The Small Book of Railroad Employee Protections

by Donald F. Griffin

THE SMALL BOOK OF RAILROAD EMPLOYEE PROTECTIONS

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INTRODUCTION

This tome is the product of almost thirty years' experience in the field of employee protective agreements and conditions applicable to the railroad industry. The perspective presented is a labor-friendly one. I've been working for the railroad, rail labor unions or practicing law on behalf of unions since 1973. I remember when Conrail was created in 1976 and when it was carved up between Norfolk Southern and CSX in 1999. I've seen the disputes under protective conditions turn from claims for compensation to raging battles over the ability of railroads to compel changes to collective bargaining agreements outside of the negotiation processes of the Railway Labor Act. This means that employee protective conditions do not exist in a vacuum. They are an integral part of the evolution of American railroading for almost one hundred years. Whether these conditions will continue to have vitality going forward is a task to be taken up by the readers of this slim volume. My task is to explain how we got here, why those protections are both unique and important to the men and women who work on the railroad, and how the protective conditions and agreements work today.

Employee protective conditions and agreements are the expression of what seems quaint in the 21st century — a public concern for the effects of corporate restructurings on the long-serving employees of those same corporations. Today, we read paeans to the "entrepreneurs" who move the economy forward by dismantling companies, moving work overseas and reducing domestic workforces. We see politicians make political capital out of tearing down the living standards of unionized workers as other working people cheer. Contrast today's sentiments with the testimony presented by Donald Richberg to Congress in 1933. Mr. Richberg was a longtime attorney for rail labor. He was responsible for drafting much of what became the Railway Labor Act of 1926; he encouraged rail labor to act collectively and helped found the Railway Labor Executives' Association. While he later served in President Franklin Roosevelt's administration, Mr. Richberg was a midwestern Republican of the old progressive stripe. He was no radical, yet here is his testimony in 1933 concerning federal legislation designed to stabilize railroad employment in the midst of the Great Depression:

> *[I]t is our foundation principle that the primary purpose and the primary obligation of every industry is to furnish a livelihood to those who have invested their lives in that industry. So long as that principle is maintained there will be not only production, but power of consumption and maintenance of property values. When that principle is disregarded, as in the recent period of deflation, the result is inevitably a downward spiral of industrial operations, which unless checked must end in complete economic collapse.*[1]

Employee protective conditions and agreements were crafted with that principle in mind. The preservation of compensation and employment were public goods that not only benefited the adversely affected employee, but also the community in which he or she lived. Maintenance of income means maintenance of consumption and allows the economy to continue forward. Put another way, those corporations who benefit from a merger must "share" a bit of their gains, temporarily, with the employees whose lives are disrupted by the transaction.

The following discussion of the evolution of employee protective conditions will focus on those conditions that retain vitality today. Accordingly, there will be no discussion of the employee protective conditions applicable to the creation of Conrail from six bankrupt Northeastern railroads as those conditions no longer have application to anyone. Additionally, there will be little discussion of the "Appendix C-1" and "Appendix C-2" conditions created when Amtrak took over the operation of intercity rail passenger service in 1971, except to note how provisions of those conditions became incorporated in those imposed under federal law in freight railroad transactions.

There is one individual whose name appears over and over again in the various administrative agency and court battles over

1. Testimony of Donald Richberg before the Senate Committee on Interstate Commerce, May 10, 1933 at 79.

employee protective conditions. That individual is William G. Mahoney, a founding partner in the firm of Highsaw & Mahoney, the place where I began my legal career in 1987 after graduating from law school, after working full-time for the Pennsylvania Federation of the BMWED. Bill Mahoney tirelessly and patiently went over the history of employee protective conditions, recounted tales of his personal involvement in many of those cases and always offered wise counsel to a sometimes beleaguered and befuddled attorney. Bill passed that torch to me through his teachings, and I hope I can pass on part of his revealed wisdom to anyone who reads this modest effort.

CHAPTER ONE

THE BEGINNINGS

The first recorded instance of employee protective conditions arose in 1909 when the Kansas City Southern railroad purchased the houses of employees in Mena, Arkansas following a change in those employees' work locations. Ever since, the underlying purpose of employee protections is the amelioration of the economic harm suffered by railroad employees when their employers engage in mergers, line sales, leases or abandonments. All of these transactions allegedly are designed to provide a "public good" through an economic benefit to the railroad enterprise, and therefore to its stockholders and other investors. These transactions often lead to employees losing their jobs or being forced to relocate to continue in employment with the railroad. These transactions also can upset existing seniority relations as seniority territories are sold, carved up or simply disappear following completion of the transaction. Changes of this sort had been affecting employees since the first railroads were constructed, however, it was not until 1936 that the railroads agreed to provide protective benefits to employees adversely affected by mergers and consolidations. That 1936 agreement provided the impetus for Congress to mandate employee protections in mergers and consolidations beginning in 1940. Nevertheless, the period before 1936 saw private and governmental attempts to ameliorate the harms flowing from such transactions.

When the Unites States entered World War I in April 1917, the railroads were in a parlous state. The mobilization of American industry and manpower demanded an efficient rail network to get troops and their supplies to Eastern ports for shipment to Europe. The nation's railroads failed in their collective response to such an extent that Congress nationalized the railroads and created the Presidentially appointed post of "Director General" to manage them. The Director General was granted broad powers, including the power to fix levels of employee compensation and impose work rules on the railroads. Union membership soared during federal control of the railroads, and many maintenance of way collective agreements have their origins in the model agreement imposed by the Director General in 1919. In 1920, the Director General required the preservation of seniority rights and free transport of household goods to employees affected by a consolidation of facilities. That requirement is the distant ancestor of the current "implementing agreement" that accommodates competing seniority systems in mergers and the provisions for moving allowances in all modern protective conditions.

The Transportation Act of 1920 returned the railroads to private ownership. However, that Act also acknowledged that the overconstruction of the nation's railroads led, in part, to federal control during World War I because many of the railroads could not earn sufficient revenues to maintain their physical plants. Accordingly, the 1920 Act mandated the Interstate Commerce Commission to create a "final system plan" that would merge and integrate the nation's railroads into 13 major systems.[1] Moreover, while the ICC was working on that final system plan, the railroads were encouraged to make those mergers and consolidations that made economic sense to the private markets. Therefore, from 1920 until the onset of the Great Depression, we see fitful attempts at employee protections as the railroads attempted to "rationalize" their systems. In 1921, the Erie Railroad purchased the houses of employees in Galion, Ohio whose work locations had been transferred to Marion, Ohio. In 1921, Montana adopted a law that required railroads to compensate employees for the losses on the sale of their homes when the employees were forced to relocate due to a change in division points or other facilities. The Delaware & Hudson reached an agreement with its employees in 1922 that provided furloughed employees $10 per week for six weeks if their annual salaries were less than $1000.00. Furloughed employees earning more than $1000.00 annually received a $15 stipend for the same

1. The ICC eventually published its final system plan in the 1930's, but by then the Great Depression rendered such a massive reorganization politically impossible. However, an individual reviewing the ICC's final plan with the subsequent mergers and consolidations in the industry will see that the railroads privately executed over the next 60 years much of what the ICC proposed.

period. In 1930, the Hocking Valley and Chesapeake & Ohio railroads merged. That merger adversely affected 160 clerks. Those clerks who did not obtain new jobs or who were not pensioned off, received two months' pay as severance.

As noted earlier, the ICC was charged with creating 13 new consolidated rail systems operating throughout the United States. The creation of these systems necessarily would result in the closure of redundant facilities and the laying off or relocating of many employees. In ***Consolidation of Railroads,*** 185 I.C.C. 403, 427 (1932), the Commission stated:

> *In working out the modified plan herein approved it is expected that carriers will give careful consideration to the interests of their employees with the view of avoiding the imposition of undue hardships upon them in connection with the relocation and consolidation of shops and offices. When applications under section 5 of the act may be filed for our approval, the applicants will be expected to deal adequately with these questions and, to the extent necessary and warranted by the record, we will consider the imposition of such conditions as we may find to be proper and within our jurisdiction. If any doubt exists as to our jurisdiction in the premises it should be safeguarded by Congress.*

Similarly, in ***St. Paul Bridge & Term. Ry. – Control,*** 199 I.C.C. 588, 597 (1934), the ICC went further and imposed the following explicit conditions upon its approval of the transaction:

> *Under the circumstances, we conclude that we should impose the condition in granting the application that the applicant maintain a separate seniority register for the employees of the terminal company employed in the territory now operated by it, and in future adjustments of employment resulting from necessary changes in traffic or operating conditions employees covered by such register will be given their pro rata share of the available work, and if, to maintain this relationship, transfer to other duties is required, no employees shall without his consent be in any worse position by reason of such transfer, in respect of the conditions of his service as a whole, including tenure of employment, remuneration, pensions, superannuation, sick fund, or other benefits or allowances, whether obtaining legally, or by customary practice of the constituent or*

subsidiary company, as compared with the conditions of service formerly obtaining.

At this time, the Interstate Commerce Act contained no command that the ICC impose any conditions to protect employees when approving transactions. Instead, a majority of the Commission believed that the "public interest" inquiry included in Section 5(4) of the Act was sufficient to include the interest of employees affected by a transaction the Commission otherwise believed was in the public's interest.

The ICC's assumed authority under Section 5(4) applied only to transactions presented to it for approval. The Commission had no roving authority regarding the railroads' treatment of their employees during times of economic hardship. Any relief in that area would require express legislation.

CHAPTER TWO

THE WASHINGTON AGREEMENT OF 1936

2.1. Congress Enacts Emergency Protective Conditions

The onset of the Great Depression ravaged railroad employment. In hearings on what was to become the Emergency Rail Transportation Act of 1933 (ERTA), Donald Richberg testified on behalf of the Railway Labor Executives' Association (RLEA) that 800,000 of the 1,800,000 employees represented by the RLEA unions were unemployed.[1] Mr. Richberg's testimony is significant because he raised two issues that are fundamental and have been included in all employee protective conditions or agreements issued subsequently. His first point was that labor involvement in the planning of coordinations and consolidations was essential to their success. Richberg stated:

> *In other words, if this plan [consolidation and coordination of railroads and their facilities] can be carried out, it can only be carried out either by a tyrannical subjection of employees to the commands of the railroads regardless of their rights, or else the whole-hearted cooperation and working together with the employees to work out these questions. That is exactly the situation that we have found frequently when these consolidation questions have come up. When there has been cooperation, it has been possible to work the questions out; and when there has not been cooperation, they have been dealt with in an exceedingly inadequate and unfair manner.*[2]

The second point raised by Mr. Richberg concerned the direct economic affect these consolidations and coordinations would have on employees. He argued that if the legislation was passed by Congress, "the Government of the United States cannot at the present time assume the responsibility for depriving workers of employment without assuming at the same time the responsibility for future support."[3] His proffered solution to this problem

1. Senate Hearings on the Emergency Rail Transportation Act of 1933 at 77.
2 Ibid, at 81.
3 Ibid

was that a "provision must be made for substitute employment or other means of self-support, or a pension or dismissal wage to take care of those displaced from service under the requirement of this bill."[4]

The solution reached in ERTA was far less dramatic. Rather than wrestle with how to implement labor involvement in planning for consolidations or coordinations and rather than determine what was a suitable "dismissal wage," Congress instead imposed a job freeze on the railroad industry. Section 7(b) of ERTA provided that "the number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as is shown by the pay rolls of employees in service during the month of May, 1933 …" Ultimately, the "job freeze" provisions of ERTA proved unsatisfactory for the reorganization of the industry. The dirty secret of mergers and consolidations is that they would eliminate redundant facilities and the merged carrier likely would require fewer employees than the two previously separate carriers. In those circumstances, President Roosevelt let it be known that he expected rail labor and rail management to devise something to replace the job freeze provisions of ERTA by sometime in 1936. Labor and management began negotiations to that end on February 3, 1936 in New York City. However, rail labor held a trump card in the form of proposed legislation from Senator Wheeler that would provide legislated protective conditions. Under those circumstances, rail management resistance slowly waned, and the parties reached agreement in Washington, D.C. on May 21, 1936.

3.2. The Negotiation Of The Washington Agreement

The Washington Agreement, often referred to as the "Washington Job Protection Agreement" (WJPA), included the two essential factors raised by Donald Richberg three years earlier —involvement of the employees in carrying out the transaction and compensation for those employees adversely affected by a covered transaction. The execution of the WJPA marks the beginning of the "modern era" of employee protections as the elements of the WJPA have been carried forward and adapted for inclusion

4. Ibid, at 82.

into every protective arrangement whether through agreement or legislation since.

Section 1 of the WJPA contains a recitation that remains the foundation of employee protective conditions today; that those conditions are designed to ameliorate economic harm flowing from specific rail carrier actions. The parties stated,

> *" . . . it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination. Therefore, the parties hereto understand and agree that fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement."*[5]

The WJPA applies only to "coordinations" which are defined as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." In other words, the WJPA is designed to apply to mergers of two or more railroads, or instances where one railroad acquires another.

Railroads intending to engage in a "coordination" had to do so "*only upon the basis of an agreement approved by all of the carriers parties thereto and all of the organizations of employees involved (parties hereto) of all of the carriers concerned."* These agreements were to be reached through a notice and negotiation process outlined in Sections 4 and 5. The employees were to receive at least 90 days' written notice of the coordination, bargain with the rail carriers and, if no agreement was forthcoming, either side could submit the dispute to final and binding arbitration under Section 13. These negotiations are called the "implementing agreement negotiations." The topics discussed and arbitrated usually relate to integration of formerly separate seniority lists and a determination of what collective agreement will apply to the employees involved in the coordination. These sections provide the negotiated solution to Mr. Richberg's problem regarding

5. The WJPA is Appendix One.

implementation of coordinations — should the employees suffer a unilateral carrier integration of seniority? Or, should they be consulted regarding a fair and equitable solution to the integration problems? In the WJPA, rail carriers and rail labor opted for a negotiated (or arbitrated) fair and equitable solution.

The second complaint raised by Mr. Richberg that employees should not bear the burden of unmitigated unemployment also was addressed by the WJPA. Section 6 provided income stabilization for up to 5 years for those employees who remained in service but were, *"as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination."* Employees who lost their jobs as a result of a coordination were eligible for a "coordination allowance" equivalent to 60 per cent of the employee's average monthly compensation for a period of up to 5 years. Alternatively, an employee otherwise eligible for a coordination allowance could resign from the carrier and receive a lump sum separation allowance that provided up to 12 months (30 days' pay per month) pay for long service employees. In addition to the compensation provisions, the WJPA provided a relocation allowance to an employee *"required to change the point of his employment as a result of such coordination and is therefore required to move his place of residence."* If that move resulted in the employee taking a loss on the sale of the home compared to the pre-transaction price, the WJPA provided a dispute resolution process for that as well.

The WJPA was a watershed for employee protections. In one agreement, all of rail labor had struck a grand bargain with most of the nation's railroads that provided the procedures and protection to employees that would permit an orderly carrying out of railroad mergers and consolidations. However, the agreement didn't cover all large railroads, the Atlantic Coast Line didn't sign on until 1939 as did the Gulf, Mobile & Ohio. The Southern Railway held out until 1940. Moreover, the WJPA applied only to "coordinations", so leases, trackage rights and abandonments remained outside its coverage. It is at this point that the ICC and Congress moved to fill in the voids in coverage left by the WJPA.

CHAPTER THREE

THE ICC AND THE FIRST IMPOSED CONDITIONS

In 1937, the bankruptcy trustees of the Chicago, Rock Island & Gulf Company and the Chicago, Rock Island and Pacific Company filed an application at the ICC seeking permission to lease the Gulf Company to the Pacific Company. The transaction was expected to save the two companies $100,000 annually and would result in the furlough of 49 Gulf Company employees and the transfer of 20 more from offices in Texas to Chicago. ***Chicago, R.I. & G. Ry. Trustees – Lease,*** 181, 183 (1938). Rail labor sought the imposition of the provisions of the WJPA in this case, because the Pacific and Gulf Companies were considered one "carrier" for WJPA purposes, so the proposed consolidation of facilities between the Pacific and Gulf Companies was not a "coordination" subject to WJPA protective conditions (ibid, at 186). The ICC held the welfare of the railroad employees affected by the lease was a legitimate public interest concern and imposed the WJPA level of protections for adversely affected employees as a condition of its approval of the lease (ibid, at 187). The ICC found that the cost of the employee protective conditions over the 5 year period would be $290,000 while the savings resulting from the consolidation of facilities flowing from the lease would be at least $500,000 over the same period.

The trustees challenged the ICC's decision arguing that employee protective conditions prescribed were unrelated "to the public interest in its statutory sense," contending that the employees' interests in retaining employment or compensation was a wholly private concern. The Supreme Court disagreed.

The Court observed that the Transportation Act of 1920, which returned the railroads to private ownership, established a national policy of consolidation of the nation's railroads. Indeed, the Act charged the ICC with creating its own plan of consolidation. The Court noted that the ICC found that *"it speedily became apparent that the great savings which would result from consolida-*

tion could not be effected without profoundly affecting the private interests of those immediately concerned in the maintenance of the existing nationwide railway system, the railroad security holders and the employee." ***U.S. v. Lowden,*** 308 U.S. 225, 232-33 (1939). Continuing, the Court noted that bond holders usually obtained a financial advantage from a consolidation, whereas 75 % of the savings from consolidations would be extracted from labor in the form of *"wholesale dismissals and extensive transfers, involving expense to the transferred employees, but in the loss of seniority rights which, by common practice of the railroads, are restricted in their operation to those members of groups who are employed at specified points or divisions."* (ibid, at 233). The Court found that such impacts could not be divorced from the public's interest in favoring railroad consolidations, indeed, the Court noted, *"[o]ne must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation has no bearing on the successful prosecution of that policy, and no relationship to the maintenance of an adequate and efficient transportation system."* (ibid, at 234). Given that background, the Court held that the employee protective conditions imposed by the ICC were in the public interest in assisting the national transportation policy that favored railroad consolidations. A similar analysis soon was forthcoming from the Court in the case of the ICC's discretionary authority to impose protective conditions on a railroad's abandonment of some of its lines.

The Pacific Electric Railway Company (a wholly owned subsidiary of the Southern Pacific Railroad) operated electric railroad, bus and truck services in Southern California. PE applied for the ICC's permission to carryout *"a general program of rearrangement … involving abandonment of certain rail lines."* ***Railway Labor Executives' Ass'n v. I.C.C.,*** 315 U.S. 373, 374 (1942). Rail labor interests intervened and asked the ICC to impose protective conditions on any abandonment authority granted to Pacific Electric. The evidence in the case revealed that the abandonments would result in an annual net savings of $378,000 and about $302,000 of that figure would come from net wage losses of the employees. The ICC approved the abandonment transaction, but held it lacked authority to impose employee protective conditions as a matter of discretion. The rail labor groups appealed the decision to the Supreme Court.

The Court framed the issue simply, *"[w]hether it is within the Commission's power in abandonment proceedings to impose conditions for the protection of employees[?]"* (ibid). The ICC's position before the Court was that the abandonment section permitted it to approve applications which "the public convenience and necessity require" and that standard was more restrictive than the public interest test discussed in ***Lowden***. The Court determined that it did not have to make a distinction between the two tests because:

> *the Lowden case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system. Such possible unstabilizing effects on the national railroad system are no smaller in the case of an abandonment like the one before us than in a consolidation like that involved in the Lowden case. Hence, it is only by excluding considerations of national policy with respect to the transportation system from the scope of 'public convenience and necessity,' an exclusion inconsistent with the Act as this court has interpreted it, that the distinction made by the Commission can be maintained. (ibid, at 377).*

Arguments by the ICC that when Congress mandated employee protective conditions in mergers and consolidations in the Transportation Act of 1940 it implicitly removed any discretionary authority to impose protective conditions in abandonment cases also was rejected as "illogical." (ibid, at 379).

