MINUTES OF THE MEETING
BUSINESS AND LABOR COMMITTEE
50TH LEGISLATIVE SESSION

March 16, 1987

The meeting of the Business and Labor Committee was called to order by Chairman Les Kitselman on March 16, 1987 at 8:00 a.m. in Room 312-F of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Jan Brown who was excused.

HOUSE BILL NO. 862 - Rep. Cal Winslow, House District No. 89, Billings, sponsored the bill. Rep. Winslow stated this bill calls for some decisive action today to make things better, and calls for increased funding for science and technology, a program that has proven itself and is continuing to prove itself as being effective, and has only been in place a short period of time and is showing some positive results. He said it has been proven that the country and technology has been changing rapidly and over 50% of the jobs were not available 10 years ago. He commented that additional funds need to be put into the capitol for higher education to train the workforce for these jobs and areas to have the least costly and highly trained workforce.

PROPONENTS

Jim Smith, representing the Montana Human Services Development Councils. Mr. Smith stated that the best social program that has ever been developed in this country is the job, and that is what the people want and need. He said if this bill could create employment for those that want it and need it who otherwise would be recipients of public assistance, this bill has to be supported by his organization and others like it.

Kelly Holmes, representing the Montana College Coalition. Ms. Holmes submitted written testimony. Exhibit No. 1.

John Lahr, representing Montana Power Company. Mr. Lahr stated Montana Power Company has not attempted in the past to advise the legislature about how to spend coal severance tax, but in this instance Montana can use some revitalization and some jobs and redevelopment, and this bill seeks the means to produce such change. He said this is a self help program for Montana, and without such programs, something more drastic will be needed.

Tom McGree, representing Mountain Bell Telephone Company. Mr. McGree stated that Mountain Bell thinks the economic

development in this bill is well placed. He said they applaud the efforts of this act in terms of the combination of effort between private and public in the state of Montana.

OPPONENTS

None.

QUESTIONS

Rep. Cohen asked Rep. Winslow how much the 5% is going to cost. Rep. Winslow responded that the 5% going into science and technology would be about $1.5 million, in 1988 and over $1.5 million in 1989 and the same amount for business assistance.

Rep. Hansen asked if 50% of the money would go to the Board of Investments and the other 50% would be allocated in this manner. Rep. Winslow responded that if SB 228 for this biennium does not pass, then the increase to the education trust fund would be 37%, and this would increase it to 22%, which is beyond what they have had in the past.

CLOSING

Rep. Winslow stated that it is time for Montana to decide what they want to do. He commented Montana needs a goal, the legislature talks about balancing the budget, but there is no direction for the state. He said the legislature needs to give some direction to the state, and this bill provides some investment in programs that are working.

SENATE BILL NO. 52 - Senator Bob Brown, Senate District No. 2, sponsored the bill. Senator Brown stated the bill provides that the Commissioner of Insurance can establish limitations on the rate level increases and decreases which take affect with respect to any market for insurance without prior approval. He said these rules must be designed to restore and promote stability in insurance markets, so this rate making authority is given to the Insurance Commissioner, and some parameters are given on which the rates would be based. He commented that this concept would help restore some stability to the marketing of insurance in the state of Montana, and it would be worth the $1/2 million in the fiscal note.

PROPONENTS

Rep. Joan Miles, House District No. 45, Helena. Rep. Miles stated she had served on the interim committee that worked on this bill and wants to support it. She stated in the

fiscal note the additional cost of this particular type of system is about $45,000 per year, and that is the degree that the Insurance Commissioner's office is underfunded in order to have them implement their current regulatory system. She said the intent of this regulatory system is to eliminate the wild fluctuations of prices, and this will allow the insurance companies to act in a competitive manner, but if they do need to change their rates beyond the zone of reasonableness, then they would have to be able to justify it. She commented there has been a lot of tort reform legislation this year, but there has been very little reform on the other side. She said that a lot of the impetus behind the tort reform legislation has been to infuse predictability into the civil justice system, and the consumers should have some kind of predictability in the insurance rates, and this kind of method would provide that.

Carl Englund, representing the Montana Trial Lawyers Association. Mr. Englund stated there are two points that need to be made. He said the burden of regulating the insurance industry falls on the states, because the federal government does not regulate the insurance industry. He commented that unlike all other industries that are not regulated by the federal government, the insurance industries are exempt from anti-trust laws, so that the federal government has essentially removed itself completely from the insurance field, leaving this field entirely up to the states. The second point is that the wild fluctuations in the cost of liability insurance are the major cause of the so called-liability crises. He added in 1977 and 1984 when interest rates were high and investment income was high, the insurance industry was looking for every premium dollar so that it could invest that money and get those high rates of returns. He said a business that has to have liability insurance has difficulties in paying the high premium rates, and this is a good solution, by giving the Commissioner of Insurance the right to look at the markets and to set the zone of reasonableness.

Tanya Ask, Insurance Commissioner's Office, State Auditor's Office. Ms. Ask stated that more adequate rate regulation in Montana is necessary, whether through this bill or adequate funding of the current law that is in place. She said in order for this bill to do consumers any good, it would have to be adequately funded.

OPPONENTS

Randy Gray, representing the State Farm Insurance Companies, and National Association of Independent Insurers. Mr. Gray stated this concept sounds good in theory, but in practice the bill is overly broad, it won't work, is not needed, and

will be expensive. He said Montana at present is a file and use state, meaning the insurance companies file their proposed rates with the Commissioner, and the Commissioner has the power to review those rates to make sure the rates are fair; but the laws are designed to encourage as much competition in the insurance industry as possible. He commented the law works well, and the insurance industry is highly competitive in the state. He stated the bill provides that the companies cannot raise or lower the rates beyond a certain band that is established by the Insurance Commissioner without her consent. He said what the bill attempts to do is to control insurance pricing in a vacuum, but insurance rates are set in response to many factors in the national and international arenas, and this is attempting to control all those national and international factors, which cannot be done. He submitted a copy of a study from Wisconsin Commissioner of Insurance Office. Exhibit No. 2.

Dee Ann Bernhart, Regional Manager, Alliance of American Insurers, submitted written testimony. Exhibit No. 3.

Jacqueline Terrell, American Insurance Association. Ms. Terrell stated they oppose the bill for the same reasons that the previous opponents listed. She emphasized that the burdensome and complicated administrative procedure that is attached to this bill would be a costly experiment for the state. She said flex rating has not been adopted widespread over the United States, and this is an experiment that Montana cannot afford now.

Carl Swanson, Branch Manager, USF & G Company, Helena. Mr. Swanson stated that as far as their experiences in paid losses for getting reserves, since 1980 they have paid a 582 percent increase. He said it is not the insurance cycle which has impacted this, it is the expanding tort liability situation.

Roger McGlenn, Executive Director, Independent Insurers Agents Association of Montana. Mr. McGlenn stated that every study they have read has pointed to the fact that this simply would not work. He said to control the cycles government would also have to control factors like recession, interest rates, value of the dollar, and inflation, etc., and insurance companies only have control of price and availability. They are also concerned about the availability of insurance products in Montana because of the limited market area, but if a new product was developed for a specific class, and did not have actuarial data developed to substantiate it, the Insurance Commissioner, under the bill, may have to reject that coverage because there is no actuarial data to substantiate it because it is a new product and concept. He said they feel this expensive

experiment, that is not working in the states that have implemented it, is not in the best interests of the state.

QUESTIONS

Rep. Swysgood asked that in the event the Commissioner establishes the rates that would not be conducive to exposure, is there anything that requires an insurance company to continue to write insurance if they do not desire to do so. Senator Brown responded that the Insurance Commissioner establishes a belt of rates which is done by different methods, and if they get out of the belt, either up or down, that could trigger a public hearing and if there is proper justification given, then they can go beyond the belt.

Rep. Swysgood asked Ms. Ask in referring to the fiscal note that is asking $273,000 more per year, if that was coming out of the $500,000 that is now going into the general fund. Ms. Ask responded that they are now being funded from the regulatory account which has the $1.2 million, so it is anticipated that this will be coming out of the regulatory account first, before they go to the general fund.

Rep. Simon asked Ms. Ask what would the Commissioner's Office do if suddenly the insurance rates exploded beyond the established bands, and how would they handle public hearings for every rate on every liability insurance policy in the state. Ms. Ask responded that it was conceivable that they would have a huge influx of rate increases outside the band and would be required to hold hearings on all of them.

Rep. Simon asked Ms. Ask if there were provisions in the bill to allow for coverage to be provided in case the Commissioner's Office couldn't hold all the hearings within a reasonable period of time, because of the volume they might receive. He said they would be cutting off the availability of products because they can't sell outside those bounds, and if the Commissioner's Office can't hold the hearings in time, they are not going to be able to sell those product lines until they have a hearing. Ms. Ask responded there were no provisions.

Rep. Simon asked if the consumer, that needs that product and the hearing can't be held in time, would not be able to get the coverage during that time. Ms. Ask responded that has happened in the last two years already.

Rep. Cohen asked Ms. Ask how do they intend to handle the increased work load of trying to regulate all these insurance companies, when they are already short on staff. Ms.

Ask responded that the fiscal note is their best guess of how many more people they would need.

Rep. Thomas asked what area of the market, commercial liability or commercial lines, was the goal of this bill to regulate. Senator Brown responded both.

CLOSING

Senator Brown stated this bill is the only bill that addresses insurance regulation. The problem in the law is that it says in order for the Insurance Commissioner to turn down a rate, the rate has to be excessive, inadequate and unfairly discriminatory, and those terms are not defined in the law. He said there is competition allowed within the band of rates; it is just when you go out of the band that the competition is not allowed.

HOUSE BILL No. 832 and HOUSE BILL No. 863 were heard simultaneously.

HOUSE BILL NO. 832 - Rep. Budd Gould, House District No. 61, Missoula, sponsored the bill. Rep. Gould stated this bill provides for revising video draw poker machine control law by reducing state and local license fees. He said the reason he feels there should be a percentage, is that in many areas in the state with a small percentage, they cannot afford a $1500 license fee above the cost of $4,000 for a machine.

