Approved September 19, 1988
Date

MINUTES OF THE House COMMITTEE ON Transportation.

The meeting was called to order by Rex Crowell
Chairperson at

1:30 ~~xx~~./p.m. on February 25, 1988 in room 519-S of the Capitol.

All members were present except: Representatives Laird and Gross

Committee staff present:

Bruce Kinzie, Revisor of Statutes
Hank Avila, Legislative Research
Donna Mulligan, Committee Secretary

Conferees appearing before the committee:

Representative Jeff Freeman
Mr. Ron Calbert, United Transportation Union
Mr. Richard Dame, Brotherhood of Locomotive Engineers
Mr. A. A. Maxwell, Kansas Corporation Commission
Mr. Pat Hubbell, Kansas Railroad Association
Representative Jim Russell
Ms. Mary Martin, City Attorney, Coffeyville, Kansas
Mr. Glen Weldon, City Manager, Coffeyville, Kansas
Mr. Don Moler, League of Kansas Municipalities

The meeting was called to order by Chairman Crowell and the first order of business was a hearing on HB-2938 concerning the acquisition of railroad right-of-way.

Representative Jeff freeman, a sponsor of the bill, briefed the Committee on its contents.

Mr. Ron Calbert, United Transportation Union, testified in support of HB-2938. (See Attachment 1)

Mr. Calbert said the UTU supports HB-2938 because it provides the Kansas Corporation Commission with information concerning Kansas rail lines sales. He said the KCC can then determine whether or not these sales are in the public interest.

Mr. Richard Dame, Brotherhood of Locomotive Engineers, testified in favor of HB-2938.

Mr. A. A. Maxwell, Kansas Corporation Commission testified concerning HB-2938. He stated the KCC neither supports nor opposes this legislation.

Mr. Pat Hubbell, Kansas Railroad Association, testified in opposition to HB-2938. (See Attachment 2 and 3)

He referred to an Interstate Commerce Commission decision dated January 28, 1988, which addresses branch lines, labor protection and sales of branch lines, and gives a good background of what direction the ICC has taken since the Staggers Act and passage of the Motor Carrier Transportation Act. (See Attachment 3)

The hearing on HB-2938 was concluded.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Transportation,

room 519-S Statehouse, at 1:30 ~~xxx~~/p.m. on February 25, 1988

The next order of business was a hearing on HB-2969 increasing penalties for blocking street crossings by railroads.

Representative Jim Russell, briefed the Committee concerning HB-2969. (See Attachment 4)

Representative Russell said the intent of HB-2969 is to update the law to 1988 standards, so that rail crossings will not be blocked for long periods of time.

Committee discussion was held concerning who should be held liable for blocking rail crossings, the train crew or the railroad company.

Representative Russell read a letter from Representative Nancy Brown, expressing support for HB-2969. (See Attachment 5)

Ms. Mary Martin, City Attorney, Coffeyville, Kansas, testified in favor of HB-2969. She said the fine of $5 up to $25 for blocking a rail crossing is not enough of a deterrent. Ms. Martin reported that when citizens learn the fine is only $25, they do not want to take the time to file a court case. Ms. Martin told the Committee a stiffer monetary penalty would help enforce the law.

Mr. Glen Weldon, City Manager, Coffeyville, Kansas, testified in support of HB-2969.

Mr. Don Moler, League of Kansas Municipalities, testified in favor of HB-2969. (See Attachment 6)

Mr. Pat Hubbell, National Railroad Association, gave testimony in opposition to HB-2969. (See Attachment 7)

Mr. Hubbell said a solution to controlling the conduct prohibited by K.S.A. 66-273 is to return to the penalty concept embodied in K.S.A. 66-274, as that statute existed prior to 1973.

Mr. Hubbell submitted their recommendation in the form of a proposed substitute bill. (See Attachment 8)

Mr. Ron Calbert, United Transportation Union, testified concerning HB-2969 and said he is not opposed to the bill. He stated it is not the fault of the crew when a rail crossing is blocked, and he would oppose getting the crew involved.

