Articles

Railroad Labor Protective Programs in Mergers: Generous Public Policy for a Favored Few

Herbert R. Northrup*

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I. Introduction

By legislative or administrative regulation, railroad employees for nearly sixty years have enjoyed income and job protection in mergers, consolidations, and "abandonments" (facility closings) which are far more generous than those available to employees in industry generally. Prior to deregulation, this policy was extended to airlines by administrative action, but thereafter it has not been continued. In urban transit, the railroad system was adopted when the industry became almost entirely publicly owned, but few mergers have occurred. The rationale for protection in transit was to maintain existing collective bargaining relationship and contracts after the transfer to public ownership. The net effect has been to expand union penetration and control in the industry.[1]

This article first examines the history and provisions of railroad labor protective programs (LPPs), and their spread to airlines and urban transit. It then analyzes their costs, other economic impacts, the rationale for their existence, and the types of jobs which LPP recipients of benefits have performed. A final section proposes a different approach for handling such layoffs that is both less costly and more likely to return laid-off workers to productive employment.

II. Development of Railroad Protective Programs

The success of the railroad unions in establishing the concept of LPPs came during the 1930s. From a high of two million during World War I, employment on the railroads had declined to about one-half that number as a result of the competition of trucks and automobiles and the impact of the Great Depression.[2] Meanwhile, the industry, which had

1. *See*, Simon Rottenberg, *Protection of Employees in the Public Acquisition and Operation of Urban Transit*, in Herbert R. Northrup & Philip A. Miscimarra, Government Protection of Employees Involved in Mergers and Acquisitions 605 (Labor Relations & Public Policy Series No. 34, 1989).

2. Except for the World War II period, employment in the railroad industry has been on a

been faced with overcapacity for many years, was in dire need of consolidation and merger, a fact that had been "addressed as early as . . . in the Transportation Act of 1920."[3] With the severe downturn during the Great Depression, railroad unions feared that mergers and consolidations would be implemented that would result in substantial unemployment of their members. They, therefore, sought political protection against such action, and were very successful in this endeavor.

> The Emergency Railroad Transportation Act of 1933[4] was passed to encourage, promote, or require action on the part of railroads to avoid unnecessary duplication of service and facilities and to promote financial reorganization . . . section 7(b) was included in the act of 1933. This was the first legislation in this country (generally following an example of the British in 1921) to protect employees. The striking feature of . . . [§ 7(b)] was to "freeze" into their jobs all railroad employees actively employed in May 1933, who might be affected by reason of action taken pursuant to authority contained in the Emergency Railroad Transportation Act of 1933 . . . for a variety of reasons, not the least of which was this "job freeze," no significant consolidations took place under this legislation.[5]

A. The Washington Agreement of 1936

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

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steady decline since the 1920 peak. It rose to 1.4 million during World War II, and then fell over the years to about 235,000 today. For data, *see*, Transportation in America (ENO Transportation Foundation, Inc., 12th ed. 1994), at 24.

3. Daniel J. Kozak, *Labor Protection in the Railroad Industry*, in Northrup & Miscimarra, *supra* note 1, at 501, *citing* The Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920). Dr. Kozak's study, based in part on his doctoral dissertation (University of Maryland, 1981), and on information supplied by several railroads on their experience in major mergers, is the most thorough and recent study of railroad LPPs now extant.

4. Emergency Railroad Transportation Act of 1933, Pub. L. No. 73-68, 48 Stat. 211 (repealed 1951)(footnote added to quotation).

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

part.[6]

The Washington Agreement "set the tone for railroad labor protective arrangements for the next fifty years."[7] Its principal provisions provided that employees deprived of employment as a result of coordination received either sixty percent of their prior earnings for as long as they had worked up to five years, or a lump sum severance. Those accepting the former also continued to receive such fringe benefits as free transportation, pension credits, and medical benefits. In addition, employees who were downgraded as a result of coordination received an allowance for up to five years to make up for the difference in earnings; and employees who were required to move to continue to work received transportation, moving expenses, and compensation for losses on the sale of homes. The five-year extent of benefits, unique at the time of adoption and rarely matched elsewhere since, was based upon a current estimate of the time when employees could expect to return to the railroad active work force.[8]

B. Expansion of ICC-Imposed Labor Protection

Even before the Washington Agreement was negotiated, the Interstate Commerce Commission (ICC) was considering making some type of employee protection a condition of approving mergers and consolidations. In 1934 the Commission actually required some modest employee protection despite the absence of explicit statutory authority to do so.[9] In 1938, the ICC declared that it had the authority to impose labor protection provisions pursuant to the public interest criterion. In the test case decided the next year, the Supreme Court ruled that the ICC's assumption of authority was appropriate for the maintenance of an adequate and efficient transportation system.[10]

Despite the Washington Agreement and the ICC support, the railroad unions were concerned that LPPs would not be continued. The Washington Agreement was set to expire in 1941; the ICC policies were discretionary, not mandatory. For these reasons, the unions sought legislation. The Transportation Act of 1940[11] added section 5(2)(f) to the In-

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

7. Kozak, *supra* note 3, at 502.

8. Rehmus, *supra* note 5, at 145.

9. St. Paul Bridge & Terminal Ry. Co. Control, 199 I.C.C. 588 (1934).

10. United States v. Lowden, 308 U.S. 225 (1939). According to Ris, the Court was particularly "concerned with the fact that government policy encouraging railroad consolidation was at least partially responsible for the damage suffered by the displaced and dismissed employees." *See*, William K. Ris, Jr., *Government Protection of Transportation Employees: Sound Policy or Costly Precedent?* 44 J. Air L. & Com. 509, 517-18 (1979).

11. Pub. L. 76-785, 54 Stat. 898 (1941)(codified as amended at 49 U.S.C. §§ 10101-11914, (1988)).

terstate Commerce Act, making labor protection provisions mandatory whenever the ICC approved a merger or consolidation. Under § 5(2)(f) of the 1940 legislation:

> The ICC . . . adopted specific protection criteria centering around displacement allowances for employees forced to hold lower paying positions, dismissal allowances for employees deprived of employment, preservation of fringe benefits, arbitration provisions [to settle disputes arising over interpretation of ICC directives], and moving and relocation benefits.[12]

The ICC also developed standard sets of conditions to meet particular transactions: "the *Oklahoma Conditions* in 1944 for joint purchase arrangements; the *Burlington Conditions* in 1944 for abandonments; and the *New Orleans Conditions* which clarified and enhanced the *Oklahoma Conditions*."[13] These conditions included all the Washington Agreement-type benefits, with durations of four and five years.

C. The ICC's Current Conditions for LPPs

In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act (4R Act),[14] which further liberalized and made mandatory railroad LPPs. As a result, the Commission increased wage guarantees from 60 percent of income for five years, which was the Washington Job Protection Agreement model, to full income for six years. This liberalization followed in the Rail Passenger Service Act of 1970 which created the Amtrak system.[15] "The Amtrak arrangements, in turn, were based on the labor protective arrangements initially developed through the Urban Mass Transportation Act of 1964."[16]

After the passage of the 4R Act, the ICC developed the standard six-year packages which are summarized in the Appendix: *New York Dock*[17] conditions for mergers, consolidations, and acquisitions of control; *Oregon Short Line*[18] conditions for abandonments; *Mendocino Coast*[19] condi-

12. Kozak, *supra* note 3, at 506.

13. *Id.*

14. Pub. L. 94-210, 90 Stat. 31 (1976) (codified as amended in scattered sections of 15, 31, 45 and 49 U.S.C.).

15. Pub. L. No. 91-518. 84 Stat. 1327 (1970) (codified as amended in scattered sections of 45 U.S.C.).

16. Kozak, *supra* note 3 at 507. Reference is to the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (1964) (codified as amended at 49 U.S.C. App. 1601-21 (1988). *See also, supra* note 1 and note 35 and accompanying text.

