the Commission is an important end in itself as it helps to inform the Commission of the range of problems and circumstances confronting transportation. If current policy does not provide routine protection, it is because experience has demonstrated that the formation of new lines would be thwarted, to the overall public detriment. Where exceptions are needed, the Commission has the authority to fashion a full remedy.

Jurisdiction is not determined by outcome. The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines.[40] This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide

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[36] 54 Stat. 899.

[37] The Lowden court, while noting the pendency of the legislation which was to become the 1940 Act, concluded that the legislative initiatives did not militate against the conclusion that the Commission had implied power over labor protection in consolidations, but rather that Congress merely sought to make mandatory what was at the time discretionary. United States v. Lowden, supra, at 239.

[38] 90 Stat. 31.

[39] Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, Notice of Proposed Rulemaking served October 2, 1987.

[40] Brotherhood of Locomotive Engineers v. C&NW, supra; Chicago and North Western Transportation Co. v. Kalo Brick and Tile Co., 450 U.S. 311 (1981).

labor protection under its auspices.[41] We believe this is the correct interpretation of the matter at issue.

The fact that a particular "labor outcome" does not dictate the extent or effect of ICC jurisdiction is a necessary correlative to the Commission's discharge of its responsibilities. That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority -- rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonment has been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our small-railroad policy illustrates the complexity of the process and information that led to our present policy.

As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these two types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome.

Organized as it is, FRVR stands a far better chance of developing a self-sustaining rail operation than does CNW. Over the past quarter century the miles of road operated by CNW has decreased by a third.[42] Its management goals include further reduction in size, either through line sales or abandonment. Whether the lines at issue here could be abandoned immediately under existing law has not been demonstrated. However, fierce trucking competition combined with CNW's comparative disadvantage in rail costs significantly increase the potential of future abandonment. Clearly, the National Transportation Policy will be advanced by permitting the sale of these lines to a willing, experienced and optimistic group of managers, who will in turn rely on experienced labor and a commitment to the local customer base in an attempt to revive and preserve competitive rail transportation for this region of Wisconsin.

This action will not significantly affect either the human environment or energy conservation.

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[41] RLEA v. Staten Island Railroad Corp., 792 F.2d 7 (2d Cir. 1986) cert. denied 107 S. Ct. 927 (1987).

[42] Moody's Transportation Manual (1963 and 1987 issues) indicates that CNW operated over 15 thousand miles of road in 1962 (including miles operated under contract and trackage rights) but that total had declined to slightly over 10 thousand miles by 1986.

It is ordered:

The Petition of CNW and FRVR for an order clarifying jurisdiction and other matters is granted.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons. Commissioners Lamboley and Simmons dissented with separate expressions.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting:

I would have denied the petition for clarification. I have supported the policy expressed by the majority because I believe it has contributed, to some extent, to the preservation of rail lines that otherwise would have been abandoned. However, I do not agree with the majority's use of such glowing terms to describe the efficacy of the Commission's denial of labor protection in so-called "short" line sales under 49 U.S.C. 10901. The language of the decision strongly implies that there can be virtually no valid justification for departure from this policy. Indeed, the decision to grant the petition for clarification and enter this declaratory order to enunciate a policy that has long been settled and affirmed in the courts indicates a certain lack of objectivity and fairness in the application of that policy.

We must not lose sight of our responsibility to weigh the interests of labor as a part of the public interest considerations associated with section 10901 sales. Neither this responsibility, nor the policy of which it is a part is enhanced by the gratuitous declaratory order entered here by the majority.

COMMISSIONER LAMBOLEY, dissenting:

While no one disputes the authority of the Commission to issue declaratory orders,1/ I believe to do so in this instance is an inappropriate use of process. In my view, there is insufficient evidence of controversy or uncertainty to warrant the issuance of this "clarifying" decision.

In invoking the class exemption process under Ex Parte No. 392 (Sub-No. 1)2/ petitioners have also requested that the agency declare that its authority under 49 U.S.C. 10901 supersedes the provisions of the Railway Labor Act (RLA)3/ and the Norris LaGuardia Act.4/ They do so because of an alleged "climate of

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1/ 5 U.S.C. 554(e).

2/ Ex Parte No. 392 (Sub-No. 1), Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985).

3/ 45 U.S.C. 151, et seq.