Mr. Richard Dame, Brotherhood of Locomotive Engineers, spoke in opposition to HB-2969.

The hearing on HB-2969 ended.

A subcommittee was appointed by Chairman Crowell to further study HB-2716 concerning child passenger safety restraints. The subcommittee consisted of Representative Snowbarger, Chairman, and Representatives Moomaw and Adam.

The meeting was adjourned at 3:20 p.m.

Rex Crowell

Rex Crowell, Chairman

R. E. (RON) CALBERT
DIRECTOR/CHAIRMAN

united transportation union

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KANSAS STATE LEGISLATIVE BOARD

Statement Re: House Bill No. 2938

An Act Relating to Railroads;

Concerning the Acquisition of Right-of-Way

Presented to: House Transportation Committee

February 25, 1988

Mr. Chairman, and members of the Committee, thank you for this opportunity to appear before you today in support of House Bill No. 2938, an act relating to railroads, concerning the acquisition of right-of-way. 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.

We support House Bill No. 2938 because it provides the Kansas Corporation Commission (KCC) with information on Kansas rail line sales. The KCC can then determine whether or not these sales are in the public interest.

The three instances listed in the bill under Section Two, Subsection (a), one through three are three Interstate Commerce Commission (ICC) exemptions for line sales. (See attachment.) This means that under these three conditions, the Interstate Commerce Commission does not investigate rail line sales. If this bill becomes law, the KCC would investigate line sales under these three conditions; in essence, the KCC would be picking up where the ICC leaves off.

Attach. 1

There has been some question as to the state's role in the review of these sales, but the facts are that nothing in the "Staggers Act," the act that deregulated the railroad industry, prohibits disclosure to the KCC. This legislation does nothing to interfere with federal law or intent, but rather is a valid exercise of state power limited in scope and is sound legislation.

This legislation does not stop the sale of railroads, but it gives the KCC the authority to investigate the sale of railroad trackage to determine if the prospective buyer is adequately financed or if the sale is simply being used as a device to abandon rail lines. It simply provides the KCC with information so that it can take the appropriate action if the sale is not proper or in the public interest. The bill would allow the KCC to call conference with the parties involved, under reasonable terms, to look into the conditions of a sale.

What we need to remember is that railroads are common carriers. They are public utilities and they are the primary transportation system that Kansas depends on to move agricultural products to market. We need to be concerned with what happens to the rail lines in our state. We need to be concerned with who buys the tracks and whether they have the knowledge and resources to operate a railroad.

H.B. 2938 has no effect on rail abandonments. Our membership depends on rail lines for employment. Railroad workers, more than anyone, want to see Kansas' rail transportation system kept intact.

Two items that would assist in maintaining our state's rail transportation system - and H.B. 2938 can accomplish this - are public review and public input into rail line sales. Remember, a railroad is a public utility and should be subject to review. Once again, this bill does not stop the sale of rail lines, but rather provides for a review

process.

Between 1974 and 1985, 160 short lines were created in the United States. Of those 160 lines, thirty have already failed, according to Peter Gilbertson, a Washington based attorney who was quoted in Newsweek magazine.

Remember, when short lines go bankrupt there is no need for the abandonment process. The lines will almost certainly be lost. That is why it is important to pass H.B. 2938. The people of Kansas must be assured that when rail lines change hands, the transaction has been reviewed and service can be expected to continue.

House Bill No. 2938 is intended to require a non-railroad company that is acquiring, buying or leasing a railroad right-of-way to file the intent or notice with the Kansas Corporation Commission at least thirty days in advance. The notice must designate the private or corporate identity, financial information, and a thorough description of the line involved; this information will be kept confidential by the Kansas Corporation Commission.