17. New York Dock Ry. - Control - Brooklyn E. Dist. Terminal, 360 I.C.C. 60 (1979), *aff'd* 609 F.2d 83 (2d Cir. 1979).

18. Oregon Short Line R.R. & Union Pacific R.R. - Abandonment Portion of Goshen Branch between Firth & Ammon, Bingham, & Bonneville Counties, Idaho, 360 I.C.C. 666 (1980).

19. Mendocino Coast Ry. - Lease and Operate - California Western R.R., 354 I.C.C. 732

tions in lease transactions; and *Norfolk and Western*[20] conditions for trackage rights transactions. To be eligible for such statutory benefits, employees must show that their worsened position has been caused by a "transaction" which is defined as a merger. Ordinary layoffs or downgradings, such as those caused by economic conditions, automation, or other developments are not covered. A transaction, however, may occur in any year after the merger is effectuated, and then the six-year period is tolled. For example, if after five years of merged operations, a carrier decides to consolidate two repair shops and this is found to be a covered transaction, anyone laid off is entitled to six years of protection effective the day on which the layoff occurs. Thus, LPP protection costs may continue for many years beyond the sixth anniversary of the merger.

Only for transactions covered by *New York Dock* and *Oregon Short Line* conditions did the ICC also require a collective bargaining implementing agreement *before* any merger-related changes could take place.[21] This gives the unions tremendous bargaining power to extract conditions favorable to them because the potential economic benefits of the merger are being withheld from the carriers until an agreement is reached. Such a requirement is especially effective under the Railway Labor Act[22] with the "interminable delays" inherent in its prescribed bargaining and government intervention requirements.[23] Some relief is provided to carriers under *New York Dock* and *Oregon Short Line* because disputes over implementation agreements can be taken to arbitration which the ICC can accept, overturn, or return to the arbitrator for further consideration. Although this procedure can also be time consuming, it works faster on average than do the Railway Labor Act procedures. Nevertheless, the unions have been able to win expanded definitions of what is entailed by a "transaction" by holding up agreement, thus adding to costs.

All the above conditions provide that employees who are dismissed under covered conditions are made "whole" for up to six years, as are those who are downgraded. The former can receive instead lump sums of 90-360 days' pay based upon years of service, with smaller payments to persons with less than one year of service. The costs of such protection are substantial. For example, even though railroad passenger service had been reduced to a minimum by the time that Amtrak was created, and

(1978), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom.* Ry. Labor Execs' Ass'n. v. United States, 675 F.2d 1248 (D.C. Cir. 1982).

20. Norfolk & Western Ry. Co. - Trackage Rights - Burlington Northern Inc., 354 I.C.C. 605 (1978), *modified* by cases cited in notes 17 & 18.

21. This was derived from the Washington Agreement and the *New Orleans* conditions.

22. Pub. L. No. 73-442, 48 Stat. 1185 (1934) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

23. *See*, Herbert R. Northrup, *The Railway Labor Act—Time For Repeal?* 13 HARV. J.L. & PUB. POL'Y 442, 451 (1990).

despite the fact that most passenger railroad employees also held seniority in freight service and, therefore, elected to take jobs in freight, bumping out the most junior employees, $52.5 million (unadjusted for inflation) was paid out in these benefits during 1971-77.[24] Moreover, since the costs of these benefits to the newly established National Railroad Passenger Corporation (NRPC), the government entity established to own Amtrak, along with other debts, including obligations to workers employed at the time of Amtrak's takeover of passenger service were "ultimately to be absorbed by the government, the taxpayers were in effect guaranteeing the payment of employee protection [to such employees]."[25]

D. Lifetime Attrition Benefits

In the 1960s and early 1970s, a much more liberal labor protection package became common in major rail mergers, including the merger of the Pennsylvania and New York Central railroads in 1968. Perceiving a risk that the political power of the railroad unions could derail their proposed merger, the Penn Central merger proponents agreed to "lifetime attrition protection"[26] of the labor force as a means of gaining union support. This was both preceded and followed by a series of major mergers which provided (in most cases by agreement of the parties) the same extravagant protection that guaranteed lifetime attrition protection even for employees who were in their twenties and thirties.[27] Moreover, when the Penn Central went bankrupt, such benefits were incorporated into law[28] despite the prophetic warning of then Secretary of Transportation Claude S. Brinegar. He described the bill's LPP as "unprecedented provisions which do not assure the new system of labor costs that will permit it [Conrail] to survive, but which do impose an excessive burden on the taxpayer." Brinegar further warned that there would be an "adverse long-term impact" in maintaining the very conditions that "helped bring on the demise of the six major [eastern railroad] bankrupts."[29] Then Sen-

24. Kozak, *supra* note 3, at 508.

25. Ris, *supra* note 10, at 521.

26. "Lifetime attrition protection" provides the individual workers covered by LPPs with, among other benefits, wage and benefit coverage throughout work life except in cases of retirement, resignation, or discharge for cause.

27. These mergers were those of the Virginian & the Norfolk & the Western (1959); Norfolk & Western and the Nickel Plate, and lease of the Wabash (1964); Chicago & North Western and Chicago Great Western (1967); the Baltimore & Ohio, the Western Maryland, and the Chesapeake & Ohio (1967); the Great Northern, the Northern Pacific, the Chicago, Burlington & Quincy, and the Spokane, Portland & Seattle into the Burlington Northern (1970); and the Illinois Central and the Gulf, Mobile & Ohio into the Illinois Central Gulf System (1972). *See* Kozak, *supra* note 3, at 511.

28. Reference is to the "3R Act" described *infra* note 40.

29. Quoted by Ris, *supra* note 10, at 539.

ator Beall summed up the unfairness involved:

> While . . . it is essential that displaced workers be provided fair and equitable treatment, the labor protective provisions in the Senate bill are unwise from a public policy standpoint, overly generous in terms of their benefits, unprecedented, and discriminatory to other railroad employees, and to employees in other industries who lose jobs.
>
> Thus, by any standards, the displacement benefits are generous and extraordinary. The generous benefits provided go far beyond protection available to employees of other industries, and beyond what we have heretofore provided other railroad employees.[30]

As discussed below, the costs of such benefits proved too great even for the United States Treasury, and were drastically modified in the early 1980s with severance pay substituted for salary continuance.

E. Transfer of LPPs to Airlines and Urban Transit But Not Trucking

Railroad-type LPPs spread to the airline and urban transit industries, but not to trucking, the industry employing the largest number of transportation employees. Despite the fact that the airline industry, in contrast to railroads, has been expanding almost since its inception, the now defunct Civil Aeronautics Board (CAB) followed the ICC and by administrative action provided LPPs for airline employees modeled upon the ICC policies. It ceased such requirements following the deregulation of the airline industry in 1978. Airline programs were limited to five-year durations, but because of the high wages in the industry and the scope of CAB protections, LPPs in air transport tended to inhibit mergers.[31] After the CAB was abolished and the duty to approve mergers and related matters transferred to the Department of Transportation (DOT), no LPPs have been ordered.[32]

Additionally, an "Employee Protection Plan" (EPP) included in § 43(e)(2) and (d)(1) of the Airline Deregulation Act of 1978[33] provided a more modest protection for airline employees in mergers and related transactions, but was never fully implemented or financed by Congress. It was discontinued by its own terms in 1987, although litigation concern-

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30. Quoted by Kozak, *supra* note 3, at 517.

31. Ris, *supra* note 10, at 526. *See also*, Stanley B. Rosenfield, Labor Protective Provisions in Airline Mergers (1981).

32. *See*, Herbert R. Northrup, *Airline Labor Protective Provisions: An Economic Analysis*, 53 J. Air L. & Com. 401, 403 (1987); updated and reproduced in Northrup and Miscimarra, *supra* note 1, at 555.