HOUSE BILL NO. 863 - Rep. Norm Wallin, House District No. 78, Bozeman, sponsored the bill. Rep. Wallin submitted his written presentation and also amendments he was proposing. Exhibit Nos. 4 and 5.

PROPONENTS

John Poston, representing Montana Coin Machine Operators Association. Mr. Poston stated that House Bill No. 832 was introduced originally as an effort to eliminate machine gambling in the state. He said it is a gross proceeds tax but it does not in any way reflect the way the industry works.

Mr. Poston stated that House Bill No. 863, with the gross proceeds tax and without any consideration for the cost of doing business takes the net proceeds and apply the percentage to that. If House Bill No. 832 was passed, they would see more revenue from the poker machines because there would be more machines, as they would not have to pay the $1500 up front and could pay it on a quarterly basis.

Larry Lippen, DNR Music, Bozeman. Mr. Lippen stated that the numbers that are used across the state have been generated by the Department of Revenue and their accurate figures are that each machine net on the average $16,000 a year. He said this is a deceptive number, because in reality that is a gross net figure. He gave a scenario of a typical machine that would be taking the Department of Revenue's figure of $16,000 annually and Rep. Wallin's figures and license fees and breaking them down in sums of money for poker and for keno.

Donald W. Larson, representing Montana Tavern Association, stated he supported House Bill No. 832 as it was introduced. Mr. Larson submitted written testimony. Exhibit No. 6.

Lynn Seelye, Sailboat Lounge, Great Falls, stated he was a proponent for HB 832 and an opponent for HB 863. He submitted written testimony. Exhibit No. 7.

OPPONENTS

Alec Hansen, Montana League of Cities and Towns, stated they were opposed to both of these bills. He said that under HB 863, there would be a loss of $130 per machine to the cities, and they would have to consider the market consequences of the combination of taxes and license fees, and what effect they would have on the distribution of poker machines. He said with House Bill No. 832 the cities would lose about $3.8 million of potential tax revenue, and they can't stand to lose that amount.

Robert A. Ellerd stated he was supporting House Bill No. 863 and opposing House Bill No. 832.

Chairman Kitselman stated he is referring both bills to a subcommittee composed of Reps. Brandewie, Swysgood, and Pavlovich, with Rep. Brandewie as chairman.

QUESTIONS

Rep. Driscoll asked Rep. Wallin to explain the figures of $84 million net from video poker, and $39 million for last year that were listed in his presentation. Rep. Wallin responded that was for the two years.

Rep. Cohen asked Tod Hudek to give his statement.

Tod Hudek, representing the Associated Students of Montana State University, and the Associated Students of the University of Montana. Mr. Hudek stated they support HB 863 which is a bright spot for the University System, and urges the

Committee to keep this option open for revenue raising for the University System.

CLOSING (HOUSE BILL NO. 863)

Rep. Wallin stated there are two basic objections brought up for his bill, one was that the money was going to the University System. He said he didn't feel that was so unusual. He commented that the other main objection was the percentage, the 25% of the 75%. He said it was only right that the state and local governments receive 25% of that revenue, leaving 75% for the taverns.

HOUSE BILL NO. 861 - Rep. Dennis Nathe, House District No. 19, Redstone. Rep. Nathe reviewed the proposed amendments for the bill. He said the bill provides for disclosure of certain types of information on a private contract between a buyer and a seller, and in the instance of the proposed sale from Laurel through Missoula to Sandpoint, Idaho, about 966 track miles, and the magnitude of the sale is such that it is to the state's best interest to know the terms. He commented that the Railroad has no competition, and the state has to see that there is some competition left. He said any of the service provisions, providing service to the individual shippers on that section and on the branch lines, and car supply, needs to be protected. He added the state needs the information of that contract between buyer and the seller.

PROPONENTS

James T. Mular, representing the Brotherhood of Railway and Airline Clerks. Mr. Mular submitted written testimony. Exhibit No. 8.

Charles Collins, attorney, Gardiner. Mr. Collins stated right now the national transportation policy is in a complete state of flux. He said the challenge for the states is to keep a steady course and avoid a lot of harm while these experiments are going on, and at the same time, deal with the new federalism. He said the federal government is getting out of railroad regulation, and going from large interstate carriers to a number of small intrastate carriers. He commented that the second part of the bill addresses the transition period, keeping contracts in effect when you change from the old to the new. He said these changes cannot be stopped, but the state can ease the harm and prevent 750 Montanans from losing their jobs overnight and with this bill, customers and the people working on the lines can be protected at least for a while. He added the railroads that are making it are the ones that are organized,

keep the experienced people to run them, and continue to service their customers.

John Post, representing the Citizens Alliance to Save the South Line, Livingston. Mr. Post submitted written testimony. Exhibit No. 9.

Anna Belle Floy, representing WIFE, stated she supports the bill.

Wayne Budt, Transportation Division, Public Service Commission, stated the Commission supports this legislation.

Robert VanDerVere stated he supports the bill.

Gary Blakely, representing the United Transportation Union, Livingston, submitted written testimony. Exhibit No. 10.

Joe Brand, representing the United Transportation Union, Brotherhood of Maintenance, and Brotherhood of Locomotives Engineers, stated they support this legislation.

James Paine, Montana Consumer Counsel, submitted written testimony. Exhibit No. 11.

OPPONENTS

W. W. Francis, Regional Vice President, Burlington Northern Railroad, headquartered in Seattle. Mr. Francis stated that Section 4 of the bill would require that the new railroad operator take on the labor contracts of the previous owner. He said this bill if passed would have the effect of insuring that numerous railroad lines in the state will be abandoned at an accelerated rate. He commented that this bill would return them to a program of having no alternative but abandonment. He submitted his written testimony. Exhibit No. 12.

Mike Strawbridge, Vice President and General Manager, Ideal Basic Industries, Trident. Mr. Strawbridge submitted written testimony. Exhibit No. 13.

Stewart Doggett, representing Montana Chamber of Commerce. Mr. Doggett stated that this legislation would allow undue intrusion of the state into the private sector of the function of the free enterprise system. He said this bill would undo much of the progress that has been made at this legislative session to try to improve the business climate in Montana, it would set a bad precedent, unduly restrict the flow of commerce and tells corporations to stay out of Montana.

Steven Brown, attorney, representing the Montana Chamber of Commerce. Mr. Brown analyzed the bill from a Montana perspective both in terms of possible legal problems and public policy concerns. He submitted written testimony. Exhibit No. 14.

John Greene, President of Montana Western Railway and Director of the American Short Line Association. Mr. Greene stated this bill raises serious constitutional questions as to its legality. He commented that having been with the Association for 15 years now there is no short line railroad that has turned down an existing transportation contract. He said in the case of Montana Western, when they took over their operation, they took over all of the numerous contracts for transportation. He said this legislation would eliminate any new short lines in the state of Montana, leaving just one option, that Burlington Northern is going to abandon railways, and their belief is that abandonment is not as good as a short line. Mr. Greene submitted additional testimony. Exhibit No. 15.

Don Englund, Chairman of the Board of the Montana Central Railway. Mr. Englund stated that if this bill passes as is, it would be hard on Central Montana Rail to operate under the labor constraints of this bill. He said that right now they have an efficient operation, but with this bill it would hurt it.

QUESTIONS

Chairman Kitselman stated he is referring House Bill No. 861 to a subcommittee composed of Reps. Simon, Bachini, and Grinde, with Rep. Simon as chairman.

Rep. Cohen asked Mr. Francis if Burlington Northern tries to work with the employees in consideration of forming an employees stock ownership plan, where the employees could take over the ownership of these short lines and operate them. Mr. Francis responded that there have been some inquiries about doing that, and they have no policy that would forestall them.

Rep. Cohen asked what the Public Service Commission's policy regarding the railroads is. Mr. Budt responded that the Commission's concern is with service and safety as it affects Montana shippers and citizens on intrastate shipments.

Rep. Cohen asked if the PSC would be compelled to enforce employee wage protection pursuant to section 69-14-1001 if

this bill passed. Mr. Budt responded that he did not think so.

Rep. Driscoll stated there seems to be a lot of concerns of the short lines being able to operate with the labor contracts, and there are other short lines in the country working with labor contracts. He asked Mr. Collins if he would explain how that worked. Mr. Collins responded that the most successful short lines keep the organizations and keep the experienced people, but they renegotiate the contract. He said the short line contracts that they end up with are substantially more simple and less generous than the national contracts, but they are considerably more help to people than if they were employees at large. He added it was not a choice between abolishing unions or abandoning the track, there are many good compromises that are working, and this bill is intended to work toward the compromises.

Rep. Bachini stated that they have heard from the opponents that this is a measure to stop the sale of the line, and he believes it is not that, and asked Rep. Nathe comment on that. Rep. Nathe responded that it was not to stop the sale, but to provide the state with information regarding the terms of the sale, so that if there are any problems, the state has a method of getting involved.

Rep. Pavlovich asked Mr. Paine to comment on the severability amendment proposed by Rep. Nathe. Mr. Paine responded that the severability is very important to the bill, because there is a question regarding federal preemption with regard to assumption of the existing contracts, and the disclosure aspect is important.

CLOSING

Rep. Nathe stated that the issue of the sale of the line is before the Committee, and it is not that they are trying to impede the sale. He said the basic issues are if it is a subtle way to abandon lines, or is it a way to keep railway lines open, and the issue becomes if the state has the right to know certain information concerning contracts between the seller and the buyer.

ADJOURNMENT

The meeting adjourned at 12:15 p.m.

REP. LES KITSELMAN, Chairman

DAILY ROLL CALL

BUSINESS & LABOR COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date MARCH 16, 1987

NAME	PRESENT	ABSENT	EXCUSED
REP. LES KITSELMAN, CHAIRMAN	✓		
REP. FRED THOMAS, VICE-CHAIRMAN	✓		
REP. BOB BACHINI	✓		
REP. RAY BRANDEWIE	✓		
REP. JAN BROWN			✓
REP. BEN COHEN	✓		
REP. JERRY DRISCOLL	✓		
REP. WILLIAM GLASER	✓		
REP. LARRY GRINDE	✓		
REP. STELLA JEAN HANSEN	✓		
REP. TOM JONES	✓		
REP. LLOYD MCCORMICK	✓		
REP. GERALD NISBET	✓		
REP. BOB PAVLOVICH	✓		
REP. BRUCE SIMON	✓		
REP. CLYDE SMITH	✓		
REP. CHARLES SWYSGOOD	✓		
REP. NORM WALLIN	✓		

CS-30

Montana College Coalition

EXHIBIT 1
DATE 3/16/87
HB 862

Kelly D. Holmes

Northern Montana College | *Eastern Montana College* | *Montana Tech* | *Western Montana College*

March 16, 1987

Re: House Bill 862

Mr. Chairman and Members of the Committee:

When any part of Montana's primary economic base --business, labor, education --is not healthy, Montana is not healthy. In many ways, how we view our situation will determine the outcome.