In closing, Mr. Chairman, the railroads will claim that they need the secrecy to sell their property like other companies; however, other companies did not acquire the majority of their property by merger, acquisition, or land grants from the United States government. The railroad company is a common carrier having Interstate Commerce Commission authority to operate interstate. Their intrastate sales should be reviewed by a state agency (Kansas Corporation Commission). In 1987, North Dakota passed legislation that is identical to that found in House Bill No. 2938.

Thank you again, Mr. Chairman, for furnishing me the opportunity to appear before your Committee in support of House Bill No. 2938 and express the concerns of the Kansans that I represent. I will attempt to answer any questions at this time.

certificate of public convenience and necessity. Operations may commence immediately upon the filing; however, the Commission will review the information filed, and if complete, will issue a modified certificate notice.

(b) A notice for a modified certificate of public convenience and necessity shall include the following information:

(1) The name and address of the operator and, unless the operator is an existing rail carrier:

(i) Its articles of incorporation or, if it is unincorporated, the facts and organizational documents relating to its formation;

(ii) The names and addresses of all of its officers and directors and a statement indicating any present affiliation each may have with a rail carrier; and

(iii) Sufficient information to establish the financial responsibility of the operator.

(2) Information about the prior abandonment, including docket number, status and date of the first decision approving the abandonment.

(3) The exact dates of the period of operation which have been agreed upon by the operator and the State which owns the line (if there is any agreement, it should be provided);

(4) A description of the service to be performed including, where applicable, a description of:

(i) The line over which service is to be performed;

(ii) All interline connections including the names of the connecting railroads;

(iii) The nature and extent of all liability insurance coverage, including binder or policy number and name of insurer; and

(iv) Any preconditions which shippers must meet to receive service.

(5) The name and address of any subsidizers, and

(6) Sufficient information to establish the financial responsibility of any subsidizers (if the subsidizer is a State, the information should show that it has authority to enter into the agreement for subsidized operations).

(c) The service offered and the applicable rates, charges, and conditions must be described in tariffs published by the operator to the Commission's rules.

§ 1150.24 Termination of service.

The duration of the service may be determined in the contract between the State and the operator. An operator may not terminate service over a line unless it first provides 60 days' notice of its intent to terminate the service. The notice of intent must be: (a) Filed with the State and the Commission, and (b) mailed to all persons that have used the line within the 6 months preceding the date of the notice.

Subpart D—Exempt Transactions

Source: 51 FR 2504, Jan. 17, 1986, unless otherwise noted.

§ 1150.31 Scope of exemption.

(a) Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (*See* 1150.1, *supra*). This exemption also includes:

(1) Acquisition by a noncarrier of rail property that would be operated by a third party;

(2) Operation by a new carrier of rail property acquired by a third party;

(3) A change in operators on the line; and

(4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at § 1180.3(c).

(b) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at § 1180.2(d)(1) and (2), and the from securities regulation at 49 CFR Part 1175.

§ 1150.32 Procedures and relevant dates.

(a) To qualify for this exemption, applicant must file a verified notice

providing details about the transaction, and a brief caption summary, conforming to the format in § 1150.34, for publication in the Federal Register.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the Federal Register within 30 days of the filing. A change in operators would follow the provisions at § 1150.34, and notice must be given to shippers.

(c) If the notice contains false or misleading information, the exemption is void *ab initio*. A petition to revoke under 49 U.S.C. 10505(d) does not automatically stay the exemption.

§ 1150.33 Information to be contained in notice.

(a) The full name and address of the applicant;

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

(2) The proposed time schedule for consummation of the transaction,

(3) The mile-posts of the subject property, including any branch lines, and

(4) The total route miles being acquired;

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

(g) A certificate that applicant has complied with the notice requirements of § 1105.11.

[51 FR 2504, Jan. 17, 1986, as amended at 51 FR 25207, July 11, 1986]

§ 1150.34 Caption summary.

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

INTERSTATE COMMERCE COMMISSION

Notice of Exemption

Finance Docket No.