33. Pub. L. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 App. 1301)(1988)).

ing its coverage continues.[34]

Section 13(c) of the Urban Mass Transportation Act of 1964 (UMTA)[35] established railroad-type LPPs for mass transit, a chronically profitless industry, when the UMTA transferred municipal mass transit operations from private to public ownership. There are actually few mergers in urban transit, but the LPP requirements set forth in § 13(c), as administered by the U.S. Department of Labor, "have not so much prevented workers in the industry from being disadvantaged as they have fortified their privileges,"[36] and thus have contributed to the losses almost universal among publicly-owned urban transit carriers.

In the trucking industry, efforts of the International Brotherhood of Teamsters (Teamsters) to win LPP benefits either for mergers or for deregulation,[37] which resulted in a drastic reduction in union membership in that industry, have been unsuccessful.[38] Even where trucking workers are employees of a trucking common carrier owned by a railroad, LPPs have been won only in two highly unusual cases.[39]

As shown above, generous railroad LPPs were developed when the

34. For a summary of the EPP, *see* Herbert R. Northrup, *The Failure of the Teamsters' Union to Win Railroad-Type Labor Protection for Mergers or Deregulation*, 22 TRANSP. L.J. 365, 400 (1995).

35. *See* note 16. Section 13(c) of the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (1988) reads as follows:

> It shall be a condition of any assistance under section 3 of this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights and benefits (including continuation of pension rights and benefits) under existing collective agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the [Interstate Commerce] Act of February 3, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangement.

36. Rottenberg, *supra* note 1, at 626.

37. Deregulation in trucking was accomplished as a result of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified as amended in scattered sections of 49 and 5 U.S.C. (1988)).

38. *See* Northrup, *supra* note 34.

39. Employees of Penn Truck, then owned by what became Conrail, were included as "railroad employees" in the 3R Act, and in a case known as *Cosby*, the Court of Appeals, Eighth Circuit, ordered that LPP benefits be granted to employees of Frisco Truck Lines, a subsidiary of the San Francisco and St. Louis Railway, after it was merged into the Burlington Northern. Other courts and the ICC have rejected the reasoning of the *Cosby* court. *See*, Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984). *Contra* Missouri Pac. Truck Lines, Inc., v. United States, 3 Cl. Ct. 14 (1983); *aff'd* 736 F.2d 706 (Fed. Cir. 1984); Kansas City S. Indus., Inc., et al. v. I.C.C., 902 F.2d

industry was heavily regulated, and influenced the development of such LPPs in two other regulated industries. Unlike the airline industry, however, as the railroads have gone through a period of deregulation, LPPs have continued to be instituted almost as a matter of course when covered transactions occur involving Class I railroads.

III. Lifetime Attrition Benefits — Costs and Beneficiaries

Lifetime attrition benefits are still being paid by several of the major railroads as a result of agreements made in 1959-1971. As one would expect, such agreements have proven to be very expensive. Additionally, a disproportionate amount of the funds paid have gone to relatively young employees, a majority of whom are in the clerical group. The experience of two carriers — Conrail and Burlington Northern — illustrate how such generous payments work in practice, and how they affect operations.

A. The Conrail Experience

The 1968 merger of the Pennsylvania and New York Central Railroads into the Penn Central Railroad was based upon the theory that the elimination of duplicate facilities and routes would return these two giants to profitability. The theory proved wrong for a number of reasons, not the least of which was that, prior to the merger, an accord with the unions had been reached on a lifetime attrition agreement. As a result, the merged labor force of what became the Penn Central totaled 102,000 in 1968, in part because it cost the company at least as much to lay off unneeded employees as to keep them employed. Two years later, Penn Central declared bankruptcy. Meanwhile, other northeastern railroads were also either bankrupt or about to cease operations.

To deal with this situation, Congress created the Consolidated Rail Corporation (Conrail) in the 1973 Regional Rail Reorganization (3R) Act.[40] It was designed to take over not only the Penn Central, but also its subsidiaries and other northeastern railroads; to consolidate their essential rail properties; and to create a viable entity that could be sold as such to private investors. To solve the labor problem, Conrail was required to negotiate new agreements, a process that took four years under the Railway Labor Act while the uneconomic and overlapping existing agreements remained in effect, and the bloated labor force remained almost intact.

Meanwhile, unions were anxious to obtain federal subsidies for life-

423 (5th Cir. 1990); and Rives II v. I.C.C., 934 F.2d 1171 (10th Cir. 1991). A detailed analysis of this issue and the cases is found in Northrup, *supra* note 34, at 373.

40. Pub. L. No. 93-236, 87 Stat. 986 (1974) (codified at 45 U.S.C § 701 (1988)).

time protection, while carriers were reluctant to inaugurate a "take away" struggle with the unions. They, therefore, agreed to continue this extremely generous protection. As a result, a twenty-page labor agreement which incorporated lifetime attrition protection became Title V of the 3R Act.[41]

From its inception, Title V was an economic disaster. The costs were greatly underestimated at $250 million. By January 1981, $319.1 million had already been paid in benefits.[42] A report of the United States General Accounting Office found that, although $250 million had been budgeted on the assumption that the bulk of these dollars would be utilized for severance payments, more than that amount had been spent on lifetime attrition guarantees instead because the affected employees chose the latter benefits rather than severance pay.[43]

Congress tightened some of the benefits procedures in the Staggers Rail Act of 1980.[44] Then, in the 1981 Northeast Rail Service Act (NERSA),[45] Congress repealed Title V of the 3R Act, gave Conrail clear rights to lay off unneeded personnel, and set a $25,000 limit on severance pay for operating and $20,000 for nonoperating employees. Free to act, Conrail cut its employee count from 70,273 in 1981 to 35,500 in 1986 when the NERSA program ended.[46] When Conrail was sold to the public in 1986, its work force stood at 33,437. It became profitable almost immediately and remained so even during the recession of the early 1990s. By improving operating procedures, installing better and more automated equipment, and disposing of unprofitable lines, Conrail had further reduced its employment to 24,833 by 1994.[47]

B. The Burlington Northern and Other Carrier Experiences

The merger of the Chicago, Burlington & Quincy, the Great Northern, the Northern Pacific, and the Spokane and Portland and Seattle Railroads to form the Burlington Northern (BN or the Northern Lines merger), was not approved by the ICC in 1966, in part because the Commission did not believe that the then-standard *New Orleans* LPP conditions would be just and reasonable in light of the impact on employees. Only after the railroads agreed with the unions to provide lifetime attri-

41. For these developments, *see* Kozak, *supra* note 3, at 513; and Ris, *supra* note 10, at 521, 540.

42. Kozak, *supra* note 3, at 519.

43. Employee Protective Provisions of the Rail Act Need Change, Rep. by the Comptroller Gen., GAO, CED-80-16 (Dec. 5, 1979), at 25.

44. Pub. L. No. 96-448, 94 Stat. 1898 (1980) (codified at 49 U.S.C. 10101 (1988)).

45. Pub. L. No. 97-35, 95 Stat. 643 (1988).

46. Kozak, *supra* note 3, at 523-24.

47. Henry J. Holcomb, *Conrail Says It will Lay Off 590 Workers*, Philadelphia Inquirer (June 15, 1995), at C1.

tion conditions was the merger approved in 1967.[48] BN's experience and that of other carriers with such extraordinary payments for non-working employees shows just how costly these conditions are, and what age groups and employee classes are the principal beneficiaries thereof.