CHAPTER FOUR

THE TRANSPORTATION ACT OF 1940 TO NEW YORK DOCK

4.1. The First Mandatory Protective Conditions Up To The New Orleans Conditions

In 1938, President Roosevelt appointed the "Committee of Six" composed of three representatives from rail labor and three from the carriers to submit recommendations to the White House regarding the railroad transportation situation. One of the recommendations made by the Committee was an amendment to federal law that would mandate a fair and equitable set of federally imposed conditions to protect the interests of employees affected by approved railroad consolidations. While the specifics were not enumerated, some of the Committee members opined that the WJPA provided a useful model for the possible legislated protective benefits. As Congress reviewed the status of the Transportation Act of 1920, the views of the Committee were considered as Congress contemplated moving the impetus for railroad consolidations from the ICC to the railroads themselves.

On September 18, 1940, Congress passed amendments to the Transportation Act of 1920. These amendments, collectively called the Transportation Act of 1940, took the ICC out of the business of planning railroad consolidations and left their development in the hands of the railroads. Significantly, when considering an application to merge, lease or obtain trackage rights, the ICC was obligated to *"give weight to the following considerations . . . [including] the interest of the carrier employees affected."*[1] Moreover, the employee protective conditions the Court in Lowden had held were within the ICC's discretion to impose now were mandatory in the new Section 5(2)(f):

> *As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and*

1. 54 Stat. Ch. 722, 906.

> *equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.*[2]

Significantly, the new mandatory employee protective conditions were less generous than the terms contained in the WJPA. First, the protective conditions were effective "during the period of four years from the effective date" of the approval of the transaction. As most know, transaction-related changes can arise years after a transaction is approved. The questions of what is a temporally distant "transaction-related change" and how the federally imposed protective conditions did or did not apply were questions that continued on until the 1990's. Second, the conditions did not specify what exactly they provided in terms of compensation benefits. For example, did they include moving and relocation allowances? What did the phrase "will not result in employees of the carrier or carriers affected by such order being in a worse position with respect to their employment" mean? That question wasn't answered by the Supreme Court until 1961. Nevertheless, these conditions were a promising start as they guaranteed benefits to employees affected by railroad mergers, leases and trackage rights transactions. However, these mandatory protective conditions did not apply to abandonment transactions which were considered by the ICC under another section of the Interstate Commerce Act (ICA) and remained a matter of discretionary imposition as originally provided in ***RLEA v. ICC,*** above.

In 1944, the ICC promulgated what have been commonly referred to as the ***Oklahoma Conditions. Oklahoma Ry. Trustees***

2. Ibid, at 907

– ***Abandonment,*** 257 I.C.C. 177 (1944). That transaction involved the Oklahoma Railway's abandonment of freight service and the simultaneous purchase of some of its lines by the Santa Fe and Rock Island railroads which intended to continue freight service. As a result, the ICC found the transactions to *"constitute an inseparable plan for the unification of railroad facilities"* which required the mandatory imposition of protective conditions (ibid, at 194). The ICC determined the transaction would affect 69 of the Oklahoma's employees (ibid, at 192). Despite the contentions of rail labor that the full WJPA benefits should apply, the ICC imposed a limited relocation benefit and compensation benefits for the four years following ICC approval of the transaction, the so-called "conditions 4 through 9 of the ***Oklahoma Conditions***." Significantly, the ***Oklahoma Conditions*** provided increased compensation to "dismissed employees" who would receive one-twelfth of their prior year's earnings each month, rather than the 60 % provided under the WJPA to employees who lost their jobs as a result of a "coordination". However, this dismissal allowance could be offset by outside earnings and unemployment insurance received by the employee, something the WJPA did not require. Additionally, the dismissed employee, as well as the "displaced employee" (one retained in service at a lower rate of compensation), was required to accept work offered on the other carriers involved in the transaction or suffer the loss of all protective benefits (ibid, at 197-99). A serious defect in the ***Oklahoma Conditions*** was its lack of clear arbitration provisions like those contained in the WJPA.

The fundamental problem with the statutorily mandated protective conditions was the temporal limitation on their application. The conditions became applicable on the effective date of the ICC's order approving the transaction and expired 4 years later. Put another way, because ICC approval of a transaction is permissive, the carriers involved could delay actual operational implementation for some time after the effective date of the ICC's order. A year's delay would mean the protective benefits applied for only 3 years. Moreover, what of the situation where part of the approved transaction would not be implemented for over 4 years after the effective date of the ICC's order? The case involving the reorganization and realignment of trackage in New

Orleans provided the answer to that question.

The New Orleans Conditions and The Melding of the WJPA and Mandatory Protective Conditions

In 1948, the city of New Orleans and several railroads operating in the area filed an application with the ICC seeking to construct and jointly own some tracks and abandon others as part of the construction of a new passenger terminal in the city. ***New Orleans Union Passenger Terminal Case,*** 267 I.C.C. 763 (1948). The potential impact on employees from the proposed transactions would be substantial: the ICC estimated that 1,032 employees would be affected and only 680 would be necessary to operate the new Union Terminal and related trackage (ibid, at 777-78)· Rail labor intervened in the proceeding and requested the ICC impose protective conditions to be applicable for more than four years following approval of the transaction because the parties to the transaction admitted that completion of the approved transaction could take as many as five years from the ICC's date of approval. Essentially, rail labor argued that the ICC should impose conditions whereby the 4 year protective period began only when the employee suffered an adverse effect from the approved transaction. (ibid, at 780). The ICC demurred, asserting the plain language of the Act precluded the imposition of any protective conditions that ran more than 4 years from the effective date of the transaction (ibid, at 782).

The unions appealed the ICC's order contending that the ICC had statutory authority to impose protective conditions of a longer duration when it was clear that the time frame for the approved transaction would outstrip the applicability of protective conditions designed to ameliorate the economic harm to employees flowing from the transaction. In ***Ry. Labor Executives' Ass'n v. U.S.,*** 339 U.S. 142 (1950), the Supreme Court agreed with the unions. The Court first noted that the protective conditions imposed in the ***Lowden*** case were five years in duration. Therefore, the ICC clearly had discretionary authority to impose lengthier protective periods prior to the Transportation Act of 1940 (ibid, at 147-48). The question then addressed was whether or not the four year time period placed in Section 5(2)(f) by the 1940 amendments imposed a limitation on that previously held and exercised discretion.

The Court's opinion involved a discussion of the so-called "Harrington Amendment" to the 1940 Act. That original amendment forbade the ICC from approving any transaction that *"will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."* (ibid, at 150-51). The Court viewed that proposed amendment as one that essentially blocked all future railroad consolidations because it constituted a job freeze in effect. The Court followed that amendment's legislative history. In conference, the Harrington Amendment was stripped from the bill entirely. However, the House remitted the entire Transportation Act to conference to create a modified form of the Harrington Amendment. The Court focused on that legislative action to conclude that the four year limitation of protective benefits applied to a "Harrington Amendment" type of job freeze benefits (ibid, at 152). In other words, the four year mandatory benefits were *"a new guaranty of protection for the interests of employees, without restricting the Commission's power to require greater protection as part of a fair and equitable arrangement."* (ibid, at 153-54). The Court remanded the case to the ICC for reconsideration in light of its opinion.

A close and literal reading of the decision in ***RLEA v. US,*** would suggest there are now two levels of statutory protection for employees. The first level is the discretionary authority first exercised in ***Lowden*** where the ICC can fashion protective conditions of any length or breadth necessary for the "fair and equitable" treatment of the employees. The second level of protections would be a four year "job freeze" prohibiting the involved carriers from laying off any employees or reducing their pay. That question would be revisited by the Supreme Court eleven years later.

On remand, the ICC imposed an amalgam of the ***Oklahoma Conditions*** and the WJPA. Employees adversely affected within 4 years of the effective date of the order were to receive the ***Oklahoma Conditions*** benefits. However, if an employee within that group did not receive the total amount of benefits otherwise available under the ***Oklahoma Conditions,*** the employee was to continue to receive benefits under the WJPA until the amount otherwise payable under the ***Oklahoma Conditions*** was reached.

Furloughed employees receiving allowances under either the ***Oklahoma Conditions*** or the WJPA would have outside earnings and unemployment payments offset against their allowances. This new amalgam of the ***Oklahoma Conditions*** and the WJPA became known as the ***New Orleans Conditions. New Orleans Passenger Terminal Case,*** 282 I.C.C. 271 (1952). The ***New Orleans Conditions*** began the evolution of the notion that the statutory protective conditions initially were applicable to an employee at the time of adverse effect, not simply the effective date of the order providing protection to the employee.

The controversy regarding the Harrington Amendment first discussed in ***RLEA v. US,*** was decided by the Supreme Court in ***Bhd. Of Maintenance of Way Employes v. U.S.,*** 366 U.S. 169 (1961). The case arose from the merger of the Erie and the Delaware, Lackawanna & Western Railroads. In proceedings before the ICC, the applicant railroads suggested that the ***New Orleans Conditions*** be imposed if the merger was approved. The unions objected, stating that the second sentence of Section 5(2)(f) required that no employee be laid off for four years following the effective date of the ICC's order (ibid, at 171). The ICC disagreed; imposed the ***New Orleans Conditions*** and the unions appealed.

The Court observed that the unions did not challenge the ***New Orleans Conditions*** when first imposed after the Court's remand in ***RLEA v. US.*** Instead, the Court characterized the unions' argument in the instant case as one that required the ***New Orleans Conditions*** as applying for events occurring four years after the effective date of the ICC's approval and that for the first four years following the order of approval, *"employees currently on the payroll remain in the surviving railroad's employ for at least the length of their previous employment up to four years."* (ibid, at 172). In essence, the unions' argument followed what was said by the Court in ***RLEA v US,*** which was that the unlimited job freeze provisions of the Harrington Amendment were converted into a 4 year job freeze. The Court disagreed with that interpretation of the legislative history and gloss the unions placed on the Court's earlier decision.

Instead, the Court noted that when Section 5(2)(f) finally emerged from committee, two things had been done with the Harrington Amendment. First, the four year limitation on protective conditions was imposed, rather than the open ended protection in the original amendment (ibid, at 175). More significantly, and fatal to the unions' argument according to the Court, was that the clear job freeze language of the Harrington Amendment had been changed into *"general language of imprecise import."* (ibid). Viewing that general language in the light of statements from the conferees, the Court concluded that what Congress "intended" was compensation protection, not a freeze on layoffs (ibid). As added support for that interpretation, the Court noted that the unions had contemporaneously characterized the 1940 amendments as providing income, not job protection and noted that over 80 cases since 1940 had provided only compensation protection as a condition of approval. (ibid, at 176-78). However, the Court's decision begs the question regarding the ICC's authority to impose protective conditions longer than 4 years. In ***RLEA v. US,*** the Court had bifurcated its analysis of the first two sentences in 5(2)(f) to get to its conclusion that the ICC could offer protection greater than 4 years in duration that it deemed "fair and equitable", because the first four years were a legislatively added job freeze protection to the private arrangement in the WJPA. If that construction was wrong, as ***BMWE v. US*** held, then what is the *statutory* basis for mandatory statutory protective conditions extending more than 4 years from the effective date of the order approving the transaction?[3] The Court didn't address that question in ***BMWE v US.***

4.2. New York Dock and the Creation of Today's Statutory Protective Conditions in Mergers and Consolidations

Congress passed the Rail Passenger Services Act in 1971. The purpose of the Act was to transfer responsibility for providing intercity rail passenger service from the nation's freight railroads to a newly formed quasi-public corporation commonly known as "Amtrak." Obviously the creation of a new single-provider passenger system out of the remnants of the systems operated by the freight railroads would involve transfers of employees from the freight railroads to Amtrak as well as the elimination

3. Section 5(2)(f) also gives authority for the unions and railroads to reach a private protective arrangement. One such private arrangement is the WJPA. The scope of the parties' discretion to fashion a private agreement was reviewed by the Supreme Court 10 years later in the Nemitz case.

of passenger rail jobs that would not be continued by Amtrak. Accordingly, Congress included Section 405 in the Act which provided protective benefits for employees. The exact type of benefits were not specified, instead, Congress established 5 provisions that had to be accounted for and set the minimum level of benefits at the ***New Orleans Conditions*** imposed by the ICC in freight consolidations. Section 405 read as follows:

> *Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of such individual employees against a worsening of their positions in respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to Section 5(2)(f) of the Interstate Commerce Act.*

The Secretary of Labor was charged with drafting the protective conditions required under Section 405. These conditions were known as the “Appendix C-1 Conditions” after the provision in the Act requiring them. The conditions promulgated by Secretary of Labor Hodgson deviated from those in the ***New Orleans Conditions*** in several significant ways.

First, the Secretary did not adopt Sections 4 and 5 of the WJPA requiring a negotiated (or arbitrated) implementing agreement prior to consummation of the transaction. Instead, the C-1 Conditions provided a 20 day notice and negotiation period for an implementing agreement. If no agreement was reached, the parties could take the dispute to arbitration, but Amtrak and the freight railroad were free to consummate the transaction as they proposed. The affected employees would receive any compensatory benefits after the fact through negotiation or arbitration. Clearly this provision was designed to move the transactions forward speedily, but this change also unbalanced the bargaining power labor and management brought to the table. Labor now was placed in the situation of either agreeing quickly to the railroads' proposals or be saddled with the problem of administering after-the-fact remedies to a work force already rearranged by the involved carriers.

Second, the "protective period" maximum was extended up to 6 years based upon an employee's length of service with the railroad. This was a clear benefit to employees as the WJPA limit was 5 years, and the ICC-imposed conditions had a statutory limit of 4 years. Additionally, those employees who were "dismissed" by a transaction, i.e., were laid off, received 100 per cent of their test period earnings during their protective period rather than the 60 per cent under the WJPA. Additionally, the test period averages for both displaced and dismissed employees would be increased by any subsequent general wage increases applicable to the affected employees. Neither the WJPA nor the ***New Orleans Conditions*** had any provision for an upward adjustment of protective payments during the period an adversely affected employee received compensation benefits.

Third, the Appendix C-1 conditions provided an express provision for the arbitration of claims for protective benefits. That provision, Article I, Section 11, contained a sub-section setting forth the competing burdens of proof in such a case as follows, "[i]n the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relief upon. It shall then be the Railroad's burden to prove that factors other than a transaction affected the employee."

Fourth, the Secretary included a provision from Section 10(c)(1) of the Urban Mass Transit Act of 1964 that seemed innocuous at the time. Article I, Section 2 simply stated, "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of Railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes." More will be written about that later.

A number of rail unions challenged the C-1 conditions in court, alleging that the replacement of Sections 4 and 5 of the WJPA with the 20 day notice and negotiation period for an implementing agreement provided lesser protections than the ***New Orleans Conditions. Congress of Ry. Unions v. Hodgson,*** 326 F. Supp. 68 (D.D.C. 1971). The court rejected the challenge because it found the Secretary's promulgation of the protective conditions as committed to agency discretion and not reviewable by a court of law. (ibid, at 73-74). Alternatively, the Court noted that if it had jurisdiction to review the merits of the Secretary's decision, the C-1 Conditions complied with the requirements of Section 405. The court held that any review of the Secretary's decision must be on an "abuse of discretion" standard. Using that standard of review, the court agreed with the Secretary's claim that the protective conditions previously imposed by the ICC merely required some form of notice and negotiation and not the inclusion *verbatim* of Sections 4 and 5 of the WJPA. (ibid, at 76).

On February 5, 1976, President Ford signed the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") designed to speed up ICC consideration of railroad transactions.[4] The 4R Act amended Section 5(2)(f) to include the following additional sentence, "[s]uch arrangement shall contain provisions no less protective of the interests of employees, than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."[5] On October 17, 1978, President Carter signed a bill that recodified, without substantive amendment, the Interstate Commerce Act.[6] As part of that recodification, Section 5(2)(f) was recodified as 49 U.S.C. §11347. That section read as follows:

> *When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of*

4. Pub. L 94-210, 90 Stat. 31 et seq.

5. 90 Stat. 62

6. Pub. L 95-473, 92 Stat. 1337 *et seq.*

> *employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Nothwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).*

That section contained a number of internal contradictions. The conditions imposed before February 5, 1976 generally were the ***New Orleans Conditions*** which included a protective period of up to 5 years and required a pre-consummation agreement allocating forces among the merged carriers. The terms established under Section 565 of Title 45 are the Appendix C-1 Conditions. Those conditions provided for a 6 year protective period and upward adjustments to displacement and dismissal allowances based on subsequent general wage increases. However, the Appendix C-1 Conditions did not require an agreement on the allocation of forces to be in place prior to consummation of a transaction. Finally, the language of the 1940 Transportation Act remained regarding a 4 year minimum protective period. The vehicle used by the ICC to resolve these contradictions was a merger between two small dockside rail carrier operations in New York City.

This transaction began when the New York Dock Railway sought to obtain stock control of the Brooklyn Eastern District Terminal, two small rail to marine carriers. Rail labor intervened, petitioning the ICC that the transaction was one of general transportation importance that required the full Commission's review. The basis for the petition was the 4R Act amendments to Section 5(2)(f) that appeared to amend the minimum protective arrangements the ICC must impose in an approved transaction. After several intermediate administrative steps, the ICC issued its final decision in 1979. ***New York Dock Ry. – Control – Brooklyn Eastern Dist. Term.,*** 360 I.C.C. 60 (1979). In essence, the ICC blended the six year maximum protective period of Appendix C-1 with the notice and negotiation provisions of Sections 4 and 5 of the WJPA. The two applicants appealed that decision to the Court of Appeals for the Second Circuit, where the Court sustained the ICC's decision.

The Second Circuit first noted that the newly fashioned New York Dock conditions "can be fairly characterized as significantly more protective of the interests of railway labor than any previously imposed single set of employee protective conditions." ***New York Dock Ry. v. U.S.,*** 609 F.2d 83, 91 (2d Cir. 1979). Moreover, while these conditions were enhanced over previously imposed conditions, the Court held that the New York Dock Conditions were promulgated by the ICC to apply as the minimum standards required in rail merger and consolidation cases. (ibid, at 92). As all parties to the litigation agreed the ICC-imposed protective conditions contemplated by the 4R Act amendments were the ***New Orleans Conditions,*** the Court found that the dispute between the petitioners and the ICC concerned that language contained in the 4R Act amendments (as codified in Section 11347) requiring the protective conditions should include "the terms established under section 565 of title 45." The petitioners contended that provision only meant the 5 enumerated conditions set forth in Section 565, while the ICC and rail labor argued that phrase meant the Appendix C-1 conditions themselves. The Court agreed with the ICC, observing that the use of the words "terms established" meant the actual conditions developed under Section 565, not the statutory language listing 5 categories, among others to be considered (ibid, at 94). Therefore, the Court concluded that the minimum standards required under Section 11347 included (ibid, at 94-94):

> *the imposition of any employee protective provision which can be traced directly to either the "New Orleans conditions" (as clarified in Southern Control II) or the Appendix C-1 conditions clearly should be unobjectionable as embodying the minimum degree of protection contemplated by* ***49 U.S.C. s 11347****. Such provisions include: the 90 day advance notice requirement (Art. I, s 4(a)), the requirement of an implementation agreement as a precondition to the initiation of any action directed toward the consummation of a proposed transaction (Art. I, s 4(b)), and the binding arbitration requirements (Art. I, s 11), all of which are drawn from related pro-*

visions contained in the "New Orleans conditions" (as clarified in Southern Control II); and the extension of the protective period to six years (Art. I, s 1(d)) together with the express allocation of the burden of proof between the parties (Art. I, s 11(e)) both of which are drawn directly from identical provisions contained in the Appendix C-1 conditions.

There was one area that gave the Court concern. The Appendix C-1 conditions included a new provision, Article I, Section 3, that prohibited the "pyramiding" or duplication of benefits under C-1 and some other protective arrangement. Section 3 reads as follows:

Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that there shall be no duplication or pyramiding of benefits to any employees, and, provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

In the ***New York Dock Conditions,*** the ICC expanded on that language in Article I, Section 3 of those conditions to provide:

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

The Court broke down this dense language in the following way. First, it was clear that a protected employee could not elect to receive income stabilization under ***New York Dock*** and some other protective arrangement simultaneously. However, if an employee entitled to wage stabilization under some other arrangement elected to receive the wage stabilization of ***New York Dock,*** the employee could not return to the previous arrangement if it still would otherwise apply. That, the Court said would be a "pyramiding" of benefits of like kind (ibid, at 99-100). However, an employee confronted with the possible "choice" of taking retraining benefits or some right of recall to work would not have an election. In that case, the benefits were of different kind, so, as long as the employee complied with the obligations for both sets of benefits, he would not have to choose between them (ibid, at 100).