(1)—Exemption (2)-(3)

(1) Has filed a notice of exemption to (2) (3)'s line between (4). Comments must be filed with the Commission and served on (5). (6).

Key to symbols:

(1) Name of entity acquiring or operating the line, or both.

(2) The type of transaction, *e.g.*, to acquire, operate, or both.

(3) The transferor.

(4) Describe the line.

(5) Petitioners representative, address, and telephone number.

(6) Cross reference to other class exemptions being used.

The notice is filed under § 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

PART 1151—FEEDER RAILROAD DEVELOPMENT PROGRAM

Sec.

Authority: 5 U.S.C. 553, 49 U.S.C. 10910.

Source: 48 FR 9654, Mar. 8, 1983, unless otherwise noted.

§ 1151.1 Scope.

This part governs applications filed under 49 U.S.C. 10910. The Commission can require the sale of a rail line to a financially responsible person. A rail line is eligible for a forced sale if it appears in category 1 or 2 of the owning railroad's system diagram map (but the railroad has not filed an application to abandon the line), or the public convenience and necessity, as defined in 49 U.S.C. 10910(c)(1), permit or require the sale of the line. Until October 1, 1983, section 10910 is

93-186 O—87—11

KANSAS RAILROAD ASSOCIATION

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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 Transportation
The Honorable Rex Crowell, 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. Thank you for allowing me to express the position of the Kansas Railroad Association on House Bill No. 2938. The railroad industry has serious reservations and concerns with this proposal.

Section 1(b) of the bill appears to duplicate certain statutory duties conferred on the Secretary of Transportation (see, K.S.A. 75-5025) and, together with section 2(c), appears to usurp the role of the State Rail Advisory Committee appointed pursuant to K.S.A. 75-5018. Additionally, the provisions contained in section 2 conflict with certain relevant sections of the Interstate Commerce Act (49 U.S.C.

Attach. 2

§10101 et seq.) The Interstate Commerce Commission ("Commission"), in a decision issued on January 28, 1988, expressed its preemptive authority over the subject matter of H.B. 2938 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. . . .
>
> ". . . 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. 2938. 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 innerently 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, ennancing 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.)

This morning I had the privilege of appearing before the Committee on Labor and Industry. My remarks were directed to a bill entitled, "An Act enacting the railroad employee equity act." I advised the Labor and Industry Committee that the cause of equity for railroad employees would not be advanced with passage of the bill. I advised the Committee that a more effective step toward achieving equity for railroad employees would be taken if the Kansas Legislature were to memorialize the Congress of the United States to repeal the Federal Railway Labor Act, merge the railroad retirement system into the social security system, scrap the federally-run unemployment system for railroad employees, and repeal the Federal Employers' Liability Act.

I renew that recommendation before this Committee. Except in the area of rail safety regulation, the interests of all parties concerned would be better served if the federal government were to get out of the business of railroading. Unfortunately, the federal government is in the business of railroading today, and passage of H.B. 2938 would only serve to further complicate an already complex scheme of federal regulation of the railroad industry.

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.

A-3

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.

Attach. 3

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, Winona Bridge Railroad Company Trackage Rights - Burlington Northern Railroad Company.

JIM RUSSELL
REPRESENTATIVE, SEVENTH DISTRICT
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STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS

MEMBER COMMERCIAL AND FINANCIAL INSTITUTIONS
ELECTIONS
TRANSPORTATION

February 25, 1988

TO: House Transportation Committee

SUBJECT: H.B. 2969

Thank you for the opportunity to appear before you today.

In 1897, the penalty for a train, engine or car to stand upon any public highway, crossing, street or alley exceeding ten minutes was "a fine of not less than fifty dollars nor more than three hundred dollars or by imprisonment in the county jail not to exceed ninety days".

In 1903, the penalty was changed to "a fine of not less than five dollars nor more than twenty-five dollars"...and the "imprisonment in the county jail" was dropped.