1. Burlington Northern LPP Costs

In the Northern Lines merger proceeding, the applicants projected that the attrition conditions would cost a total of $10 million. In fact, the actual costs have been many times more. Although some of the costs include *New York Dock*, as well lifetime attrition benefits, the bulk of the following costs involve the latter:

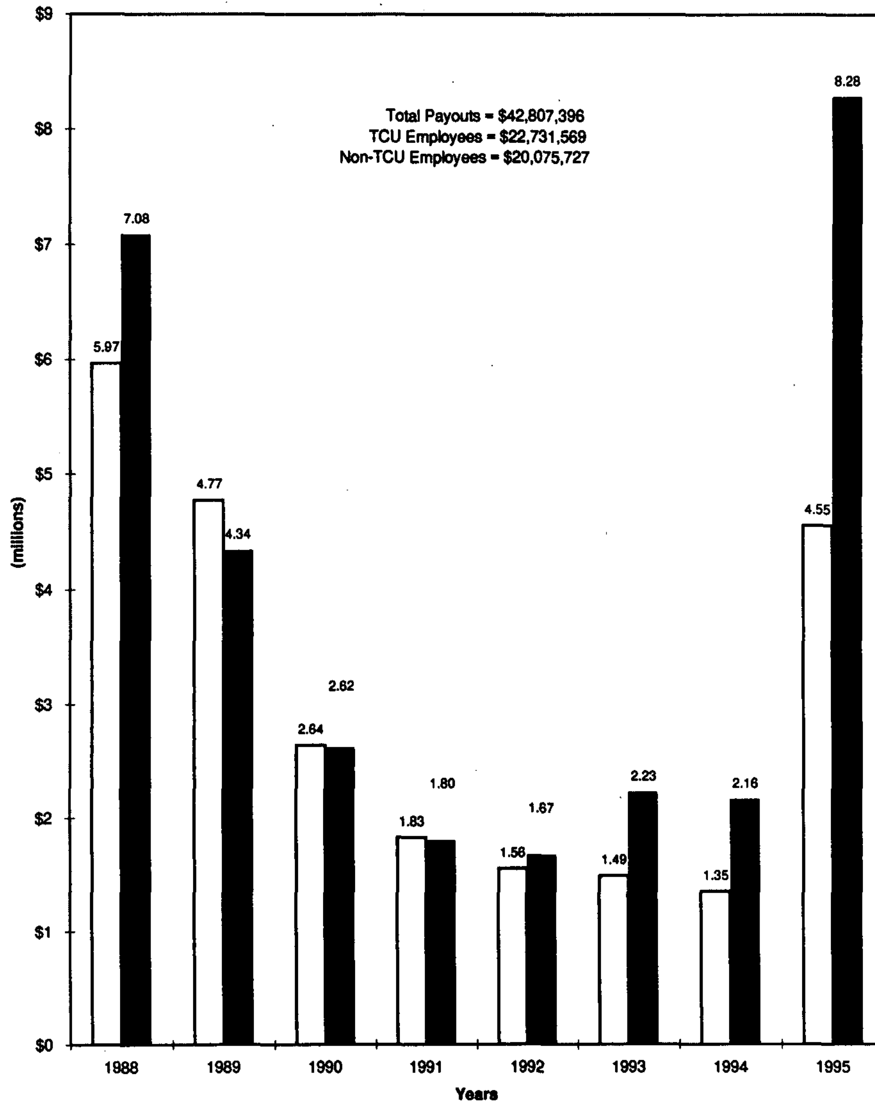
- From 1982 to 1987, BN paid more than $100 million in total labor protection costs (includes attrition and *New York Dock* payments) - Table 1;
- For clerical employees alone, from 1980 to mid-year 1988, BN paid more than $70 million in lifetime attrition payments;
- From 1988 to mid-May 1995, BN paid $42.8 million in total labor protection costs (includes attrition and *New York Dock* payments);
- For clerical employees alone, from 1988 to mid-May 1995, BN paid $22.7 million in lifetime attrition payments.[49]

The concentration of payments to clerical employees, who are represented by the Transportation Communications Union (TCU), (formerly the Brotherhood of Railway & Airline Clerks), is especially important, as is discussed below. These are railroad employees whose jobs are very similar to those in other industries. They are, therefore, employees whose talents and skills can be quite easily utilized by non-railroad businesses with only minimum training.

48. Great N. Pac. & Burlington Lines, Inc. — Merger, Etc. — Great N. Ry. Co., 331 I.C.C. 228, 276-7 (1967).

49. Data from Burlington Northern Railroad. These data do not include severance payments, which are additional. The data do include displacement (downgrading) costs, as well as dismissal (layoff) costs. Since, however, employees subject to displacement must accept the highest-rated position available under their seniority system in their craft or class or lose their LPP eligibility, displacement costs are not a significant part of the total costs. The *New York Dock* payments are largely the result of the BN's 1980 merger with the much smaller St. Louis and San Francisco Railway. The 1982-87 data were supplied to this author by the Burlington, and passed on to Kozak for his study. *See* Kozak, *supra* note 2, at 530. Data for 1988-1995 were developed as evidence in the 1995 BN - Sante Fe merger proceedings before the ICC, and used in part in this author's presentation. *See*, Rebuttal Verified Statement of Herbert R. Northrup, Burlington Northern, Inc. and Burlington Northern Railroad Company - Control and Merger - Sante Fe Pacific Corporation and The Atchison, Topeka and Sante Fe Railway Company, ICC, Finance Docket Nos. 32549, 32549 (Sub-No. 1), *et al.*, (June 9, 1995).

FIGURE 1
BURLINGTON NORTHERN RAILROAD
LABOR PROTECTION PROGRAM PAYOUT (1988-1995)



Note: data for 1995 cover 5 months.
Source: Burlington Northern Railroad

TABLE 1
LABOR PROTECTIVE COSTS ($ MILLIONS)
BURLINGTON NORTHERN RAILROAD, 1982-1987

1982	$ 12.3
1983	21.0
1984	18.8
1985	17.9
1986	16.0
1987	14.2
TOTAL	$100.2

Note: Data include totals for lifetime attrition, *New York Dock*, and other LPPs.
Source: Burlington Northern Railroad Company.

2. The Age Groups Receiving Benefits

The data obtained for the Kozak study found that, sixteen years after the Northern Lines merger, LPP benefits went primarily to particular age groups, both for these lines and for other carriers. He reported that although no two of the LPP benefits in the data presented resulted in the same claimant distribution, they all fell into one of three modal groups: 50-65 years, 26-40 years, or both

> It is . . . interesting . . . that such a large percentage of these expenditures are paid to younger workers, junior in seniority, who would appear to be able to find jobs when layoffs occur, and who may be paid these moneys even while working in other jobs. Perhaps the rail unions push hard for these protective payments because it is one way of gaining the loyalty of the junior men who might otherwise more deeply resent the precipitous layoffs in the railroad industry . . .[50]