Clearly, the creation of new opportunities require a new and continuing commitment to education. We are not going to create a new generation of well trained citizens able to compete in this new economy by reducing our funding for education and training.

Make no mistake about it -- what is happening to the U.S. economy is mirrored in Montana --we are moving from one kind of economy to another. Business and education must develop a strategy to provide economic health in a changing world economy.

Montanana have successfully made the transition between differing economies in the past. Reality dictates that we continue to do so --if we desire to have any measure of future success.

The University System of the State of Montana is involved in business and economic activities within the State on a daily basis. These efforts range from the high tech efforts of Montana State University symbolized by its new Advanced Technology Center to the Middle Technology Center at Northern Montana College to the extensive Small Business Institutes activities at the School of Business both at Eastern Montana College and the University of Montana.

The University System is committed to using its resources to spur economic activity and business development. Each of the six institutions currently offers degrees at the undergraduate level in business and two (MSU and UM) offer nationally accredited MBA degrees.

Montana State University offers a wide variety of business assistance services in engineering, agriculture, the sciences, and technology areas. Several technology-based firms have sprung up in and around Bozeman as a direct consequence of MSU's presence. The opening of the University's Advanced Technology Center will spur this development and will provide prospective entrepreneurs with a location that will give them direct access to a superb science and engineering faculty.

Northern Montana College has traditionally maintained considerable strength in vocational-technical education and in recent years has become a premier institution in the Rocky Mountain area for mid-technology. Northern faculty and personnel are capable of dealing with concrete production and distribution problems and are especially skilled at demonstrating how newly available technologies can be molded and adjusted for use in the Montana workplace.

Another very capable academic participant in the state's economic development is Montana Tech. Montana Tech historically has offered mining and engineering programs of considerable strength. The State of Montana maintains a mining research unit at Montana Tech that is designed to produce research and experimentation upon practical mining problems that confront Montana mining business.

The University System supports the concept of public-private partnerships. The combination of public resources from the University system and state government plus the private resources and entrepreneurship of Montana firms can produce a synergy in business development that has an impact that is greater

the sum of its parts because of the complementary nature of the efforts involved. The University System is committed to working with, and through, the State Department of Commerce and the Alliance for Science and Technology.

The business and economic development efforts of the State of Montana must depend very substantially upon the University System. The record in other states, for example, Massachusetts, Texas, and California, is clear. The business and economic development activities of universities make a critical difference in the progress of a state and constitute the springboard for its economic development. Thus, the paybacks to the State of Montana from its investments in its University System are large and immediate.

If we choose instead to eliminate these services, then we must live with the cost of lost opportunity, because our economy will not grow without these long-term investments. It is hypocritical in the extreme to advocate an inproved business climate, while failing to create the conditions that would ensure success.

Not only are we capable of change, we must change, as Montanans have adapted to change in the past. We are all in this together, not just for now, but in the long-term. Our childern will either reap the benefits or sustain the costs of our actions.

I urge you to assume the task of defining priorities. Support House Bill 862. Thank you.

EXHIBIT 2
DATE 3/16/87
SB SB 52

OCI
OFFICE OF THE COMMISSIONER OF INSURANCE

P. O. Box 7873
Madison, WI 53707
(608) 266-3585

DATE: January 20, 1987
CONTACT: Danford Bubolz
(608) 267--5029

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MADISON -- Insurance Commissioner Thomas P. Fox announced today the findings of a study conducted by his office which examined the issue of the regulation of commercial liability insurance rates. This study was in response to a recommendation contained within the final report of the Special Task Force on Property and Casualty Insurance. Commissioner Fox appointed the 25 member Special Task Force on Property and Casualty Insurance in November 1985 to study the problems associated with the availability and affordability of certain lines of commercial liability insurance.

The rate regulation study examined the history of Wisconsin insurance rate regulation and evaluated the approaches being taken in five other states. The five states analyzed were New York, California, Minnesota, New Jersey and Oregon. Their approaches ranged from increasing rate and supporting documentation filing requirements to advocating a return to a form of prior approval. Probably the most widely discussed approach is New York's recently enacted flexible-band rating law. This system requires all companies requesting rate changes in excess of an established flex-band limit to submit the rate change to the insurance department for its review and approval.

The study concluded that establishing a flex-rating system, or returning to a prior approval rate filing system is not an appropriate solution to the problem of regulating commercial liability insurance rates.

It noted that the philosophy of a prior approval process is contrary to Wisconsin philosophy of a competitive rating system and that prior approval regulation which existed in some states during the most recent commercial liability insurance crisis were no more effective in controlling rate fluctuations than were competitive rating laws. In addition, prior approval regulations are very expensive to administer, the cost of which will ultimately be passed on to the insurance consumer in the form of increased premium, and cannot guarantee that rates will not increase since rate increases that can be justified will still be permitted. The Office of the Commissioner of Insurance recently hired a property and casualty actuary who has been reviewing any rate increase greater than 10 percent and all rate decreases since March 1, 1986. During this period, no rate requests have been denied although the actuary has found it necessary to request additional supporting data from many companies to justify proposed rate changes.

The study also notes that the inherent delays in implementing rate changes which are characteristic of a prior approval process may actually result in a reduction in the types of insurance products available in the Wisconsin insurance marketplace.

The study does recommend that Chapter 625 of the Wisconsin Statutes be clarified to grant the commissioner the authority to promulgate a rule to require insurers to submit supporting data to document the need for a rate change without the commissioner first having to make a finding that competition is not an effective regulator or that a substantial number of companies are competing irresponsibly through the rates being charged. The reporting requirements for the filing of additional supporting data is similar to legislation being enacted in Minnesota.

# # # # #

Report to the Commissioner of Insurance

State of Wisconsin

Regulation of Commercial Liability Insurance Rates

December, 1986

Prepared by staff of the Office
of the Commissioner of Insurance:
Marvin Van Cleave, Assistant
Deputy Commissioner
Rae M. Taylor, Actuary
Danford C. Bubolz, Planning Analyst

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01/13/87

Introduction

The recent availability and affordability problems in certain lines of commercial liability insurance have generated considerable debate concerning the regulation of insurance rates. Although the liability insurance crisis is occurring in almost every state, regardless of the type of rate regulation, concern has been expressed over whether the current insurance rate regulation system in Wisconsin could be modified to prevent the volatile fluctuations in liability rates which have occurred in the past several years.

This report will examine the benefits and costs of alternative rate regulation mechanisms for commercial property and casualty lines as they relate to the consumer, the insurance industry, and the Office of the Commissioner of Insurance. Commercial property and casualty business (which includes liability insurance) was selected for study because of the concern over substantial rate increases in these lines. The report will briefly discuss various forms of rate regulation, outline major historical developments in rate regulation, describe Wisconsin's current rate regulatory authority and rate review activity, and analyze recent activity in other states concerning rate regulation. The report will conclude with comments and recommendations.

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I. Types of Rate Regulation

There are several ways in which states regulate insurance rates. Briefly, these are:

1. State-Made Rates. With state-made rates an insurance regulatory authority determines and promulgates the rates to which insurers must adhere. This system gives insurers the least flexibility in rate-making.

2. Mandatory Bureau Rate Systems. An insurer must be a member in a licensed rate service bureau before it can write a given line of insurance. Members of a rate service bureau may deviate from bureau rates with insurance department approval. The bureau must obtain prior approval before promulgating rates.

3. Prior Approval Laws. These laws are patterned after the All-Industry laws approved by the National Association of Insurance Commissioners (NAIC) in 1946. The principal features are as follows:
   A. Rates and supporting data must be filed with the state insurance commissioner.
   B. Rate filings do not become effective until either the rates are deemed approved after a certain period of time, or the commissioner affirmatively approves them.
   C. Rates may not be excessive, inadequate nor unfairly discriminatory.
   D. The commissioner may disapprove rates that do not meet these standards.
   E. Insurers may opt to cooperate in making rates with other insurers through bureau membership or subscribership, or they may file rates independently.

4. Modified Prior Approval Laws. This is a hybrid between the prior approval laws and the file and use laws, defined below. A rate revision based solely upon a change in the loss experience is effective immediately upon filing, subject to subsequent disapproval by the commissioner. A rate revision based upon a change in expense relationships or rate classifications is subject to prior approval.

5. File and Use - These are sometimes called "subsequent disapproval" laws. Rates become effective immediately upon filing with no affirmative action by the commissioner required. Adherence to a rate service organization's rates may or may not be required. Rates may be disapproved if they are found to be excessive, inadequate or unfairly discriminatory.

6. Use and File - This category differs from the category (5) in that the rates may become effective prior to the actual filing. The filing, however, must be made within a short period of time, usually 30 days from the date the company commenced using the rate. Rates are subject to disapproval by the commissioner if excessive, inadequate or unfairly discriminatory.

7. No File - Under this method there is no requirement that rates be filed or approved by the commissioner. Rates may be put into effect immediately. The standards for a valid rate are that the rate not be excessive, inadequate or unfairly discriminatory. Rating organizations and bureaus are advisory only. Both insurers and rating bureaus are required to maintain accurate information as to their rates and that information must be made available to the commissioner.

8. No File, No Rating Standards and No Rates in Concert. After the expiration of its "open competition" rating law in 1971, Illinois was left with no rating law. In 1972 the state enacted a law authorizing "advisory organizations" to compile insurance statistics, prepare insurance policy and underwriting rules, make surveys and inspections or carry out insurance research and to furnish that which it compiles to insurance companies. Such organizations must obtain a license and are subject to the jurisdiction of the insurance department. The statute prohibits insurers from agreeing with each other or with any advisory organization to adhere to the use of statistics or policy or underwriting rules. There are no filing requirements since there is no rating law.