The ***New York Dock*** conditions are the high-water mark for employee protective conditions. Employees affected by mergers, consolidations and line sales were entitled to: 1) a negotiated or arbitrated agreement selecting forces to staff railroad; 2) up to 6 years of 100 % income protection, for "displaced" and "dismissed" employees; and 3) a burden of proof allocation that was favorable to the employee seeking protective benefits. However, the ***New York Dock*** conditions did not apply to ICC-approved leases, trackage rights arrangements and line abandonments which also required mandatory protective conditions. The development of that fork from the passage of the Transportation Act of 1940 to the 4R Act is the next part of our story.

CHAPTER FIVE

DEVELOPMENT OF ICC IMPOSED CONDITIONS IN ABANDONMENTS, LEASES AND TRACKAGE RIGHTS TRANSACTIONS

5.1. The Development of Protective Conditions for Abandonments

The ICC's imposition of employee protective conditions in abandonment proceedings was discretionary until 1976. As discussed in Chapter 2, the ICC initially held the position that it could not impose protective conditions in any abandonment proceeding. The Supreme Court's 1942 decision in ***ICC v. RLEA,*** required the ICC to reverse its position and consider the imposition of protective conditions in abandonment transactions on a case by case basis.

In ***Chicago, B. & Q. R.R.–Abandonment,*** 257 I.C.C. 700 (1944), the ICC essentially imposed the ***Oklahoma Conditions*** upon the carrier's abandonment of certain lines of road in Iowa. In that case, the ICC made the conclusory statement "that in cases of the character herein involved, protection should be afforded employees adversely affected..." (ibid, at 704). No detailed explanation supporting the ICC's exercise of discretion was recorded. The conditions thereafter provided in abandonment proceedings were called the ***Burlington Conditions.***

However, in a subsequent decision, ***Chicago, A. & S. R.R.–Receiver Abandonment,*** 261 I.C.C. 646 (1946), the Commission offered its view on the propriety of imposing employee protective conditions in abandonment proceedings. In this case, a small carrier, the Chicago, Attica & Southern, was granted permission to abandon lines in 1944 without the imposition of protective conditions. Subsequently, several employees petitioned the ICC for compensation for wage losses they suffered beginning in 1943 when the carrier embargoed service over the lines subsequently abandoned under authority of the ICC's order. The Commission classified the abandonment cases presented to it as follows (ibid, at 651):

These situations fall into general groups, (1) abandonment of entire properties by carriers which are no longer able to continue the struggle for survival because of highway competition or other conditions depriving them of sufficient means of livelihood; (2) partial abandonments by generally unprosperous carriers in the effort to reduce expenses and thereby preserve service to the public on their remaining lines; and (3) abandonment of main lines, branch lines or parts of lines by carriers, not in extremis, where abandonment is warranted and desirable as a benefit to the transportation system, but, in the language of the court, results also in a private benefit for the railroad in the form of savings realized by discontinuing uneconomic service.

As regards the first two types of abandonments, the Commission noted that dismissal allowances were not justified. Essentially, the ICC viewed the employees harmed in such cases as a necessary economic sacrifice. As to the third type, the ICC referred back to the ***Burlington*** case and found that abandonment of a line by an otherwise strong carrier justified the imposition of protective conditions (ibid, at 652). Interestingly, in the case at bar, the ICC determined that the petitioning employees were adversely affected by the embargo in anticipation of the abandonment authority and ordered the carrier to pay them lost wages for the period September 15, 1943 until October 19, 1943, even though the ICC originally had imposed no protective conditions upon the transaction (ibid, at 653). From the 1940's onwards, the ICC continued to apply its three-part classification to abandonment proceedings by imposing discretionary protective conditions only upon those involving otherwise viable carriers.

The 4R Act changed that, requiring the ICC to impose protective conditions in approved abandonment applications. The requirement was set forth in Section 802 that contained a newly drafted Section 1(a)(4) of the ICA that stated:

Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).[1]

Initially, the ICC imposed conditions very similar to the Appendix C-1 conditions, specifically those provisions that mandated only a 20 day notice and negotiation period before the involved carrier could abandon operations on the line. ***Oregon Short Line – Abandonment,*** 354 I.C.C. 584 (1978). Rail labor petitioned the ICC for reconsideration of the decision on the grounds of error in the initial decision and also because the decision involved a matter of general transportation importance. The ICC granted reconsideration and adopted the 90 day notice and negotiation procedures contained in New York Dock. ***Oregon Short Line – Abandonment,*** 360 I.C.C. 91, 95 (1979). Thereafter, the protective conditions applicable to abandonments, and rail mergers and consolidations were identical and remain so today. While Section 1(a)(4) appeared to require mandatory employee protective conditions in all abandonment cases, the ICC and its successor continued to apply the three part classification first set forth in Chicago & Attica Southern in 1946. The ICC's interpretation of the statute was affirmed in the comprehensive decision by Judge Friendly in ***Ry. Labor Executives Assn v. I.C.C.,*** 735 F.2d 691 (2d Cir. 1984).

In 2011, the continuing validity of the ICC's three part classification of abandonment proceedings was analyzed in depth in a case involving a small railroad in St. Louis. On March 24, 2011, the Manufacturers Railway Company (MRS), a wholly owned subsidiary of Inbev-Anheuser Busch, sought authority to discontinue service over its entire system located in St. Louis, Missouri. Rail labor filed oppositions to the MRS petition asserting that employee protective conditions should be imposed even though service on the entire system was being discontinued. The Surface Transportation Board (STB) agreed. Initially, the Board reaffirmed its long-standing policy that protective conditions were not required as a matter of law in whole line abandonments. However, in this case, the Board noted that MRS merely sought discontinuance authority--in essence it was just stopping operations--but would continue to own the trackage and be subject to Board jurisdiction. Under those circumstances, the Oregon Short Line protective conditions would be imposed. Docket No. AB-1075X, ***Manufacturers Ry.–Discontinuance Exemption,*** decided

1. Pub. L 94-210, 90 Stat. 128. That section subsequently was recodified as Section 10903

July 12, 2011 (not published), slip op. at 5-6.

All of the rail labor parties reached agreements with MRS regarding employee protection and withdrew from the case. Nevertheless, MRS sought review of the STB decision in the court. In ***Manufacturers Ry. v. S.T.B.,*** 676 F.3d 1094 (D.C. Cir. 2012), the court set aside the STB's decision as arbitrary and capricious because it did not adequately explain why the whole line abandonment exception to the imposition of employee protective conditions did not apply to this case.

On remand, the STB reaffirmed that a carrier seeking system-wide discontinuance authority stood in a different position than one seeking an abandonment of its system. The Board noted that when discontinuance authority is sought, the carrier retains ownership of the lines and remains subject to STB jurisdiction and therefore retains the advantage of pre-emption of local regulation of the property. Moreover, the carrier can "reactivate" service at any time without the need for regulatory approval. Finally, the Board noted that imposing protective conditions in this limited case more closely follows the language of Section 10903 that appears to mandate employee protective conditions in any abandonment case. Docket No. AB 1075X, ***Manufacturers Ry.–Discontinuance Exemption,*** decided February 5, 2013 (not published), slip op. 4-7.[2] Despite this decision, it is safe to conclude that the original ***Chicago & Attica Southern*** interpretation of abandonment protective conditions will continue to apply in future proceedings before the STB.

5.2. The Development of Lease and Trackage Rights Conditions

The development of protective conditions for lease and trackage rights transactions also followed a different track from those developed for mergers and consolidations. Initially, the ICC treated leases, trackage rights and mergers identically by imposing the ***Oklahoma Conditions*** on the transaction. Those conditions did not contain an "implementing agreement" requirement later

2. Another factor not cited in the Board's discussion but mentioned in the opinion was that Anheuser-Busch continued to receive 6-7 inbound cars daily at its brewery located on the lines. Therefore, the ultimate owner of the lines continued to receive a benefit from their ownership while being relieved of common carrier obligations through the discontinuance.

mandated under the ***New York Dock*** conditions or required in WJPA for "coordinations" between carriers.

After the 4R Act placed mandatory employee protective conditions in trackage rights and lease cases under Section 5(2)(f), the ICC imposed the protective conditions first imposed in ***Oregon Short Line,*** i.e., a decision that did not require an implementing agreement to be in place prior to consummation of the abandonment. Rail labor sought administrative review of that decision, contending that any transaction to which conditions attached under Section 5(2)(f) (later Section 11347) such as trackage rights and lease transactions required the adoption of Sections 4 and 5 of the WJPA with its requirement that an implementing agreement be in place before the abandonment could be consummated. The ICC denied the petition. The ICC observed that in most trackage rights transactions, it had imposed the ***Oklahoma Conditions*** which did not contain Sections 4 and 5 of the WJPA. ***Norfolk & Western Ry.–Trackage Rights,*** 354 I.C.C. 605, 607 (1979). The ICC noted that Congress was aware that different protective arrangements had been applied in the past, and since the ICC had not imposed Sections 4 and 5 of the WJPA in trackage rights transactions before passage of the 4R Act, the imposed conditions here were not "less protective of the interest of employees than the arrangement imposed under old section 5(2)(f) in trackage rights cases." (ibid, at 607-08).

Similarly, in a lease transaction, the ICC imposed protective conditions from the first ***Oregon Short Line*** decision. The Locomotive Engineers sought review, on the same grounds as those raised generally by rail labor in Norfolk & Western. The ICC then denied the Engineers' petition on the same grounds that it did in ***Norfolk & Western. Mendocino Coast Ry.–Lease,*** 354 I.C.C. 732 (1978).

Subsequently the ICC reopened both transactions and invited comments from interested parties concerning application of the "changing law" of employee protective conditions set forth in ***New York Dock*** and ***Oregon Short Line III*** where the ICC had imposed Sections 4 and 5 of the WJPA into its protective conditions in rail mergers and line abandonments. ***Mendocino Coast Ry.–Lease,*** 360 I.C.C. 653 (1980). The ICC again rejected rail labor's arguments regarding Sections 4 and 5. According to the

ICC, *"trackage rights and lease transactions frequently have lesser employee disruptive impacts than those resulting from other types of transactions."* (ibid, at 662). Moreover, the cases with greatest employee impact likely would be transactions related either to abandonments or mergers. In that case, the ICC noted that either the ***Oregon Short Line III*** or ***New York Dock*** conditions would be imposed and contain Sections 4 and 5 of the WJPA (ibid, at 663). Based upon that observation, the ICC found *"little justification for extending a blanket imposition of provisions requiring substantially advanced preconsummation notice and preconsummation negotiations with 'interested' employees when possibly there are no substantial number of employees likely to be adversely affected by a trackage rights or lease transaction."* (ibid) The rail labor parties appealed this decision without success. ***Ry. Labor Executives Ass'n v. U.S.,*** 675 F.2d 1248 (D.C. Cir. 1982).

The resolution of the various protective conditions decisions by 1980 left railroad employees in a very good position regarding protective conditions. Protective benefits were now available for up to 6 years after the date the employee was affected by an approved transaction. In this case, a major improvement over the ***New Orleans Conditions*** which applied the statutory protections for 4 years from the effective date of the transaction and then left the WJPA to cover any remaining protective liability. Also, the compensation guarantees for both dismissed and displaced employees were 100 per cent of their "test period earnings", rather than the 60 per cent paid to dismissed employees under the WJPA. These compensation guarantees also were subject to upward adjustment by subsequent general wage increases, something previously unavailable under ICC-imposed conditions or the WJPA. Finally, there was an express allocation of the burdens of proof in any claim for compensation. All of these provisions were important, substantial improvements for employees. The only substantive difference in the conditions was the lack of a pre-consummation implementing agreement in lease or trackage rights cases. However, just at this high-water mark, Congress passed the Staggers Act, designed to deregulate rail rate setting and expedite proceedings at the ICC. The effect of that Act on employees was substantial and adverse. The next decade and a half saw a proliferation of short line railroads created from trackage spun off of the major roads. Additionally, the large railroads began a series of mergers, acquisitions and combinations that resulted in only seven major railroads left in the United States by 1996. Throughout this process, rail labor struggled to obtain protective benefits in the short line creations; fought to have implementing agreements negotiated in line sales between major (and minor) rail carriers and struggled against rail carriers using the implementing agreement process to make wholesale changes in collective bargaining agreements. Before entering that fray, a brief review of the Staggers Act is necessary to provide the statutory background (or lack thereof) for some of the changes that occurred after 1980.

CHAPTER SIX

STAGGERS AND THE TRANSFORMATION OF EMPLOYEE PROTECTIVE CONDITIONS

The primary purpose of the Staggers Act was the deregulation of railroad rate-setting. The ICC had been established in 1887 as a reaction to the railroads' predatory pricing of certain commodities in certain geographic areas. The regulatory structure established by the ICC set high rates on high value goods and low rates on low cost bulk commodities. These rate structures were largely inflexible. Until the end of World War II, this structure worked as railroads faced only minimal competition from other modes of transport. However, with the building of the Interstate Highway System, long-haul trucks now had the advantage of using high-speed taxpayer funded roadways. Trucks also competed effectively on both time and rates compared to the railroads. The result of this competition left the railroads largely carrying bulk commodities for which only low rates could be charged. As a result, railroads could not meet their costs of capital and could not maintain or modernize their systems.

The Staggers Act changed this dynamic by freeing the railroads of the fixed tariff system established by the ICC. Instead, the railroads and shippers were permitted to negotiate rates and the duration of service contracts. Additionally, railroads were now given quicker regulatory pathways to abandon unprofitable lines, merge or consolidate operations or sell parts of their systems to new entrants to the industry (called "noncarriers"). One byproduct of this economic deregulation was a push by railroad managements to extract substantial work rules concessions from their employees through collective bargaining. In the period 1980 to 1991, railroad management eliminated cabooses from trains, eliminated the fireman positions, reduced train crew size from three to two and obtained an extension of the miles constituting a basic day's work for train and engine crews. On the non-operating side, the railroads obtained employee contributions to the cost of health insurance through reduced wage increases or the substitution of lump sum payments instead of general wage increases. Additionally, railroad management obtained substantial flexibility in the use of maintenance of way crews to operate regionally or system-wide.[1] Put simply, rail labor was assaulted both by carrier proposals in bargaining and the economic reorganization of the rail industry encouraged and assisted by the ICC and its statutory successor, the STB.

6.1. The Rise of the "Noncarriers" and Elimination of Employee Protective Conditions in Section 10901 Transactions

6.1.a The History of Section 10901

The Transportation Act of 1920 contained, in Section 1(18), a provision restricting carriers from unilaterally expanding or abandoning lines without ICC approval. The Section read in relevant part:

> *No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad . . .*[2]

Note that the statute speaks of the actions of a "railroad" which was defined in Section 1(3) of the Act to include:

> *all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or deliver of any such property.*

Section 1(18) was included in the 1920 Act to prevent the overbuilding of rail lines that resulted in the nation's railroads

1. An excellent discussion of these changes can be found in Chapters 5 and 6 of Saunders, *Main Lines–Rebirth of the North American Railroads* 1970-2002, DeKalb, IL 2003.
2. Pub. L. 66-152, 41 Stat. 477 (1920)

being unable to properly maintain their infrastructure prior to Word War I resulting in Federal control of the railroads. ***Fox Valley & W. Ltd. v. I.C.C.,*** 15 F.3d 641, 643 (7th Cir. 1994), citing Dempsey & Thoms, ***Law and Economic Regulation in Transportation,*** 50 (1986). Prior to passage of the 4R Act in 1976, the creation and operation of "short lines" and smaller regional carriers largely had been organic. A locality or region had given rise to a small rail system to serve the needs of that area. The creation of new rail carriers from lines previously owned and operated by larger systems was a very rare occurrence, and, as we shall see, initially was confined to operation of lines either abandoned by a rail carrier or subject to abandonment. In other words, lines of railroad that were so lacking in revenue generation potential that the owning railroad had been, or would be, permitted to cease operations.

6.1.b The ICC's Treatment of Noncarrier Acquisitions Before Staggers

Most of the nation's trunk line railroads evolved from "short line" carriers created before 1900. After passage of the Transportation Act of 1920, until passage of Staggers some 60 years later, there are only a handful of "noncarrier" acquisitions of rail lines and the ICC's treatment of those proceedings was idiosyncratic.

In 1945, the owner of a lumber company in the state of Washington sought to purchase the short line Port Townsend Southern Railroad. The application was submitted to the ICC under Section 5(2), not 1(18). Previously, the purchaser operated the line under a contract previously approved by the ICC, so the Commission considered the purchaser already a "carrier" because it was subject to ICC jurisdiction. Nevertheless, the Commission rejected any argument that Section 1(18) should apply, observing (***R. S. Fox Purchase (Port Townsend Southern R.R.),*** 261 I.C.C. 95, 100 (1945)):

> *in numerous proceedings, we have assumed jurisdiction of applications filed under section 5(2), or under the portion of the Interstate Commerce Act in effect prior to September 18, 1940, known as section 5(4), be persons seeking to acquire properties of existing railroad companies and who at the time did not have control of any carrier. The wording of section 5(2) in this respect is identical with*

> *that of former section 5(4) and which it supersedes. Since the working of the statute was not changed by the enactment on September 18, 1940, it must be presumed that the construction thereof previously adopted by us coincides with the legislative intent.*

However, in ***Iowa Terminal R.R.–Acquisition & Operation,*** 312 I.C.C. 546 (1961), the ICC changed direction. In that proceeding involving an electrified short line running between Mason City and Clear Lake, Iowa, the Commission now held that a "noncarrier" acquisition of an existing rail line was subject to Section 1(18) and not Section 5(2). The explanation given was that the purchaser was not now a carrier and therefore could not be subject to Section 5(2). Id. at 548. Support for that position was gleaned from some motor carrier cases decided by the Commission since 1940. However, the ICC simply disregarded the fact that Section 1(18) addressed the actions of a "railroad" to construct or acquire lines. The purchaser was neither a "carrier" nor a "railroad" at the time of the purchase. Moreover, the ICC did not address the point raised in ***R. S. Fox,*** that before 1940 the ICC had treated noncarrier acquisitions under Section 5(4) and the language in that section, while re-numbered, was not changed substantively by the Transportation Act of 1940. While the ICC's change of direction would have future negative implications for employees, approval of this transaction was conditioned on the application of the ***Oklahoma Conditions*** for the benefit of adversely affected employees.

Three years later in ***Cadillac & Lake City Ry.–Acquistion & Operation,*** 320 I.C.C. 617 (1964), the Commission "refined" the Section 1(18) acquisition process. In that case, the Pennsylvania Railroad sought abandonment authority for a line of railroad in Michigan. Subsequently, a newly formed corporation, the Lake City, filed an application to acquire the line sought to be abandoned. The Commission "as a matter of procedure" dismissed the abandonment application; however, the Commission also found that the only employees affected worked for the Pennsylvania because the Lake City currently had no railroad employees. In what could only be considered a leap of logic, the ICC concluded that if the abandonment application had proceeded to completion, the Pennsylvania employees would have obtained protective conditions. Accordingly, it applied the ***Burlington***

Conditions for the benefit of those employees (ibid, at 618).

