

Featherbedding on the Railroads: by Law and by Agreement

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I. INTRODUCTION

The concept of "featherbedding"¹ or make-work rules involves the conflict between two ideals: efficiency, usually necessary for the profitable operation of an enterprise, and job security, which is the desire of every worker and the hope of any union interested in maintaining its membership rolls. These conflicting ideals must be reconciled at some point.

In the railroad industry, where the controversy over featherbedding has been most pronounced and the consequences most strongly felt, the carriers argue that the increased labor cost resulting from this practice is crippling the industry. In 1963 it was estimated that featherbedding

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1. Featherbedding has been defined as "[T]hose work rules which require the employment of more workers than needed for the job. In addition, when technological advances eliminate positions, unions often insist that the workers be retained and receive their regular pay for doing nothing" A. PARADIS, *THE LABOR REFERENCE BOOK* 71 (1972).

The United States Department of Labor says that featherbedding is:

a derogatory term applied to a practice, working rule, or agreement provision which limits output or requires employment of excess workers and thereby creates or preserves soft or unnecessary jobs; or to a charge or fee levied by a union upon a company for services which are not performed or not to be performed. U.S. DEPT. OF LABOR, BULL. NO. 1438, *GLOSSARY OF CURRENT INDUSTRIAL RELATIONS AND WAGE TERMS* 31 (1965).

provisions in railroad contracts cost the carriers \$592 million annually.² This compares with industry earnings in that year of \$681 million.³ More recently, in 1970, two of the last full-crew laws (in Wisconsin and Indiana) cost the railroads operating in those state \$35.5 million.⁴ The long-anticipated merger of the New York Central and Pennsylvania Railroads into the Penn Central Railroad was intended to be cost-saving, but a job security agreement won by unions in the deal cost the new railroad \$93 million from 1968 to 1970.⁵

Employees and unions offer their own counterarguments. One claim is that a massive discharge of workers would bring economic havoc to these individuals and their families, and also to society as a whole, which would bear the responsibility of either finding new jobs for them or starting retraining programs. There is also the standard argument that a train cannot be safely operated without firemen, brakemen and other helpers. A third argument is that some of the carriers are topheavy with an excess crew of vice-presidents, department heads and managers.⁶

Recent legislation has not improved the deteriorating situation in the railroad industry. A proposed National Railway Act is set out at the end of this article to serve as a guideline for the necessary changes.

II. STATUTORY BASIS OF FEATHERBEDDING

Featherbedding practices, although often arising from contracts or agreements between management and labor, have been encouraged in large part by state and federal laws. State regulation of labor agreements between railroads and their employees has been characterized for many years by full-crew and "train consist"⁷ laws which, through the pressure of organized labor, remained on the books long after any useful function they may have served had vanished.

A. FULL-CREW LAWS

The Arkansas full-crew laws⁸ were illustrative not only of the endurance of these laws, but also of the burden which was placed on the railroads. In the Arkansas statute a crew of six was required on freight operations: "an engineer, a fireman, a conductor and three brakemen,

2. A. PARADIS, *supra* note 1, at 71 (1972).

3. MOODY'S TRANSPORTATION MANUAL 1974 at a5.

4. CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, 1971 ANNUAL 13.

5. J. DAUGHEN & P. BINZEN, THE WRECK OF THE PENN CENTRAL 221 (1971) (The cost of the agreement was supposed to have been \$78.5 million over an eight-year period).

6. BUSINESS WEEK, September 29, 1975, at 63.

7. Train consist laws limited the maximum number of cars that could be connected in a single train.

8. ARK. STAT. ANN. § 73-720 *et seq.* (1957). Repealed by Initiative Act No. 1, November 7, 1972.

regardless of any modern equipment of automatic couplers and air brakes."⁹ The two exceptions to this rule were carriers whose lines were less than fifty miles in length or freight trains with less than twenty-five cars.¹⁰ There appears to have been no plausible reason for conferring such special treatment upon carriers which were less than fifty miles long.

Equally ludicrous were the requirements for switch crews. These consisted of an engineer, a fireman, a foreman, and three helpers.¹¹ The exceptions to this provision were that only first and second class cities had to have such a crew and railroads that operated less than 100 miles were not required to abide by the regulation.¹² The Arkansas legislature also found it necessary to point out that "nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this act."¹³

The full-crew laws have been litigated frequently but never overturned. The Arkansas law, for example, was the object of lawsuits for over fifty years. In the case of *Chicago, Rock Island & Pacific Railway Co. v. Arkansas*,¹⁴ the United States Supreme Court upheld the law while saying that it may not have been necessary at all to have such a law. The reasons for sustaining the statute were that it was not unreasonable, there was no federal legislation to preempt state regulation, and it did not discriminate against any carriers, even though those with lines shorter than certain minimum lengths were exempt from the full-crew laws in certain instances.¹⁵

Today the full-crew laws are no longer an issue. The laws have been changed, since the brotherhoods no longer oppose repeal or nonenforcement. In their stead the unions have obtained protective agreements with the carriers.¹⁶

9. *Id.* at § 73-720 (emphasis added).

10. *Id.* at § 73-721.

11. *Id.* at § 73-726.

12. *Id.* at § 73-728.

13. *Id.* at § 73-727.

14. 219 U.S. 453 (1910).

15. *Id.* Two other attempts were made to invalidate the Arkansas full crew laws. In the case of *St. Louis, Iron Mountain & S. Ry. v. Arkansas*, 240 U.S. 518 (1916), the railroad argued that a terminal railroad less than 100 miles in length had switching operations over the same tracks as they did, but was exempt from the full crew requirement. How did the United States Supreme Court circumvent this argument? It held that "[T]he distinction seems arbitrary if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary" *Id.* at 521.

In the second attempt, *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1939), the Supreme Court was totally unsympathetic to the carriers, stating that "the same or greater need may now exist for the unspecified number of brakemen and helpers in freight train and switching crews" *Id.* at 255.

16. In Arkansas there was no need for such an agreement. When the full crew laws were

B. TRAIN CONSIST LAWS

Closely akin to the full-crew laws are the state train consist requirements. Although these laws were never as profuse as the full-crew laws, they still imposed a burden on the railroads. Limiting the size of a train forced a railroad to add more trains to its schedule and this in turn required more crews. Arizona's train consist law was voided in the case of *Atchison, Topeka, & Santa Fe Railway Co. v. La Prade*,¹⁷ although this case was reversed on procedural grounds by the Supreme Court.¹⁸ Twelve years later, in 1945, the Arizona train consist law was held to be preempted by federal regulations and the national control of interstate commerce in *Southern Pacific Co. v. Arizona*.¹⁹ The Court made an attempt to distinguish state train consist laws, which were invalid from the full-crew laws, which were still valid. The Court regarded the national interest as sufficient to override the state interest in the former case but not in the latter.