II. History of Rate Regulation

Before the Southeastern Underwriters Decision

Early developments in systematic rate-making began in the field of fire insurance during the 19th century in the form of self-regulation. It began with local boards and in the late 1800s the National Board of Fire Underwriters was organized to establish and maintain uniform premium rates and to control agent's commissions, among other matters, through an association of insurance companies. During profitable periods in the fire insurance business, however, companies often violated their own membership agreements (or compacts) by cutting their rates.

In the late 19th and early 20th century, federal legislation was enacted outlawing combinations in restraint of trade and several states enacted anti-compact laws which prohibited private rate fixing combinations of insurance companies. Anti-compact laws were challenged and declared unconstitutional in some states, fell into disuse by nonenforcement in other states, and were generally ineffective in curtailing the growth and influence of private rate-making bureaus.

Early state laws concerned with rate-making were almost exclusively anti-discrimination laws. What was needed to meet the problem of pricing was actuarially sound criteria for the classification of exposures and the accumulation of credible experience for each class. To study this, New York appointed the Merritt Committee to investigate fire insurance rating procedures. This committee recognized that sound rates could not be developed from the experience of only one insurer and that it was a wasteful and expensive procedure for each insurer to devise its own rates. The committee recommended legislation to permit the making of rates in concert by private rate-making bureaus but under state supervision and regulation.

This anti-competitive insurance industry structure would have been a clear violation of the federal antitrust laws, except that in the case of Paul v. Virginia, 8 Wall 168 (1869), the U. S. Supreme Court upheld a state law subjecting a foreign insurance company and its local agents to licensing requirements. This case was generally interpreted as meaning that insurance was not interstate commerce and therefore not subject to federal antitrust jurisdiction.

While the Merritt Committee's primary concern focused on the adequacy of rates, a subsequent New York committee, the Lockwood Committee, focused its attention on excessive rates. The outcome of this committee's investigation was a change in the New York legislation which permitted an insurer to become a member of a rating bureau without the insurer being required to adhere to bureau-established rates. Members were permitted to deviate from bureau rates subject to departmental approval. Over time, other states adopted similar legislation.

After the Southeastern Underwriters Decision

On June 5, 1944, in United States v. South-Eastern Underwriters Association, et al., S.E.U.A., 322 U.S. 533 (1944), the Supreme Court ruled that a combination of insurance companies engaged in price-fixing activities was in violation of the Sherman Antitrust Act. Not only did this decision make the insurance industry subject to federal statutes based on the commerce clause of the United States Constitution, but the validity of state regulation was put in doubt because it might constitute a burden on interstate commerce. The entire legal basis for the immunity of combinations in rate-making was eliminated. Moreover, doubt was cast on the system of state regulation and taxation of the insurance business.

To clarify the situation, Senators McCarran and Ferguson introduced a proposal based on recommendations by the National Association of Insurance Commissioners which, after considerable debate and revision, was passed by Congress and signed by President Roosevelt on March 9, 1945. The McCarran-Ferguson Act confirmed the principle of state regulation of insurance and declared that the federal anti-trust laws apply to the insurance industry only to the extent insurance is not regulated by the states. The laws impact on property-liability insurance price-making was that the Sherman Act, which prohibits price-fixing, and hence rate-making agreements among insurance companies, does not apply to concerted rate-making practices by rating bureaus to the extent that such bureaus and practices were "regulated" by state law.

The legislative hearing history of the McCarran-Ferguson Act does not reveal a consistent intent of the Congress as to the form of rate regulation nor did the act itself indicate the specific pattern or patterns of state insurance regulation which are regarded as consistent with the purpose of the Act. The broad language of the Act has resulted in a wide variety of regulatory responses by the states.

Two model rate regulatory bills, one for fire insurance and one for casualty, were drafted by the National Association of Insurance Commissioners (NAIC) through an NAIC committee and an All-Industry Committee. These two model bills were approved by the NAIC in 1946 and were recommended to the states for passage by their respective state legislatures. These bills reflected the "prior approval" approach to regulation of insurance rates and restored the right of bureaus to make and administer insurance rates. Under these model regulations material data on rates are filed with the commissioner who can request additional information to determine compliance with the standards. An insurer can satisfy the obligation to file by becoming a member or subscriber of a rating bureau licensed to make such filings. A filing is deemed approved unless disapproved by the commissioner within 15 days (or 30 days if the commissioner needs additional time). The commissioner is required to hold a hearing if he or she finds, subsequent to the review period, that the filing fails to meet the requirements. Every member or subscriber to a rating organization is required to adhere to the filings made on its behalf except that insurers can file a deviation filing, a uniform percentage decrease or increase to the premium produced by the rating system.

Within a year after approval of these model bills by the NAIC, new rate regulatory laws were enacted or existing laws were amended in 37 jurisdictions. By 1951 every state had adopted some type of fire and casualty insurance rating law. While the preponderance of states patterned their rating laws on the prior approval approach in the commissioner's all-industry bill with some modifications, a few states departed radically from the model bills. A wide spectrum of regulatory methods emerged, ranging from government promulgation of rates in two states to a no filing approach with complete reliance on competition in California.

Subsequent to the approval by the NAIC of the all-industry prior approval rate regulatory bills, there were two major investigations conducted by the NAIC of rating organizations and rating laws. The first culminated in a report by the Rates and Rating Organizations Subcommittee of the Property, Casualty and Surety Insurance Committee of the NAIC. A conclusion of that study was that the All-Industry laws were devised for an insurance market that was basically noncompetitive and since the enactment of that legislation in the late 1940s, changes have occurred in the competitive nature of the fire and casualty business. The subcommittee recommended generally that where an increase in competition permits placing a greater reliance on competition in the regulation of rates, legislation should be enacted to authorize the commissioner to suspend the prior approval requirement in those instances where conditions warranted. The report of the subcommittee was approved by the committee and by the full NAIC in December 1968. The chair of the Rates and Rating Organizations Subcommittee was then Commissioner Robert D. Haase of Wisconsin.

In 1979 and 1980 the Competition Subcommittee of the Market Conduct, Examination and Reporting Committee of the NAIC worked through several task forces and an advisory committee, on various aspects of an open-competition rating law. A model bill was adopted by the Competition Subcommittee and subsequently by the NAIC in December 1980 with the title: "Property and Liability Model Alternative Competitive Pricing and Appropriate Support Systems Act." The rate standards included in most rate regulatory laws were continued in this model act -- i.e., rates shall not be excessive, inadequate or unfairly discriminatory. Those standards are generally determined on the basis of whether there is competition in the business. Filing of rates for personal lines risks in a competitive market are required but rates for commercial lines risks need not be filed. The commissioner is given the authority, after finding that a reasonable degree of competition does not exist in a market, to require that insurers in that market file supporting information in support of existing rates.

The role of rate regulation in the pricing of insurance was a major issue in the insurance crisis of the 1970s. At that time, it was claimed that the crisis was caused by the government interference in the market mechanism and that the problems could have been avoided if open competition had set the insurance rates. Thus, many states, including Wisconsin, moved from "prior approval" regulation to "open competition" regulation.

At that time, considerable academic research was done to determine the effects of various regulatory systems on prices and underwriting results. Underwriting results were defined as individual state loss ratios for direct business. Direct business, in property-liability insurance, is business which originates with the primary insurer and, as such, does not include the effects of reinsurance. Since expenses and investment income are not available for individual states, the loss ratio comparisons cannot provide unequivocal evidence of regulation on underwriting profitability or total profitability including investment income. The studies compared non-competitive states with competitive states. A non-competitive state had either state-made rates, mandatory bureau rates, or prior approval laws. A competitive state had either file and use, use and file or no file laws.

These studies made no distinction between the methods used by different states to implement the rating system. For example, two states may each be classified as "use and file." In one, the commissioner may not disapprove a rate change without a hearing. In the other state, the commissioner can disapprove a rate without a hearing and, in so doing, has essentially established a significant feature of a prior-approval system. Furthermore, these studies reviewed the effect of various regulatory systems, as previously defined, on private passenger automobile and homeowners coverages, as these lines were effected by the prior crisis. Because these studies were limited to personal lines, they may not be applicable to commercial lines.

Scott Harrington in the December, 1984 issue of The Journal of Risk and Insurance surveyed the literature on these studies through 1982. The basic result of these studies is that in the long-run there is no statistical difference in the loss ratios between competitive and non-competitive states. Over the short-run the loss ratios appear to be more variable in competitive states. This could be used as evidence of a quicker response to changing market conditions in the competitive states. It appeared that the loss ratios in the competitive states were higher during the peak periods of the insurance cycle and lower during the depressed periods of the cycle than in non-competitive states. However, the statistical evidence is not strong and the objections discussed above are applicable. The studies also indicated a greater dependence on bureau rates and state insurance plans in non-competitive states.

The United States General Accounting Office (GAO) report to Congress on the effect of the states' increased reliance on competitive market forces to regulate price and availability of automobile insurance was issued in August, 1986. The GAO developed two measures of automobile insurance costs; average inflation adjusted premiums and average premiums per dollar of losses, for the period 1975-1983. While the study found that the cost of automobile liability insurance coverage under either measure was generally higher in competitive states than in non-competitive states there was, however, no statistical difference between competitive and non-competitive states. There was a statistical difference in cost between states based on the level of urbanization and the existence of compulsory insurance laws. The study found that in competitive states insurance companies voluntarily insured relatively more drivers than in non-competitive states. The results of this study are subject to the same criticisms noted in the other studies in the classification of states and ignoring other factors of insurance company operations which effect premium. The GAO concluded with no recommendations to change the current system.

The Illinois Insurance Committee on Tort Reform commissioned a study by Kathleen Carlson, Ph.D., to determine if the forms of rate regulation are systematically related to outcomes for consumers and insurers. The study examined both pure loss ratios and standardized loss ratios which had been adjusted for yearly fluctuations due to external forces such as interest rates for the periods 1975-1984, 1980-1984, and 1982-1984. Four lines of commercial insurance were included in the study. They were fire, allied lines, commercial multiperil and other liability. This study concluded that there was no statistical evidence to suggest that prior-approval systems cause insurers to have higher pure loss ratios than competitive systems. However, there was an indication that the competitive states had somewhat higher loss ratios in the lines of commercial multiperil and other liability, possibly providing a greater value to the insureds. Some of the criticisms of the other studies are also applicable to this study.