A similar transaction was presented to the ICC in ***Prairie Trunk Ry.–Acquisition & Operation,*** 348 I.C.C. 832 (1977), where a newly formed company sought to acquire a line of railroad for which the Baltimore & Ohio sought abandonment authority. In that case, in addition to compensation protections, the United Transportation Union (UTU) sought conditions that: (1) required Prairie Trunk to maintain the B&O wage levels for its employees and (2) obligated Prairie Trunk to bargain with the representatives of the former B&O employees over the rates of pay, rules and working conditions applicable to it employees, many of whom might be former B&O employees who were to be given preferential hiring rights (ibid, at 838). In this case, the ICC expressly held that no pending or prior abandonment proceeding was required to make an application to acquire the line subject to Section 1(18) rather than Section 5(2) (ibid, at 851). The Commission reiterated that *"Section 1(18), on the other hand, is intended to deal with the abandonment, acquisition, and extension of an individual line of railroad and is essentially directed at the transportation-oriented activities of a single rail carrier or applicant."* (ibid) The Commission did observe that imposition of discretionary protective conditions in such cases was customary and imposed the ***Burlington Conditions*** for the protection of affected B&O employees (ibid). However, the ICC rejected UTU's additional requests for wage stablization and a bargaining order holding that *"such conditions would subject Prairie Trunk to inequitable and unduly limiting standards which are particularly unnecessary when we consider that those employees who might be adversely affected by the transaction are adequately protected by standard employee protective conditions imposed upon and willingly assumed by a financially secure rail carrier."* (ibid, at 852).

On appeal to the Seventh Circuit, the Court affirmed the ICC's handling of Prairie Trunk's acquisition under Section 1(18). The Court accepted the ICC's view that Section 1(18) focused on the actions of a single rail carrier or applicant. ***People of the State of Illinois v. United States,*** 604 F.2d 519, 525 (1979), cert. denied 445 U.S. 951 (1980). Additionally, the Court affirmed the ICC's decision that the transaction did not have to take a two-step form involving first, the selling carrier's formal abandonment of the line, followed by the seller's acquisition of the now abandoned line of railroad. (ibid, at 527). While the Court affirmed the ICC's efforts to streamline the non-carrier acquisition of rail lines, it also affirmed the ICC's decision to impose the ***Burlington Conditions*** in this case when only the employees of one of the parties had "protectible" employees. The important point of this decision is the Court's affirmance of certain policy decisions made by the ICC. As noted earlier, Section 1(18), replaced by Section 10901 in 1978, did not expressly apply to noncarrier acquisitions of active rail lines. Similarly, the imposition of the ***Burlington Conditions*** in Section 1(18) cases always had been discretionary as a matter of law. Essentially, the Court held that the ICC's policy determinations in 1977 that Section 1(18) applied to noncarrier acquisitions of active rail lines; that an abandonment proceeding did not have to be consummated by the seller before the noncarrier could acquire the line in question; and that employee protective conditions were appropriate to protect the selling carrier's employees were permissible, not mandatory, interpretations of the ICA.

6.1.c Noncarrier acquisitions post-Staggers

Following the passage of the Staggers Act and the election of Ronald Reagan, circumstances changed dramatically. Additionally, the employee protective landscape had changed since ***Prairie Trunk*** as well. The 1976 amendments to the ICA now made employee protective conditions in abandonment cases mandatory, rather than discretionary as they had been since 1920. What that meant for employees involved in ***Prairie Trunk*** type transactions was so long as the ICC treated the sale either as a two step process involving a formal abandonment followed by a transfer of the abandoned property to the "noncarrier" or as including an implied abandonment of service by the seller in the context of the "noncarrier" acquisition, the seller's employees probably would receive protective benefits. And, since the seller's employees were the only ones involved (since, by definition, the acquiring "noncarrier" had no railroad employees), all employees affected by a "noncarrier" acquisition would be protected. Unfortunately for the employees, "noncarrier" acquisitions did not follow either course.

In March 1981, the ICC exempted from prior review and approval the acquisition by the "noncarrier" Knox & Kane Railroad (K&K) of 79 miles of railroad owned by the B&O. The ICC determined that imposition of employee protective conditions in a Section 10901 transaction (the recodified successor to Section 1(18)), or those exempted from prior review and approval under Section 10505, was discretionary and no evidence had been submitted demonstrating the need for such protections for any railroad employees. The transaction was consummated in January 1982.

In May of that year, BMWE and UTU filed a petition to reopen the proceeding for the purpose of imposing the ***Oregon Short Line*** conditions on the transaction. BMWE's argument was "that the transaction is analytically similar to an abandonment, under which imposition of the Oregon III conditions would be required, in conjunction with a subsequent purchase by the new operator." ***Knox & Kane R.R.–Petition for Exemption,*** 366 I.C.C. 439, 440 (1982). The ICC characterized BMWE's position as arguing that the seller of a marginal line is obtaining the same benefit as if it had abandoned the line and, therefore, protective conditions should be imposed (ibid, at 443). That is exactly the approach the ICC took in the ***Prairie Trunk*** case some ten years earlier. This time, the ICC diverged from its analysis of ten years' earlier. The Commission focused on the national rail transportation policy that encouraged keeping marginal rail lines active. If protective conditions were *"reflexively applied"* many carriers would not sell lines and defer maintenance to the point that the line, when eventually abandoned, would be unattractive to potential buyers (ibid, at 444). Additionally, the ICC chided the BMWE for waiting until after the transaction had been consummated to bring its petition, saying such delay would have been independent grounds for denial of the petition.

Section 213 of the Staggers Act also amended Section 10505 of the ICA to promote the ICC's exemption from prior review and approval of those transactions which were *"not necessary to carry out the national rail transportation policy"* and were either of *"limited scope"* or regulation was not necessary *"to protect shippers from the abuse of market power."* Subsection (g) of that Section did provide that a party could not be exempted from its obligations to protect the interests of employees as required under the Act. However, in Section 10901 "noncarrier" acquisitions, the imposition of employee protective conditions was discretionary under the Act.

In 1985, the Commission initiated a proceeding based upon a proposal from a holding company that created "noncarriers" to acquire lines of railroad from existing carriers. This proceeding, commonly referred to as ***Ex Parte No. 392,*** created a class wide exemption for "noncarriers" to acquire lines of railroad from existing carriers through the filing of a verified notice of exemption. This process meant that a "noncarrier" need only file a verified notice that it was eligible to use this class exemption and it would have permission to consummate the proposed deal 7 days after filing the notice.[3] Any party challenging the transaction on the merits, or seeking the imposition of discretionary employee protective conditions was required to file an after the fact petition to revoke the exemption.

The ICC and STB Rebuff All Attempts to Protect Employees and Congress Finishes the Job

The Commission's stance on employee protective conditions was clear — they would not be imposed on transactions subject to 10901 even though the Commission had discretionary authority to do so. The ICC supported its decision by asserting that "our discretion to not impose employee protection on this class of transaction is consistent with congressional intent," citing the refusal of Congress to impose protective conditions on transactions subject to the "feeder line" provisions of Section 10910. ***Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901,*** 1 I.C.C.2d 810, 814 (1985). Instead, the ICC viewed its obligations as directed to the shippers who would be served by these new operations. In the ICC's view, the only choices for the lines being sold was abandonment or a sale to a new operator. According to the ICC, *"[e]mployee protection is also inconsistent with our goals in granting this class exemption and would discourage acquisitions and operations that should be encouraged."* 1 I.C.C.2d at 814. Nevertheless, the ICC did provide that *"in an extraordinary case,"* labor could seek protective conditions in

3 In practice this led to "noncarriers" filing verified notices very late on Friday night to be able to consummate the transaction on the following Friday at 12:01 AM. Such a practice was possible because in those days the ICC's offices were open 24/7 for the filing of notices, briefs, etc.

a petition to revoke filed after consummation. However, the ICC said protective conditions would be imposed only upon an *"exceptional showing of circumstances justifying the imposition"* of such conditions (ibid, at 815). After adoption of the class exemption, the ICC never found "exceptional circumstances" that justified the imposition of any protective conditions unless the "noncarrier" signaled its acquiescence to some form of protective conditions. In 1995, Congress amended Section 10901 to remove even the discretionary authority of the newly constituted Surface Transportation Board to impose protective conditions in Section 10901 transactions. Therefore, since ***Knox & Kane*** any transaction conducted under Section 10901 has not contained protective conditions for the benefit of employees adversely affected by the transaction unless the noncarrier or selling carrier, in their sole discretion, agreed in advance to provide some protective benefits.

Once the ICC decided as a matter of policy that employee protective conditions in Section 10901 "noncarrier" transactions were to be disfavored, employee advocates attempted to have challenged transactions re-characterized as those requiring employee protective conditions. One such approach was to claim the "noncarrier" was the "alter ego" of its corporate parent. This usually was called the *"indicia of independence"* test and required the challenger to prove to the ICC that the "noncarrier" lacked sufficient independence from its corporate parent that the transaction should be viewed as the corporate parent's acquisition of the line in question. Given that these "noncarriers" had no assets and either borrowed money and equipment from their corporate parents or had the corporate parent guarantee loans, one would think that success in the "indicia of independence" test was frequent. Actually, the ICC *never* found that a "noncarrier" lacked sufficient independence such that its acquisition would be deemed an acquisition by its corporate parent. While there are many cases that fall within the "indicia of independence" rubric, a recent, egregious example best illustrates the legal contortions the ICC, and now STB, undertake to deny employees protective benefits in such sales.

In April 2014, the "noncarrier" Rapid City, Pierre & Eastern Railroad ("RCP&E") filed a verified notice of exemption with the STB announcing that it was acquiring over 600 miles of railroad from the Dakota, Minnesota & Eastern Railroad ("DM&E"), a wholly owned subsidiary of CP Rail. The notice was accompanied by another exemption notice announcing that after RCP&E acquired the lines and started common carrier service, it would be controlled by Genesee & Wyoming Industries ("GWI"), a holding company that operated many short lines in the United States and, collectively, had revenues from railroad operations that exceeded the standard to be considered a Class 1 carrier for regulatory purposes. Several unions petitioned the STB to revoke the exemptions arguing: 1) that the size of GWI and the nature of its operations meant that the ICC's old policy of encouraging the acquisition of marginal lines no longer was necessary; 2) that RCP&E was not sufficiently independent of GWI; and 3) that DM&E employees should receive the protective benefits attached to the control transaction even though DM&E was not formally a party to that transaction.

In a decision issued over a year later, the STB rejected the petitions. STB Finance Docket No. 35799, ***Rapid City, P. & E.R.R–Acquisition & Operation Exemption–Dakota, M. & E.R.R.,*** served May 14, 2015 (not published) [2015 WL 2326174 (S.T.B.)]. Regarding the unions' first and third arguments, the STB claimed that Congress's elimination of any employee protective conditions in Section 10901 transactions in 1995 would be undercut by a change in policy thus (ibid, at 5):

> *When Congress enacted* ICCTA *in 1995, it specifically provided that non-carriers can obtain authority to acquire railroad lines under § 10901, and that when they do so the agency cannot assign the labor protection obligations of the carrier that previously operated the lines. 49 U.S.C. § 10901(c). Doing away with the two-step process would effectively undercut the statutory changes that Congress made. The two-step process has also been affirmed by the courts.*

The agency also rejected the unions' "indicia of independence" arguments. The STB noted the test had two elements: 1) prove the subsidiary was not created for substantial business reasons and not *solely* to avoid employee protective conditions, and 2) prove the subsidiary did not have an independent corporate existence. Given that it is impossible to prove that a "noncarrier" was created *solely* to avoid employee protective conditions, the unions failed in the first prong. They failed in the second even through they established that GWI essentially funded the start-up of RCP&E and guaranteed the subsidiary's performance obligations. Those facts did not impress the STB which noted that start-up funding from the parent was permissible because funding might not otherwise be available to a new corporation and continuing administrative support from the parent was acceptable, so long as the new corporation "paid" the parent something for those services (ibid, at 7-8). This decision makes it clear that 35 years after the ICC first refused to apply protective conditions in "noncarrier" transactions, that policy has become ingrained through successive Republican and Democratic administrations. There can be no dispute that the encouragement of the "protectionless" acquisitions by "noncarriers" had an adverse affect on rail employees, many of those simply exercised seniority to other places on the selling carrier without any relocation allowances. Others, particularly in the maintenance of way craft, remained with the selling carrier but did not relocate. In essence those employees finished out their careers in traveling gangs, never working close to home. Unfortunately, those were not the only effects of deregulation, at this same time the ICC and STB made other policy choices in the case of mandatory protective conditions to speed up rail transactions and weaken the ability of affected employees to have any say in how they would be carried out.

CHAPTER SEVEN

EMPLOYEE PROTECTIONS IN ACQUISITIONS BY CLASS II CARRIERS

While the ICCTA expressly forbade the STB from imposing protective conditions in "noncarrier" acquisitions under Section 10901, the new law also changed employee protective arrangements in acquisitions by existing Class II and Class III carriers.[1] Previously, if one existing rail carrier acquired the lines of another, the full New York Dock protective conditions would apply. The new law provided in Section 10902, differing protective arrangements for acquisitions by Class III and Class II carriers.

In the case of a Class III carrier's acquisition of an additional rail line, Congress continued the same prohibition on any employee protective conditions established in Section 10901(c). Acquisitions by Class II carriers did involve the imposition of economic conditions, but these were substantially scaled back from the ***New York Dock*** conditions that would have applied earlier.

Section 10902(d) required any Class II carrier who received STB approval of its acquisition of a rail line:

> *to provide a fair and equitable arrangement for the protection of the interests of employees who may be affected thereby. The arrangement shall consist exclusively of one year of severance pay, which shall not exceed the amount of earnings from railroad employment of the employee during the 12-month period immediately preceding the date on which the application for such certificate is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of the employee with the acquiring carrier during the 12-month period immediate-*

1. Railroad "classes" were first designated by the ICC in 1911 and used to determine the reporting obligations of those carriers. Today, the STB continues that classification in the following way: rail carriers with adjusted annual gross revenues of fewer than $20 million are "Class III" and rail carriers with adjusted annual gross revenues of $20 million but fewer than $250 million are "Class II."

ly following the effective date of the transaction to which the certificate applies.

The confusion and contradictions in this section are obvious. Initially, it requires the Class II carrier to provide a "fair and equitable arrangement" for the protection of affected employees. That requirement is followed by a statement that the "arrangement" exclusively is a year's severance pay. That bad drafting became the subject of administrative and judicial proceedings.

In October 1996, the Wisconsin Central (then an independent Class II carrier) petitioned the STB for exemption from formal review and approval of its acquisition of about 18 miles of line from the Union Pacific. In the petition, Wisconsin Central stated how it would apply the Section 10902(d) protective conditions. As this was a case of first impression, the STB issued a notice for public comment on the adequacy of the protective arrangements proposed by Wisconsin Central.

That proceeding, ***Wisconsin Central Ltd.–Acquisition Exemption,*** 2 S.T.B. 218 (1997), received comments from three Representatives involved in drafting the legislation, railroad trade associations, rail carriers and rail labor. The STB largely adopted the comments of rail labor in fashioning the scope of protective conditions available under Section 10902(d). Specifically, the STB said the protections should contain the following procedural and substantive protections:

- The Board would initiate a rulemaking on the propriety of requiring a 60 day advance written notice to unions representing employees working on the line of the proposed transaction, number of jobs affected and potential employment by the acquiring carrier.
- The definition of affected employees should include those whose jobs are eliminated by the sale and any other employees of the selling carrier who are economically affected as a result of the sale. Disputes over eligibility should be resolved in arbitration.
- No employee of the selling carrier would be required as a condition of receiving benefits to accept a position with the acquiring carrier.
- Adversely affected employees would receive the severance

payment in 12 monthly installments if they continue working for either the seller or acquirer. Calculation and payment of the severance would be similar to the calculation of the test period earnings and time paid for in ***New York Dock***.

The Association of American Railroads and Wisconsin Central sought review of this decision in the D.C. Circuit, ***Assoc. of American R.R. v. S.T.B.,*** 162 F.3d 101 (D.C. Cir. 1998). On review, the court substantially narrowed the group of employees potentially eligible for these reduced protective arrangements. The court focused on Congress's use of the term "severance" to mean that the intended group of employees to be protected was limited *"to those whose employment with the selling carrier was terminated as a result of a transaction."* (ibid, at 104). That language means, according to the court, that protective benefits are owed only to those employees who lose their jobs with the seller and take jobs with the acquiring carrier (ibid, at 105). However, the court did agree that the STB had authority to define the earnings used to compute the severance payment to include all railroad earnings in the 12 months prior to the acquisition (ibid). Finally, the court also agreed the STB had authority to compel arbitration of unresolved disputes over compensation (ibid, at 107).

Again, although this provision has been "on the books" for over 20 years, no BMWED member has received protective benefits under the law. It probably is safe to say that going forward, no BMWED member ever will collect benefits under the provision.

CHAPTER EIGHT

THE USE OF NEW YORK DOCK BY THE ICC AND STB AS A WEDGE TO CHANGE COLLECTIVE AGREEMENTS AND RESTRICT EMPLOYEE CHOICE IN LINE SALES

Prior to the passage of the Staggers Act, the negotiation or arbitration of implementing agreements under Sections 4 and 5 of the WJPA had been private affairs. The parties had resolved their differences in proceedings that did not involve a third party review of the "adequacy" of the arrangement for the selection of forces and assignment of employees required by an ICC approved transaction. Prior to passage of the 4R Act in 1976, proposed railroad mergers languished at the ICC for years. For example, the proposed merger of the Seaboard Air Line and the Atlantic Coast Line was announced in 1960 and was not consummated until July 1, 1967. Such intervals certainly gave the parties the opportunity to adjust differences and move forward. The only anomaly during this time was the Southern's control of the Central of Georgia, as discussed below. However, in that case, the ICC's intervention was limited to enforcing the procedural commands of Sections 4 and 5 of the WJPA as part of the protective conditions imposed on the transaction. The ICC never opined on the merits of the parties' subsequent adjustment of their dispute.

The passage of the Staggers Act and the appointment of anti-labor deregulatory zealots to the ICC upset that equilibrium. The railroads were now "deregulated," and what that meant was unknown, yet evolving. Ronald Reagan was a strong advocate of deregulation and no friend of collective bargaining or unions. What was clear early on is that Class I railroads would begin to shed marginal and unprofitable branch lines to "noncarriers" in the transactions discussed in Chapter 6. Those transactions essentially subcontracted the operation of branch and secondary lines to lower cost operators that were captive at their interchange points to the Class 1 selling carriers. In essence, the major railroads were able to subcontract the operation of lower density lines to cheaper operators, yet hold on to the bulk of the linehaul revenue. In other words, in the guise of "deregulation", the ICC regulated the labor relations on short line sales by permitting them to occur without employee protective conditions.

The 4R Act, and later Staggers, substantially shortened the time the ICC could take to approve or disapprove a proposed merger. As the nation's railroads began to compete in a world where rates were unregulated, they began to seek economies. In the 1960's two railroads in the South, the Florida East Coast and the Southern, had aggressively gone after work rules and employee headcounts. The FEC was struck in 1963 and essentially broke all the unions on the property. Ten years after the strike began, the FEC was obtaining the same amount of revenue with half the employees it had pre-strike.[1] The Southern sought to automate or mechanize whatever was possible. Some of the first mechanized maintenance of way equipment was developed for use on the Southern.[2] These issues would have continued regardless of Staggers, but what that Act did was make the merger of formerly competitive Class I carriers possible. And mergers generally meant a reduction in headcounts, but railroads also saw mergers as a method to compel changes in collective agreements. The question for them was how? The ICC, aided by increasingly conservative courts, provided the ways and means.

8.1. The First Skirmish – Southern Control

In 1962, the ICC approved the Southern Railway's stock control of the Central of Georgia and imposed the ***New Orleans Conditions*** on the transaction. The Commission also noted that the Southern and Central of Georgia were signatories to the WJPA. While the ICC first noted that the ***New Orleans Conditions*** "superimpose" the WJPA on the ***Oklahoma Conditions,*** it clarified that observation by stating the ***"New Orleans"*** conditions "were imposed for the specific purpose of giving protection to those employees who knowingly were not to be adversely affected in their employment until a substantial period elapsed after the date of the order authorizing the transaction..." ***Southern Ry.–Control,*** 317 I.C.C. 557, 564 (1962). That vague language begged the question as to whether Sections 4 and 5 of the WJPA applied to the conditions applicable to the transaction. In the protec-

1. Saunders, Merging Lines at 286.
2. Ibid, at 291.

tive conditions imposed, the ICC did include paragraph 6 which provided for arbitration *"[i]n the event any dispute or controversy arises with respect to the protection afforded by these conditions or with respect to their interpretation, application or enforcement..."* (ibid, at 590). In a subsequent decision, the Commission denied rail labor's petition for reconsideration of the protective conditions originally imposed. ***Southern Ry.–Control,*** 317 I.C.C. 729 (1963). The conditions imposed by the ICC did not expressly provide any procedures for the integration of the Southern and Central of Georgia workforces, specifically those procedures contained in Sections 4, 5 and 9 of the WJPA.