C. JOB PROTECTION

Another method of securing the retention of excess labor has been the enactment of federal laws which guarantee compensation for employees who are either laid off or transferred into another job category. The first such legislative enactment was the Emergency Transportation Act of 1933.²⁰ This Act was promulgated during the depths of the depression when many of the Nation's railroads were faltering. This innovative piece of legislation provided that a carrier was not permitted to reduce its employment by more than five percent per year or lessen employee compensation.²¹ This, however, was only a temporary measure which originally was to be effective for only one year unless renewed by the President.²²

finally repealed in 1972 the second section of the Initiative Act, *supra* note 6, stated: "[n]o railroad employee who has seniority in train, engine or yard service in this state on the effective date (November 7, 1972) of this Act shall be discharged, laid off, furloughed or suffer a reduction in earnings by reason of this Act."

17. 2 F. Supp. 855 (D. Ariz. 1933).

18. *Ex parte La Prade*, 289 U.S. 444 (1933).

19. 325 U.S. 761 (1945).

20. Act of June 16, 1933, 91, 48 Stat. 211.

21. *Id.* § 7(b). This section in full states 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 shown by the payrolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the payrolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any one year than 5 per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

22. *Id.* at 217.

The next federal law enacted to protect employees was the Transportation Act of 1940.²³ This Act was preceded by the landmark case of *United States v. Lowden*,²⁴ wherein the United States Supreme Court held that it was permissible under the Commerce Clause to regulate the conditions upon which an employee could be dismissed or retained. The basis for the Court's decision was not simply the welfare of the individual involved, but also the effect on interstate commerce.²⁵

The Transportation Act, which has become a part of the Interstate Commerce Act,²⁶ gave four years of protection to employees of carriers which merged or consolidated. Using the same terminology as the Emergency Act of seven years earlier, it also stated that employees are not to be placed in a worse position with respect to their employment.²⁷

The legislative history of the Transportation Act of 1940 indicates that a much more punitive measure against the carriers could have been passed. One proposal that was given serious consideration provided protection for employees not only in a consolidation action, but also in cases of abandonment of lines where there was a substitute form of transportation. The substitute transportation would have the burden of employing the workers who lost their jobs. These workers would be protected by law from dismissal by the substitute company for an indefinite amount of time. Congressman Lea stated that such protective conditions were "about as wild a proposition as this House was ever asked to approve."²⁸ He feared that such protective agreements would be extended to other employees in other industries when there was no need to retain them.²⁹ Congressman Harrington, the sponsor of this extensive

23. Act of September 18, 1940, ch. 722, 54 Stat. 898.

24. 308 U.S. 225 (1939).

25. *Id.* at 240.

26. 49 U.S.C. § 1 *et seq.* (1970). *See especially* § 5.

27. The relevant portion of the Act, § 5(2)(f), which deals with the rights of employees in a rail unification or merger states:

As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and 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, than the period during which such employee was in the employ of such carrier or carriers prior to 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.

28. 86 CONG. REC. 5865 (1940) (remarks of Rep. Lea).

29. *Id.*

proposal, said his reason for offering it was that railroad labor had no protection. He also was concerned about the public. Railroad consolidations and abandonments resulted in "economic deflation of communities."³⁰ He even felt it would be beneficial for the carriers since it would "stay the hand of railroad financial interests . . . bent upon reducing the physical plant of our great railroads."³¹

A major problem during the hearings was an interunion fight. Some of the railroad unions desired to secure as much legislative protection as the most pro-labor Congressman would sponsor. Other unions felt that only a modified protection plan for railroad employees would gather the necessary support for passage.³² As finally passed and enacted the legislation was admitted to be very favorable to labor.³³

The leading case interpreting this unique protective provision of the Interstate Commerce Act is *Railway Labor Executives' Association v. United States*.³⁴ In this case it was decided that the section did not mean that the ICC could require only four years of protection, but rather it had "power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years"³⁵ The case extended the theory of *Lowden* to a logical conclusion: if the government has the power under the Commerce Clause to specify that employees be protected from being discharged without compensation, then it also has the power in a given case to specify the duration of protection beyond the statutory period. The legislative history is unclear as to whether this was the intention of the Act. All that the Act said was: "[T]he employees have the protection against unemployment for four years, but the Interstate Commerce Commission is not required to give them benefits for any longer period"³⁶

III. FEATHERBEDDING BY AGREEMENT

In addition to the statutory protection conferred upon railroad employees, private contracts have been created which entitle employees to hold their jobs beyond the time they are needed or, in the alternative, allow for favorable severance allowances. These contracts form the basis for present job protection agreements between labor and management in railroading.

30. 86 CONG. REC. 5870 (1940) (remarks of Rep. Harrington).

31. *Id.* at 5871.

32. See 86 CONG. REC. 5869 (1940).

33. "We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement." *Id.* at 10178 (remarks of Rep. Lea).

34. 339 U.S. 142 (1949).

35. *Id.* at 155.

36. See note 33 *supra*.

A. WASHINGTON AGREEMENT

The first such contract of importance was the Washington Agreement, executed on May 21, 1936.³⁷ Under this pact employees who were displaced³⁸ were given protection. An employee was allowed the difference between his average monthly earnings before displacement from his former position and his current monthly earnings following the salary diminution. Protection is also offered in a "coordination"³⁹ if the employee loses his employment entirely. When this occurs he is entitled to sixty percent of his former earnings for from six months to five years, depending on his length of service. However, any amount a terminated employee receives from other railroad earnings has to be deducted from his severance allowance. Even if a worker has worked for less than one year he is entitled to a lump sum payment based on sixty days' salary.

A retained employee can receive other benefits, such as moving expenses, loss on the sale of a home, free railroad transportation, a pension, and hospitalization. Any disputes between the parties arising from a Washington-type agreement is referred to a committee of the parties. If the parties are unable to agree, a neutral referee is selected either by them, or if they are unable to choose a referee, the dispute goes to the National Mediation Board.⁴⁰

Not everyone was pleased with the terms of the Washington Agreement. Representative Harrington, in his distaste for the terms of the Agreement, oversimplified the Agreement by saying that all it involved was a surrender of a life's work for a "mere" sixty percent of an employee's salary.⁴¹

B. OKLAHOMA CONDITIONS

Another common pattern for setting compensation terms in the railroad industry is the one found in the Oklahoma Conditions.⁴² The

37. See H. JONES, RAILROAD WAGES AND LABOR RELATIONS 1900-1952, at 98-99 (1953).

38. Displacement is defined in terms of the employee:

A displaced employee is one who is retained in service but who, because of the coordination, is placed in a worse position with respect to compensation and rules governing working conditions that he occupied at the time of such coordination. Displacement is usually associated with the effects of "bumping" whereby employees with greater seniority exercise their rights to jobs perviously held by the displaced employee. D. ROBB & J. LUSTIG, RIGHTS OF RAILROAD WORKERS 406 (1968).

39. A coordination is defined as:

[J]oint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities in any of the operations or service previously performed by them through such separate facilities. *Id.* at 407.

40. *Id.* at 406-09.