III. Rate Regulation in Wisconsin

Long before the McCarran-Ferguson Act of 1945, Wisconsin had a history of legislation relating to the regulation of insurance rates. Wisconsin was one of the states that passed legislation to prohibit combinations to establish rates for fire insurance. A system of rate regulation applicable to fire insurance was developed in Wisconsin in the early 1900s. A form of prior approval of rates for fire insurance had been in effect in Wisconsin at least since 1933, and required that fire insurance rates be approved by the commissioner of insurance.

By 1945, Wisconsin Statutes required rates and underwriting rules for fire insurance to be reasonable and not unfair or discriminatory. Changes in basic rates and rules were subject to a public hearing before the commissioner of insurance. The commissioner was to approve or disapprove the rate changes within three days after the hearing or within ten days after the filing if no hearing was required. Insurers were required to follow the rates filed for them by rating bureaus, but there was provision for deviation from any bureau rates, generally on a percentage basis. Rates for liability insurance were treated separately in the Wisconsin statutes which generally prohibited unfair discrimination. The statutes required the filing of proper rates and classification with the commissioner. The commissioner could by order require that a schedule or system be modified if the rates were discriminatory or unreasonable.

In 1947, subsequent to the McCarran-Ferguson Act, Wisconsin enacted prior approval rate regulatory statutes patterned after the NAIC model laws.

The rate regulatory system for property and casualty insurance was changed in 1969 from a prior approval system to the current use and file system. This system applies to all property and casualty coverages with the exception of worker's compensation, ocean marine, and group and blanket accident and sickness insurance other than credit accident and sickness insurance. Under this system, rate changes with supporting documentation must be reported to the commissioner within 30 days of the effective date of the change. All rate filings and supporting information are available for public inspection, allowing all consumers and insurers free and immediate access to current and past rate information. The commissioner may deny a rate change only if it has been determined in a hearing that the filing violates Wisconsin statutes. The criteria for determining violation is whether the rates filed are inadequate, excessive or unfairly discriminatory. Furthermore, the burden of proof is on the commissioner to prove that a rate is inadequate, excessive or unfairly discriminatory.

Chapter 625, Insurance - Rate Regulation [Appendix 1] was developed by the Insurance Laws Revision Committee of the Legislative Council. The committee comment to the bill gives information about the reasons for the provisions in the statute. The initial conclusions were that:

1. The existing (prior approval) system of rate regulation has been rendered unnecessary through the development of a strikingly greater degree of meaningful price competition in many of the most important lines of insurance.

2. The rate-making process in insurance is so imprecise that the difficulty and cost of the regulatory effort are too great in relation to the beneficial results achieved by it.

3. Rate regulation in the traditional manner produces unfortunate side effects: it distracts attention from real problems in the marketplace to formalistic tests of imagined "reasonableness." It generates a feeling that the system is responsible for most problems that plague insurance today, ranging from constriction of the market and lack of profitability to the tendency to disinvest in insurance business.

4. Much discussion has been misdirected toward the question whether one or another (rating) system will produce lower rates. But no (rating) system should always seek lower rates. A rate regulatory system should prevent unconscionably high rates or dangerously low rates. It should not seek to determine the "proper" rate, for that is not possible.

The Insurance Laws Review Committee comments recommended a system of rate control which eliminated the requirement that rates be reviewed by the commissioner before use. However, rate regulation was not completely abandoned. Rates must be filed after they have begun to be used and the commissioner's power to intervene is preserved though the ability to disapprove a rate, after a hearing, if it is found to be excessive, inadequate or unfairly discriminatory.

The committee discussed many reasons why rate regulation should not be abandoned.

1. Although there was meaningful price competition at the time -- this was not always so and it may not always remain so.

2. Rate-making in concert is not the only danger to a healthy price competition. Insurers may voluntarily and individually conclude that it is more profitable for them to compete in other ways than by lowering premiums.

3. Insurance tends to be "sold" rather than "bought" and it is sold by agents who never have a full display of products available for easy comparison, and comparison of competing coverages is extremely difficult because of the abstract nature and legal complexity of an insurance policy.

4. Competition may become unreasonable or excessive. "Rate Wars" of the 19th century variety are not likely again but there is still a constant danger of excessive optimism. Still, it is not the purpose of Chapter 625 to guarantee the continued existence and success of every insurer now operating in Wisconsin. Competition, as a regulator, assumes rewards for efficiency and punishments for its absence.

Accordingly, Chapter 625 is to be liberally construed to:

a. Protect policyholders and the public against adverse effects of excessive, inadequate or unfairly discriminatory rates.

b. Encourage, as the most effective way to produce rates that conform to the standards of par. (a) independent action by and reasonable price competition among insurers;

c. Provide formal rate regulatory controls for use if independent action and price competition fails;

d. Authorize cooperative action among insurers in the rate-making process, and to regulate such cooperation in order to prevent practices that tend to bring about monopoly or to lessen or destroy competition;

e. Encourage the most efficient and economic marketing practices; and

f. Regulate the business of insurance in a manner that will preclude application of federal antitrust laws.

Chapter 625 contains the traditional rate standards, "not excessive," "not inadequate," and "not unfairly discriminatory," but deals with them in such a way as to leave no doubt that the regulator is to be concerned only with serious departures from a "reasonable" rate level. Another rate standard, "nor shall an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly," is also included. Excessiveness is defined in terms of a competitive market and long-run profitability. Inadequacy is defined in terms of rates being clearly insufficient, together with investment income, to sustain projected losses or expenses. Unfair discrimination is defined as rates which clearly fail to reflect equitably the differences in expected losses and expenses.

Other key provisions of Chapter 625 are:

1. It defines licensing requirements for rate service organizations and provides for delegation of rate-making and rate-filing obligations to rate service organizations for a particular kind or line of insurance.

2. If competition is not an effective regulator of the rates charged, or if companies are competing irresponsibly through the rates charged, the commissioner may promulgate a rule which requires filing rates 15 days prior to their effective date for that particular kind or line of business. This rule is subject to a one-year sunset provision. The commissioner may also promulgate a rule which requires the filing of supporting data which is deemed necessary for the proper functioning of the rate-monitoring and regulatory process.

3. It authorizes the commissioner to promulgate or approve reasonable rules for use by all insurers in the reporting of loss and expense experience in order that the experience may be made available to the commissioner for the rate review process.

Recently, to help review the adequacy of property and casualty rate filings, the Office of the Commissioner of Insurance hired a full-time property and casualty actuary on February 17, 1986, following an almost nine-month nationally advertised recruitment process. Previous attempts to recruit a property and casualty actuary in September 1979 failed to locate a qualified and interested candidate. This apparently is due to the state's salary structure for actuarial positions and a very limited number of qualified candidates.

Prior to March 1, 1986, rate filings in Wisconsin were not reviewed on any regular basis. It was assumed that market competition was providing compliance with Chapter 625. Since March 1 any rate increases greater than ten percent and all rate decreases have been reviewed by the actuary to determine if the rates comply with the statute. Through November, 1986, 231 such rate filings, or approximately eight percent of the more than 2,800 total rate filings filed since March 1 have been reviewed. Of the 231 rate filings reviewed, 114 were personal lines and 117 were commercial lines. The commercial lines filings included surety, mortgage guarantee, and umbrella coverages along with SMP and professional liability. Individual rate filings for title insurance were not reviewed or counted.

The statute establishes the basic factors which can be considered in a rate filing. Included are experience and trends within and outside the state, and judgment of technical personnel. Documentation supplied with the filings varied from pure loss ratios with no support, to rate studies involving advanced actuarial procedures, to comparisons with other companies' rates. If there are any questions about the filing, the company is contacted for further clarification. Below is a table showing some of the data which were submitted as supporting documentation:

Documentation	Number of Companies
Comparative data	5
Wisconsin loss data	152
Countrywide loss data	123
Loss development studies	85
Credibility studies	65
Wisconsin expense data	60
Countrywide expense data	94

Of the 123 filings which used countrywide loss data, 74 also included Wisconsin data. The relationship between the countrywide and the Wisconsin information was provided in 65 of the reviewed filings. The time required for a review of an individual rate filing varied from minutes to hours depending on the supporting documentation supplied with each filing.

No rate filings have been disapproved since the review process began although rates have been reviewed, questioned, and additional supporting information has been requested. This is due primarily to the fact that the rate submissions appear to be justified.

Furthermore, the commissioner cannot disapprove a rate filing unless he or she finds, after a hearing, that the rate is either excessive, inadequate, or unfairly discriminatory. The criteria for proving excessiveness and inadequacy are difficult to prove in the short-term.

Excessiveness is defined in terms of the lack of a "reasonable degree of price competition for a particular class of business," and that this lack of competition results in an "unreasonable long-run profit in relation to the riskiness of the class of business." A "reasonable degree of price competition" has never been specifically defined. The commissioner is

instructed to consider, among other factors, the number of insurers actively engaged in the market and whether any rate differentials exist between those competitors. Arguably, competition could be found to exist in a market consisting of only two insurers each charging a different rate. Furthermore, the existence of a limited number of insurers each charging a very similar rate, is not, in itself, prima facie evidence that the rate is excessive. The commissioner is still required to prove that the rate will result in a long-run profit which is unreasonably high in relation to the riskiness of the business. Problems encountered will be in defining what long-run profit should include or exclude; underwriting profit, investment income either including or excluding unrealized capital gains or losses, and federal income taxes, to name just a few. The commissioner will also have to determine what constitutes an "acceptable" rate of return on investment for a particular class of "risky" business. Finally, the forecasting of long-run profit for a particular class of "risky" business is subject to much uncertainty. Changing societal attitudes, the civil justice system, and the proper estimation of ultimate losses are just a few of the unknowns.