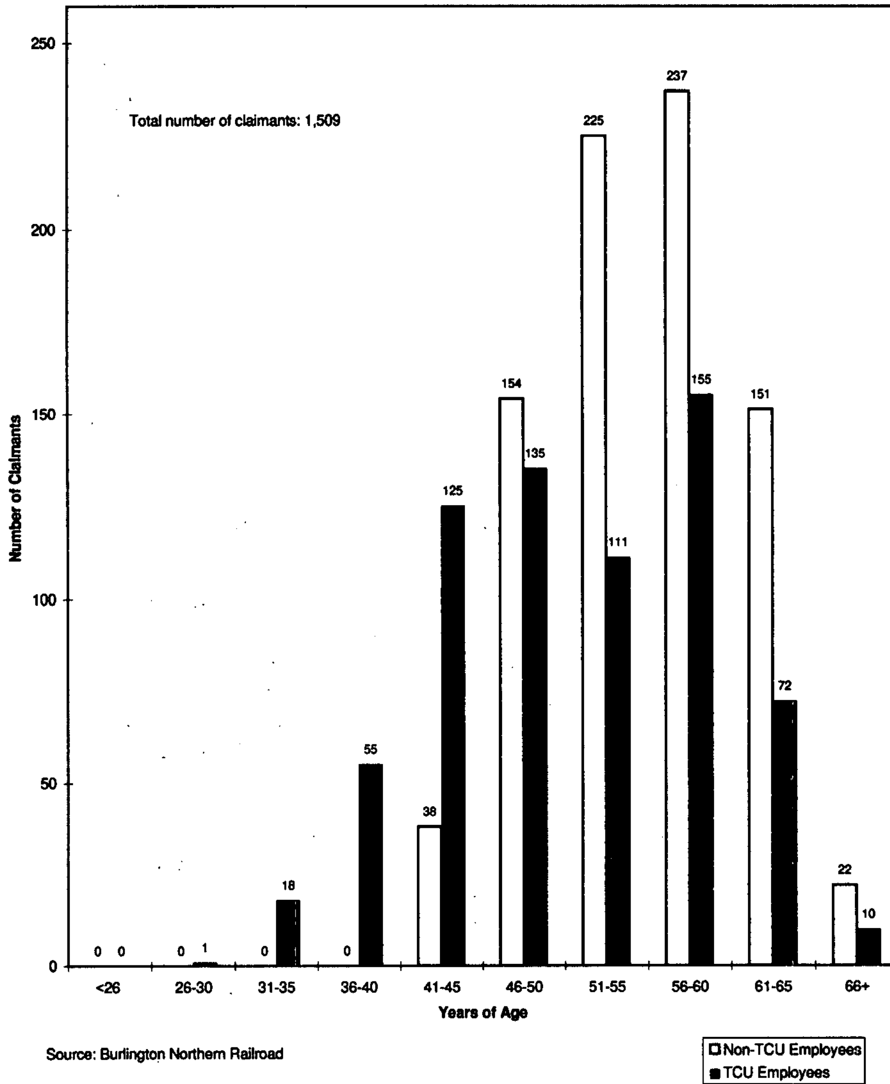
Figure 2 shows that by 1994, more than twenty-five years after the Northern Lines merger, the largest age group receiving lifetime attrition benefits were 392 non-working employees aged 56-60 years; another 255 were 61 years or older, but 336 were 51-55; and those 50 or younger included one clerical 26-30, 18 clericals 31-35, 55 clericals 36-40, and 125 clericals 41-45 years of age. No other class of employees was found in the 40 and under brackets. Here again, the data show that younger clericals were among the largest beneficiaries of lifetime attrition benefits.[51]

The *Wall Street Journal* quoted one young recipient of another railroad's similar LPP:

> "I worked maybe a month last year, but I still collected my pay check every

50. Kozak, *supra* note 3, at 531. This data represents a one month snapshot.
51. Data developed by Burlington Northern for the *Sante Fe* merger case.

FIGURE 2
BURLINGTON NORTHERN RAILROAD
AGE DISTRIBUTION OF CLAMANTS IN
LABOR PROTECTION PROGRAMS 1994



Source: Burlington Northern Railroad

week," says David Halterman, a former clerk for the Illinois Central Gulf Railroad. Mr. Halterman left a protected job for one that he said offered opportunity for advancement. Plus, he said that at 33, he is "a little young to be retired."[52]

C. Merger Costs — Various Railroads, 1970s and 1980s[53]

Kozak provided LPP cost data for various railroads, including the BN, and also reviewed other available data covering the 1970s and 1980s. He reported "tremendously high protection costs":

> Wilner . . . stated that protection benefits paid in 1985 by seven railroads, including severance payments to buy out protective obligations, amounted to about $338 million.[54] Protection costs . . . from 1971 to 1977 . . . under . . . [Amtrak] totaled $52.5 million. . . . The $250 million fund set aside for labor protection under the . . . [3R Act] of 1973 was supposed to last twenty-five years. It lasted forty-six months. Labor protection associated with . . . [Conrail] cost the American taxpayers in excess of $630 million . . . between 1976 and 1986. Labor protection associated with the Milwaukee Road and Rock Island Railroad restructuring efforts cost the federal government [i.e., taxpayers] $92.6 million. . . .[55]

For individual railroads, data supplied by an eastern railroad showed $70.6 million paid for LPP benefits, 1983-1987; and for a western railroad, $173.6 million, 1983-1986.[56]

IV. Economic Effects of Lifetime Attrition Protection

No carrier in any other transportation industry, including those directly competitive to the railroads, is required to pay lifetime protection charges. Indeed, no railroad merger has been subjected to lifetime attrition conditions for over twenty years.[57] As a result, carriers, like BN, which are paying lifetime benefits compete with those, like Union Pacific, which are not. Such costs clearly must handicap competition by the paying carriers with railroads and motor carriers which are not so burdened.

Attrition conditions are likewise a continuous drag on profits and

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52. Daniel Machalaba, *Railroads May Be Forced to Cut Costs After ICC Rejection of Proposed Merger*, Wall St. J., (July 28, 1986), at 5, col. 1.

53. The data, as of 1986, provided by Burlington Northern, for the Northrup-Miscimarra book. Other carriers also supplied information. *See supra* note 3, at 527.

54. Frank N. Wilner, Railroads and Productivity: A Matter of Survival (1985). Wilner is with the Association of American Railroads. (Footnote in original.)

55. Kozak, *supra* note 3, at 528.

56. *Id.*, at 529-30.

57. *See, e.g.*, Union Pacific Corporation — Control — Chicago and Northwestern Transportation Company, F.D. No. 32133, 1995 ICC Lexis 37 (March 7, 1995); Union Pacific Corp. — Control — M.K.T.R. Co., 4 I.C.C. 2d 409 (1988); Union Pacific Corp. — Control — Missouri Pacific Corp., 366 I.C.C. 459 (1982).

productivity. The cost to profits is, of course, clear. The funds spent to pay employees for *not* working are direct deductions from profits. In economic terms, they are rents paid to non-working employees by stockholders, a transfer from owners to the non-working employees, which may reduce the propensity to invest in railroads and may likely depress stock prices.

In terms of productivity, the existence of non-working but paid employees clouds the effective utilization of the work force in a number of ways. It drains funds away from investment, first by reducing the moneys available to invest in more productive and efficient equipment, operations, and technology. Second, it complicates decisions providing for proper labor force utilization. What may be the most productive labor utilization, or most productive investment in equipment, operations, and technology to enhance labor productivity, may be thwarted because non-working employees' salaries must be considered in the cost-benefit calculation. The addition of the non-working employees' wages to a cost-benefit calculation can result in maintaining a less efficient operation in order to avoid increasing those receiving pay but performing no service. As a result, employees are likely to be maintained on the rolls when they are either performing no required service, or doing a job in a less efficient and less productive manner than could be achieved if lifetime attrition benefit costs did not skew the efficiency curve.

The whole purpose of a railroad merger is to help maintain and enhance effective and efficient transportation. Paying people for not working as long as they profess to be available for work does not contribute to this goal; in fact, it does just the opposite. Making progress toward a more efficient transportation network is a means for the railroads to contribute public benefits. This requires doing more with less resources, including labor as well as capital resources. By their very nature, lifetime attrition benefits thwart this objective. Such benefit costs could result, for example, in trucks obtaining business that might otherwise be won by railroads if they were not burdened by these costs. The resulting higher costs, as well as those for highway congestion, maintenance, and repair, plus possible environmental degradation, are then borne by the public, including the vast numbers of workers who have no such benefits.

As a result of lifetime attrition conditions, labor protection costs can thus add substantially to the total costs of railroads and offset other economic advantages of a merger. These advantages include eliminating duplicate facilities, centralizing functions, reducing overhead expenses and increasing capital availability for investment in more efficient equipment.

There are other uneconomic and antisocial aspects of lifetime attrition protection. The existence of the lifetime attrition requirements contributes to a loss of skills on the part of the recipients. This is particularly

true for those needing computer and data processing skills, which include most of the clerical class. If one does not use those skills, they soon fade. Moreover, such skills are constantly being upgraded by technical advances, making it ever more difficult for employees not working to maintain competitive skills. The employees receiving these benefits are likely to suffer disemployment consequences — the longer they are receiving benefits, the less productive they are likely to become. Certainly, this is not good for the employer, the employee, or society.