41. 86 CONG. REC. 5869 (1940). Representative Harrington in his parochial view of railroad management added: "The 1936 jobs agreement constitute only what railroad financiers voluntarily accepted." *Id.* at 5870.

42. Oklahoma Ry. Company Trustees Abandonment of Operation, 257 I.C.C. 177 (1944).

Oklahoma Conditions are applicable when a railroad abandons either part or all of its operations and some of its trackage is sold to another company. The basic difference between the Oklahoma Conditions and the Washington Agreement is found in the treatment of pay allowances when an employee is either dismissed or demoted. Under the Oklahoma Conditions the protective period is four years—the same as found in the Interstate Commerce Act. Unlike the Washington Agreement, which allows a dismissed employee only 60% of his former earnings, the Oklahoma Conditions call for giving a dismissed or demoted employee 100% of his former wages, minus earnings in *any* other employment or *any* benefits collected from unemployment insurance. The Oklahoma Conditions are very defective in the provisions for settling disputes. If a controversy arises which cannot be settled it may be referred to an arbitration committee by either party. This committee is one whose formation, duties, procedure and compensation are agreed upon by both parties.⁴³ Considering the past inability of labor and management in the railroad industry to agree on nearly any issue, this definitely is not a workable proposition.

C. NEW ORLEANS CONDITIONS

The third type of agreement commonly used is known as the New Orleans Conditions.⁴⁴ These Conditions are basically a combination of the Washington Agreement and the Oklahoma Conditions. If the employee is adversely affected within four years of an ICC order the Oklahoma Conditions apply. If more than four years elapse the terms found in the Washington Agreement are applicable.⁴⁵

No discussion of agreements is complete without mention of the agreement between the unions, the Pennsylvania Railroad and the New York Central Railroad.⁴⁶ These conditions are *sui generis*. To appease the unions the two railroads practically had to guarantee lifetime employment to any worker affected by their proposed merger. All employees who wished to continue their employment with the merged company could do so for as long as they desired. An employee's position could not be worsened with respect to compensation, working conditions or fringe benefits. Employment could be reduced only if business contracted more than five percent in any thirty-day period.⁴⁷

43. *Id.* at 197-201. The Oklahoma Conditions are almost entirely identical to the Burlington Conditions and the names for these two agreements are often used interchangeably. Chicago, B. & Q. R.R. Abandonment, 257 I.C.C. 700 (1944).

44. New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952).

45. *Id.* at 280-2.

46. Pennsylvania Railroad Company—Merger—New York Central R.R. 327 I.C.C. 475 (1966).

47. *Id.* at 543. The ICC would frown upon using a term such as job guaranty:

Under its terms, although the merged company is restricted severely in reducing its

What was the *quid pro quo* here? Besides allowing the merger to occur, the unions gave the consolidated company the right to transfer employees throughout the system. Transfers across seniority lines, however, could only occur within a craft.⁴⁸

D. WORK RULES

One of the most pernicious featherbedding practices in the railroad industry developed from inflexibility in the face of changing times. In 1916 Congress passed the Adamson Act⁴⁹ to establish the eight-hour work day for railroad employees.⁵⁰ A practice soon developed of defining a work day both in terms of hours and miles traveled. An employee completed a regular work day when he had either worked for eight hours or traveled on a freight train for 100 miles. This work rule, so sensible in the days when a freight train could scarcely make 100 miles in an eight-hour day, became an obnoxious and expensive featherbedding provision when train speeds greatly increased.⁵¹ Now a day's pay may be for much less than eight

work force in accomodating the merger program, . . . we do not construe the agreement as providing for a so-called "job freeze" *Id.* at 685.

48. *Id.* at 543.

49. 45 U.S.C. § 65 (1970). The Adamson Act states:

Eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, Provided, that the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are engaged themselves in transfers of freight between railroads, or between railroads and industrial plants.

50. The passage of the Adamson Act was the culmination of railroad brotherhood demands for wage increases. From the turn of the century to 1916 the unions were in constant disagreement with the carriers on wages. Strikes were averted only by binding arbitration. In all likelihood the aversion to arbitration by the railroad unions stems from this time when they had to settle for wage increases they felt were not satisfactory. In 1916 the brotherhoods strongly insisted on an eight-hour day and increased wages. The railroads opposed both, but were willing to arbitrate, which the unions refused to do. When an impasse was reached the brotherhoods set a strike for September 4, 1916. President Wilson asked for a postponement of the strike, but he was turned down. The mode of operation he chose for preventing a strike was to ask Congress to enact an eight hour day law. This was done, and he was able to sign the Adamson Act on September 3, 1916. S. PERLMAN & P. TAFT, HISTORY OF LABOR IN THE UNITED STATES 1896-1932, IV LABOR MOVEMENTS 374-85 (1935).

51. The agreements between the carriers and the brotherhoods no longer even make a pretense that eight hours is a day. It is not uncommon for an agreement to say that less than eight hours is the work day:

In all classes of freight service, 100 miles or less, 8 hours or less (straight-away or turn-around) shall constitute a day's work; . . . St. Louis-San Francisco Railway Company; St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Locomotive Engineers 18, Effective January 19, 1920, Revised effective January 16, 1950.

Passenger Service. One hundred miles or less (straight-away or turn-around), five hours

hours of work. According to the Association of American Railroads there are a number of instances in which a work day consists of less than two hours.⁵²

One critic of the "100 miles equals a day of work" rule has said that the railroads missed an opportunity to have this rule modified at the time the Adamson Act was passed: "[t]he roads failed to take advantage of the opportunity to trade a reduction of the day in hours for an increase in the day in miles"⁵³ The reason that this trade-off did not occur was that the speed-up in freight service had not yet started and the railroads did not yet anticipate it. At that time the carriers usually were not able to run a freight train 100 miles in eight hours. Increasing the number of miles in an eight-hour work day would have meant overtime payments.⁵⁴

Unfortunately, the railroad industry is subject to a spectrum of work practices which either constitute featherbedding or encourage featherbedding. A common practice in many industries is to allow workers of one craft to do work in another craft, especially if it is closely related. This is not so in railroading. In the disputes between the carriers and the brotherhoods a major point of contention has been clauses such as "where regularly assigned to perform service within switching limits, yardmen

or less, . . . shall constitute a day's work, miles in excess of 100 will be paid for at the mileage rate provided, according to class of engine.

Six hours and forty minutes or less shall constitute a day in suburban service. St. Louis-San Francisco Railway Company; St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Locomotive Firemen and Enginemen 11, (effective May 16, 1910, revised June 16, 1947).

Brakemen, in passenger service, have to do more work to earn a day's pay. For them it is 150 miles or less. However, on freight service 100 miles or less will meet the requirement of a day's pay for a day's work. St. Louis-San Francisco Railway Company; St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Railroad Trainmen 4, in effect March 15, 1920, as revised March 1, 1953.

52. Loomis, RAILWAY DIGEST, April, 1959, at 19. According to the AAR very little work was being done by the various types of employees. And the amount of work that was being done was constantly diminishing. The AAR prepared the following chart showing the decline in work hours.