Inadequate rates are those which, when combined with the investment income attributable to them, are insufficient to sustain projected losses and expenses in the class of business to which they apply. Only a serious disparity between the projected cost of the coverage and the anticipated premium which would threaten the solidity of the insurer would be a basis for disapproval of a rate on the grounds that it was inadequate. Therefore, unless an insurer is declared financial impaired, it is a basic assumption that the premium received, along with investment income, will be sufficient to pay all claims and expenses.

Unfairly discriminatory rates exist if a rate clearly fails to reflect equitably the differences between expected losses and expenses when compared to another rate in the same class. However, rates are not unfairly discriminatory if they result in different premiums for policyholders with like loss exposure but different expenses or like expenses and different loss exposure. Nor are they unfairly discriminatory if the rates are broadly averaged among persons insured under a group contract. It is possible that a rate could be unfairly discriminatory to Wisconsin policyholders as a whole, if a rate change is based on countrywide experience rather than Wisconsin experience. The possibility exists that the Wisconsin experience might be more or less favorable than the countrywide experience yet the rate change would be based on the countrywide experience. In these circumstances, a possible presumption of discrimination could be assumed unless additional information is provided with the filing. The additional information is usually in the form of a credibility adjustment to the Wisconsin information. This adjustment assumes that the volume of Wisconsin business is not sufficient to prevent large fluctuations in experience while the countrywide experience is adequate. This implies that the Wisconsin experience is only partially reliable. The difficulty with this type of justification is in determining whether an insurer's basis for the adjustment is reasonable.

There is a large volume of literature developing statistical theory on this subject with only partial agreement as to what determines full reliability or "credibility." The rate filings reviewed to date have generally provided an explanation of how the Wisconsin rate was determined or a statement as to the relationship between the Wisconsin experience and the countrywide experience.

IV. Recent Activity in Other States Concerning Rate Regulation

As a response to wide rate fluctuations in commercial liability insurance business, several states have revised their rate regulations. Probably, the most widely discussed approach is New York's flexible-band rating law. In addition, other states are proposing approaches ranging from increasing rate filing requirements and supporting documentation to advocating a return to a form of prior approval.

The approaches of New York, California, Minnesota, New Jersey, and Oregon are summarized below. Following each approach is a discussion of the potential advantages and disadvantages to Wisconsin if that approach were implemented in this state.

NEW YORK

New York has recently enacted a flexible band system for regulating commercial liability insurance rate changes. This system requires all companies requesting rate changes in excess of the established flex-band limits to submit to prior approval by the superintendent, the title of the insurance regulator comparable to the commissioner of insurance in most other states. The superintendent has the right to disapprove a rate filing without hearing. Prior to the implementation of this system, all rate changes were file and use except for private passenger auto, public livery, worker's compensation, title and mortgage guaranty, and medical malpractice which were prior approval. These lines remain prior approval but are exempt from the flex-band system.

Under the flex-band system, any commercial liability rate change which is less than the band limits may be implemented on a file and use basis. However, an insurer is allowed only three rate changes a year and the sum of the changes may not exceed the flex-band limits. The fourth change during any one-year period requires prior approval. Normally, an insurer will be allowed only one rate change per year which exceeds the flex-band limit. If the insurer determines that it can justify further rate changes, it may submit the request to the superintendent for prior approval. Rate changes in the opposite direction of the approved change are permitted on a file and use basis provided they are within the flex-band limits. In connection with commercial multiple peril rates, each component of coverage must be rated separately. If one component of the coverage exceeds the flex-band limit even though the overall rate change does not, the entire rate change is subject to prior approval. Also, if different flex-band limits apply to different components of the coverage, the entire filing will require prior approval if the narrowest limit is exceeded. In addition, if any individual policyholder rate is increased or decreased 20 percent beyond the overall rate change, the entire rate change is subject to prior approval regardless of whether the filing was within the flex-band limits. The flex-band limits also apply to all insurer rating plans which modify filed rates by experience, use of schedules, composite rating, and retrospective rating plans. Once these plans are filed, the use of the plan is mandatory and must be applied in a uniform nondiscriminatory manner for all eligible classes or risks.

The flex-bands will be periodically reviewed by the superintendent. Factors which could affect the band limits include investment and underwriting experience of the insurers, consumer complaints especially with regard to cancellations and nonrenewals, the extent of denials and restrictions of coverage, and changes in the social environment. The band limits were initially established using judgment and are specific to individual lines of commercial liability coverage. The band limits range from ±10 percent to ±30 percent depending on the line of business. Appendix 2 illustrates the band limits.

This system applies to all writers of liability insurance including town mutuals and rate service organizations filing rates for member insureds and subscribers. Rate filings by a rate service organization which receive prior approval may be adopted within 90 days by an insurer without requesting additional approval. If the filing is adopted by the insurer after 90 days, prior approval is required. Company deviations may need prior approval depending on whether the change would affect the company's rates by more than the percentage approved by the rate service organization rate revision.

The system does not apply to excess and surplus lines writers or companies which handle individual risks with very high premiums, such as jumbo risks with premium in excess of $500,000. Also, certain markets, mainly those dealing with high limits, individual special risk insurance, and nuclear and pollution liability, are exempt from the flex-band system.

The results of an insurer's rate change will be subject to retrospective audit of the insurer's actual experience by the department. Misrepresentation of the rate revision could subject the insurer to penalties.

There are both advantages and disadvantages to a flex-band system. The advantages of the New York system to Wisconsin are:

1. This system might have some effect on the wide pricing variability that has characterized the commercial liability market lately and should address policyholder concerns of affordability and predictability of insurance rates. This assumes that no rate increases above (or below) the flex-band limitation will be found to be justifiable and that companies will not change their underwriting or classification schedules.

2. The application of the flex-band system to rating plans may encourage better underwriting by preventing rate modifications through the use of excessive credits and debits. This may provide stabilization to individual rates.

3. The reporting system will allow the commissioner to evaluate the rating practices of all insurance companies and recognize trends in rating changes.

The potential disadvantage of the New York flex-band system are:

1. Flex-rating is expensive to administer. For example, the New York legislature provided its insurance department with $3,000,000 over the next two years and permission to hire a staff of 60 to implement and

maintain its flex-band system. The legislation has a two-year sunset provision. Implementing such a system in Wisconsin will require a significant increase in the Wisconsin Commissioner's 1985-86 budget of $3,788,325. Since the Office of the Commissioner of Insurance's budget is funded by fees and assessments levied against the insurance industry, any increase in the budget will ultimately be passed on to the consumer by the insurers in the form of increased premiums.

In addition, a mechanism would also have to be funded and established to track all commercial liability insurance rate changes for compliance with the flex-band system especially with regard to frequency and size limitations. The average magnitude of the rate changes of the different liability lines would also have to be monitored, as this is used in the determination of the next year's flex-band limits. New York already has a rate change tracking system. Therefore, the cost of this system is not included in the $3,000,000 flex-band funding.

2. Rates may still fluctuate. The policyholder cannot be sure that rate changes will be less than the limitations imposed by the flex-band since filings could be approved if the justification was adequate.

3. Delay in the implementation of rate changes may cause pricing problems and other market inefficiencies.

   - Currently, in Wisconsin an insurer can use a revised rate immediately and has 30 days to file such a rate with the commissioner. Instead of immediate use of a rate change, rate revisions could take as long as 75 days before the rate filing is complete and could be implemented. This is because any rate which is not exempt from flex-banding must be submitted 30 days prior to the effective date of the rate revision. The commissioner may extend the waiting period for an additional 45 more days. The rate revision will be deemed approved unless disapproved. Disapproval does not require a hearing by the commissioner.

4. Insurers may attempt to circumvent the prior approval requirements contained in this legislation by:

   - Using underwriting policies to achieve the same ends as rate changes. For example, the insurer might tighten its underwriting criteria to eliminate policyholders with high risk profiles. While this would allow the insurer to reduce its losses to meet the current premium levels, it may result in increased availability problems for some consumers, in addition to having the unintended effect of increasing the utilization of unregulated excess and surplus lines insurers.

   - Requesting a greater increase (or smaller decrease) than would otherwise be necessary simply to avoid having to repeat the prior approval process too often. This could lead to excessive rates and thereby excessive profits. In addition, an insurer may delay necessary rate changes in order to avoid the prior approval process which may result in inadequate rates and possible financial difficulties.

- Avoiding the prior approval process completely by strictly adhering to rate service organization's approved rates and classification schedules. This could impact significantly on the diversity and innovation in rates, classification schedules, and available coverage seen in Wisconsin.

5. The initial determination of the flex-band limits would have to be based on judgment, as Wisconsin does not have sufficient information to determine the limits using actuarial methods. If the limits are too wide, the flex-band system will be ineffective in controlling wide swings in rates. If the limits are too narrow, the companies will not be able to effectively respond to market forces and the result may be either excessive or inadequate rates.

CALIFORNIA

Prior to recent investigative hearings, rates were not filed with the commissioner. The commissioner instead had rating examinations in which the rate filings were reviewed at the company for compliance with the statutes. Subsequent to these hearings, the commissioner is requiring all commercial liability rate filings of 25 percent or more on an overall annual basis to be submitted with actuarial justification for review. The 25 percent applies to a credible class within the rate filing and not to the overall rate increase requested.

Under the new bulletin the companies will still be able to use rate changes prior to review. However, the rate change must be filed immediately upon use. The commissioner has 60 days to review the filing and has the authority to roll back any change if, in the commissioner's opinion, the rate change was not justified or excessive. An actuarial justification is required which should include state experience supplemented by countrywide experience when needed, credibility adjustment between the two, if necessary; trending and loss developments, and an explanation of techniques used including judgmental factors.

The commissioner will publish the names of companies found to be charging excessive rates. It is expected that current California department staff will be able to handle the filings by reallocation of field staff.

The main advantages of the California system are:

1. This system could be instituted with little increase in staff.

2. It maintains the current competitive rating environment which allows insurers to establish rates without government involvement. At the same time, the system allows the monitoring of rate increases which might be excessive.

3. The California system also allows the commissioner to roll-back rate increases without a hearing. Current statutes require the Wisconsin commissioner to hold a hearing if a rate change is disapproved and must issue an order if a rate is to be discontinued. This system will provide the commissioner with more freedom in regulating rates.