4/ 29 U.S.C. 101, et seq.

uncertainty" which it is claimed impedes consummation of the proposed transaction. Upon closer examination it becomes evident that the alleged controversy or uncertainty results from judicial decisions as well as petitioner's own conduct, neither of which the declaratory order requested from this agency will necessarily resolve. Indeed, this order may well exacerbate matters not only for this case but for constructive activities in this forum on such issues in the future.

Petitioners argue such action is necessary because several recent court decisions 5/ "reflects a misapplication of the accommodation doctrine and a misunderstanding of this Commission's role in addressing labor issues pertaining to transactions within its jurisdiction." The petitioners do not agree with the outcome of judicial action in which they did not participate, although the Commission did. Without more, the petitioners simply request that the Commission here render a "proper" interpretation of applicable law by declaratory order. Petitioners offer neither substantial reason nor purpose for their request as it may relate to judicial activity.

Additionally, the petitioners claim the Commission's declaratory order is necessary because, while the CNW has met with the rail unions and informal discussions have taken place, no agreements have been reached since the unions believe (apparently contrary to petitioners) that RLA procedures apply to such discussions. The petitioners do not explain why they simply do not file a request with the Commission to fashion and impose appropriate protective conditions, with post consummation negotiation and arbitration procedures, if need be. Such request for relief would squarely address alleged controversy or uncertainty concerns relating to the process and substance of negotiation.

In sum, neither judicial action nor voluntary conduct is sufficient premise upon which to establish controversy or uncertainty as cause for declaratory relief in this case.

Further, quite apart from the lack of any legitimate, demonstrable need for declaratory relief, I fail to see that this order makes any significant contribution toward resolution of statutory "accommodation" issues. There is little doubt that the Commission does not have the requisite jurisdiction to interpret the applicability and scope of statutes other than the ICA. Certainly the agency may "express its viewpoint". Such as it is. It is a position which has been expressed repeatedly in court briefs 6/ submitted by the Commission, and is well known. This decision appears to be little more than an attempt to supplement arguments in briefs previously filed and bolster prior discussion in Ex Parte No. 392 (Sub-No. 1) 7/. It is self-serving and offers no new instruction.

Moreover, of particular concern here, is the eagerness to justify a well known position, the effect of which places the

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5/ Railway Labor Executives' Association v. Pittsburgh & Lake Erie R. Co., - F.2d - (No. 87-3664, 3rd Cir. October 26, 1987) (P&LE I) and Railway Labor Executives' Association v. Pittsburgh and Lake Erie R. Co., Civil Action No. 87-1745 (W. D. Pa. Nov. 1987), appeal pending sub. nom. Railway Labor Executives' Ass'n v. Lake Erie Co., No. 87-3797 (3rd Cir. filed Nov. 25, 1987) (P&LE II).

6/ See for example the Commission's brief in P&LE II, also a letter to District Judge dated October 8, 1987.

7/ Ex Parte No. 392 (Sub-No. 1), Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985).

Commission in the position of apparent bias. This is especially true here because, in addition to the extended discussion of the Ex Parte No. 392 (Sub-No. 1) and pre-emption matters, this decision addresses specific employment security and displacement issues in this transaction, and consequently, in anticipatory fashion, effectively prejudices and precludes meaningful consideration of any subsequent petition for revocation raising protective condition issues. The lack of agency constraint here has unfortunate ramifications.

Finally, after all things are considered, it is fair to say that any instability or uncertainty over employment security and displacement issues is largely a consequence of our own doing by decisions such as this, as well as those in Ex Parte No. 392 (Sub-No. 1) and its progeny. Legitimate transportation transactions under the ICA have been authorized in an manner which encourages and permits unilateral abrogation of legitimate, collective bargaining agreements and statutory requirements of the RLA, without procedural or substantive accommodation of respective interests. Mutuality and reciprocity in collective bargaining contemplated by the RLA and resultant market-based arrangements have been nullified by our approach. It is small wonder then that the incentives for problem solving and dispute resolution through the negotiation process have been diminished and relations have become unstable.

It has become abundantly clear in these cases that the essence of the dispute is labor relations issues, not transportation. 8/ Assuming jurisdiction, the Commission's current fixed position prevents adjustment and resolution in this forum.

8/ See, also letter dated December 2, 1987 in Finance Docket No. 31163, Winoma Bridge Railroad Company Trackage Rights - Burlington Northern Railroad Company.

TESTIMONY BEFORE THE HOUSE COMMITTEE ON TRANSPORTATION

February 25, 1988

My name is Rick Webb. I am the Treasurer of the South East Kansas Railroad. Seated with me is Mark Blazer, the General Superintendent. I want to express my sincere thanks to all members of this distinguished Committee for allowing us to testify against House Bill No. 2939, otherwise known as the Railroad Employee Equity Act.