Average Number of Hours of Work Required to Earn a Basic Day's Pay

	1922		1957	
	Hrs.	Mins.	Hrs.	Mins.
Passenger engineers	4	31	2	57
Passenger firemen	4	28	2	50
Passenger conductors.....	5	45	3	55
Passenger brakemen	5	43	3	40
Passenger baggagemen	5	45	4	05
Through freight engineers	6	36	4	05
Through freight firemen	6	35	4	08
Through freight conductors	6	31	3	56
Through freight brakemen	6	32	3	57

53. S. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 191 (1941).

54. *Id.*, n. 73.

shall not be used in road service when road crews are available . . . ,"⁵⁵ or "[e]xcept as otherwise provided all work done exclusively within switching limits will be given to the yardmen from that seniority list."⁵⁶ Another requirement that encourages the retention of workers that are not needed or may not be wanted for a particular assignment is the rule that "[a] yardman shall not be removed from his position by reason of defective eyesight or hearing, if . . . he is found competent for the service he is engaged in."⁵⁷ Then there is the work rule that allows a railroad employee to be employed by a union in its activities. This "shall be considered as in the service of the railroad on leave of absence"⁵⁸ Consequently seniority will continue to accrue. Still another work rule prohibits trainmen from loading more than three bales of cotton at any one station.⁵⁹

An analysis of these rules reveals that they are archaic and no longer serve the purposes for which they were intended. In some instances the result may be the exact opposite of what was intended. A rule which states that members of one craft cannot do the work of other crafts is meaningful if the two crafts are so unrelated as to render incompetent the performance of one who is not a member of that craft. Otherwise craft distinctions only promote featherbedding, especially when the amount of work to be done in all crafts of an industry is declining. These rules also do not bear a reasonable relationship to such goals as safety and welfare of workers. Seniority rules may be of paramount importance in protecting labor. However, if seniority distinctions are set rigidly by divisional boundary lines the employees will not benefit. Carrier operations may be hampered by an inability to move workers to districts where they will be more useful.

A rule which states that a worker who has poor eyesight or poor hearing must be retained in his position defeats the purposes of safety and welfare, not only for the worker, but also for fellow employees who may be endangered by him. The goal of long-term financial protection of employees is also defeated. If too many employees become a burden on a railroad the carrier loses its competitive position, not as to other railroads that are burdened by the same work rules, but as to other forms of transportation such as trucks and airlines. In any line of business, marketplace economics dictate who will be able to reap the profits. If the railroads have to charge higher prices for their services because of high labor costs or discriminatory governmental regulations, they either have to

55. St. Louis-San Francisco Railway Company Agreement with United Transportation Union, Yardmen's Schedule 5 (effective January 1, 1973), as revised October 28, 1972.

56. *Id.* at 34.

57. *Id.* at 29.

58. St. Louis-San Francisco Railway Company, St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Railroad Trainmen 50 (effective March 15, 1920), as revised March 1, 1953.

59. *Id.* at 19.

pass on the increased costs to their clients or simply cease doing business. In the latter case employees are left without a job.⁶⁰ On the other hand, by adjusting with the times the railroad brotherhoods may be able to save more of their members' positions than by adhering to rules that produce only short-term results.⁶¹

Not much credit can be given to the brotherhoods for being flexible. There are some instances in which there has been a slight degree of adjustment. This is illustrated by the elimination of a past rule that required the payment of arbitraries⁶² to yardmen who carried portable radios as part of their employment. Still, even with the elimination of the rule, vestiges of it remain "for individual service not properly within the scope of yard service".⁶³

IV. FEATHERBEDDING PROSCRIBED

A. FEDERAL STATUTES

Two federal laws of general application and one applying specifically to railroads have made half-hearted and ineffectual attempts to control or diminish featherbedding. Of the general laws, the Labor-Management Relations Act of 1947⁶⁴ (LMRA) explicitly prohibits the payment of wages or salaries which are not for work done:

It shall be an unfair labor practice for a labor organization or its agents—to cause or attempt to cause an employer to pay or deliver . . . any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. . . .⁶⁵

60. This is exactly what has happened to railroad employees. In 1920 slightly over 2 million workers were employed by the railroads. By 1974 the payroll figure had declined to 525,000. MOODY'S TRANSPORTATION MANUAL 1975, at 43.

61. This is a view that has often been expressed by labor arbitrators and various courts. It was well put in the case of *Austin v. Painters' District Council*, 32 L.R.R.M. 2595, 2595-596 (1953), *aff'd*, 339 Mich. 462, 64 N.W.2d 550 (1954), *cert. denied*, 348 U.S. 979 (1955):

The defendants also seem to be alarmed that the use of the pressure and/or pan roller will bring about a great reduction in the employment of painters in this area. With this reasoning the court does not concur. From the very beginning of our industrial age, . . . down to the present day labor saving devices, it has always been the position of those connected with the various trades affected that the use of these mechanical devices would greatly reduce employment. However, history has proved the contrary; that they have constantly and steadily improved employment, brought about the reduction of costs and the making of a better product, enabling the public to buy a better product at a lesser price and consequently in far greater quantities.

62. See note 58 *supra*, at 42. Arbitraries are special allowances paid to railroad workers for additional service performed "during the course of or continuous after the end of regularly assigned hours." *Id.* at 5.

63. *Id.* *St. Louis-San Francisco Railway Company, St. Louis, San Francisco and Texas Railway Company Agreement with Brotherhood of Railroad Trainmen*, *supra* note 58 at 5.

64. 29 U.S.C. § 141 *et seq.* (1970).

65. 29 U.S.C. § 158(b)(6) (1970).

The policy considerations behind this provision are important to the railroad industry since the arguments pro and con are basically the same. This anti-featherbedding clause, simple and to the point on its face, is revealed by the legislative history as one of the more controversial aspects of the LMRA. In the House version of the bill,⁶⁶ five different activities were defined as featherbedding: employing more persons than necessary, making a payment instead of employing an excess number of individuals, paying more than once for a service that is performed, paying for services not performed and paying a tax for using or agreeing to restrictions on the use of certain machines. In the Senate bill there was no provision dealing with featherbedding. The Senate felt that matters concerning how many workers are required to perform a function was something that a court of law could not determine because of variations from industry to industry.⁶⁷ Senator Taft, a staunch supporter of the measure to prohibit featherbedding, believed differently. He asserted emphatically that it was "quite clear" the aim was to forbid "extortion by labor organizations or their agents."⁶⁸

The opponents of the provision were just as adamant. Senator Pepper of Florida believed it would eliminate clauses in contracts which called for paying workers who reported at a work site and then were told by the employer that there was no work. The end result, according to the Senator, would be to "wreck" unions.⁶⁹ Senator Murray of Montana indicated that health and safety measures that had been instituted would have to be sacrificed.⁷⁰ Other opponents went so far as to say that employees' vacation time and their minimum number of hours of work per week would be endangered.⁷¹ Another individual who vehemently opposed the anti-featherbedding clause was President Truman. One of the reasons he vetoed the entire 1947 LMRA was because he felt that employees' rest periods, safety provisions and other legitimate practices were threatened by the language used in drafting the section concerned with featherbedding.⁷² The Act was passed over his veto.⁷³

This law could have been very useful for regulating labor-management relations, especially if it were more specific.⁷⁴ Surely it need

66. H.R. 3020, 80th Cong., 1st Sess. (1947).

67. 93 CONG. REC. 6443 (1947).