Disadvantages to Wisconsin are as follows:

1. It may add to insurance company expense. Many Wisconsin commercial liability insurance writers may be unable to comply with the requirements for the actuarial justification without hiring consultants or using bureau rate filings. The cost of the consultants will be passed onto the policyholders in the form of increased company expenses. The use of bureau filings will possibly reduce the diversity of rates and coverages found in Wisconsin.

2. If a rate was considered excessive, the company would be required to roll-back the rate increase. Since the companies and the consumers do not know whether a rate increase will be rolled back, this could lead to instability in the insurance pricing mechanism.

3. A mechanism would have to be funded and established to track rate increases since an insurer could take many small increases which individually do not exceed 25 percent but on aggregate do exceed this limit. Since rate changes of less than 25 percent do not have to be filed the creation of a tracking system to monitor such activity appears impossible.

4. The California policy regulates large rate increases, but does not deal with the issue of large rate decreases.

5. The publication of a list of commercial liability insurance companies with excessive rates may have an unintended effect on other commercial property or personal lines business written by the company.

MINNESOTA

Minnesota is a file and use state, where the commissioner can only disapprove a rate change with a hearing. As a response to the current market, the commissioner is reviewing all rate increases of more than 25 percent. The commissioner may require additional data if it is determined that the filing inadequately supports or explains the proposed rate change. If this data is not received within 30 days, the rate is presumed to be excessive and should no longer be used. The commissioner has also called for meetings with individual companies on any rate change that has appeared too excessive even though adequately supported. A bulletin has been issued which provides guidelines for the support needed to justify a rate change pursuant to changes in Minnesota law. The law affects all licensed property and casualty companies and all licensed rate service organizations and applies to all lines of liability and property coverage not just commercial liability lines. The law specifies that all rate filings must include the following:

1. Five years' experience including either collected premiums or premiums at the rate level in effect when policy premiums were earned, paid and unpaid losses, the number of claims for reported losses, and incurred but not reported claim reserves.

2. Premium and loss adjustment factors by year, such as current rate level factors, loss development factors, loss adjustment expense factors, and severity and frequency trend factors. An explanation of the method and judgment underlying these factors must be included.

3. Documentation of the permissible or expected loss ratio including, where appropriate, an adjustment for investment income.

Insurers' rates which deviate from those filed by a rate service organization must explain and support the deviation with the same documentation as required above.

The advantages of the Minnesota system to Wisconsin are:

1. Minimal increase in staff is expected. The Minnesota department uses an actuary and a technical support person to administer this system.

2. This system maintains the advantages of a competitive system and will provide the commissioner with some degree of oversight over the pricing mechanism with respect to large rate increases.

3. The rate filing requirements should result in uniformity of rate filings which should facilitate the review process.

The disadvantage of the Minnesota system is that there does not appear to be any mechanism for tracking trends.

NEW JERSEY

Prior to the Commercial Insurance Deregulation Act of 1982 (hereafter CIDA), New Jersey required prior approval of all commercial property and casualty rate changes except for ocean marine and certain classes of inland marine business. The review and determination process of the rate filings required annually more than 15,000 hours of professional actuarial and rate analyst effort. It frequently took at least six months for final approval or disapproval of a single rate change.

Under CIDA, filings are not required for commercial risks producing minimum annual premiums in excess of $10,000, exotic risks, risks on the commissioner's exportable list, commercial inland marine risks, and fidelity, surety, and forgery bonds. However, insurers are required to maintain records of these risks which include loss and expense statistics, financial data, and other underwriting information. All other commercial rate filings must be filed with the commissioner within 30 days after the rate change becomes effective and are deemed to be approved within 30 days of the filing date unless disapproved. The commissioner has the right to disapprove a rate change following a hearing.

Rules were adopted to implement the provisions of the CIDA. These rules were essentially the same as those under the prior approval system, even though the system was now use and file. The rules provided, among other requirements, that rate filings must be supported by statistics and provide the information which the insurer relied on in making the filing.

Even though CIDA changed New Jersey into a use and file state, the law still required the commissioner to act as if the prior approval system still existed. The only difference was that the rates for certain risks did not have to be filed and the commissioner had only 30 days to disapprove a

filing. The insurers under this less restrictive system increased the number of independent filings for both rates and rating plans. This resulted in greater variability in policyholder rates. The insurers also used the law to introduce new types of insurance products. There was much less dependency on bureau rates and rating plans. While the combination of insurance department and industry behavior resulted in no savings in department costs, the consumer benefited in the increased diversity in rating plans and products.

As a response to the commercial liability crisis and the department requirements for statutory rate reviews, the New Jersey department has recommended that rate changes be filed 30 days prior to use. If the filing is found to be acceptable, the rate change can be implemented. If not, the filing must be amended and refiled before the rate change can be used. If within the 30 days the department finds that the required rate change is not supported or is inconsistent with statutory standards, the department may extend the review for 60 additional days in order to determine approval or disapproval of the rate change. The New Jersey Insurance Department is also considering a return to the prior approval system. However, this proposed system would include a 60-day deemer provision.

The advantage of the New Jersey review process is that:

1. It allows monitoring of the insurance rating system for identifiable trends in rate changes. This system also requires standardized rate filings which allow more efficient review by the commissioner. Since commercial risks with premiums of less than $10,000 annually require the commissioner's approval of the rating plan, small consumers are provided with rate control which can prevent wide swings in rate changes.

The primary disadvantages of this system to Wisconsin would be:

1. The cost to the department of professionals to review rates.

2. The delay in time the companies would experience in obtaining necessary rate approval for those risks which are subject to prior approval.

3. The lack of diversity in rates and insurance products available to the small consumer due to the prior approval process.

4. Other disadvantages already discussed elsewhere in this report deal with rating bureau dependency, changes in underwriting procedures, and decreased market efficiencies.

New Jersey is also considering adopting a simplified version of its private passenger automobile excess profit law for commercial liability. The current law is based on Florida's excess profit law which is applied to each private passenger automobile insurer. Simply stated, an insurer is considered to have earned excess profits if during the past three-calendar years the average underwriting gain as a percent of premiums earned exceeds the profit loading in the rate by more than 5 percentage points. In determining underwriting gain, premium and expenses are on a calendar-year basis and losses are on an accident-year basis. Investment income is not specifically included in underwriting gain but the department is required to consider investment income in its evaluation. As a result, investment income must be reflected in the profit allowance of private passenger automobile rate filings.

The advantage of an excess profit statute is that the market can control the price structure but the commissioner can monitor and, to some extent, control any excess profits resulting from short-run market inefficiencies. This is a retrospective method of rate control which adjusts for rates which appeared adequate but were, after the fact, excessive.

There are disadvantages with an excess profit law in that it is bound to be unfair either to the insurers or to the consumers because the rates which are not excessive to the consumer may be inadequate to the insurer and rates which are excessive to the consumer need not be adjusted for three years. Also, there is no easy definition of the rate of return for the insurance industry. There is only one standard for long-run profitability in the law. It does not distinguish between large and small companies nor does it distinguish between substandard and preferred writers which may have different long-term rates of return. The return of short-run profits by using an excess profit law may reduce the long-run rate of return since the insurers will not be allowed to recoup deficiencies from the policyholders when the short-run rate of return is less than the excess law standard. This could change the nature of the insurance industry. The use of a three-year average assumes an underwriting cycle that is much shorter than is being experienced now. This implies that insurers could be required to return excess profits at times when they were losing surplus. There is also the possibility that some insurers will not implement new ideas in products or efficiencies in service in order to delay increases in profits which could effect the availability of necessary insurance products to the consumers. Finally, depending on the definition of the excess profit law, rates may no longer be competitively set by the market.

OREGON

Prior to April 21, 1986, Oregon was a file and use state. At that time, the commissioner asked for and received the authority to require prior approval for all commercial liability insurance premium rate increases or decreases that exceed 25 percent for any policyholder covered by the rate change. Prior approval applies to all base rates, rating bases, rating plans, manual rules, territorial definitions, or any combination of rating system components for which a rate change exceeding 25 percent is requested. The 25 percent does not apply to the overall rate change, but to the change to an individual rating classification within the rate filing. If a commercial liability insurance rate filing is less than 25 percent change, the file and use system is still in effect. However, the rate filing must contain an actuarial certification by a member of the American Academy of Actuaries stating that the filing is not subject to the rule. The company and the actuary are liable to disciplinary action, if the filing is later found to have been subject to the rule. The filing must be received 30 days prior to the effective date of the rate change, if the rate changes for any individual by 25 percent. If the filing is considered to be incomplete, the counting of the 30 days begins after the commissioner has received the necessary supporting information. The supporting data should consist of countrywide and state experience, credibility weighing between the two if relevant, exhibits showing trending and loss development, and explanations of techniques used. The commissioner can extend the 30 days to 60 days if so desired. Under this rule, rate filings can be disapproved without a hearing.

The potential advantages of the Oregon system are as follows:

1. The commissioner is able to monitor and control independent of the hearing process the gross movements in commercial liability rates. This affects the affordability of commercial liability insurance to the consumer.

2. With the certification by a member of the American Academy of Actuaries and uniformity in supporting documentation of the rate filings, the review of complete rate filings would be easier as the burden on proof is on the insurer and not on the commissioner.

The apparent disadvantages of this system to Wisconsin are as follows:

1. More staff would be needed. The Oregon insurance division has received funding for one permanent actuary, one limited term actuary and two rating analysts. It is estimated that currently 25-30 percent of time of these individuals is spent on reviewing prior approval commercial rate filings and validating on a sample basis the certifications of nonapplicability. Applying this system to Wisconsin would require the commissioner to increase his staff by at least one full-time property and casualty actuary plus one or two rating analysts.

2. Rates may still fluctuate. The policyholder cannot be assured of predictable rate changes. A rate change could exceed 25 percent and still be justifiable.

3. Some substantial rate increases would not be subject to prior approval. There is nothing in the rule to prevent a company from submitting several rate changes during the year which would not exceed 25 percent each, but would exceed 25 percent in the aggregate. Some form of monitoring system would have to be established and funded to track rate changes on an individual-policyholder basis.