For these and other public policy reasons, the ICC has rarely imposed lifetime attrition protection because:

> the imposition of such conditions would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of national transportation policy under which we are required to promote economical and efficient service and to foster sound economical conditions in transportation and among the several carriers.[58]

V. The Economics And Rationale For *New York Dock* Benefits

The ICC interprets the present provisions of the Interstate Commerce Act to require the imposition of *New York Dock* conditions as the standard labor protection for affected railroad employees when it approves a merger involving a Class I carrier. This has been done without any careful economic analysis to determine whether present conditions, or those inherent in the affected merger, can justify paying the covered employees their full salaries and benefits for six years for not working. It has also been done without any attempt to gain concessions from the railroad unions to eliminate remaining anti-productivity work rules. An examination of the economic effects of such payments, and the rationale for making them, does in fact raise serious questions about the propriety of treating railroad workers so generously under these circumstances.

A. Economic Impact of *New York Dock* Conditions

New York Dock conditions can have serious economic and social disadvantages and create disincentives similar to those that have been described for lifetime attrition benefits. *New York Dock* provides labor protection for up to six years instead of lifetime attrition benefits. Therefore, the costs to the carrier are much less over time. *New York Dock* costs are, nevertheless, a significant amount considering that it is pay for

58. Missouri Pac. R.R. Co. - Merger - The Texas & Pac. Ry. Co. and Chicago & E. Ill. R.R. Co., 348 I.C.C. 414 (1976). This opinion cites a number of previous cases to the same effect.

employees not working and, therefore, detracting, not contributing, to a carrier's return on investment. For example, in three years, 1990-92, BN paid out $93,881.09 in *New York Dock* benefits to thirteen employees of the former relatively small St. Louis and San Francisco Railway, eight of whom were in the 41-60 age bracket.[59]

New York Dock benefits potentially inhibit economical and efficient service for the critical years following a merger, when the economies of merger should be installed, by reducing profits, curtailing investment, offsetting the most efficient and productive utilization of the work force, and transferring funds from stockholders to non-working employees. This is exacerbated by the requirement that no merger-related change can be effectuated until implementing agreements with the unions are reached because it is likely to induce the carrier to give the most favorable rendering of *New York Dock* conditions in order to obtain an agreement. Just as the ICC has noted for lifetime attrition benefits, many times *New York Dock* can be, "not consistent with the public interest . . . preserve unneeded jobs . . . unduly restrict . . . the most economical operations . . . [and] conflict with the objectives of national transportation policy . . . to promote economical and efficient service. . . ."[60]

An excellent example of how *New York Dock* benefits may inhibit sound railroad economic policies is found in Amtrak's current situation. A careful analysis of its economic situation by the General Accounting Office (GAO) has found that Amtrak has never been able to make a profit on any of its passenger lines, and that it is steadily falling farther behind in this regard. Moreover, Congress, which has been heavily subsidizing passenger rail service, is demanding that these subsidies be reduced, if not eliminated.[61]

One of the GAO's recommendations is to amend § 405 of the Rail Passenger Service Act to modify LPP requirements.[62] Actually, this may be crucial to Amtrak's future because eliminating its cross-country system could result in $5 billion in LPP payments which Amtrak certainly cannot pay.[63] Therefore, LPP payments could be the taxpayers' obligation unless Congress amends the National Passenger Rail Service Act somehow to permit a solution similar to that established for Conrail.

LPP benefits, as already noted, are heavily directed to junior employees because senior employees mostly remain on the job. Such bene-

59. Data from the Burlington Northern Railroad.

60. *See* Missouri Pac. R.R. Co., 348 I.C.C. 414.

61. Intercity Passenger Rail, Financial and Operating Conditions Threaten Amtrak's Long-term Viability, Rep. by the Comptroller Gen., Gen. Accounting Office to Congressional Committees, GAO/CED-95-71 (Feb. 1995).

62. *Id.* at 79.

63. James R. Norman, *The Featherbed Express*, FORBES, Aug. 28, 1995, at 42.

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fits have a deleterious effect by discouraging covered employees from proceeding with their working life. Such discouragement to seek jobs elsewhere must surely occur. Numerous studies have demonstrated that unemployment benefits which are considerably less generous than *New York Dock* ones tend to lengthen unemployment duration.[64] Likewise, the higher the benefits paid under workers' compensation, the longer is return to work likely to be postponed.[65]

Similarly, *New York Dock* benefits encourage employees to postpone looking for new opportunities until their payments for not working are exhausted. By then, a 35-year-old worker is over 40, a 45-year one over 50, etc. Postponing career decisions is likely not only to lessen the ability of a person to obtain a job; it can also reduce a person's capabilities and qualifications for work as jobs change, technology advances, and employer needs are altered by competitive, business, and technical developments.

The difficulties that even excellent employees have in returning successfully to work after being absent for long periods may be illustrated by the problems encountered by engineers and scientists who are off from work for a considerable time. Science today moves so rapidly that one year's absence from work can be very difficult to make up.[66] Of course, scientists and engineers are not involved here. Yet the field of computer and data processing skills, like science, moves forward rapidly and requires skills that must ever be upgraded. Absences of one to six years can, therefore, have a most deleterious impact on job qualifications of the clericals, the largest group who receive LPP benefits.

Consequently, putting people on six-year salary continuances for doing no work is not necessarily in their best interest, as well as being wasteful, inefficient, and uneconomic for the business. Moreover, an examination of the rationale developed for railroad LPPs demonstrates that the historical reasons advanced for their existence frequently do not withstand scrutiny in today's labor market and economy.

B. The Rationale for Railroad Labor Protective Programs

The traditional rationale advanced for awarding LPPs to railroad

64. *See, e.g.*, Harry C. Benham, *Unemployment Incentives and Unemployment Duration Distributions*, 65 Rev. of Econ. & Stat. 139 (1983); and Daniel N. Price, *Unemployment Insurance, Then and Now,* 48 Soc. Secur. Bull. No. 10, at 22 (1985).

65. Bruce D. Meyer, *Workers' Compensation and Injury Duration: Evidence from a Natural Experiment*, 85 Amer. Econ. Rev. 322 (1995).

66. One of the difficulties women have experienced in research and development laboratories is that extended absences for child birth and care can set back their careers for just this reason. *See*, Herbert R. Northrup, *Professional Women in R&D Laboratories*, 31 Res.-Tech. Mgmt. 44 (1988).

workers has been that these employees have unique skills that are not utilized in other industries. It is further maintained that when a railroad ceases operations, such as when a merger between competing railroads occurs, no other avenues of employment are available for the utilization of the displaced railway personnel. Moreover, since the railroads have suffered declining employment for over seventy-five years, opportunities for employment with other railroads outside the workers' domiciles are very slim.[67] Even if job opportunities on other railroads existed, the displaced workers would be required to begin any new railroad employment at the lowest job in the craft or class because the rigid seniority system in the industry is carrier and carrier district specific. Thus, it is argued that when railroad workers are laid off permanently, or for long periods, ordinary unemployment compensation arrangements are insufficient for their needs. It is further contended that, since government regulates numerous phases of railroad industry behavior and operations, and has encouraged railroad consolidations, it should also regulate employee relations to ensure that employees are properly treated.

Historically, there are several reasons why the different treatment of railroad workers in nearly all aspects of labor and social legislation has occurred, in addition to this alleged uniqueness of work. First, the railroads by the latter part of the nineteenth century were the most significant means of transporting goods, materials, and people over long distances, and vital to the commerce of the country. Second, regulation of the railroads was found constitutional under the interstate commerce clause of the Constitution at an early date. Therefore railroads, unlike manufacturing industries, have long been subject to congressional regulation. Finally, at the turn of the century, the railroad operating crafts had gained power and influence and were able to affect political decisions. When government takeover of the railroads during World War I encouraged the unionization of the non-operating crafts, union power and influence were greatly enhanced. During the 1930s, railroad employment, even though cut by one-half since 1920, stood at one million, and the unions had members in every congressional district and were a key political force.