68. 93 CONG. REC. 6859 (1947) (remarks of Sen. Taft).

69. 93 CONG. REC. 6514 (1947) (remarks of Sen. Pepper).

70. 93 CONG. REC. 6503 (1947) (remarks of Sen. Murray). Senator Murray believed, as many still do, that the solution to featherbedding is in the collective bargaining process.

71. *Id.* at A2916, quoting an article by Alfred Friendly in THE WASHINGTON POST, June 15, 1947.

72. 1947 U.S. CONG. SERV. 1853.

73. H.R. 3020, 80th Cong., 1st Sess. (1947) U.S. CODE CONG. & AD. NEWS 168.

74. A possible criticism of the provision is that there is no uniform method of applying

not have been relegated to the unimportant role that the courts have given it.⁷⁵

Another general statutory proscription on featherbedding is found in the Hobbs Act.⁷⁶ It prohibits the obstruction, delay or movement of an item in commerce by robbery, extortion, violence or threat of violence. In *United States v. Kemble*⁷⁷ the Hobbs Act was construed to encompass labor activities involving "imposed, unwanted and superfluous services" if commerce were obstructed,⁷⁸ but it is clearly of very narrow applicability.

A. PUBLIC LAW 88-108

The only federal proscription relating specifically to featherbedding on the railroads comes from Public Law 88-108.⁷⁹ The background for this

standard criteria since conditions differ from industry to industry. This need not be so. Under a statutory grant of power from Congress, the Department of Labor can promulgate rules proscribing featherbedding. Then it can publish in the *Federal Register*, in precise detail for each industry, the specific practices which constitute featherbedding. Although it would be impossible to formulate guidelines for every existing type of work, it would be a good start to delineate featherbedding practices where they are most common—for example, in the maritime, printing, entertainment, and construction industries, as well as in the railroads. The enforcement procedures for the railroads should be the same as for other industries, except that statutory authority for such procedures should arise under the Railway Labor Act. 45 U.S.C. § 151 *et seq.* (1970).

There is precedent for such a procedure. In the environmental field, not only are standards for pollution control being promulgated industry by industry by the Environmental Protection Agency, but also industry subcategories are often treated separately.

75. Much of the blame for this situation can be placed on two cases. In *American Newspaper Publishers Ass'n. v. NLRB*, 193 F.2d 782 (7th Cir. 1951), *aff'd*, 345 U.S. 100 (1953), it was decided that it was not an unfair labor practice under the appropriate section of the LMRA, § 8(b)(6), to set bogus type. The court reasoned that the employee actually worked in setting the bogus type and was not merely hired for that purpose alone. Furthermore, it took only five percent of his working time.

American Federation of Musicians v. Gamble Enterprises, Inc., 92 N.L.R.B. 1528 (1952), concerned the employment of stand-by musicians. The National Labor Relations Board found that the musicians were not guilty of a featherbedding practice. The decision was based on the fact that if they were given employment they would do actual work. The Board interpreted § 8(b)(6) to mean that a violation would occur only if no work were performed or no work was to be performed. On appeal, *sub nom. Gamble Enterprises, Inc. v. NLRB*, 196 F.2d 61 (6th Cir. 1952), the court equated forcing someone to use services that were not needed to an exaction. Therefore, the musicians would fall under the featherbedding proscription. When the case came up to the Supreme Court, 345 U.S. 117 (1953), the Board's view was adopted and the Court of Appeals was reversed. The Supreme Court deftly avoided the issue of featherbedding. Since the offers to work by the musicians were in good faith there was no need to determine whether they were demanding an exaction.

The dissent felt that "[C]ongress surely did not enact a prohibition whose practical application would be restricted to those without sufficient imagination to invent some 'work'." 345 U.S. at 126.

76. 18 U.S.C. § 1951 (1970).

77. 198 F.2d 889 (3rd Cir.), *cert. denied*, 344 U.S. 893 (1952).

78. *Id.* at 891-92.

79. Joint Resolution of August 28, 1963, Pub. L. No. 88-108, 77 Stat. 132.

law was a dispute that arose between the carriers and the unions in 1959 when changes in existing work rules and pay structures were sought. Once the possible consequences of the dispute were realized, President Eisenhower appointed a commission of fifteen members, five each from the public sector, railroad management and the railroad brotherhoods. After thirteen months of studies and hearings the commission recommended against the carriers as to work rule changes, while favoring a modification in pay structures. The carriers accepted the findings and were willing to abide by them; the unions were not.⁸⁰

In 1963, with the prospects of a strike looming, President Kennedy established an emergency board that was to submit proposals for the resolution of issues. The board's recommendations, like those of the commission, were not binding on the parties. The brotherhoods objected strongly to one of the suggestions, arbitration. On July 10, 1963, the eve of a strike deadline, President Kennedy asked the parties to permit a subcommittee of the President's Advisory Committee on Labor-Management Policy to review and report on the issues involved. This was agreed to by all concerned and the threat of a strike was temporarily averted.⁸¹

This committee basically reiterated the findings of the board and of the commission. Its report listed eight issues in the controversy, of which the most important were the disputes over firemen and crew consists. The Presidential commission had come to the conclusion that firemen were not a necessity for safe train operations. However, it recommended firemen with ten years of seniority should be retained while those with less seniority should be given other railroad job assignments, retraining, or severance pay. The Presidential board had recommended that there should be a determination of when firemen were needed for safety. The second controversy was over crew consists, where the differences were narrow. The difficulty was that the unions did not want a determination by arbitration of the disagreement over crew consists for branch lines.

One of the lesser issues concerned the combination of yard crews with road crews. The unions wanted these disputes handled locally while the railroads felt that a national determination would be better. The parties were also in dispute over compensation, with dissatisfaction being aroused by widespread inconsistencies in wage structures among the various railroads. The railroads did not want to discuss this issue until the two major issues involving the firemen and crew consists were resolved. The other issues were the manning of motor cars and self-propelled vehicles, interdivisional runs, employment security and apprenticeship programs.⁸²

80. 1963 U.S. CODE CONG. & AD. NEWS 1544-46.

81. *Id.*

82. *Id.* at 1546-549.

In conclusion, all the committee accomplished was to state the issues that were preventing the parties from coming to an agreement. For this the carriers and the brotherhoods did not need a Presidential committee. The indications are that the main purpose of the committee was to stall for time; however, procrastination does nothing for the resolution of disputes that have been in the making for decades.