On June 17, 1963, the Southern unilaterally implemented its consolidation of Central of Georgia operations. Employees were laid off, work was transferred and facilities closed all without notice or negotiation with representatives of the affected employees. ***Southern Ry.—Control – Central of Georgia Ry.,*** 331 I.C.C. 150, 167 (1967). According to the ICC, more than 1580 employees, mostly from the Central of Georgia, were adversely affected by the Southern's unilateral actions.[3] The Southern defended its actions, stating that the imposed protective conditions omitted the notice and negotiation provisions of the WJPA. In other words, the Southern essentially argued that the ICC had given the Southern the unilateral authority to integrate workforces in a manner contrary to the WJPA requirements that had been in place since 1936 in all railroad coordinations.

As the Southern began carrying out its acquisition of the Central of Georgia, rail labor sought judicial review of the Commission's orders. A three-judge court of the Eastern District of Virginia affirmed the ICC's order in all regards. ***Ry. Labor Executives' Ass'n v. U.S.,*** 226 F.Supp 521 (E.D.Va. 1964). Rail labor appealed directly to the Supreme Court asserting the case should be remanded to the ICC for it to determine whether or not the conditions imposed contained or omitted Sections 4, 5 and 9 of the WJPA. The Court, in a per curiam decision agreed with rail labor and directed the ICC to answer that question. ***Ry. Labor Executives' Ass'n v. U.S.,*** 379 U.S. 199 (1964).

3. Ibid, at 171 and see discussion at pp. 171-76 for a full explanation of the harms suffered by employees in the carrying out of the transaction.

On remand, the ICC disingenuously contended that the Southern "knew" the provisions of the WJPA attached to the initial protective conditions because the Southern's president stated the carrier intended to abide by its provisions and asked that they be included in the ICC's order of approval. ***Southern Ry.–Control,*** 331 I.C.C. at 164-65. Indeed, the ICC assumed that the Southern "knew" that transfers of work from one carrier to another would require "procedures provided in the agreements or by obtaining superseding contracts which would permit such transferring of work to occur." (ibid, at 165). According to the ICC, the WJPA was such a "superseding contract" that overrode the prohibitions against employee transfers in the existing on-property agreements (ibid). Therefore, the ICC found that *"[o]nly by disregarding some of the basic obligations of the respective collective bargaining agreements, including the Washington Agreement, could applicants follow their proposed plan in effectuating the consolidations here in question."* (ibid). Essentially, the ICC argued that compliance with the WJPA's selection of forces provisions was of such an established practice and understanding, that any protective conditions imposed by the Commission must contain them unless expressly excluded in the ICC's order (ibid). Put another way, as Bill Mahoney remarked to me, the ICC made such a mess of its initial order approving the transaction that an aggressive rail carrier could attempt to exploit those ambiguities regarding the applicability of the WJPA. The upshot of this was that employees of the Central of Georgia sat in a limbo until 1967 to determine if they ever would have the opportunity to "follow their work" that was transferred to the Southern.

The Southern's other argument, that Section 5(11), which applied to rail mergers approved by the ICC, provided a "self-executing" override of the WJPA, was the first time that argument had been raised in an ICC proceeding. Section 5(11) was originally enacted as Section 5(8) of the Transportation Act of 1920 to provide merging carriers relief from the antitrust laws.[4] The override provisions contained in the 1920 Act were expanded as part of the Transportation Act of 1940 in Section 5(11) to

4. For an excellent discussion of the history of the so-called "immunity" or "cram down" provisions of the ICA, see ***Bhd. Ry. Carmen v. I.C.C.,*** 880 F.2d 562 (D.C. Cir 1989), ***rev'd sub nom., Norfolk & Western Ry. v. American Train Dispatchers Assn.,*** 499 U.S. 117 (1991).

accommodate the need for shareholder approval of mergers and consolidations. This relief is obvious, because from 1920 forwards, the rail transportation policy in the United States favored rail consolidations because Congress deemed that the railroads suffered from too much inter-carrier competition to the detriment of their abilities to provide common carrier service. Section 5(11) provided:

> *The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibition of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . .*[5]

Southern argued that the Section *"obliterates all requirements of the Washington Agreement and the collective bargaining agreements."* The ICC disagreed.

First, the ICC noted that the Southern had paid claims to former Central of Georgia employees for failing to provide 5 days written notice of abolishments as provided in the CBA and had defended their assignment of transferred work as required by the Southern CBAs (ibid, at 169). Therefore, the Southern's actions in fact did not comport with its legal arguments to the ICC. Second, the ICC found no conflict between the WJPA and the approved transaction. The ICC observed that employee rights under CBAs, the WJPA and ICC-imposed protective conditions were *"independent, separate and distinct rights."* (ibid) Essentially, the ICC-imposed protective conditions were designed to provide compensatory protections for *"wages, fringe benefits and*

5. 54 Stat. 908-909.

*other losses . . . after that carriers have arrived at their adjustments of the labor forces **in accordance** with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect."* (emphasis in original, ibid, at 170) In the view of the ICC, the WJPA was such an agreement that facilitated adjustment of the workforces. In other words, the WJPA, like the requirement of the advance notice on abolishments contained in the CBA, were agreements or rules that *facilitated* the carrying out of the transaction and were not overridden by Section 5(11). According to the ICC, Section 5(11) *"applies only to antitrust and other restraints of law from carrying into effect the transaction so approved."* (ibid). The Commission was clear that the WJPA and collective agreements were not such restraints subject to Section 5(11). Simply put, there is no way to read ***Southern Control*** as supporting an argument that Commission approval of a transaction automatically overrides collective bargaining agreements or the Railway Labor Act that underlays their negotiation and administration.

8.2. The ICC Initially Declines to Review the Application and Intent of Its Protective Conditions

The ***Southern Control*** proceedings were an anomaly for the ICC. Prior to that decision, it had asserted no oversight of its protective conditions once an application was approved. However, ***Southern Control*** was preceded by a case that reached the Supreme Court because the parties amended an earlier protective agreement certified by the ICC as "fair and equitable" to the affected employees.

In 1964, the Norfolk & Western, the Nickel Plate and the Wabash merged. As part of that merger, the new company also acquired a line of railroad from the Pennsylvania ("the Sandusky Line"). Labor and management negotiated an "attrition type" agreement that provided an income supplement to any affected employee who earned less than his test period average compensation in the 12 months preceding the transaction. As part of the merger, some of the Pennsylvania employees accepted positions with the merged carrier. Their test period compensation was computed on *all* earnings on the Pennsylvania in the prior 12 months, rather than their earnings on the Sandusky Line. This fact is significant because due to the winter freeze on the Lake Erie, the Sandusky Line shut down for the season and the employees worked on other lines in the Toledo Division. Following consummation of the merger, those employees were restricted to the Sandusky Line and were, therefore, laid off in the winter, yet continued to receive protective payments based on earnings from parts of the Pennsylvania Railroad not included in the merger.

The ICC adopted the original attrition protections as the "fair and equitable" arrangement for the protection of employees. In 1965, the Sandusky Lines employees were about to arbitrate the railroad's refusal to pay their protective claims when labor and management amended the protective agreement so that only earnings on the Sandusky Line would be computed in the test period average compensation. The affected employees went to court to have the original attrition protections enforced as an order of the ICC. The District Court and Court of Appeals found for the employees and the Supreme Court accepted *certiorari* to review those decisions.

In ***Norfolk & Western Ry. v. Nemitz,*** 404 U.S. 37 (1971), the Court affirmed the lower courts' decisions. The Court held that the attrition agreement had been adopted by the ICC in its order approving the merger. In such a case, *"The collective agreement then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of s 5(2)(f) and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the interests' of the employees within the meaning of the first sentence."* (ibid, at 43). Because that agreement was a condition of approval, the ICC and the courts retained jurisdiction to determine any subsequent agreement did *"not substantially abrogate employees' rights grounded in an I.C.C. order."* (ibid, at 44).

The ***Nemitz*** decision left open the question of what exactly was contained in an ICC condition protecting the interests of employees. That question was answered by the ICC in a dispute presented to it by employees involved in the mergers resulting in the creation of the Burlington Northern system.

In 1967, the ICC approved the mergers and leases that created the Burlington Northern railroad. As a condition to that approval, the ICC adopted another "attrition" protection agreement negotiated by labor and management as the "fair and equitable" arrangement for employees. Some eight years later, some operating craft employees filed a complaint with the ICC alleging that various terms of the 1971 "national" agreements covering operating employees diluted the value of those benefits, or, in ***Nemitz*** terms, the 1971 agreement "substantially abrogated" their rights grounded in an ICC order.

The ICC resolved all the complaints in ***Leavens v. Burlington Northern,*** 348 I.C.C. 962 (1977). Initially, the ICC noted that prior to the decision in ***Nemitz,*** it had declined jurisdiction to review protective agreements reached under Section 5(2)(f). However, the Supreme Court's decision now required the ICC to review any private protective conditions to insure they *"conform to the requirement of the law."* (ibid, at 973). The agency noted that the purpose of both the statutory language in Section 5(2)(f) or a negotiated protective arrangement under that section *"is to afford protection against adverse effects suffered by an employee with respect to his employment* ***as a result of the transaction."*** (emphasis in original, ibid, at 975). Specifically, ICC review should be limited to *"those matters that either result from the merger or which claim violation of a specific condition that was intended to protect against a specific merger-related harm."* (ibid). More to the point, the ICC added: *"In adopting these protective conditions and the related arbitration provisions, we provided that those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions. This Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations."* (ibid).

The ICC's reluctance to become involved in resolving after that fact disputes regarding the meaning of its protective arrangements was highlighted in a complaint raised by an employee of the Western Maryland. The employee alleged the carrier violated the protective conditions imposed by the ICC in the Chesapeake & Ohio-Western Maryland merger in 1967. The specific complaint was the carrier refusing to consider the individual an "employee" covered by the protective conditions adopted by the ICC. The ICC refused to answer the question, and sent the dispute to the arbitration process included in its protective order because *"Where we have specifically prescribed arbitration as the remedy for employee complaints, we no longer have authority to become involved in disputes between a railroad and individual parties arising out of the protective conditions."* ***Bell v. Western Maryland Ry.,*** 366 I.C.C. 64 (1981).

At that juncture, the scope of the ICC's involvement in the administration and interpretation of protective conditions seems fixed. Following the ***Nemitz*** decision, the ICC was obligated to ensure that subsequent collective agreements did not "substantially abrogate" protections in the ICC's order approving a transaction. ***Leavens*** held that the ICC's review of any subsequent agreement would be limited to issues regarding changes to the level or amount of protective benefits included in the original protective order. In other words, the ICC would monitor situations like the one in ***Nemitz*** where a subsequent agreement substantially reduced the protective payments due to affected employees under the ICC's original order. The ***Bell*** case appears to stand for the proposition that individual disputes over eligibility for benefits under protective conditions must be resolved in arbitration when such a procedure is included in the protective conditions adopted by the ICC when it approved a transaction. The next ten years would see that supposedly settled world blown apart by an activist ICC intent on making employee protective conditions the vehicle to make substantial changes in existing collective bargaining agreements.

8.3. The Mixed Treatment of Cram Down in the Federal Courts Before the 1980's

The ICC's discussion of the effects of Section 5(11) on the WJPA and other collective bargaining agreements did not occur in a complete vacuum. A few skirmishes, precursors of sorts, were fought in the federal courts before the ICC made its paradigm shift regarding the effect its approval of a transaction had on both the RLA generally and the collective agreements negotiated under its aegis.

Two cases from the 1960's first raised this issue. They reached different results, but a close reading of either case, and a related earlier case involving the approval of a merger by the Civil Aeronautics Board ("CAB"), show the issues presented were much narrower than those bandied about in the 1980's and later.

The first case involved changes to railroad operations in the Corpus Christi, Texas area. The three railroads serving the area agreed to coordinate operations through the construction of a new railroad bridge, the construction of a joint yard and the creation of a terminal association to handle the operations. The railroads involved served Section 6 notices under the RLA and made agreements with all affected unions but the Brotherhood of Railroad Trainmen.[6] As part of this operational change, the railroads obtained ICC approval of the proposed coordination and the ICC imposed the standard ***New Orleans*** conditions; no privately negotiated implementing agreement was incorporated into those conditions and order of approval. Subsequent to ICC approval, the National Mediation Board released the union and carriers from mediation and a strike date was set by the union.

The subsequent litigation, ***Texas & N.O.R.R. v. Bhd. Of R.R. Trainmen,*** 307 F.2d 151 (5th Cir. 1962), ***cert. denied,*** 371 U.S. 952 (1963) involved three issues: (1) whether the federal Norris-LaGuardia Act divested the court of jurisdiction to issue an anti-strike injunction; (2) the application of the RLA to a dispute involving ICC approval of a transaction; and (3) the related issue of the ICC's "exclusive and plenary" authority to approve the changes in working conditions required by the coordination. The court held the NLGA applied and because this was a "major dispute" under the RLA, it lacked subject matter jurisdiction to issue an injunction (ibid, At 155-56).

Significant in this discussion is the court's rejection of the carriers' argument that the employee protective conditions mandated in Section 5(2)(f) were part of national labor legislation that required "accommodation" of the NLGA's anti-strike provisions. First, the court rejected the argument that ICC approval

6. The Brotherhood of Railroad Trainmen generally represented over the road Brakemen. In 1969, it merged with the Order of Railway Conductors; Switchmen's Union of North America and the Brotherhood of Locomotive Firemen and Enginemen to become the United Transportation Union ("UTU"). In 2011, after much litigation, the UTU consummated its merger with the Sheet Metal Workers' International Association to become the International Association of Sheet Metal, Air, Rail and Transportation Workers ("SMART"). The former UTU is now the SMART-Transportation Division.

of the transaction necessarily means any operational change flowing from it was also approved (ibid, at 158). The court observed that ICC approval of the transaction was permissive in that the carriers were not obligated to consummate it. The court reasoned that if the carriers could simply walk away from the approved transaction without consequence, it made no logical sense that a third party like the union was somehow bound to mandatory changes in its collective agreements (ibid, at 159). Regarding, the alleged authority of Section 5(11) to override the RLA, the court noted that the involved carriers were obligated to comply with corporate and local law to carry out the restructuring, so how could they be relieved of their duties under Section 6? Especially when it was the carriers who initiated the process. Finally, the court observed that Section 5(2)(f) granted the parties the right to negotiate a private protective agreement and said that right would be illusory if the union was not free to strike at the end of the process (ibid, at 160).

There is an important *caveat* to this case. Essentially, the court held that the reach of Section 5(11) to relieve carriers of legal constraints in a merger was not "self-executing" as the carriers argued.[7] Instead, the carriers were free to return to the ICC for an express ruling that the demands sought by the union were contrary to the public interest expressed in the approved transaction and, if such findings were made, the ICC order would relieve the carriers of their RLA obligations (ibid, at 166-67). Put another way, the court believed Section 5(11) might be used to override the RLA or collectively bargained agreements, but the ICC would have to make a direct ruling on the particular override sought by the carriers.

The next skirmish moved north from Texas to Minnesota.

In 1960, the Chicago & North Western received ICC approval to acquire the Minneapolis & St. Louis Railway. The carriers entered into a protective agreement with the union and the ICC expressly adopted the agreement as a condition of its approval. That agreement included provisions for the notice, negotiation and arbitration of an implementing agreement providing for the selection of forces and assignment of employees in coordi-

7. The Supreme Court would reject that argument 29 years later in the ***Dispatchers*** decision, *infra.*

nated service. In December of 1960, the CNW invoked the notice provision of the implementing agreement to make changes to operations in Marshalltown, Iowa. The union objected, and said any changes must occur under Section 6 of the RLA.

In ***Bhd. Locomotive Engineers v. Chicago & N.W.R.R.,*** 314 F.2d 424, 429 (8th Cir. 1963), ***cert. denied,*** 375 U.S. 819 (1964) the court rejected the union's argument, holding the ICC's authority to approve mergers also includes the power to authorize changes in working conditions necessary to effectuate such mergers. In reaching that decision, it relied upon an earlier decision involving the authority of the CAB to authorize airline mergers.

The case relied upon by the 8th Circuit, ***Kent v. C.A.B.,*** 204 F.2d 263 (2d Cir.), ***cert. denied*** 346 U.S. 826 (1953), concerned the CAB's approval of the merger of Pan Am and American Overseas Airways. The CAB imposed compensation protections similar to the ICC imposed employee protective conditions for the benefit of both airlines' employees. Significantly, the CAB said those compensation benefits would not be available until the unions and carriers either reached agreement or arbitrated an arrangement governing the integration of seniority. All of the unions, save the Flight Engineers, either reached agreement or went to arbitration. The CAB resolved the impasse with the flight engineers by imposing a seniority arrangement upon them that involved a simple dovetail of the Pan Am and AOA Flight Engineers. The Pan Am union sued, contending the CAB lacked jurisdiction to impose the arrangement or compel arbitration. (The Pan Am flight engineers wanted the AOA flight engineers placed on the bottom of the Pan Am roster regardless of prior AOA service.)

The court rejected the union's argument. It held that the CAB has express authority to approve airline merges upon *"such terms and conditions as it shall find to be just and reasonable."* That express authority contained the implicit authority to impose employee protective conditions. Indeed the court noted the Supreme Court's decision in ***Lowden*** as applicable to the question of the CAB's implied authority to imposed compensation protections. The flight engineers also argued that even if the CAB has authority to provide compensation protections, it lacked authority to impose seniority modifications as a condition of receiving those protections. Again the court rejected that argument holding (204 F.2d at 265):

> *However, when a merger involves two or more groups of employees each having separate seniority rights, the public interest in maintaining peaceful labor relations so as to effect an orderly continuation of operations is not always satisfied merely by conditioning approval of the merger on financial protection to the employees. Industrial strife may arise by reason of a dispute between the two or more employee groups as to how a unified seniority list should be drawn. And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate.*

Finally, the union argued the order was invalid because it conflicted with the seniority provisions in the existing flight engineer/Pan Am CBA. The court swiftly disposed of that argument stating: *"A private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates, such as are here involved, only upon such terms as it determines to be just and reasonable in the public interest."* (204 F.2d at 266).

After reviewing the Kent decision, the 8th Circuit also reviewed the Supreme Court decisions in ***Lowden,*** the ***New Orleans*** case and ***BMWE v. US*** to conclude that the ICC had jurisdiction to consider the interests of employees affected by the transaction and impose conditions to protect their economic interests. Those conditions were intended to deal with **all** effects flowing from the transaction and that authority derives from the ICC's exclusive and plenary authority in Section 5(11). Accordingly, the union's argument that the ICC made no express ruling that override of the RLA processes was necessary to carry out the transaction was irrelevant because such an express finding was unnecessary. The ICC had imposed protective conditions in this case, indeed it adopted a voluntary agreement made by the parties that contained implementing agreement procedures. In that case, it could be argued, said the Court, that the ICC actually made an express finding that the RLA processes were overridden. Regardless of whether or not such a finding was made, the 8th Circuit held that the authority granted under Section 5(11) is "self-executing" and the RLA could not be interposed to block the notice, negotiation and arbitration provisions of the conditions imposed by the ICC upon its approval of the merger.