These historical foundations for LPPs no longer apply. The deregulated environment is one in which the railroads must compete. Consequently, LPPs that inhibit the carriers' ability to compete, and thereby retard job maintenance and creation, need to be reexamined.

Furthermore, if one examines the jobs of railroad workers, the alleged "uniqueness" appears to be confined largely to engineers and con-

67. For numbers relating to the employment decline in the railroad industry, *see supra* note 2.

ductors. Signalmen have training in electrical and electronic applications, which surely could be used in other industries. All clerks and office personnel could undoubtedly qualify with minimal training for jobs in other industries, and these employees are the main beneficiaries of LPP benefits. Skilled mechanics in the shops should have little difficulty obtaining positions in many metal industries. Most maintenance-of-way workers are laborers or equipment operators. The latter could easily be trained in road construction or other heavy equipment operation.

The absence of other jobs in the same industry and location is not unique to the railroads. Identical thinking and claims could be applied to numerous other industries, such as steel mills, which have experienced tremendous cutbacks, paper mills, and many plants located in one-industry towns. Moreover, given that the railroads emphasize careful selection of operating employees, it is difficult to believe that these employees, if laid off, would not qualify for jobs in other industries after some training.

Employees of other industries which are directly affected by government action and arguably play a more valuable or significant role in the economy have no benefits or privileges akin to LPPs. Engineers and scientists working for the aerospace industry have been, and continue to be, laid off by the thousands since the end of the cold war as the federal government decreases its defense expenditures. In 1989, aerospace employment stood at 1.3 million; by 1993, it was down to 966,000 and declining rapidly.[68]

This industry is likely to lose one-half its current employment by the turn of the century. One factor hurrying the decline is that the federal government appears to be encouraging the merger and consolidation of aerospace and other defense-related companies. Thus, Lockheed purchased the aircraft manufacturing divisions of General Dynamics and made other acquisitions; then, it merged with Martin Marietta, which had purchased the defense electronics and space divisions of General Electric. The Lockheed Martin Company expects to lay off 19,000 employees by the turn of the century, closing twelve plants and laboratories and twenty-six field offices.[69]

In 1993, approximately 146,000 aerospace employees were engineers and scientists, and another 50,000 technicians.[70] Such employees receive no payments or protections similar to LPPS. Yet, these employees possess education and training that have contributed in no small manner to

68. AEROSPACE FACTS & FIGURES 1994-1995 (Aerospace Industry Association, 1994), at 140.

69. Kenneth N. Gilpin, *Lockheed to Eliminate 12,000 Jobs*, N.Y. TIMES, (June 27, 1995), at D1, col. 5. Lockheed had already announced a lay off of 7,000, thus totaling 19,000 in all.

70. *See supra* note 68, at 144.

the defense and the maintenance of well-being of the country and fellow citizens, and could again be needed for this same service.

The arguments for LPPs in the railroad industry thus rest largely on grounds that are no longer defensible in terms of the "uniqueness" of the jobs, their location, or their significance to the country's welfare in comparison with jobs in other industries. The payment of generous benefits for six years to railroad workers laid off because of mergers or consolidations results in special privileges to these workers not enjoyed by those elsewhere in the economy, significant costs and competitive disadvantages to carriers, and a financial burden to the public, which in the final analysis must pay the costs of more expensive transportation.

VI. The Special Features of The Burlington-Sante Fe Merger

The 1995 merger of the BN and Sante Fe (SF) railroads provided an opportunity for the ICC to reexamine its policy of automatically awarding *New York Dock* benefits in mergers. The facts of this case seemed unusually suitable for such a consideration because of the nature of the merger and of the employee population that was estimated to be adversely affected.

The Commission, however, did not feel that it had the authority to make such a change, but it did move to ease some restrictions. It dismissed the unions' request for lifetime attrition benefits, stating that such benefits "are calculated to preserve unnecessary jobs, and unduly restrict a carrier's ability to establish economical conditions."[71] Moreover, whereas prior decisions under the *New York Dock* contained a phrase protecting employees who were subject to a lifetime attrition arrangement by providing that the order "shall not be construed as depriving any employee of any rights or benefits or eliminating any obligations which any employee may have under any existing job security or other protective conditions of arrangements . . . ." Rather it decreed that such questions of whether an employee was covered by prior lifetime attrition or current *New York Dock*, or perhaps by any LPP was to be left to negotiations and arbitration.[72] The Commission further stated:

71. *Burlington Northern Inc.*, Decision No. 38, (1995), at 80. [Reference is to the duplicated copy; the decision will be printed in the ICC's published volumes in due course.] The ICC is also unlikely not to order *New York Dock* benefits if, as expected, it approves the impending takeover of the Southern Pacific by the Union Pacific, but it may well loosen some of the restrictions as it has done in the *Burlington* case. For the *Union Pacific* case, *See*, Union Pac. Corp., Union Pac. R.R. & Missouri Pac. R.R. — Control and Merger — S. Pac. Rail Corp., S. Pac. Trans. Co., St. Louis Southwestern Ry., SPCSL Corp & Denver & Rio Grande Western R.R., I.C.C. Finance Docket No. 32760 (1995).

72. *Id.* at 81. Under the rules governing arbitration pursuant to an ICC order, the ICC

> Though we do not think that the BN/Sante Fe should be given carte blanche to modify the provisions of applicable prior protective arrangements, we are not now prepared to say that prior protective arrangements can never be modified in negotiations or arbitration. . . . Some prior protective arrangements, by way of illustration, may not permit jobs to be mover; some such arrangements, by way of further illustration, may not require the employee to relocate; and it may be that some terms of some prior protective arrangements may need to be modified to allow BN/Sante Fe to carry out the control transaction we are approving in this transaction.[73]

To what extent this decision will lead to substantive changes remains unclear, although certainly it is a step toward loosening the rigidity of the LPP arrangements. Moreover, Congress could change the law, or possibly the ICC could alter its views and design an approach such as that proposed for this merger. It is believed that the following recommended approach would be more in keeping with the needs both of the employees and the carriers in the railroad industry, particularly where the situation approximates that in the BN-SF merger, since it is designed to return those laid off to productive employment.

The BN-SF merger is basically an end-to-end, not an overlapping merger, so that displacement is relatively small. Moreover, the merger proposal foresaw *adding* to the operating craft work force, not decreasing it.[74] Thus, engineers, conductors or brakemen, whose skills are the most unique to the railroad industry of any group or class, stand to gain by this merger.

Layoffs in the shop crafts and maintenance-of-way groups are expected to average about 5 percent, which has been the normal attrition rate in these crafts. Therefore, it is likely that few, if any, layoffs will occur among these employees as a result of the merger.

The clerical force accounts for almost all employees who are expected to be adversely affected by the merger. Some 1,400 jobs are scheduled for abolishment in this category. Fortunately, this class of employees has the most transferable skills. Most are computer literate; their jobs, more than any others, are not unique to the railroad industry; and they are, therefore, the most able to obtain jobs elsewhere within a reasonable period of time.

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retains the right to modify, or even set aside, the arbitrator's decision. This, in turn, can be appealed to the courts.

73. *Id.* at 81-82.

74. In their presentation to the ICC in behalf of the merger, BN and SF provided a list of all personnel who would be either laid off (dismissed), transferred, or downgraded (displaced) as a result of the merger. That list is in the author's possession.

VII. A Positive Policy For Labor Protection

Industry generally seems most always to be looking for well-motivated, trained employees, and especially clerical employees who are computer literate and able to handle jobs in clerical and data processing work. Such employees are the largest group laid off in railroad mergers and consolidations. It would seem, therefore, that what would be a fair policy for all parties — the employees, the carriers, and the public — is a program that provides proper recognition of the past services of laid-off personnel, aids them in their job search, is consistent with the economic needs of the carriers, and enhances competition in transportation services for the public good.