The South East Kansas Railroad, a short-line railroad which runs from Coffeyville, Kansas, to Nevada, Missouri, has been in business since April, 1987. At start up, we had four full-time employees. At the present time there are approximately fifteen people either directly or indirectly affiliated with the Railroad. We operate over old Missouri Pacific trackage that was scheduled for abandonment. Our main reason for purchasing this line, since we are Southeast Kansans, was to ensure the availability of reliable rail service to customers in that part of the state.

From the beginning of our operation, we have had to struggle against the same burdensome regulations that drove the Missouri Pacific into the possible abandonment of the line. These governmental regulations concerning railroad retirement, unemployment and worker's compensation are extremely expensive to fund and are also unique to the United States railroad industry. Along with the severe restrictions placed upon us by over-regulation, we have had to try to rebuild a deteriorated track and roadbed, maintain the right of way and upgrade and build facilities at our own expense. Unlike other type of cargo transportation, we have not received one cent in governmental subsidies.

The only way we have been able to make a go out of this undertaking is because of our employees and their willingness to work to get the job done

correctly. We have put together a team of service-oriented employees who believe in only one thing - and that is that the customer always comes first. Our employees realize that the road ahead is long and strenuous. They understand that they as an employee must do whatever it takes to help improve the service to our customers in order to rebuild the line. Because of their willingness and dedication we have been able to increase the flow of traffic by a substantial amount.

If House Bill No. 2939 is passed, it will take away the flexibility of private entrepreneurs such as us to restore streamlined, efficient, flexible organization which is tailored to fit the customer's needs. If this Bill had been law when we were considering the purchase of this short line, I can say emphatically we would not have made this purchase.

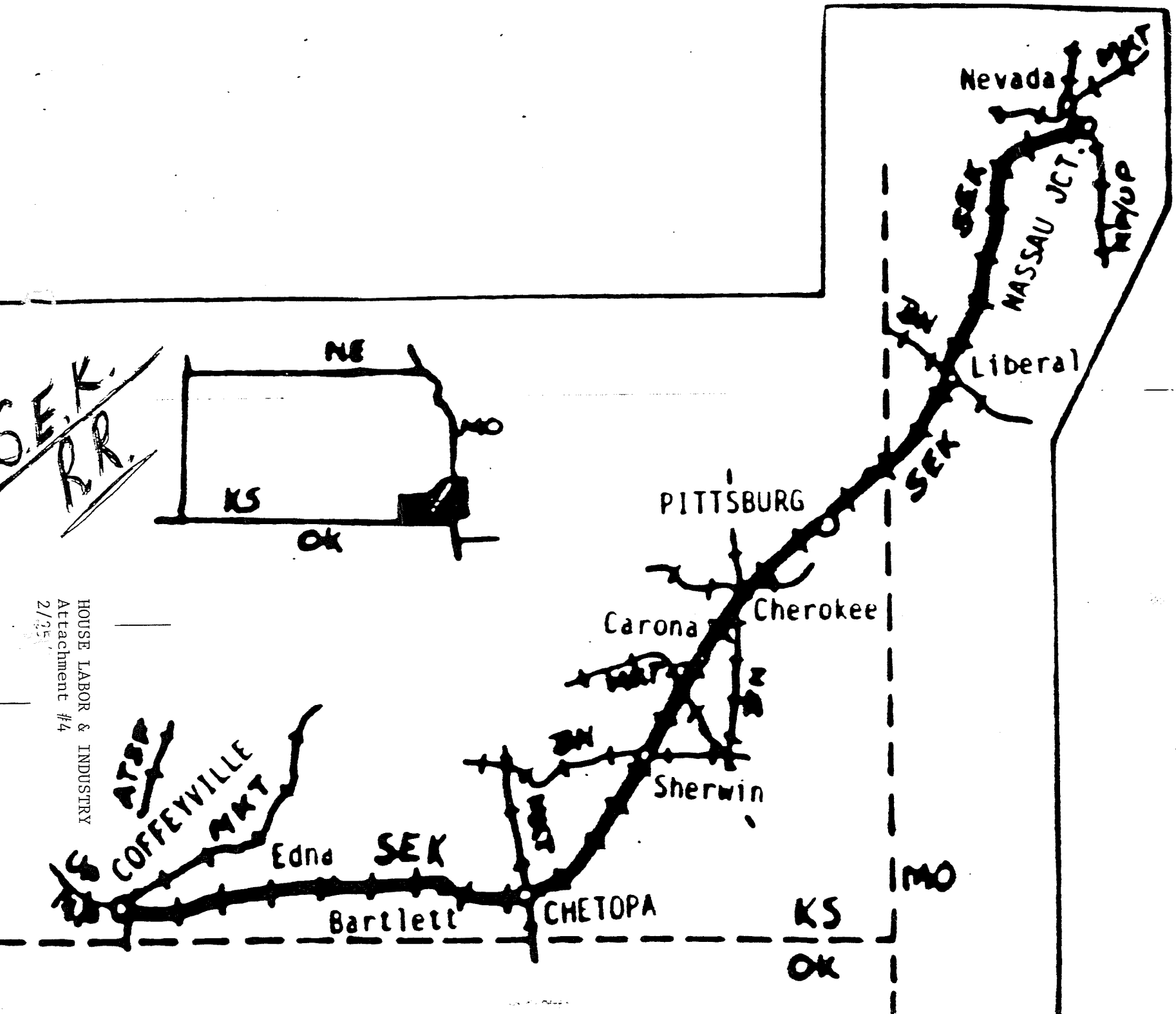
By the same token, it we had not made this purchase, three major industries in Coffeyville, eight grain elevators along the route of the line and three major industries in Pittsburg would have had their rail service partially or totally eliminated. In at least one instance in Pittsburg, one of the industries would have been forced to leave the area, because rail transportation is the only feasible method for transporting their raw materials.