Our final case in this triad of Section 5(11) cases concerns the intersection of the ICC's exemptive authority and state laws and private agreements that mandated certain staffing levels at a railroad. In 1976, the ICC approved the merger of the Missouri Pacific ("MP"), Texas Pacific ("TP") and Chicago & Eastern Illinois railroads. At issue was an agreement made by one of the predecessors of the MP, the International & Great Northern ("I&GN"). In summary terms, the I&GN was formed by a merger in the 19th century that was approved by the Texas legislature. In consideration of receiving bonds from the state of Texas, the I&GN agreed to maintain offices and employees in Palestine, Texas in perpetuity. In 1954, the MP reached an agreement with the City of Palestine and the surrounding county that it would retain 4.5% of its employees in certain classifications in Palestine in perpetuity. In its merger application, the MP expressly requested the ICC provide it relief from the 1954 agreement. The ICC granted the MP's request and relieved it from its obligations under the 1954 agreement.

Needless to say, the City of Palestine and some of the affected rail unions went to court to overturn the ICC's order and defend the integrity of the 1954 agreement. The court framed the issue simply as the scope of the ICC's power under Section 5(11). ***City of Palestine v. U.S.,*** 559 F.2d 408 (5th Cir. 1977), ***cert. denied*** 435 U.S. 950 (1978). The court found the ICC's authority under Section 5(11) was limited to the extent that it *"exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved section 5(2) transaction."* (ibid, at 414). Put another way, the court observed, *"[i]n its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger."* (ibid). Essentially, the court viewed the "approved transaction" as the corporate merger, in this case the corporate merger of three carriers that previously had been operated as a single system operationally. The court found that the agreement mandating the retention of MP employees in Palestine was not an "obstacle" to attaining the corporate merger so that the ICC's order exceeded its jurisdiction. Alternatively stated, the court held that abrogation of the 1954 agreement was not "necessary" to the carrying out of the approved transaction. In this case, while not expressly stated, the court was following the lead of the ***Texas & New Orleans*** decision of 15 years earlier that any exemption must be included in the ICC's order. In other words, the grant of authority under Section 5(11) was not "self-executing."

As we approach the 1980's, railroad deregulation and the coming of the Reagan appointees to the ICC, the legal landscape appeared well mapped. In ***Southern Control,*** the ICC had rejected a broad reading of Section 5(11) as it applied to the RLA and agreements made under it. In ***Leavens,*** the Commission had voiced a concern about becoming involved in labor disputes under its conditions due to a lack of expertise in the nuances of collective bargaining. The cases of ***Texas & New Orleans*** and ***City of Palestine*** certainly suggested a judicial skepticism of the ICC's ability to exercise broad exemptive authority for the benefit of merging carriers. The contrary decision in ***BLE v. CNW*** readily could be distinguished and explained as a case involving a union attempting to end run an implementing agreement it previously had negotiated and had imposed by the ICC as a condition of its approval of a railroad merger. There really was nothing in the law or practice to suggest that the ICC would be granted or use a "hunting license" to go after settled collective agreements.

8.4. The ICC "Goes Hunting"

The intersection of politics and changed public policy cannot be clearer than when dealing with the ICC in the post-Staggers era. While the Staggers Act certainly sought to deregulate railroad rate setting and require the rail carriers to function in a competitive environment (both against each other and against other transportation modes), the Act made no substantive changes to employee protective provisions. However, the election of Ronald Reagan and his subsequent appointments to the ICC allowed the nation's railroads to use the ICC as a sympathetic court to undermine what previously had been settled law regarding the operational implementation of ICC approved transactions.[8] Prior

8. Reagan's nominee for Chair of the ICC was Heather Gradison, a 29 year old former rate clerk for the Southern Railway whose primary qualification for the position

to this point, both the ICC and certain federal courts had confined themselves to saying that transactions should be implemented pursuant to the terms of the protective conditions imposed. In other words, if the protective conditions included Sections 4 and 5 of the WJPA (or their equivalent), disputes over the usage of employees by the merged carriers should be resolved through those procedures. However, beginning in 1983, the ICC both in its decisions approving transactions and through its review of arbitration decisions construing ICC imposed protective conditions began to impose a substantive view of *how* the transactions should be implemented and offered guidance and support to carriers who desired to use Commission-imposed protective conditions as a wedge to make wholesale changes in collective bargaining agreements.

In 1982, the ICC approved the merger of the Union Pacific and Missouri Pacific. Additionally, the ICC granted trackage rights to the Denver & Rio Grande Western and Missouri-Kansas-Texas to provide operations over part of the newly merged system. In the merger proceeding, the DRGW and MKT stated they intended to use their crews to staff trains operated over the trackage rights territory. Following approval of the merger, the DRGW used MP crews on their trains, but eventually announced that DRGW crews would be used in the future. The MKT used its crews from the beginning of trackage rights operations. The operating craft unions objected saying that any changes to crewing on the MP territory was subject to bargaining under the RLA. The BLE sought a clarification from the ICC that DRGW and MKT could not unilaterally effect those crewing changes. The ICC rejected the requested clarification, instead stating that DRGW and MKT previously stated in the merger proceeding how they would crew the trackage rights operations. According to the ICC, its approval of the merger meant the self-executing provisions of Section 11341(a) (formerly Section 5(11)) relieved the DRGW, MKT or MP from any obligation to bargain over these changes. In other words, the ICC accepted the 8th Circuit's view of the "self executing" effect of its approval, but it transferred the "hunting license" mentioned in the 5th Circuit to the railroads involved in the transaction. The BLE, now joined by the UTU, sought

appears to have been her marriage to Republican Representative Willis Gradison of Ohio.

reconsideration of the ICC's decision. The ICC denied the reconsideration request, stating that the exemption from all other laws was self-executing and the ICC did not have to make an affirmative exemption order when approving the merger and trackage rights transactions. Put differently, the ICC took the position that when it approved a transaction, its approval extended the Section 11341(a) exemption to all changes mentioned by the carriers whether or not the ICC actually made findings or commented on the changes in question.

The unions appealed the ICC's two decisions to the federal Court of Appeals in the District of Columbia. That court overturned the ICC's decision. The court rejected the "self-executing" nature of Section 11341(a), observing the exemptive effect of that section *"applies only 'as necessary' to allow transactions to occur."* ***Bhd. of Locomotive Engineers v. I.C.C.,*** 761 F.2d 714, 723 (1985), ***rev'd on other grounds sub nom., I.C.C. v. Bhd. of Locomotive Engineers,*** 482 U.S. 270 (1987). Therefore, *"[t]his statutory limit on the Commission's authority creates certain responsibilities for ICC. In exercising its waiver authority ICC must do more than shake a wand to make a law go away. It must supply a reasoned basis for that exercise of statutory authority."* As no such findings were made in the case, the court vacated the ICC's orders and remanded the proceedings back to the Commission to investigate and make findings regarding the necessity of exempting the crewing of trains involved in the trackage rights transactions from the Railway Labor Act bargaining processes. This decision moves farther than ***Southern Control*** in that it presumes that under certain facts, the ICC could use Section 11341(a) to relieve a carrier of its obligations under the RLA. However to do so, the ICC would have to make express findings that such an exmeption was "necessary" to carry out the approved transaction.

The MKT and ICC successfully petitioned for Supreme Court review of the appellate decision. On appeal, the Supreme Court reversed the lower court's decision by holding that the two ICC decisions appealed by the unions were not orders that could be reviewed on their merits. Therefore, the reviewing court lacked jurisdiction to review the ICC's decision. The decision was 5-4 with the four more "liberal" justices arguing that the court had jurisdiction to review the ICC's orders. However, the dissenters also disagreed with the lower court's decision on the merits. Instead, they argued that the ICC did not have to make a "necessity" finding before Section 11341(a) could be used. Instead, they agreed with the ICC that Section 11341(a) was self-executing and the *"breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable."* 482 U.S. at 298.

The issue left unresolved in these cases was both the scope of exemptive authority granted under Section 11341(a) and whether or not the ICC had to make specific findings regarding its use. In the UP-MP merger case, the carriers involved in the trackage rights transactions publicly stated how they intended to operate their trains as tenants over the UP track. No implementing agreements were fashioned under the ***N&W*** conditions regarding selection of forces and assignment of employees. Instead, the carriers simply unilaterally proceeded under color of authority flowing from the ICC's approval of the transaction.

8.5. Interlude — the ICC Asserts Jurisdiction to Review Protective Condition Arbitral Awards

Article I, Sections 4 and 11 of ***New York Dock, Mendocino Coast*** and ***Oregon Short Line*** all provide that the decisions rendered by their respective arbitration panels shall be *"final, binding and conclusive"* upon the parties to the dispute. Those protective conditions contain no express provision for appellate review of the arbitral award. That approach was consistent with the WJPA's treatment of arbitration in Section 13. Essentially, the arbitral decisions under both the WJPA and the ICC imposed conditions was to be final and binding on the parties so that the transaction underlying the arbitration could proceed expeditiously. In the case of the ICC imposed conditions, however, one could argue that the arbitration panel is functioning as a delegate of the ICC, therefore its decision could be construed as a final decision of that agency and a petition for review filed in the appropriate Court of Appeals. Nevertheless, prior to 1987, no party to an arbitration under ICC imposed protective conditions had sought review of the decision in any forum. Indeed, in the ***Bell*** decision, the ICC rejected a petitioner's request that it construe its protective conditions by referring the petitioner back to arbitration and, further, noting the ICC's general lack of expertise in labor relations matters. That changed in what is called the ***"Lace Curtain"*** case. ***Chicago & North Western Trans. Co.–Abandoment,*** 3 I.C.C. 2d 729 (1987), ***aff'd sub nom., Int'l Bhd. of Electrical Workers v. I.C.C.,*** 862 F.2d 330 (D. C. Cir. 1988). A dispute over the rather trivial issue of whether or not a modest increase to relocation allowances was within the arbitrator's jurisdiction to impose.

In ***Lace Curtain,*** an employee adversely affected by the ICC's approval of the abandonment of rail lines in Iowa sought reimbursement for moving expenses and a loss on the sale of his home following relocation. The arbitration committee granted him the loss in value of his home, mortgage interest costs and real estate broker's fees as well as the actual cost of the move, prejudgment interest and a $500 "lace curtain" allowance as part of the moving expenses. [9] The railroad was dissatisfied with the award and appealed the decision to the ICC, while the union objected claiming the ICC had no jurisdiction to review the award.

The ICC's decision accepting the railroad's petition for review acknowledged this was the first request it had received to review an arbitration decision made under its protective conditions. The ICC also conceded that nothing in ***Oregon Short Line*** or the Interstate Commerce Act expressly conferred review jurisdiction upon it. Nevertheless, the ICC noted that reviewing courts had found jurisdiction for the CAB to review arbitrations from its protective conditions even though there was no express statutory authority granted to the Board to do so. Here, the ICC observed that unlike CAB protective conditions which were discretionary, the Commission was required to impose ***Oregon Short Line*** on the abandonment. While the imposed conditions might refer to final and binding arbitration of such disputes, *"nothing in the mandatory arbitration requirement forecloses us from considering whether our abandonment decisions (and labor protection conditions) have been properly interpreted or carried out as we intended. Accordingly, we find that we have authority to review arbitrators' decisions so '****proper implementation of the statute may compel our review when an arbitration decision raises issues concerning our statutory responsibility to impose labor protection.****'"* 3 I.C.C.2d

9. The term "lace curtain allowance" refers to an arbitrary payment offered to relocating employees over and above any out of pocket expenses resulting from the move. Apocryphally, the allowance was to be used by the employee's spouse to buy "lace curtains" for the windows of the new residence.

at 735 (emphasis added). As for the standard of review, the ICC said it would defer to the expertise of arbitrators in determining factual questions and would only accept review jurisdiction in matters of *"recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions."* (ibid, at 736). The D.C. Circuit affirmed the ICC's exercise of review authority.

8.6. *Carmen* And *Dispatchers* – No Agreement Is Safe From The ICC

The following discussion involves two arbitration decisions under Article I, Section 4 of the ***New York Dock*** conditions. The number of employees involved was a little more than 100 combined, yet the effects of those decisions affected everyone of the 200,000 or so railroad employees working in the late 1980's into the late 1990's. These two decisions must be read in the background of a railroad "merger mania" that afflicted the Class I carriers at that time. In 1986, the ICC rejected the proposed merger of the Southern Pacific and Santa Fe Railways. That decision left a weakened Southern Pacific, which had been in a voting trust during the early 1980's, as the target and eventual merger partner of the Denver & Rio Grande Western. The Santa Fe walked away from its unconsummated merger with the SP and merged with the Burlington Northern in 1994. At the same time the UP acquired and merged with the Chicago & North Western. That merger led to serious traffic disruptions throughout the Midwest. In 1996, the UP then acquired the SP and DRGW and proceeded to cripple rail traffic at Pacific and Gulf ports for months. Finally, in 1998, Canadian National acquired Illinois Central and shortly after that, Norfolk Southern and CSX made a joint offer to acquire and dismember Conrail after each carrier had engaged in a costly bidding war to obtain sole control of the eastern carrier. These were massive mergers involving thousands of employees and created massive systems. The nation's railroad map was redrawn by 1999. There were two mega systems on each side of the Mississippi River and 3 smaller north-south systems of much more limited scope in CN, Kansas City Southern and Canadian Pacific's Soo Line subsidiary. This rearrangement occurred coincidentally to the shedding of branch lines and secondary lines by the Class I carriers through the Section 10901 process described in Chapter 6. Rail employees were being buffeted by sales that removed portions of their seniority territories without compensation protection and by rail mergers which upended the entire seniority and rules systems contained in their collective agreements.

The first of these cases, commonly referred to as the ***"Dispatchers"*** case, involved about a dozen power directors employed by the Norfolk and Western Railway in Roanoke, Virginia. In 1982, the ICC approved the merger of the N&W and Southern. Immediately following the corporate consummation of the merger, the existing collective agreements remained in place on both the N&W and Southern. In 1986, the merged carriers served notice under Article I, Section 4 of the ***New York Dock*** conditions to transfer power distribution work from Roanoke to Atlanta, Georgia. The power distribution work in Roanoke was performed by a group called SOC Supervisors, represented by the American Train Dispatchers Association ("ATDA") while the power distribution work in Atlanta was performed by non-union "managerial" employees.

When the parties could not reach agreement on an implementing agreement the issue was arbitrated under the ***New York Dock*** conditions. In that proceeding, NS testified that all other dispatching had been consolidated in Atlanta save the power distribution function. According to NS, the consolidation of all dispatching functions in Atlanta would create "efficiencies" in the merged carrier's operations. The ATDA challenged the jurisdiction of the arbitration committee arguing that the consolidation of dispatching was not contemplated by the ICC's order approving the merger because it had not been mentioned in the labor impact statement filed with the original application. Additionally, ATDA contended that Article I, Section 2 of the ***New York Dock*** conditions expressly preserved existing RLA agreements until they were changed under those same processes. Therefore the ***New York Dock*** conditions actually protected the employees against the type of forced change in agreements advocated by NS in its notice.

The arbitrator viewed the basic questions presented for decision as: "whether the type of consolidation desired by the Carriers was authorized by the ICC in its decision and if it was, what are the protections afforded by New York Dock." Particularly, the arbitrator said the "central issue" was the "reconciliation" of Sections 2 and 4 in an implementing agreement. Looking at the historical record, the arbitrator noted this issue had not arisen before 1981. Then, between 1981 and 1983, at least 5 arbitrators said Section 2 prohibited them from making changes to RLA agreements. However, the arbitrator noted a change at the ICC when in a 1985 decision it held that the Section 4 implementing agreement process was designed to supersede conflicting RLA obligations.

Following this review of the history of the attempted "reconciliation" of the two sections, the arbitrator stated he was a creature of the ICC and bound by its decisions. Since the ICC had held that Section 4 trumps any conflicting RLA procedures or contract terms, the transfer of work must be authorized in the implementing agreement even if that means taking the work from the ATDA agreement and taking union representation from any SOC Supervisors who transfer to Atlanta.

The second case, called the ***"Carmen"*** case also involved a transfer of work from one location to another, although in this case, the transferred employees would retain collective bargaining rights with their unions, just under different agreements. However, the proposed transfer contained another twist; the Carrier's proposal also would make changes to an implementing agreement negotiated under the protective conditions attached to an earlier merger in 1966 between constituents of the rail conglomerates that became CSX in 1980.

In August 1986, CSX served notice to close its Waycross, Georgia repair shop and consolidate all work at its shop in Raceland, Kentucky. The work in the Waycross facility was subject to agreements between the unions and the former Seaboard Coast Line, while the Raceland facility was subject to agreements with the former Chesapeake & Ohio. A complication in this was that in 1966, when the ICC approved the merger of the Seaboard Air Line and Atlantic Coast Line railroads, the parties negotiated an implementing agreement consolidating work in Waycross. The essence of that agreement, called the "Orange Book", was that the newly merged carrier could transfer work throughout the merged territory, but the employees were entitled to "attrition" protections — meaning they had an income guarantee that continued until they left the service of the carrier.

In the subsequent arbitration, the union contended: (1) the arbitration panel also lacked jurisdiction because the consolidation of work to Raceland was not contemplated in the 1980 order of approval creating CSX; (2) that Section 2 did not permit the changes sought by the carrier; and (3) that the Orange Book protections meant that employees subject to that agreement did not have to relocate to Raceland and could still draw benefits under the Orange Book. The arbitrator resolved the first two issues in the same manner as the SOC Supervisors case. As regards the Orange Book protected employees who comprised about half of the Waycross employees, the arbitrator held that while they could voluntarily transfer to Raceland, they did not have to because the Orange Book — another protective agreement — did not require them to move off the former Seaboard territory.

Both of these awards were appealed to the ICC, following its decision in the ***Lace Curtain*** case. These two awards were the first Section 4 awards reviewed by the ICC and constituted the agency's expression of the exemptive reach of Section 11341(a) and Article I, Section 4 of ***New York Dock***. I will deal with each separately, although their paths merge on appeal to the federal courts.

The ICC began its review of the SOC Supervisors decision by reiterating the ***Lace Curtain*** standard of review: awards would not be reversed save for egregious arbitrator error, failure of the award to draw its essence from the protective conditions or the arbitrator exceeded his authority. In this case, the ICC held the arbitrator's award passed muster. The agency's reasoning in support of the result rested on conclusory opinions, a mis-reading of ***BLE v. CNW*** and prognostication about what would flow from an approved transaction.

First, the ICC assumed that any and all post-consummation coordinations of operations could not occur under the RLA. Therefore, the arbitration provisions contained in Section 4 must displace any RLA agreement or procedures interposed against it. Next, the ICC said that ***BLE v. CNW*** held that the Section 11341(a) was self-executing and did not require express findings from the ICC on every issue. What the ICC failed to note was that the ***BLE v. CNW*** court specifically limited its decision to the facts of that case. Central to the court's holding is that the ICC decision at issue there, involved the Commission's adoption of a private implementing agreement negotiated by the parties as the protective conditions applicable to the transaction. In that case, the court essentially held you don't get two bites at the apple, once you make an agreement governing selection of forces and assignment of employees and the ICC adopts it, you are stuck with it. Finally, the ICC concluded this self-executing exemptive authority flowed to future coordinations and alleged public benefits expected to flow from the approved transaction. Therefore the Section 11341(a) exemption flowed to anything that somehow could relate back to the original merger and that created a "public benefit." In essence, the ICC held that if the carrier served a Section 4 notice under ***New York Dock***, it could bypass the RLA processes and RLA agreements to achieve whatever operational transaction it believed was merger related.

The ***Carmen*** appeal added the wrinkle of the arbitrator attempting to accommodate the Orange Book protection with the later ***New York Dock*** implementing agreement process. The ICC affirmed his decision that the Waycross work could be transferred to Raceland, but reversed his determination that the proposed transfer also could accommodate the ***Orange Book. CSX Corp.–Control–Chessie System, Inc.,*** 4 I.C.C.2d 641 (1988). The ICC noted that preservation of Orange Book rights for covered employees was consistent with Article I, Sections 2 and 3 of ***New York Dock*** and would only "slightly impair" the proposed transaction, but not prevent it. Despite the arbitrator hearing evidence from both parties and attempting to accommodate the Orange Book with the proposed transfer of work, the ICC overruled his decision.