Shortly after the report, President Kennedy, in a special message to Congress on July 22, 1963, submitted proposals for the settlement of the on-going dispute between the railroads and the unions.⁸³ The President envisioned catastrophic effects from a prolonged strike: food shortages in large population centers, weakened national defense and national security, crippled industry, massive unemployment⁸⁴ and, quite possibly, a recession.⁸⁵

With these disastrous possibilities in mind, the President proposed that for a two-year interim period work rules changes be submitted for approval, disapproval or modification to the Interstate Commerce Commission.⁸⁶ According to the President this would not be compulsory arbitration, but rather "would preserve and prefer collective bargaining and give precedence to its solutions."⁸⁷

Congress responded to the President's initiative by enacting Public Law 88-108 which was divided into nine sections.⁸⁸ The first section stated that neither party to the 1959 dispute would make any change in compensation or work rules "except by agreement, or pursuant to an arbitration award."⁸⁹ The second section established an arbitration board which was to consist of seven members, two each chosen by the carriers and by the brotherhoods and three chosen by the four arbitrators designated by the parties.⁹⁰ The third section required the board to make a decision in respect to firemen and crew consists. The decision reached would be binding on all parties to the dispute and would be a final disposition of the issues.⁹¹ The fourth section adopted the procedures found in the Railway

83. *Id.* at 1537; 109 CONG. REC. 13004 (1963).

84. The President elaborated on this statement by citing some statistics:

[T]he Council of Economic Advisers estimates that by the 30th day of a general rail strike, some 6 million non-railroad workers would have been laid off in addition to the 200,000 members of the striking brotherhoods and 500,000 other railroad employees—that unemployment would reach the 15 percent mark, for the first time since 1940—and that the decline in our rate of GNP would be nearly four times as great as the decline which occurred in this Nation's worst postwar recession. *Id.* at 1538-539, 109 CONG. REC. at 13005.

85. *Id.* at 1538-539, 109 CONG. REC. at 13005.

86. *Id.* at 1541, 109 CONG. REC. at 13006.

87. *Id.*, 109 CONG. REC. at 13007.

88. Joint Resolution of August 28, 1963, Pub. L. No. 88-108, 77 Stat. 132.

89. *Id.* § 1.

90. *Id.* § 2.

91. *Id.* § 3.

Labor Act to the extent that they were consistent with the specific provisions of Public Law 88-108.⁹² The disposition of the issues was to be made in the United States District Court for the District of Columbia and any award was to continue for two years from the date it was granted unless the parties agreed otherwise.⁹³ The other sections addressed themselves to such issues as the beginning of hearings, the resumption of collective bargaining, the public interest involved, enforceability by the courts and the expiration of the law.

The arbitration board came to a decision that was filed with the court on November 26, 1963.⁹⁴ The award started with a saving clause: "all agreements, rules, regulations . . . and practices . . . with respect to . . . firemen (helpers) shall continue undisturbed except as modified by the terms of this Award,"⁹⁵ and this considerably weakened the Award.

Substantively, the award first attacked the problem of firemen. The decision was a major setback for the unions. The board asserted that railroads would no longer be required to employ firemen "in any class of freight service" (steam power excepted). As a small concession to the unions, ten percent of the firemen were to be retained as part of the carriers' freight crews. Once this foundation was laid the board considered what provisions were to be made for the terminated individuals. If a fireman had less than two years' seniority on the effective date of the award he was only entitled to a lump sum separation allowance. Those with more than two years' seniority who had average earnings as firemen of less than \$200 per month were given the option of receiving a severance allowance of 100% of their earnings in the preceding 24 months or remaining on the seniority lists and performing functions for which they were qualified. Those in this category who had performed no services could be terminated without a severance allowance. All other firemen with less than ten years of service retained their rights and seniority continued to accrue to them. Those employees with more than ten years' seniority who were retained were fully protected and did not have to fear the loss of their positions.⁹⁶

92. *Id.* § 4. Briefly, the pertinent provisions of the RLA provide that controversies between a carrier or carriers and employees which are not settled by representatives of the parties or an adjustment board be submitted to a board of arbitration composed of either three or six individuals, one or two arbitrators chosen by each side, and the remaining arbitrator or arbitrators chosen by the already designated arbitrators. In addition, each party will be given an opportunity to be heard, the agreement to arbitrate will state the specific questions to be resolved, and an award of the board will be conclusive unless a petition for impeachment is brought within ten days. 45 U.S.C. §§ 157-159 (1970).

93. Joint Resolution of August 28, 1963, Pub. L. No. 88-108, § 4, 77 Stat. 132.

94. *Railroads v. Operating Bhd.*, 41 LAB. ARB. 673 (decision by board) (1963).

95. *Id.* at 675.

96. *Id.* at 675-77.

The decision on crew consists was inadequate and evasive. The board said that the issue should be resolved at the local level through negotiations between individual carriers and the brotherhoods. Then if the parties were unable to agree on a disputed issue, it could be referred to a special board of adjustment. The arbitration board laid down guidelines to be considered by the special board. These included such factors as safety, crew workload, special conditions that might exist, number of railroad crossings to be protected and state, county and municipal ordinances.⁹⁷

In one aspect this award was groundbreaking: featherbedding, as exemplified by firemen, was no longer sacrosanct. Courts, labor arbitrators and unions were placed on notice that firemen were not a privileged class to whom marketplace economics did not apply. Otherwise, the award was of minimal value. A number of states still had full-crew laws which mandated not only the use of firemen but also other workers, usually brakemen. In those states in which there were no such laws, railroad employees were covered by various protective agreements between them and the carriers.

Surprisingly, the Supreme Court held that Public Law 88-108 did not preempt a state full-crew law in *Chicago, Rock Island, & Pacific Railroad v. Hardin*⁹⁸ where the Arkansas full-crew law was at issue. The district court decision had gone against the Arkansas law because the court found it was the purpose of Congress to preempt state laws in this area. The primary evidence of this was said to be the omission of a saving provision in the federal law, in addition to the finding of the court that the arbitration award was in direct conflict with the Arkansas law.

The Supreme Court agreed with the lower court dissent in finding no preemption. The Court stated that the disagreement between the carriers and the unions that had been before the arbitration board did not exist in states that had full-crew laws, since those laws were decisive on the question and precluded practical disagreements over hiring full crews.

This appears to be faulty reasoning. The carriers had never conceded the validity of the state laws and had previously challenged them in court. Justice Douglas, in his dissent, found it "inconceivable that Congress intended to solve only part of the problem when it directed the Arbitration Board to make a binding award which 'shall constitute a complete and final disposition of the . . . issues.'"⁹⁹

In the crew consist issue the creation of another board, in a situation in which so many boards had already failed, only added more confusion to

97. *Id.* at 678-79.

98. 239 F. Supp. 1 (W.D. Ark. 1965), *rev'd sub nom.*, *Brotherhood of Locomotive Eng'rs. v. Chicago, R.I. & Pac. R.R.*, 382 U.S. 423 (1966).