I believe you can see what a hardship this bill would inflict on any company or individual who might be considering the purchase of a short line railroad.

Once again, we thank you for the opportunity to present the South East Kansas Railroad's views in opposition to House Bill No. 2939.

Mr. Chairman, Mr. Blazer or I would be happy to answer any questions you or the members of the Committee might have.

HOUSE LABOR & INDUSTRY
Attachment #4
2/25/88



HOUSE LABOR & INDUSTRY
Attachment #4
2/25

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STATEMENT OF THE

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

PRESENTED TO THE HOUSE OF REPRESENTATIVES

COMMITTEE ON LABOR AND INDUSTRY

THE HONORABLE ARTHER DOUVILLE, CHAIRMAN

STATEHOUSE

TOPEKA, KANSAS

FEBRUARY 25, 1988

Mr. Chairman and members of the committee, I am Richard Dame, Chairman of the Kansas Legislative Board for the Brotherhood of Locomotive Engineers. I am here today to testify in favor of House Bill 2939.

I would like to present a few points that I hope will be helpful in the committee's deliberation of HB 2939.

First, by requiring the non-railroad company that is buying the section of track in question, to offer first employment to the railroad worker who falls under the criteria of this bill you have the possibility of reducing unemployment in the town, towns, county, or counties that might be affected.

Second, there is a safety factor that needs to be considered. In hiring an employee that has railroad experience and that has

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worked on this section of track or railroad line, you are hiring a person who will be able to use his or her knowledge of this territory to handle a train or trains safely over this line. In this day and age when trains might be moving cars that contain toxic or hazardous materials, I would like you to give thought to the person who might be handling this train. As a person that might be living along or near one of these tracks or lines, would you feel more confident with the experienced employee handling the train or the employee who does not have a working knowledge of this territory? As a working railroad engineer knowing where to slow down a train for a curve, downhill grade, or even a section of bad track is very helpful in the prevention of a possible derailment.

Thirdly, would it not be less costly to use a work force that is already trained and experienced than to use a work force that has to be trained and educated on this type of work and the territory over which they will be operating trains? In the long run I feel that the use of these railroad workers would not only save this new railroad company money but would also play an important part in helping reduce or hold down the freight rates being charged to the shippers along this line or track, by simply being more efficient in their duties than an inexperienced work force.

Fourthly, in providing new career training assistance, the railroad employee, who would not be able to hold a job with this new company due to his or her lack of seniority, is a sound investment in this persons future. Helping a person become more productive does not only benefit the individual, it will also benefit the people around him, the city in which he or she lives, and the county

of their residence. It is my belief that people want to be independent and self-sufficient and that this provision in the bill will give the unemployed railroad worker that chance to do so.

In closing I would thank you, Mr. Chairman, for allowing me the opportunity to appear before this committee in support of House Bill 2939. I would attempt to answer any questions you might have at this time.

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