The ICC affirmed the arbitrator's determination that his jurisdiction under Section 4 permitted the override of the Orange Book's prohibition on the transfer of work outside the former Seaboard territory. However, the ICC strongly rejected his conclusion that Orange Book protected employees did not have to transfer to Raceland thus (4 I.C.C.2d at 649-50):

> *As we indicated, even if the committee did properly interpret the Orange Book as prohibiting the transfer of employees outside former SCL limits, its attempted "accommodation" of this supposed prohibition to the proposed transaction must be overturned because the Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission. Once it is determined that a proposed transaction is authorized by the Commission (and we have affirmed the committee's finding that this transfer of repair work was authorized in CSX-Control), the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in New York Dock or imposed by the Commission upon the involved transaction.*

Now, in the view of the ICC anything that was an "impediment" to the carrying out of an approved transaction must be struck down. Note, the ICC made no finding that preservation of the Orange Book rights would deny consummation of the merger — indeed that corporate merger had occurred years ago. The ICC also didn't make a finding that preservation of the Orange Book rights would preclude the transfer of work — instead, it was an "impediment" to that transfer. The ICC remanded the case to the arbitrator for reconsideration of the treatment of the Orange Book employees.

The two ICC decisions wound up consolidated on various petition for review filed in the D.C. Circuit. In ***Bhd. Ry. Carmen v. I.C.C.,*** 880 F.2d 562 (D.C. Cir. 1989), the court reversed the ICC's decisions. The court tried to summarize the ICC's position as the following (ibid, at 566):

> *the ICC asserted that it has the power, which devolves upon an arbitration committee convened under § 4 of the New York Dock conditions, to relieve a party to a § 11343 transaction from any provision of a CBA or of the RLA that stands in the way of implementing that transaction. Its rationale for this assertion was less than clear, however, due largely to its failure to analyze separately the statutory provisions upon which it relied and their relation to the specific rights it purported to abrogate.*

The court also noted that the ICC had appeared to abandon on appeal its contention that the protective conditions imposed under Section 11347 fully supplanted the RLA in an approved transaction.

When a federal court reviews an order of an administrative agency, that court will apply what is called the ***Chevron*** test.[10] That test has two parts: (1) has Congress directly spoken to the precise statute at issue? and if not, (2) is the agency's interpretation of the statute permissible and entitled to deference? In other words, the court will not substitute its interpretation of a statute, instead it will give deference to an agency's interpretation of a statute it is charged with enforcing provided that the agency's interpretation does not run contrary to an express command of Congress. Here, the Court found the ICC's reading of Section 11341(a) as overriding "all legal obstacles" to an approved transaction was both unsupported in the language of the statute or cases interpreting it going back to its inception in 1920. In other words, Congress had not directly addressed the immunity issue and the ICC's interpretation of an ambiguous statute was unreasonable.

The court noted that the immunity provision was incorporated into the 1920 Transportation Act as a reaction to the conflicting state and federal laws that previously governed rail mergers. (Remember in ***City of Palestine,*** the 1954 Agreement at issue had its genesis in the predecessor railroads seeking *state* authority to merge and obtain bonds.) Its analysis bears repeating here in full (880 F.2d at 570):

> *Congress addressed both of these problems with the immunity provision of the 1920 Act. First, Congress placed in the ICC, and removed from the antitrust courts, the duty of considering the anticompetitive effects of any merger proposed to it. 41 Stat. 481 (§ 5(4)) (ICC master plan to preserve competition "as fully as possible");* ***McLean Trucking Co. v. United States,*** *321 U.S. 67, 73-78, 64 S.Ct. 370, 373-76, 88 L.Ed. 544 (1944). Second, Congress continued its wartime policy to centralize supervision of the nation's railroads and to eliminate conflicting state authority; thus, for example, ICC-approved consolidations could go forward, aided by the immunity*

10. ***Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,*** 467 U.S. 837 (1984).

> *provision, free of interference by the States. This general, centralizing sentiment was echoed in other sections of the 1920 Act, which gave the ICC authority, notwithstanding contrary state law, to (1) approve any extension, construction, or abandonment of tracks, see 41 Stat. 477-78 (§§ 1(18), 1(20)); Transit Commission, 289 U.S. at 126-28, 53 S.Ct. at 537-38; (2) reject or permit any proposed issuance of securities, 41 Stat. 494-95 (§§ 20a(2), 20a(7)); and (3) adjust rates it deemed unduly preferential or discriminatory.*

After reviewing that legislative history, the court was "confident" that Congress did not intend the immunity provisions to override contracts. As further support, the court observed that when the RLA was debated and subsequently enacted by Congress in 1926, a provision permitting the ICC to reject "excessively generous" wage settlements was rejected. The Court found it odd that if contemporaneously Congress refused to give the ICC express jurisdiction to review RLA agreements, it would have impliedly granted that same jurisdiction in the immunity provisions passed some six years earlier. In conclusion, the court noted that since Section 11341(a) did not authorize the override of contracts, the ICC's contention that Section 4 permitted such an override necessarily failed as well.

At this point, the discussion of these two arbitral decisions diverges. The D.C. Circuit remanded both decisions to the ICC for reconsideration in light of its decision. Meanwhile, the rail carriers and the ICC petitioned the Supreme Court for a writ of certiorari to review the D.C. Circuit's decision. I will discuss the Supreme Court's decision first for two reasons. First, that decision put an end to the dispute over the exemptive effect of Section 11341(a). However, in making that decision, the Supreme Court essentially issued an advisory opinion (something it should not have done for prudential reasons) that *assumed* the ICC made certain findings about ***New York Dock*** and Section 11347 generally. Second, the ICC's decision on remand from the D.C. Circuit, issued before the Supreme Court's decision, offered some insight and guidance on how it analyzed ***New York Dock*** and Section 11347 following the court's rebuke of its analysis of Section 11341(a).

8.6.a The Supreme Court's Decision in *Dispatchers*

The Supreme Court's decision in ***Norfolk & W. Ry. v. American Train Dispatchers Assn.,*** 499 U.S. 117 (1991) focused entirely on the impact of Section 11341(a) on an ICC-approved transaction. In making its ruling, the Court made the following assumptions: *"we assume, without deciding, that the Commission properly considered the public interest factors of § 11344(b)(1) in approving the original transaction, that its decision to override the carriers' obligations is consistent with the labor protective requirements of § 11347, and that the override was necessary to the implementation of the transaction within the meaning of § 11341(a)."* Significantly, the Court offered no guidance on what relevant "public interest factors" applied in the override of a collective bargaining agreement; offered no guidance on what Section 11347 protected or didn't protect; and offered no guidance on what is "necessary" in the context of implementing an approved transaction. Essentially, what the Supreme Court did say was the phrase "all other law" in Section 11341(a) included relief from contracts made under color of law because, *"[a] contract has no legal force apart from the law that acknowledges its binding character."* No kidding.

The practical uselessness of this misguided opinion was best summarized in the Court's limitation of its holding:

> *The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction. We reiterate that neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the Commission held on remand from the Court of Appeals, that the scope of the immunity provision is limited by § 11347, which conditions approval of a transaction on satisfaction of certain labor-protective conditions. See n. 2, supra. It also might be true that "[t]he breadth of the exemption [in § 11341(a)] is defined by the scope of the approved transaction...." ICC v. Locomotive Engineers, supra, 482 U.S., at 298 (STEVENS, J., concurring in judgment). We express no view on these matters, as they are not before us here.*

So, the Section 11341(a) immunity *may* apply to *any* contract made under law — including contracts for the purchase of fuel, locomotive, rail cars, leases of real estate, etc. if relief from such a contract is "necessary" to carry out the approved transaction.

Of course, the Supreme Court offered no definition of either "necessary" or "transaction" when offering its opinion. Rather than issuing a decision, or more prudently refusing the petition, the Supreme Court offered up an advisory opinion based on "assumptions" that would leave parties with no guidance in dealing with real problems. Note that this decision really didn't decide whether the ICC's interpretation of Section 11347 or ***New York Dock*** was right or wrong, it merely reversed the D.C. Circuit's decision that Section 11341(a) standing alone never could be used to override a collective agreement. Interestingly, for a Supreme Court packed with Republican appointees, the zeal in screwing labor's interests inadvertently created more uncertainty for businesses.[11] The D.C. Circuit's decision essentially said that contracts were sacred and couldn't be overridden by Section 11341(a), but labor's contracts might be vulnerable to attack through Section 11347 or ***New York Dock***. The Supreme Court instead said that all contracts, whether labor or commercial, are potentially vulnerable to override under Section 11341(a) under the proper conditions. We now turn to the ICC's handling of these cases on remand from the D.C. Circuit.

8.6.b Carmen and Dispatchers on Remand

The ICC's decision on remand from the D.C. Circuit, commonly referred to as ***"Carmen II",*** dealt with the issues the Supreme Court "assumed" when it determined the scope of the Section 11341(a) immunity. The ICC began its decision with a review of how the RLA fit with ICC approval of a transaction and the ICC-imposed protective conditions. According to the ICC: (1) any merger of significance will require modification of agreements (why?); (2) the RLA procedures are *"incompatible with the efficient consummation and effectuation of a merger or consolidation"* (perhaps, but where in the ICA is there any mention that mergers or consolidations must be consummated "efficiently"?); and

11. 1991 was a very bad year for rail labor. In addition to the Supreme Court's decision in the ***Dispatchers*** case, that year saw the issuance of the report of Presidential Emergency Board No. 219. That report, adopted by Congress as a binding agreement, made wholesale changes in the bargaining relationships of the rail unions and the carriers. For example, as regards BMWED, PEB 219 provided for the creation of regional and system production gangs, compelled realignment of seniority districts, created unpaid travel time and changes in starting time rules. For the UTU, PEB 219 opened up all crew consist agreements to binding arbitration of new terms. TCU had its entire wage structure questioned and potentially would have rates reduced for incumbents over time.

(3) the ICC lamented the loss of the *"harmonious accommodation of the potentially conflicting merger and labor policies which lasted until almost 1980."* The ICC's solution in this case was to go "back to the future" and construct a *"return to the pre-1980 approach based upon harmonizing the provisions of these Acts."*

What the ICC proposed, was a turn back to its position in ***Southern Control*** some 23 years earlier. In that case, the ICC viewed the WJPA as a "superseding contract" that permitted the transfer of employees, abolishment of positions and furlough of employees while adequately protecting their basic and substantive rights to protective payments. However, those words mean very little if the implementing agreement can make wholesale changes to agreements beyond selection of forces and assignment of employees. The ICC really could not define an implementing agreement, *"[t]he scope of those terms, however, is not well defined. It must extend beyond the mere mechanism for selection or assignment of employees, and include the modification of certain important contractual rights."*

The Commission also offered its construction of Article I, Section 2 of ***New York Dock.***

> *The preservation of contract rights and collective bargaining rights certainly means, at the minimum, that employees should have the opportunity to bargain collectively over their basic and continuing conditions of employment, as contemplated by the RLA. In the context of mergers, this means that only those changes in CBAs necessary to permit an approved transaction will be appropriate. We will expect arbitrators to hold both parties to the contracts that they have voluntarily signed. As we have discussed, arbitrators have had the power since 1936 to modify CBAs to the extent necessary to permit approved transactions to proceed and have used it in a manner that did not become contentious until the 1980's.*

Again, an anodyne statement that really doesn't provide much guidance other than to send the parties into a type of "protective condition archaeology" to look at old WJPA implementing agreements. The problem with this approach is that post-Staggers, the railroads were becoming ruthless with cost-cutting and force reductions. Also, they were merging and consolidating at a rapid rate in proceedings that were statutorily mandated to be resolved much quicker than proceedings before 1980. In other words, the solutions the parties reached in a slower, regulated environment might well have nothing much to offer if one party, the carrier, was much more aggressive in seeking changes to agreements through the ICC-imposed protective conditions. The "balance" the ICC hoped for was *"that any changes in CBAs will be limited to those necessary to permit the approved consolidation and will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute. We believe that arbitrators have successfully followed this narrow and difficult path in the past and we hesitate to go beyond general statements in defining their role."* In practice, that "balance" never happened.[12]

The final chapter regarding the intersection of RLA rights and the ability of employee protective condition arbitrations to trump those rights was written by the newly created STB in ***CSX Corp.—Control,*** 3 S.T.B. 701 (1998), commonly referred to as ***Carmen III.*** In that decision, the STB stated that ***New York Dock*** arbitrators could effect changes in existing agreements subject to three "crucial" limitations: (1) the transaction to be implemented must be an approved transaction; (2) the modifications to the agreement must be "necessary" to implementation; and (3) the "rights, privileges and benefits" protected by Article I, Section 2 cannot be abrogated under any circumstance.

Unlike the earlier ICC decisions on this issue, the STB attempted to provide working definitions of some of these terms. A "transaction" included both the principal transaction approved by the agency and *"subsequent transactions that are directly related to and grow out of, or flow from the principal transaction."* The override of agreements due to necessity could only be effected *"where there are transportation benefits of the underlying transaction."* Or put another way, the "benefit" could not be the change in the agreement standing alone. The "rights, privileges and

12. Using that rubric, under the guise of an "implementing agreement", the Union Pacific obtained a system gang agreement incorporating the entire former Southern Pacific, CNW, DRGW and UP territories. UP also eliminated the SP-Texas & New Orleans agreement and replaced it with the MP agreement. CSX merged parts of six different railroads to completely rearrange operating crew districts. All of these major changes were made outside of give and take collective bargaining and were sanctioned by arbitrators and the ICC or STB under the ***New York Dock*** conditions. In one case, the triggering "transaction" was ICC approval of a merger over 30 years earlier—so much for the "efficient" consummation of transactions.

benefits” protected under Section 2:

> *include such things as group life insurance, hospitalization and medical care, free transportation, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation and unemployment compensation.*[13] *They do not include scope and seniority provisions.*

The ***Carmen III*** decision was that last word from the STB on the collision of protective conditions and the RLA. What followed was a bargained for resolution of Section 11341(a) in 2001 that followed upon legislative pressure placed on the carriers. The outline of that agreement, which modifies how agreements may be modified under Article I, Section 4 is a subject for another book. Suffice to say, since the 2001 agreement was reached, only one railroad has served a notice under Article I, Section 4 of ***New York Dock*** to deal with the selection of forces and assignment of employees related to the consummation of an operational change related to an ICC or STB approved transaction.[14] Apparently, the RLA is sufficient for the parties to “efficiently” implement those changes flowing from approved agreements after all.

13. Understand that by definition, any employees involved in a railroad merger participate in Railroad Retirement, not Social Security, so the STB’s cryptic reference here makes no sense whatsoever and, in this author’s opinion, demonstrates the lengths the STB and its staff went to make stuff up to justify conclusions unmoored from practice and legislative history.
14. Canadian Pacific served a notice upon BRS to combine the former DME, Soo and Milwaukee territories. That notice was not subject to the 2001 agreement, but significantly, Canadian Pacific has not pushed that notice to arbitration as of this writing.

CHAPTER NINE

WILMINGTON TERMINAL – THE FINAL BLOW TO RAIL LABOR COMMITTED IN THE GUISE OF EMPLOYEE PROTECTIVE CONDITIONS

Since the 1936 adoption of the Washington Agreement, any merger of rail carriers, or purchase of some or all of the line of one carrier by another had been subject to the provisions of Section 4 and 5 of that Agreement and its progeny — the ***New Orleans*** conditions, the ***Southern Control*** conditions and, finally, the ***New York Dock*** conditions and its siblings. All of those protective arrangements required an implementing agreement — what is called an "umbrella" implementing agreement — for the selection of forces and assignment of employees among the carriers and employees involved in the transaction. These arrangements permitted affected employees to "follow their work" from one carrier to another with the least disruption to their working lives that the parties could craft. Unfortunately, the "umbrella" implementing agreement also became a casualty of the battle between the unions and rail carriers over the preservation of collectively bargained rules and wages in mergers and line sales.

In ***Brandywine Valley R.R.–Purchase,*** 5 I.C.C.2d 764 (1989), the ICC was presented with a small transaction in Florida. The Brandywine was a small railroad owned by Lukens Steel Co. that operated a 4 mile long line in Pennsylvania. The line to be acquired in Florida primarily served U.S. Sugar and its operations in that state.[1] About 24 CSX employees would be affected by the transaction. The acquisition agreement between Brandywine and CSX provided that Brandywine make offers of employment to 6 CSX employees and offer future positions on the line over the next 12 months to CSX employees on a "preferential basis." In other words, the two rail carrier parties constructed an implementing agreement unilaterally without consultation with representatives of the affected employees. The ICC agreed with that characterization and directed the rail carrier parties

1. Brandywine acquired the line in 1990 and sold it to U.S. Sugar in 1994. The line now operates as the South Central Florida Express, transporting, among other things, unit trains of sugar cane.

and their employee representatives to enter into "umbrella" implementing agreements specifically noting the importance of the original Washington Agreement in this transaction thus (5 I.C.C.2d at 772):

> *Although this is a sale of a line which results in transfer of that line from one railroad to another and not a consolidation which creates an ongoing relationship among the parties thereto of the sort to which the New York Dock, supra, conditions, based as they are upon the Washington Job Protection Agreement, were designed to apply, we find the same result to be acceptable here. Therefore, BVRC as well as CSX should participate in the negotiations leading to an implementing agreement with the CSX employees represented by RLEA and the BVRC employees.*

However, the ICC noted that this procedural requirement did not dictate any particular substantive result in the implementing agreement negotiations. Instead, the ICC was focused on the procedural guarantees of an "umbrella" implementing agreement and required by ***New York Dock*** and its predecessors back to the Washington Agreement.

The ***Brandywine Valley*** decision led to a protracted struggle between the rail unions, CSX and Brandywine Valley over the question of whether or not CSX employees who "followed their work" to Brandywine Valley would continue to work under CSX work rules and receive CSX-level wages. All of the ***New York Dock*** implementing agreement arbitrators rejected the rail labor position, but the controversy had been fully joined.

A year later, the ICC was presented with another line sale transaction in ***Wilmington Terminal R.R.–Purchase & Lease,*** 6 I.C.C.2d 799 (1990). In that case, an existing Class III carrier, the Wilmington Terminal, proposed to purchase and lease about 225 miles of CSX rail lines in Georgia. The transaction also involved the purchase of 16 locomotives, 195 bad order rail cars and work, office and communications equipment from CSX. At the time of the transaction, Wilmington Terminal operated 4 miles of railroad in Wilmington, North Carolina and employed four individuals. As part of the proposed transaction, Wilmington Terminal would hire 44 employees to conduct operations in Georgia. At the same time, CSX intended to abolish 53 positions affected by the sale. In other words, this transaction looked like one where many of the 53 affected CSX employees should be able to "follow their work" to Wilmington Terminal pursuant to a negotiated or arbitrated implementing arrangement.