Attach. 4

I'd like to share with you some of the correspondence I've received on this issue:

> "After reviewing the state law and talking with the Assistant County Attorney...about the trains holding the crossings so long, perhaps it is time to update this law. Maybe a stiffer fine could be imposed as the fine is so low now, the railroad doesn't mind paying it. Perhaps a fine of $500.00 or $1,000.00 would be more appropriate."

> "We realize this may appear to be a minor thing to you but for the people in the Southwest part of Coffeyville it is major. We feel our lives are sometimes in jeopardy when we can't get out of or into the area for long periods of time. For example, recently we were blocked for 40 minutes and could not get home. This happens often and people can't get to their jobs...our contention is, there should be an update of the state law to make it more enforceable."

The purpose of H.B. 2969 is to merely update the intent of this law to 1988 standards...so that the intent of the law will not be taken so lightly.

I stand for questions.

STATE OF KANSAS

NANCY BROWN
REPRESENTATIVE, 27TH DISTRICT
15429 OVERBROOK LANE
STANLEY, KANSAS 66224-9744

COMMITTEE ASSIGNMENTS
MEMBER: GOVERNMENTAL ORGANIZATION
INSURANCE
TRANSPORTATION

TOPEKA

HOUSE OF
REPRESENTATIVES

TO: Transportation Committee

DATE: February 25, 1988

RE: Testimony of House Bill 2969

In conversation with Representative Russell, who supports HB 2969, he asked me to relay an incident to the committee that demonstrates a need for stronger measures regarding blockage of a railroad crossing.

To reach my home, I have one of three roads to use, all three are intersected by the same railroad lines.

Repeatedly for the past eight years, one or more of the crossings have been blocked sometimes as long as forty minutes. The only recourse a resident has was to report the incident to the county police department who then sent out a patrol car to interview the resident who made a complaint in order for a report to be filed.

Of course, the report requested the engine number which seldom could be observed since it was at a different point on the track. Nothing was done, to my knowledge with these reports, other than accumulate in files, take up the time of the patrolman and cause concern among the neighbors who saw the car in my drive.

One of the greatest frustrations I experienced as a mother was a return trip from the hospital, close to midnight, seeking to return home from the hospital with my young son barely out of the recovery room after the setting of a broken arm.

I could not get home without traveling miles after unsuccessfully trying to cross one of the three tracks to my home, all blocked by one of 2 trains.

Repeated complaints were made to the District Attorney's Office, the Sheriff Department and the railroad company, all without success.

I should mention that this particular track is a switching tract and the problem has now been resolved after successful meetings with railroad officials

Attach 5

who extended the holding tract (and I am grateful to our railroad representatives for responding to the situation).

However, some review of the penalties to "put some teeth" in the law is appropriate and I urge this consideration.

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

RE: HB 2969--Penalty for Blocking of Street--Railroad Crossings
TO: House Committee on Transportation
FROM: Don Moler, Attorney
DATE: February 25, 1988

The League is in support of the concept of HB 2969.

Our interest in the bill is somewhat indirect, since cities which experience repeated, excessive blockings of street crossings ordinarily rely on local ordinances, rather than on the state statute. As you know, cities frequently enact ordinances paralleling state laws to permit local enforcement and the use of the municipal court system. It is often difficult to utilize the county attorney and the district court system for such violations.

While there are exceptions, it is a fairly general rule that the penalty for ordinance violations do not exceed the penalty for the same offense under state law. Ordinance violations in the $25 maximum range, the present state offense maximum for crossing blockings, are not common, except for minor offenses like parking violations. Instead, it is common for ordinances to impose a maximum range of from $200 to $500, with the muncipal court charged with determining the exact penalty amount.

Maximum ordinance violations in excess of $500 are extemely rare, since such levels may, under past court decisions, necessitate a trial by jury, a practice not available in the municipal court system.