Such a positive policy and program of labor protection could consist of the following elements:

1. All employees whose jobs are abolished should receive mandatory severance pay based upon a minimum formula of one week's pay for each year worked up to a maximum of one year's salary. Those receiving severance pay shall be permanently severed from the company. Severance pay is the standard benefit, and the formula suggested is the standard one used by employers in other industries for permanent layoffs.[75]

New York Dock severance pay (separation allowance) is somewhat more liberal than this, as described in the Appendix, below. The *New York Dock* formula also gives the employee the opportunity to reject severance pay for displacement or dismissal allowances, as the great majority do. Even if the *New York Dock* provisions were adopted by the ICC or the Congress, severance should be made compulsory for those laid off so that they will commence looking for a new career without delay, and the carriers can immediately know and provide for the merger costs.

2. Employees scheduled for layoff may be offered employment in other crafts or classes. If offered such positions, the employee must accept a position or forfeit protection benefits. Also, if the company accepts employee for possible employment, it shall agree to train them and place them in open jobs if they complete the training to the company's satisfaction. Most LPP arrangements now place certain limitations on offers of comparable employment, such as prohibitions against loss of benefits if an employee must change his residence and, therefore declines a job offer. Unions also challenge offers of comparable employment in ar-

75. *See, e.g.*, Herbert R. Northrup et al., *Severance Pay Issues and Litigation*, in Northrup & Miscimarra, *supra* note 3, at 465; *Severance Pay and Retention Bonuses*, 44 Bull. to Management (BNA) 247 (Aug. 5, 1993); and *Severance Pay Update for 1993*, 45 Bull. to Management (BNA) 127 (Apr. 21, 1994), reporting on Coopers & Lybrand annual severance pay study for 1993.

bitration. This makes each offer subject to variable standards of comparability depending on the criteria chosen by different arbitrators.

3. Employees who are severed as a result of the transaction may during the first year thereafter apply for tuition reimbursement to take courses that are designed to improve their ability to secure new jobs or higher rated jobs either in the railroad in which they have worked or elsewhere. Tuition will be reimbursed by the carrier upon proof of satisfactory completion of the course with a passing grade. Such tuition reimbursement is very common among companies, and several railroads already have such programs.[76]

4. A dispute resolution procedure of negotiation and arbitration should be established to resolve selection or rearrangement of work force disputes *without* a requirement that any agreement be reached before the railroads make any merger-related changes.[77]

Such a program would provide immediate payment for those laid off. It might also encourage some senior personnel to accept severance pay and retire, or even be accompanied by a special bonus plan encouraging retirement, thereby making room for junior personnel to be retained. It would also give those laid off the funds to assist in reorienting their careers, looking for positions, and otherwise overcoming the loss of employment. It would invite laid-off employees to better their standing in the labor market through training and development. Finally, it would allow for disputes to be quickly and finally resolved without holding up the merger-related changes. It would be, therefore, in all ways a modern program, geared to today's labor market, and appropriate for railroad mergers, as well as for those in other industries where such programs are widely utilized.

VIII. Conclusion

Public policy in the United States has been very kind to railroad workers by treating them differently and more generously than workers in nearly all other industries. Special legislation provides railway employees and their unions with more favorable representation rights and collective bargaining, unemployment insurance and retirement benefits, and redress from injuries on the job than are available to workers generally.[78]

76. For short summaries of such programs, *see* Karen Matthes, *Tuition Reimbursement: A Wise Investment When Managed Properly*, 70 HR Focus 17 (Jan. 1933); and Gillian Flynn, *Career Development Is a Company Attention-Getter*, 73 Per. J. 22 (Oct. 1994).

77. This implementing agreement procedure is modeled on the one contained in *Mendocino Coast* and *Norfolk and Western* conditions, *cited in* notes 18 and 19, and in the original Amtrak LPPs.

78. Reference is to the Railway Labor Act for collective bargaining and representation, *See supra* note 22; The Railroad Retirement and Unemployment Insurance Act, and the Federal

Aided by such legislation, railroad employees are among the highest paid workers in the country.[79] The provisions for LPPs are, therefore, only one aspect of a public policy which raises important questions of fairness and equity that need addressing.

In a perceptive work, Charles L. Schultze has noted that:

> the specific forms of social intervention over the years have often had only a tenuous relation to the particular nature of the market failures to which they were addressed. Usually, when a problem has been singled out for public action, little attempt has been made to isolate the causes of market failure and deal with them in a way that preserves as many as possible of the elements of voluntary choice and private incentives. Rather, intervention typically substitutes a centralized command-and-control approach to decisionmaking over a far broader area than is necessary to deal with the market failure in question.[80]

The institution of LPPs by federal regulation and legislation is a prime example of such government intervention. Instituted both to protect railroad workers against unemployment and to encourage railroad consolidation, LPPs have instead encouraged employees not to work and enhanced the costs of carriers, inhibiting their profitability and resulting ability to expand employment. Moreover, major recipients of LPP benefits are relatively young clerical employees who are very likely to be employed by other industries instead of receiving pay for not working. As a result, the careers of such recipients may be blunted, not advanced, by such social engineering.

There is also the problem of overcompensating those who suffer market losses, including unemployment, in one particular industry. As it has been pointed out, railroad LPPs are not only discriminatory, they also breed inefficiency which lessens the maximum utilization of resources. Because transportation affects the costs of all products we use, this is a cost for the entire economy.

Section 11347 (formerly § 5(2)(f) of the Interstate Commerce Act, as the ICC currently interprets it, requires that *New York Dock* conditions be imposed in mergers of Class I railroads. In the event that there is legislative change, or that the ICC alters its views and is supported by the courts, the proposals set forth herein would meet the spirit of a fair and

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Employers' Liability Act. *See Compensating Injured Railroad Workers Under the Federal Employers' Liability Act* (Transp. Res. Board, Special Report 241 (1994).

79. In 1993, employees of Class I railroads earned an average of $45,354 per year. This placed them 74th in a list of approximately 900 four-digit SIC groups of employees. Most of those earning more were in such industry classifications as investment advisers, security brokers and dealers, news syndicates, etc., although some industrial classifications, such as motor vehicles and petroleum refining also had higher annual earnings. (Data from U.S. Bureau of Labor Statistics, compiled by Association of American Railroads.)

80. CHARLES L. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST at 46 (1977).

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equitable arrangement for the protection of employees. The change would also end the situation in which railroad employees receive benefits far and above those received by employees in other industries. The gains by such a change would surely exceed the losses, and would invigorate competition in transportation for the public good.

Appendix
Synopsis of ICC Imposed Railroad Labor Protection Benefits[81]

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

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

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

Eligibility for Protection Criteria

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

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

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

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

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

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One area of almost constant dispute between the railroads and unions is over the issue of eligibility criteria. The union typically attempts to link employee furloughs with ICC transactions and the carriers try to demonstrate the opposite. A large body of arbitral precedent has been built up in recent years requiring the linkage between an adverse effect and an ICC transaction in order to make an employee eligible for protective benefits. Job reductions, *per se*, do not entitle employees to ICC imposed protection benefits. Collectively bargained labor protection agreements, on the other hand, typically have much looser eligibility criteria for qualifying for protection benefits.

PRESERVATION OF COLLECTIVE BARGAINING AGREEMENTS

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

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

PRESERVATION OF ON-PROPERTY PROTECTION AGREEMENTS

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

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

NOTICE, NEGOTIATIONS AND IMPLEMENTING AGREEMENTS

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

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

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

PROTECTIVE ALLOWANCES

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

The displacement and dismissal allowances are based on a "test period" of the last twelve months in which the employee had railroad in-

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

MOVING BENEFITS

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

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