That "umbrella" agreement was not to occur. The ICC noted that this transaction, and others similar to ***Brandywine Valley*** involved rail carriers selling lines to "unrelated carriers." These transactions were not consolidations because "there is no ongoing relationship between the buyer and the seller and no melding of their respective work forces." 6 I.C.C.2d at 813. Therefore, the ICC determined it must "revisit" the ***New York Dock*** and ***Mendocino Coast*** conditions "to determine how they should be interpreted to accommodate these transactions." (ibid, at 814). At this point, it is important to remember that the Second Circuit held in the original review of the ICC's ***New York Dock*** decision that those conditions were the statutory minimum applicable to mergers, not some discretionary "improvement" to the minimum protective conditions applicable to consolidations and line sales. Therefore, in an intellectually honest environment, the ICC should have had nothing to "interpret" since ***New York Dock*** containing an "umbrella" implementing agreement obligation was the statutory minimum requirement in a line sale transaction. Nevertheless, intellectual honesty never was the ICC's strong suit, so it continued down its interpretive path. This path led to the "separate but equal" version of ***New York Dock,*** now referred to as the ***Wilmington Terminal*** variant. According to the ICC, carriers in line sale transactions should proceed as follows (ibid, at 814-15):

> *After thoroughly considering this matter, we have concluded that in line sale cases under § 11343 the seller must: (1) provide full New York Dock protection to its affected employees; (2) arrive at an implementing agreement or agreements with them prior to consummation; and (3) impose no penalty for their decision not to take similar jobs under the rates of pay and work rules offered by the buyer. The buyer must provide full New York Dock protection to its own employees and arrive at an implementing agreement or agreements with them prior to consummation. Unless otherwise provided by contract, the buyer's only obligation to the seller's employees will be to inform them of any availability of, and the terms*

and conditions of, employment. The buyer must fully inform the seller's employees of these prospects prior to consummation. Once an employee—having been fully informed of these matters—elects to accept a position with the buyer, the seller will have no further obligation to that employee. If the seller's employees decline employment with the buyer or no job is offered, they will be entitled to New York Dock protection limited to the seller…

The ICC reached this conclusion by finding a lack of "privity of contract" between the seller's employees and the buyer.[2] Therefore, the seller's employees in situations where the seller continued in operation, had no "legal" right to employment with the buyer, except on the buyer's terms.[3] Of course, that analysis begs the question of "privity" in earlier merger and consolidations. The employees of the acquired carriers in those cases had no "privity" of contract with the acquiring entity either. They were employees of an entity that had ceased to have an independent existence. In essence, what had evolved since passage of the Railway Labor Act and the employee protective conditions under the Interstate Commerce Act was a type of "successorship" doctrine whereby the acquiring entity took over as the successor to the acquired entity's labor agreements. Now why this implied successorship doctrine was abandoned in line sales in ***Wilmington Terminal*** is an unanswered question. My guess is that it was a legal move by the pro-carrier ICC to forestall any attempt to apply NLRA type "successor" law in the case of partial line sales when the acquiring entity hired a substantial number of the selling carrier's employees.

Rail labor appealed that decision to the Sixth Circuit. In ***Ry. Labor Executives' Assn. v. I.C.C.,*** 930 F.2d 511 (6th Cir. 1991), the court

2. It must be mentioned that "privity of contract", or the lack thereof, was a defense used by automobile manufacturers in the early 20th century when purchasers of those cars tried to sue the manufacturer for injuries or damage caused by a negligently designed or constructed automobile. According to the car companies, the purchaser only had "privity of contract" with the dealer, and not the manufacturer. Therefore, any liability and the standard of care owed to the car owner stopped with the car dealer. The New York's highest court overturned that defense in 1916 and most courts and legislatures soon followed. In that sense, the "privity of contract" defense was related to the "fellow servant" rule that was disposed of by the Federal Employers' Liability Act of 1908. Prior to that, railroads could interpose the defense that it was not their negligence, but that of one of the employee's "fellow servants" that caused an employee's injury, so that any liability stopped with the other railroad employee.

3. Ibid, at 816.

upheld the ICC's decision. On appeal, Rail Labor argued that ***New York Dock*** incorporated the selection and assignment provisions of Sections 4 and 5 of the Washington Agreement. Therefore, *any* transaction subject to ***New York Dock*** required an umbrella implementing agreement. The court disagreed. Essentially, the court found that the Washington Agreement applied only to "coordinations" which were similar in effect and operation to mergers and consolidations. The line sale in ***Wilmington Terminal*** did not fit the definition of "coordination" in the WJPA, therefore, Sections 4 and 5 of that Agreement never applied to them and was not incorporated into ***New York Dock*** when applied in line sale cases. 930 F.2d at 517

This ends the history and legal development of employee protective conditions applicable to inter-carrier transactions. Given the lack of any major rail mergers since the 1998 purchase of Conrail by Norfolk Southern and CSX we may have reached a quiet interlude in major transactions. Nevertheless, for anyone following in the footsteps of those practitioners who struggled with employee protective issues since 1936, it is important to understand where we came from to get where we are today, because that history might help provide a useful road map to future destinations.

CHAPTER TEN

PROTECTIVE CONDITIONS ESTABLISHED BY CONTRACT AFTER THE WASHINGTON AGREEMENT

10.1. The Agreement of February 7, 1965

A somewhat tired joke in the railroad industry is that Rail Labor always wants it to be 1955 all over again, while Rail Management wants it to be 1885. The reference to the year 1955 contains a very strong kernel of truth, however. The decade following 1955 was very bad for railroad employees. The advent of complete dieselization hurt employment among the shopcrafts as the formerly labor-intensive steam locomotives were replaced by more durable and less fussy diesel-electric locomotives. In the maintenance of way craft, the first automation was occurring, the handling of rails, ties and OTM and the tamping of roadbed was being performed by machines with a substantial impact on maintenance of way employment levels.

In response, the shopcraft unions through the Railway Employees' Department of the AFL-CIO and five cooperating non-operating unions, the Brotherhood of Railway Clerks,[1] Brotherhood of Railroad Signalmen, Brotherhood of Maintenance of Way Employes, Order of Railroad Telegraphers and the Dining Car Employes, served Section 6 notices seeking an end to subcontracting of scope work and stabilization of employment levels. A voluntary agreement with the carriers was not forthcoming for either group, so President Lyndon Johnson appointed Emergency Boards to provide recommendations to settle the disputes.

The shopcraft dispute was handled first by Presidential Emergency Board No. 160. The situation facing the shopcrafts

1. The Clerks and Telegraphers subsequently merged. In 1987, the Clerks and Carmen (one of the shopcraft unions) merged to become the Transportation Communications International Union. That union, in turn, merged with the International Association of Machinists (another of the shopcraft unions) in 2005. The BMWE merged with the Teamsters in 2005, joining the Locomotive Engineers who had earlier merged with Teamsters. The Dining Car Employees became part of the Hotel and Restaurant Employees which merged with UNITE, the product of the 1995 merger of the Textile Workers and Ladies Garment Workers, in 2004 to form UNITE-HERE.

was dire. In 1955, there were over 256,000 shopcraft employees working for the nation's large railroads. That number had dropped to slightly more than 149,000 by 1962, a 42 % decline in employment in less than a decade. The PEB's solution to this problem was a recommendation that Washington Agreement style benefits be extended to shopcraft employees displaced or deprived of employment due to technological or organizational changes instituted by the railroads that otherwise were not barred by existing agreements. In other words, the PEB did not recommend an increased union voice in carrier decisions to engage in such changes, it simply recommended that WJPA styled benefits be made available to employees adversely affected by what were the intra-carrier equivalent of the inter-carrier "coordinations" covered by the WJPA. On September 25, 1964, the shopcrafts and carriers executed an agreement along the lines recommended by the PEB. That agreement remains in effect, with some amendments, to this day.

Presidential Emergency Board No. 163 provided its recommendations for the five cooperating unions on October 20, 1964, after the execution of the shopcraft agreement. PEB No. 163 also confronted a dire situation for job stability and security among the unions presenting their case. The Board noted that between 1936 and 1955, employment among the groups represented had remained almost steady, dropping only by about 9,000 total over the period. However, beginning in 1955, the bottom dropped out. Between 1955 and 1962, employment dropped from over 479,000 to slightly over 276,000, with the BMWE represented group dropping by over 50 % during that time. Indeed, the situation actually was worse because part of those 276,000 were employed only part of each year. The average age of those unemployed was 40 years and many of them had exhausted their RUIA benefits.

The PEB's recommendation here was that the September 26, 1964 shopcraft agreement provided a good model for the five unions and the carriers to use to resolve this dispute. Given the current tenor of the times, it is worthwhile to present at length the PEB's thoughts on this matter:

> *The principle has been stated so often recently it needs no special emphasis here that restrictions on management to modernize*

> *equipment, facilities and techniques must be lifted if our economy is to move forward at a desirable pace. At the same time, it is now accepted in American industry that the price for such progress should not be paid completely, or even principally, by the employees who by virtue of long service in the industry have acquired equitable rights in their jobs.*
>
> *Time and a more analytical study of developing trends will be required before an Emergency Board or other special commission, can come to grips with the advanced proposals of the parties for a national agreement dealing with principles of normal attrition, continued employment for regularly assigned employees, and assured earning in exchange for broad relaxation of work rules.*
>
> *For the present, however, we think that the agreement of September 25, 1964, between the railroads and the shopcraft organizations following the recommendations of Emergency Board No. 160 provides a good basis for settlement of the rule changes and employee protection issues in this dispute because it matches fairly the need of employees for protection and the need of the Carrier for managerial freedom* ***under existing conditions.*** (emphasis in original)

Although PEB 163 recommended adoption of the September 25, 1964 Shopcraft Agreement, the unions and the railroads went in a very different direction that resulted in the Agreement of February 7, 1965 ("the Feb 7th Agreement"). Article I, Section 1 of that agreement stated:

> *All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this Agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964, and has fifteen or more days of compensated service during 1964, will be retained in service subject to compensation as hereinafter provided unless or until retired, discharged for cause, or otherwise removed by natural attrition.*

Essentially, virtually all employees hired on or before October 1, 1962 were guaranteed some form of wage stabilization until they left the service of the railroad through retirement or death. The "seasonal employees" referenced above were guaranteed the same number of days worked in 1964 under the same attrition protections. Seasonal employees also had to have performed some compensated service for the railroad in 1962 and 1963 to be eligible, but there was no minimum service requirement for those years.

The generous economic benefits conferred by the agreement were matched by significant obligations upon the employees. An employee subject to the Agreement's protection would forfeit such protections for *"failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements."* Additionally, an employee could forfeit protective benefits by failing to accept a position offered him in an implementing agreement made pursuant to Article III of the Feb 7th Agreement.

Article III, Section 1 of the Feb 7th Agreement begins with this recitation: *"[t]he organizations recognize the right of the carriers to make technological, operational and organizational changes, and in consideration of the protective benefits provided by this Agreement the carrier shall have the right to transfer work and/or transfer employees throughout the system…"* This language references back to the PEB 163 recommendation that economic protections should be accorded to the employees while not diminishing managerial freedom to operate the railroads. When an implementing agreement is required and what exactly constitutes a technological, operational or organizational change never have been definitively resolved. A more complete discussion of the Feb 7th Agreement is part of another book.

The problem with the Feb 7th Agreement, unlike the 1964 Shopcraft Agreement is that the benefits of the agreement attenuated over time as employees left railroad employment. As regards BMWE, the maximum percentage of members covered by the Agreement in 1996 was 2.26 %[2] and probably was lower than that given that over time employees could have forfeited protection by accepting a furlough when work was otherwise available.

When BMWE appeared before Presidential Emergency Board No. 229 in 1996, the major emphasis was on rolling back many of the work rule changes imposed by Congress in the wake of

2 PEB 229, Employees' Exhibit No. 33 at 9.

Presidential Emergency Board No. 219. However, the issue of job stability, both through restrictions on subcontracting maintenance of way work and a freeze on employment levels were presented to the Board for consideration. As part of that effort, BMWE argued for an extension of the Feb 7th Agreement to current employees in a manner similar to that obtained by the Brotherhood of Railroad Signalmen in their 1996 national agreement. PEB 229 agreed with and adopted BMWE's proposal on an extension of the Feb 7th Agreement.

On September 26, 1996, BMWE and the National Carriers' Conference Committee signed a national wage and rule agreement that included an amendment of the Feb 7th Agreement. While the original Feb 7th Agreement protected only a closed class of employees — those hired on or before October 1, 1962 — the amended Agreement provided protection to employees "who have or attain ten (10) or more years' of employment relationship" with a railroad. Seasonal employees still remained a static group, however, in their cases, they were guaranteed the number of days worked in 1997, provided they also performed compensated service in 1995 and 1996. Given that an employee's protected status as "regular" or "seasonal" is not determined until he reaches his tenth anniversary, the last group of "seasonal" employees obtained protection in 2005 based upon their employment history almost ten years earlier. The amended agreement remains in place today, subject to periodic attempts by BMWED to further augment and amend its provisions.

10.2. ARTICLE XI OF THE 1996 NATIONAL AGREEMENT

The 1996 National Agreement also contained another, little known and little used employee protective provision in its Article XI. As recounted in Part 5.3.a, *supra,* the Interstate Commerce Commission Termination Act of 1994 expressly forbade the Surface Transportation Board from imposing **any** form of employee protective conditions in a transaction subject to Section 10901 — the "noncarrier" acquisitions that became popular in the 1980's and early 1990's.

Article XI tracked earlier settlements reached by the UTU and Locomotive Engineers regarding this noncarrier transactions.

Essentially, Article XI provides the following benefits to employees:

- Minimum of sixty (60) day advance notice by the seller of its intention to sell or lease a line under Section 10901
- The union has a demand right to meet with the seller "to discuss the planned transfer"
- The contract of sale or lease must obligate the buyer or lessee to offer priority hiring consideration to the seller's employees who work on the line and also require the buyer or lessee to assume a neutral stance in any subsequent organizing campaign
- The seller must provide "priority employment rights" to other positions to affected employees
- Employees who have their jobs abolished as a result of the sale and relocate and change their points of residence are entitled to a $5000.00 relocation allowance
- Employees of the seller who go to work for the new operator have the right to return to the seller within the first 12 months of operation.

As of the writing of this book, no BMWED represented employee has received the relocation allowance provided in the agreement.

10.3. THE REPLACEMENT OF STATUTORY PROTECTIONS FOR AMTRAK EMPLOYEES

Throughout the 1950's and 1960's intercity rail passenger service declined precipitously. A substantial reason for the decline was the growth in other modes of passenger transportation, primarily jet aircraft and the development and expansion of the Interstate Highway system. However, railroad management also refused to support modern, on-time rail passenger service, deriding it as a money-loser that simply ate up capacity that otherwise could be used to move freight. To cite one example, the Missouri Pacific, a railroad which once had an emphasis on passenger service, as late as Christmas 1961 ran three sections of the Texas Eagle from Saint Louis carrying a total of 1,500 passengers. By 1968, that same train was a single section of 4 cars, standing room only, described as "sound[ing] and smell[ing] like a slow train through Bolivia, lacking only the live chickens."[3] The Transportation Act of 1958 permitted the ICC to approve the discontinuance of interstate passenger trains, removing oversight of that issue from various conflicting state agencies. By making the discontinuance of intercity passenger trains a federal problem, the means of their preservation also now resided in Congress.

Congress acted in 1970 by passing the Rail Passenger Service Act of 1970 (RPSA).[4] Congress found that the "public convenience and necessity require the continuance and improvement" of intercity rail passenger service. The vehicle for its preservation was "the designation of a basic national rail passenger system and the establishment of a rail passenger corporation for the purpose of providing modern, efficient, intercity rail passenger service…" RPSA, Sec. 101. What the RPSA proposed was the creation of what was to be called Amtrak and it was to acquire passenger equipment from the freight railroads and offer employment to employees previously working in passenger service on those roads.

As part of the transfer of rail passenger service from the freight carriers to the quasi-public Amtrak, Congress required that adversely affected employees receive protective benefits. These benefits are commonly referred to as the "Appendix C-1 conditions" that were the subject of the litigation in Congress of ***Ry. Unions v. Hodgson,*** discussed in Part 3.3, *supra.* However, subsection (c) of Section 405 also applied these protective obligations to Amtrak once it began intercity rail passenger service. Any Amtrak employee adversely affected by Amtrak's subsequent discontinuance of service also was entitled to protection under benefits substantively identical to the Appendix C-1 conditions. These intra-Amtrak protective conditions were known, not surprisingly, as the "Appendix C-2 conditions."

Throughout its now 46 year existence, Amtrak has been the target of putative "free market" conservatives who are ideologically opposed to government subsidy of intercity rail passenger service. (Now, the federal monies that go to airport construc-

3. *Merging Lines*, at 308.

4. Pub.L.91-518 (October 30, 1970).

tion, operation of the air traffic control system and the creation and maintenance of the Interstate and United States highway systems apparently are not federal subsidies to those modes of transport in the eyes of these conservatives.).

The Amtrak Reform and Accountability Act of 1997, Pub. L. 105-134 (Dec. 2, 1997), took several shots at Amtrak. The primary thrust of the law was to eliminate any Federal monies for Amtrak's operating expenses by 2002. The vehicle created by Congress to achieve this goal was the 11 member Amtrak Reform Council established under Section 203 of the Act. This Council was to investigate Amtrak's operations and make recommendations and findings. If the Council found that Amtrak would require Federal operating subsidies past 2002, it was required to present a plan to Congress for a "restructured and rationalized national intercity rail passenger system" and Amtrak was to prepare a plan for its complete liquidation.[5] (Note: the "drop dead" date came and went and Congress simply ignored its passing. One must also salute the tireless work of the late Charlie Moneypenny, the Transport Workers Union legislative representative who singlehandedly fought for rail labor's interests on the Reform Council and managed to disrupt its operations.)

As part of this putative path to operational self-sufficiency, Amtrak was relieved of its obligations under the Appendix C-2 conditions. Those conditions were to be replaced by those determined by bargaining between Amtrak and the unions representing its employees. If negotiations did not result in an agreement, the parties were directed to binding arbitration on the matter.[6]

Amtrak and the rail unions did not reach a voluntary agreement on an Appendix C-2 replacement. Instead, and pursuant to Section 142 of the Reform Act, the parties presented their cases to a 3 person arbitral panel consisting of Richard Mittenthal as Chairman, Carl van Horn as the Unions' partisan member and Joshua Javits as Amtrak's partisan member. The panel issued its decision on October 29, 1999 with the partisan members dissenting and concurring with various parts of the Award.

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5. Sec. 204.

6. Sec. 141.

The panel imposed the following set of benefits for employees adversely affected by a discontinuance of intercity rail passenger service by Amtrak:

- An employee must have a minimum of two years' service with Amtrak to be eligible if adversely affected.
- Both displacement and dismissal allowances would be calculated at 100 per cent of an employee's test period average compensation.
- Employees receiving benefits would continue to receive health insurance coverage during that time.
- The relocation and moving expense reimbursement contained in Appendix C-2 was carried over into the new arrangement.
- An employee choosing a lump sum separation would have that sum computed pursuant to Section 9 of the WJPA
- Displacement and dismissal benefits would be paid pursuant to the following schedule:

Years of Service	Duration of Benefits
2 to 3	6 months
3+ to 5	12 months
5+ to 10	18 months
10+ to 15	24 months
15+ to 20	36 months
20+ to 25	48 months
25+	60 months

As of the writing of this book, no BMWED member has received benefits under the Appendix C-2 replacement arbitrated in 1999.

CONCLUSION

This concludes the discussion concerning the history and development of employee protective conditions in the railroad industry. My purpose has been to show the organic development and relatedness of the various negotiated and statutory protections afforded to rail workers. Additionally, I have tried to stress how these protective conditions can be used not as a shield, but as a sword to harm the working conditions of rail workers. Any benefit that is the product of the legislative branch and is administered by agencies in the executive branch are subject to the political whims, predilections and ideologies of the party in power. Employee protections originally were a product of the Great Depression and legislation attempting to ameliorate the impact of corporate restructurings on employees. Over time, these conditions became relatively accepted as a forced transfer of some of the wealth created by these transfers back to the employees who would bear the economic brunt of such changes. In the 1980's we saw an ideological group that knew it could not eliminate the conditions, so instead, that group began to "interpret" the implementing statutes in ways that precluded the imposition of conditions already on the books, or transformed them into an alternative to the Railway Labor Act that would permit railroads to make wholesale changes to agreements much quicker than could be achieved under the Railway Labor Act. The justification was that the quid pro quo for such radical changes were the compensation protections contained in the protective conditions themselves. However, as I hope this book shows, the origins of these protective benefits were not related to matters of making changes to collective bargaining agreements. Instead, the protective conditions were a form of social insurance for railroad workers who lost their jobs or suffered reductions in compensation as a result of financial transactions that benefited both the owners of the railroads and the public through allegedly more "efficient" rail transportation. As the earliest court and agency decisions held, the changes to working conditions flowing from such transactions were to remain subject to standard bargaining under the Railway Labor Act. Unfortunately, the political devolution of this country into the praise of atavistic, winner take all, zero-sum ideologies twisted these same protective benefits into a sword used to change working conditions of workers already buffeted by the transactions these protections were designed to protect against.