If HB 2969 is enacted, we think at least some cities will modify their crossing blocking ordinances to increase the penalty. If prosecutions in the municipal court are unsuccessful in preventing repeated unnecessary violations, a city would probably rely on the state offense and the higher penalty imposed by HB 2969, utilizing the district court system.

KANSAS RAILROAD ASSOCIATION

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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 Transportation
The Honorable Rex Crowell, 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. Thank you for giving me the opportunity to express the position of the Kansas Railroad Association on House Bill No. 2969.

Prior to 1973, K.S.A. 66-274, the statute proposed to be amended by H.B. 2969, read as follows:

> "Any person or employee of any railroad company or corporation operating a line of railroad in Kansas failing or neglecting to comply with the preceding section [K.S.A. 66-273] shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than five dollars nor more than twenty-five dollars."

We assume that the penalty contained in the pre-1973 statute was being enforced, or no effort would have been mobilized during the 1973 Legislative Session to amend the statute in the manner in which it was amended. We also assume that the changes made in

1973 are not effectively controlling the conduct prohibited by K.S.A. 66-273, or H.B. 2969 would not have been proposed.

Our recommendation for a solution to controlling the conduct prohibited by K.S.A. 66-273 is to return to the penalty concept embodied in K.S.A. 66-274, as that statute existed prior to 1973. Our recommendation, in the form of a Proposed Substitute Bill, accompanies this statement.

Mr. Chairman, I will try to answer any questions which you or members of the Committee may have.

Proposed Substitute for

House Bill No. 2969

By Committee on Transportation

AN ACT prohibiting stopping, standing or parking in specified places; amending K.S.A. 8-1571 and repealing the existing section; also repealing K.S.A. 66-273 and 66-274.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 8-1571 is hereby amended to read as follows: 8-1571. (a) Except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or official traffic-control device, no person shall:

(1) Stop, stand or park a vehicle:

(i) On the roadway side of any vehicle stopped or parked at the edge or curb of a street;

(ii) On a sidewalk;

(iii) Within an intersection;

(iv) On a crosswalk;

(v) Between a safety zone and the adjacent curb or within thirty (30) feet of points on the curb immediately opposite the ends of a safety zone, unless a different length is indicated by signs or markings;

(vi) Alongside or opposite any street excavation or obstruction when stopping, standing or parking would obstruct traffic;

(vii) Upon any bridge or other elevated structure upon a highway or within a highway tunnel;

(viii) On any railroad tracks;

(ix) On any controlled-access highway;

(x) In the area between roadways of a divided highway, including crossovers; or

(xi) At any place where official signs prohibit stopping.

(2) Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge a passenger or passengers:

Att. 8

(i) In front of a public or private driveway;

(ii) Within fifteen (15) feet of a fire hydrant;

(iii) Within twenty (20) feet of a crosswalk at an intersection;

(iv) Within thirty (30) feet upon the approach to any flashing signal, stop sign, yield sign or traffic-control signal located at the side of a roadway;

(v) Within twenty (20) feet of the driveway entrance to any fire station and on the side of a street opposite the entrance to any fire station within seventy-five (75) feet of said entrance, when properly signposted; or

(vi) At any place where official signs prohibit standing.

(3) Park a vehicle, whether occupied or not, except temporarily for the purpose of and while actually engaged in loading or unloading property or passengers:

(i) Within fifty (50) feet of the nearest rail of a railroad crossing; or

(ii) At any place where official signs prohibit parking.

(b) No person shall move a vehicle not lawfully under his or her control into any such prohibited area or away from a curb such a distance as is unlawful.

(c) No person shall stop, stand or park a railroad train upon any public road within one half mile of any incorporated or unincorporated city or town, station or flag station, or upon any crossing or street, to exceed ten (10) minutes at any one time without leaving an opening in the traveled portion of the public road, street or crossing of at least thirty (30) feet in width.

Sec. 2. K.S.A. 8-1571, 66-273 and 66-274 are hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.