99. 382 U.S. at 447.

an already disorderly state of affairs. Such a restricted and limited resolution of the problems did not mollify the parties. The unions were least pleased since the loss of even some firemen meant that union ranks would start to dwindle. The carriers were not completely satisfied because they still had excess labor.¹⁰⁰

Litigation over the board's findings quickly developed. In *Brotherhood of Locomotive Firemen and Enginemen v. Chicago Burlington & Quincy Railroad Co.*,¹⁰¹ decided before the effective date of the board's decision, the union challenged the constitutionality of Public Law 88-108. They also contested the arbitration board's findings on the ground that they did not conform to the statute. Neither challenge was upheld.

C. STATE STATUTES

State laws that proscribe featherbedding are extremely rare. There are statutes in some states which may be construed as not allowing make-work practices. However, the state courts have not had to decide whether such construction is appropriate. An example is a statute found in North Dakota that makes it a misdemeanor for an individual to force an employer "to limit or increase the number of his hired foremen, journeymen, apprentices, workmen, laborers, servants, or other persons employed by him" ¹⁰²

A unique statute is California's Railroad Anti-Featherbedding Law of 1964.¹⁰³ This law adopted the findings of President Kennedy's arbitration

100. *Railroads v. Operating Bhds.*, 41 LAB. ARB. 673, 680 (decision by board) (1963). The opinion of the neutral members was very revealing as to the limitations and shortcomings of the decision. In a statement which may have been calculated to exonerate them from any defects which their decision may have had, the neutral members stated:

[t]he limitations under which we must deal with these issues should immediately be made clear There are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview.

In approaching our task we have been fully aware of the handicaps imposed upon us not only by our relative unfamiliarity with the complex problems of railroad operation but also by the narrow time limits within which we have been compelled by the Joint Resolution to complete our work. We have had to base our judgments entirely upon the evidence and arguments presented to us by the parties in the formal context of adversary proceedings.

101. 225 F. Supp. 11 (D.D.C. 1964), *aff'd*, 331 F.2d 1020 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 918 (1964). This decision did not apply to engine service. However, it was applicable to assistant conductors, ticket collectors, brakemen, flagmen, and others.

102. N.D. CENT. CODE § 34-01-05 (1970) (amended 1975). A non-criminal statute is found in Colorado. Under the Colorado Labor Peace Act, COLO. REV. STAT. § 8-3-101 to 123 (1973):

[I]t is an unfair labor practice for an employee, individually or in concert with others to . . . [d]emand or require any stand-in employee to be hired or employed by an employer, or to demand or to require that the employer employ or pay for an employee to stand by or stand in for the work being done by other employees, or to require the employer to employ or pay for any employee not required by the employer or necessary for the work of the employer.

103. CAL. LAB. CODE §§ 6900-6910 (West 1971).

board, created pursuant to Public Law 88-108, and declared it to be the public policy of the state of California "that featherbedding practices in the railroad industry should be eliminated and that national settlement of labor controversies relating to the management of trains should be made effective in California" ¹⁰⁴

Under the California law, carriers which run more than four trains each way every 24 hours are required to employ on their passenger trains only one conductor, one brakeman (these two must be on all passenger trains) and an engineer and fireman for diesel locomotives (or a motorman instead of the latter two if the train is propelled by electricity) and two brakemen when four or more cars are hauled. ¹⁰⁵ The statute remains silent on the requirements pertaining to freight operations. Another aspect of the California law is a provision dealing with the qualifications and work experience needed for engineers, conductors, and brakemen. ¹⁰⁶

The California statute has to be commended for taking a stand on a controversial issue that had engendered intensive opposition from labor. However, the accolades must stop at this point. The statute fails to come to terms with all the work practices and work rules that constitute featherbedding or make-work. It may be that some of these issues may have to be solved on the national level, but if the courts and arbitration boards are going to insist that areas such as crew consists are items to be negotiated by individual carriers, then it may fall to the states to regulate such agreements.

V. CONCLUSION

The problem of featherbedding has three sources: labor, management and government. Labor has become so powerful in railroading that it is usually able to dictate the conditions of a work agreement. This does not mean that the union members necessarily benefit from the agreement, and, in fact, are more often harmed than helped. The problem with management is that it is an entrenched bureaucracy and in many ways acts like the myopic labor leaders it deals with. Railroad management does not adjust with the times and is unwilling to innovate or do anything that would jeopardize the status quo. Government, mainly through the Interstate Commerce Commission, is a heavy contributor to the abominable conditions prevalent in the railroad industry. It is true that when the ICC was created, the railroads were extremely powerful and were not loath to flex their muscles. However, over the ensuing years a number of changes occurred which precipitated the railroads' fall from prominence.

104. *Id.* § 6900.5.

105. *Id.* § 6901.

106. *Id.* § 6906.

The heavy hand of the regulators did not allow the railroads to do anything without the Commission's permission.

At the present time the situation is changing only for the worse. The physical plant of the railroads is rapidly deteriorating, their position in the market place is declining,¹⁰⁷ and employment is only a fraction of what it once was.¹⁰⁸ The attitudes of management, labor and government have not ameliorated the situation. For its part government has started to recognize some of the problems. Nevertheless, new railroad legislation only sweetens the protective measures. In the Rail Passenger Act of 1970¹⁰⁹ the protective conditions of the I.C.A. were adopted. In addition the carriers are required to provide fair and equitable arrangements for training or retraining programs and to give assurances of priority in reemploying laid-off or terminated employees.¹¹⁰ Under the Regional Rail Reorganization Act of 1973¹¹¹ railroad employees who lose their jobs have a guaranteed income if they have more than five years of service.¹¹² The implications of this type of agreement are obvious. Rather than trying to meet the tough problems of railroad unemployment head-on, the government is attempting to mollify all the parties by financially bailing out the industry. This is a disturbing trend. If railroad employees are entitled to special government protection then employees in other industries that have faltered will also want favored treatment from the government. This is not how problems are solved. This government action only mitigates conditions for a short period while the basic problems remain.

This is not to say that the government should be silent while the railroads roll into oblivion. A radical solution is needed, though the necessary remedies will doubtless prove distasteful both to labor and management. The following proposal is offered in the belief that it will help in solving the problems discussed in this article. A particular goal is to limit government interference in the railroad industry in a way that will be as fair as possible to all parties. However, the ICC under this proposed law would

107. As late as 1939 the railroads handled over 62% of the total freight shipped. In the peak war year of 1943 the figure rose to 71%. In 1974 it has fallen to 38.6%. MOODY'S TRANSPORTATION MANUAL 1975 at a12.

108. See also note 60 *supra*.

109. 45 U.S.C.A. §§ 501-645 (1972).

110. *Id.* § 565(b).

111. 45 U.S.C.A. §§ 701-794 (Supp. 1975).

112. *Id.* § 775(c).

The monthly displacement allowance . . . shall continue until the attainment of age 65 by a protected employee with 5 or more years of service on January 2, 1974, and, in the case of a protected employee who has less than 5 years service on such date, shall continue for a period equal to his total prior years of service.

An employee with less than 5 years of service but more than three years of service may elect to take a lump sum payment of up to \$20,000. *Id.* § 775(e).

Under this Act a protected employee is also entitled to benefits based on any wage increase he would have received had he continued in his prior position. *Id.* § 775(b)(1)(C).

still serve a useful regulatory function. The goal for the 15-year duration of the law is to rehabilitate the railroad industry at least to the point where it will not have to reduce its employment. When this is accomplished the railroad industry might even become a growth industry!

PROPOSED NATIONAL RAILWAY ACT OF 1976

Section 1: Title.

This Act shall be known as the National Railway Act of 1976.

Section 2: Declaration of Congressional Policy.

(a) Findings—The Congress finds and declares that:

(1) An emergency exists with respect to the condition of railroads in the United States today.

(2) Essential rail service in the United States if being provided by railroads whose financial viability is questionable.

(3) The physical plant of railroads in the United States has deteriorated to a point where many communities are being deprived of efficient, safe and modern rail service.

(4) The railroads of the Nation are being unfairly discriminated against by local taxing authorities.

(5) The work rules that govern labor and management in the railroad industry are archaic and only serve to further the deteriorating state of railway affairs.

(6) The public convenience and necessity require adequate and efficient rail service throughout the Nation to meet the needs of commerce, the national defense and the environment, and the service requirements of passengers, the United States mail, shippers, states and their political subdivisions and consumers.¹¹³

(7) Continuation and improvement of essential rail service is necessary to preserve and maintain an efficient national rail transportation system.¹¹⁴

(8) Rail service and rail transportation offer economic and environmental advantages with respect to land, use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such an extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.¹¹⁵

(b) Purposes—It is therefore declared to be the purpose of Congress to provide for:

113. This section is based on 45 U.S.C.A. § 701(a)(3) (Supp. 1975).

114. This section is based on 45 U.S.C.A. § 701(a)(4) (Supp. 1975).

115. This section is identical to 45 U.S.C.A. § 701(a)(5) (Supp. 1975).

- (1) A viable rail system that is competitive with other forms of transportation.
- (2) The establishment of a Railway Trust Fund.
- (3) An end to the constant disputes between rail labor and rail management which have plagued the industry and the Nation.
- (4) An end to discriminatory taxes that have siphoned off much needed capital for the rehabilitation of the Nation's railway system.
- (5) The establishment of a Railway Study Group to formulate and propose solutions to railroad problems in the United States.

Section 3: Railway Trust Fund.

(a) Congress hereby establishes a trust fund to be known as the Railway Trust Fund.

(b) Three cents of every four cents that currently goes into the Highway Trust Fund from gasoline taxes shall from May 1, 1976, be diverted into the Railway Trust Fund.¹¹⁶

(c) There shall be an additional two cents levy on every gallon of gasoline sold which shall go into the Railway Trust Fund.¹¹⁷

(d) The Railway Trust Fund shall be administered by the Interstate Commerce Commission.

(e) Any railroad company or corporation, including switching and terminal railroads, are eligible for funds from the Trust if the purpose for which the money will be used is:

- (1) Rehabilitation and maintenance of right-of way;
- (2) Purchase of new and modern operating equipment;
- (3) Retraining of labor that may be necessitated by any provision of this Act;
- (4) Any other purpose which meets with the approval of the Interstate Commerce Commission.

(f) Funds from the Trust shall not be used for any of the following purposes:

- (1) Salaries of employees or management;
- (2) Reduction of corporate debt;
- (3) Activities unrelated to rail transportation;
- (4) Any other purpose which does not meet with the approval of the Interstate Commerce Commission.

(g) Any railroad that uses funds appropriated from the Railway Trust Fund is a "participating railroad".

Section 4: Railroad Property Taxes.

¹¹⁶ The 4-cent tax on every gallon of gasoline sold, along with some highway use taxes on trucks, yield \$6.5 billion a year. FORBES, "Billions for Concrete," November 1, 1975, p. 74.

¹¹⁷ This should bring the total yearly amount in the Railway Trust Fund to about \$7.5 billion.

(a) All property taxes levied by local taxing authorities on railroad property are hereby suspended, subject to the following conditions:

Such tax money is to be used for the improvement of the properties upon which they are levied, if these properties are:

- (A) Rights-of-way;
- (B) Railroad yards.

(2) Any tax money not so used belongs to the appropriate local taxing authority and shall be used for activities consistent with this Act.

Section 5: Railway Labor.

(a) A participating railroad shall have the right to assign, allocate, and consolidate work to any location, facility, or position on its system.

(b) Said work in Paragraph (a) may be removed from the coverage of a collective bargaining agreement.

(c) Labor organizations of participating railroads shall have the right to name one director for every three management directors currently on the board of directors of any participating railroad.

(d) Section 5(2)(f) of the Interstate Commerce Act does not apply to this Act. However, before any participating railroad removes an employee because of automation or similar reason, it shall have the obligation of:

(1) Retraining such employee for any other work he is capable of performing in the railroad's system, without any reduction in wages or benefits during and after the time the retraining takes place.

(2) Finding a position for such employee in the participating railroad's non-rail operations without any reduction in wages or benefits if no work can be found in the rail operations.

(3) A non-participating railroad is not exempt from Section 5(2)(f) of the Interstate Commerce Act.

Section 6: Railway Study Group.

(a) Congress hereby establishes a Railway Study Group.

(b) The Railway Study Group shall consist of the following members:

- (1) Three directors chosen by railroad labor;
- (2) Three directors chosen by railroad management;
- (3) Three directors chosen by the President from the community at large. These individuals shall have knowledge of railroad problems and may be, but are not limited to, labor arbitrators, economists and transportation experts.

(c) The Railway Study Group shall examine and propose solutions to current railroad problems. The Group shall examine, but not be limited to, the following problems:

(1) Methods of facilitating movement between railroad crafts;¹¹⁸

(2) More efficient utilization of present railroad facilities;

(3) Restructure of railroad management;

(4) Reformation of existing federal laws governing railroads and railroad labor;

(5) State laws governing railroads;

(6) Work rule arrangements between railroad labor and railroad management.

(d) The Group shall report all findings and recommendations to the President and the Interstate Commerce Commission.

(e) Funds for salaries and any studies made by the Group shall be appropriated from the Railway Trust Fund.

(f) This Section shall in no way be construed to limit the Railway Study Group to problems of participating railroads.

Section 7: Penalties.

A violation of any provisions of this Act is punishable by:

(1) Suspension of future aid to a participating railroad; and

(2) Return of any financial aid given to a participating railroad;

or

(3) A fine and/or imprisonment for any individual found in violation of this Act.

Section 8: Expiration.

This Act shall expire on May 1, 1991.

118. Suggestion of Harry N. Casselman, former Regional Director of the National Labor Relations Board and presently labor arbitrator and permanent umpire for John Deere, Inc. and the United Automobile Workers.