4. The certificate from a member of the American Academy of Actuaries that the rate filing is not subject to the rule will add to the expenses of insurers. The majority of property and casualty companies in Wisconsin do not have a member of the Academy on their staffs. This would either require the hiring of an actuarial consulting firm to certify <u>each</u> commercial rate filing or increase the use of bureau rate filings. The cost would most likely be passed on to the policyholders. In addition, this may reduce the number of independent rate filings, which would reduce the diversity of rates and plans used in Wisconsin.

5. Delay in the implementation of rate changes may cause pricing problems and other market inefficiencies similar to those noted in disadvantage 3. for New York's flex-rating system. Rate changes exceeding a given percentage could take more than 90 days for review. There would be no assurance of approval. Rates could be disapproved without a hearing.

V. Conclusion and Recommendations

The purpose of this report was to examine Wisconsin's current insurance rate regulation system and to determine whether the revisions being proposed in other states to control the fluctuation in commercial liability insurance rates would be suitable for implementation in Wisconsin. Those revisions ranged from increasing the minimum information that is required to be filed in a commercial rate filing to subjecting the commercial liability insurance rate-making process to a form of prior approval process.

A return to a prior approval rate filing system would not be a viable solution to the problem of regulating commercial liability insurance rates. First, the philosophy of a prior approval process is contrary to Wisconsin's philosophy of a competitive rating system. Second, prior approval regulations already exist in some states; and during the most recent liability crisis this type of rate regulation was no more effective in controlling rate fluctuations than were competitive rating systems. Third, prior approval regulations are expensive to administer and cannot guarantee that rates will not increase since rate increases that can be justified will still be permitted. Finally, this type of rate regulation, with its inherent delays in implementing rate changes, may result in a reduction in the types of insurance products available to the Wisconsin consumer, in addition to impairing the ability of a company to take immediate corrective rate actions if it is financially-troubled or pass along any rate reductions to consumers without delay.

Wisconsin's current rate regulation, Chapter 625, was drafted to permit the process of competition to be the primary regulator of the insurance rates. The drafters recognized that the rate-making process in insurance is so imprecise that the difficulty and cost of the regulatory effort are too great in relation to the beneficial results achieved by it. However, the drafters did preserve the commissioner's right to intervene, but only in those instances where serious departures from a "reasonable" rate resulted in unconscionably high rates or dangerously low rates. To help determine whether a "reasonable degree of price competition exists at the consumer level" it is recommended that an academic study be conducted to both develop criteria to determine "competitiveness," and then test that criteria in the Wisconsin insurance marketplace.

Of the various approaches being proposed by the different states, the Minnesota approach to rate regulation is most consistent with Wisconsin's philosophy of open competition. The Minnesota system maintains the advantages of a competitive system while providing the commissioner with some degree of oversight over the pricing mechanism with respect to large rate increases.

Requiring insurers to file supporting data, similar to the requirements of Minnesota law, will make rate filings more uniform, will facilitate the actuary's review process, and should facilitate rate comparisons within the industry to identify those rates which may be considered unreasonable. Furthermore, since insurers are presumed to have examined thoroughly the need for a rate change, the promulgation of a rule which requires insurers to submit supporting data to document that need should not impose any unnecessary delays in the insurer's ability to implement the rate change.

Section 625.21 (2), Wis. Stats., permits the commissioner, by rule, to require the filing of supporting data as to any or all kinds or lines of insurance as the commissioner deems necessary for the proper functioning of the rate monitoring and regulatory process. This information shall include:

a) The experience and judgment of the filer, and, to the extent it wishes or the commissioner requires, of other insurers or rate organizations;

b) Its interpretation of any statistical data relied upon;

c) Description of the actuarial and statistical methods employed in setting the rates; and

d) Any other relevant matters required by the commissioner.

However, when s. 625.21 (2) is read in context with the rest of the subsection and chapter, and, when the committee comments are considered, it becomes unclear whether the commissioner can promulgate a rule specifying the minimum supporting information filing requirements unless a finding has first been made under s. 625.21 (1) that competition is not an effective regulator of the rates charged or that a substantial number of companies are competing irresponsibly through the rates being charged. The supporting information, or lack thereof, is a critical factor to the finding that competition is not an effective regulator or that companies are acting irresponsibly. Without such supporting data the commissioner cannot make an informed decision whether competition is an effective regulator or whether a substantial number of insurers are competing irresponsibly.

Therefore, it is recommended that the Chapter 625 be clarified to grant the commissioner the authority to promulgate a rule, similar to Minnesota's, which would require the filing of supporting information similar to the criteria contained in s. 625.21 (2) without first finding that competition is not an effective regulator or that a substantial number of companies are competing irresponsibly.

It is further recommended that once the authority has been clarified, the commissioner promulgate such a rule. This rule should incorporate a provision which requires the insurer to certify that its rate filing is in compliance with the provisions of the statutes and the rule. Any rate filing found subsequently not to be in compliance may subject the insurer to administrative action, including forfeiture.

Finally, due to the difficulty the Office of the Commissioner of Insurance experienced in attracting a qualified and interested property and casualty actuary, it is recommended that the commissioner request the Department of Employment Relations to reexamine its salary guidelines for actuaries and adjust them, if necessary, to a competitive level.

Appendix 1

CHAPTER 625

INSURANCE — RATE REGULATION

625.01 Construction and purposes. (1) CONSTRUCTION. This chapter shall be liberally construed to achieve the purposes stated in sub. (2), which shall constitute an aid and guide to interpretation but not an independent source of power.

(2) PURPOSES. The purposes of this chapter are:

(a) To protect policyholders and the public against the adverse effects of excessive, inadequate or unfairly discriminatory rates;

(b) To encourage, as the most effective way to produce rates that conform to the standards of par. (a), independent action by and reasonable price competition among insurers;

(c) To provide formal regulatory controls for use if independent action and price competition fail;

(d) To authorize cooperative action among insurers in the rate-making process, and to regulate such cooperation in order to prevent practices that tend to bring about monopoly or to lessen or destroy competition;

(e) To encourage the most efficient and economic marketing practices; and

(f) To regulate the business of insurance in a manner that will preclude application of federal antitrust laws.

625.02 Definitions. In this chapter, unless contrary to context:

(1) "Market segment" means any line or kind of insurance or, if it is described in general terms, any subdivision thereof or any class of risks or combination of classes.

(2) "Rate service organization" means any person, other than an employe of an insurer, who assists insurers in rate making or filing by:

(a) Collecting, compiling and furnishing loss or expense statistics;

(b) Recommending, making or filing rates or supplementary rate information; or by

(c) Advising about rate questions, except as an attorney giving legal advice.

(3) "Supplementary rate information" includes any manual or plan of rates, statistical plan, classification, rating schedule, minimum premium, policy fee, rating rule, rate-related underwriting rule and any other information prescribed by rule of the commissioner.

History: 1983 a. 189.

625.03 Scope of application. This chapter applies to all kinds and lines of direct insurance written on risks or operations in this state by any insurer authorized to do business in this state, except:

(1) Ocean marine insurance;

(2) Worker's compensation insurance;

(4) Life insurance other than credit life insurance;

(5) Variable and fixed annuities; and

(6) Group and blanket accident and sickness insurance other than credit accident and sickness insurance.

(7) To the extent that ch. 424 is inconsistent with this chapter, ch. 424 shall apply.

History: 1973 c. 3; 1975 c. 147 s. 54; 1975 c. 373.

Legislative Council Note to sub. (3), 1975: Fraternals should be subjected to rate regulation to the same extent as and no farther than other insurers. [Bill 643-S]

625.04 Exemptions. The commissioner may by rule exempt any person or class of persons or any market segment from any or all of the provisions of this chapter, if and to the extent that the commissioner finds their application unnecessary to achieve the purposes of this chapter.

History: 1979 c. 102 s. 236 (6).

625.11 Rate standards. (1) GENERAL. Rates shall not be excessive, inadequate or unfairly discriminatory, nor shall an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly.

(2) EXCESSIVENESS. (a) *Competitive market.* Rates are presumed not to be excessive if a reasonable degree of price competition exists at the consumer level with respect to the class of business to which they apply. In determining whether a reasonable degree of price competition exists, the commissioner shall consider all relevant tests including:

1. The number of insurers actively engaged in the class of business;

2. The existence of rate differentials in that class of business;

3. Whether long-run profitability for insurers generally of the class of business is unreasonably high in relation to its riskiness.

(b) *Noncompetitive market.* If such competition does not exist, rates are excessive if they are likely to produce a long run profit that is unreasonably high in relation to the riskiness of the class of business, or if expenses are unreasonably high in relation to the services rendered.

(3) INADEQUACY. Rates are inadequate if they are clearly insufficient, together with the investment income attributable to them, to sustain projected losses and expenses in the class of business to which they apply.

(4) UNFAIR DISCRIMINATION. One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses. Rates are not unfairly discriminatory because different premiums result for policyholders with like loss exposures but different expense factors, or like expense factors but different loss exposures, so long as the rates reflect the differences with reasonable accuracy. Rates are not

unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise or blanket policy.

625.12 Rating methods. In determining whether rates comply with the standards under s. 625.11, the following criteria shall be applied:

(1) BASIC FACTORS IN RATES. Due consideration shall be given to past and prospective loss and expense experience within and outside of this state, to catastrophe hazards and contingencies, to trends within and outside of this state, to loadings for leveling premium rates over time or for dividends or savings to be allowed or returned by insurers to their policyholders, members or subscribers, and to all other relevant factors, including the judgment of technical personnel.

(2) CLASSIFICATION. Risks may be classified in any reasonable way for the establishment of rates and minimum premiums, except that no classifications may be based on race, color, creed or national origin, and classifications in automobile insurance may not be based on physical condition or developmental disability as defined in s. 51.01 (5). Rates thus produced may be modified for individual risks in accordance with rating plans or schedules which establish reasonable standards for measuring probable variations in hazards, expenses or both. Rates may also be modified for individual risks under s. 625.13 (2).

(3) EXPENSES. The expense provisions included in the rates to be used by an insurer may reflect the operating methods of the insurer and, so far as it is credible, its own expense experience.

(4) PROFITS. The rates may contain an allowance permitting a profit that is not unreasonable in relation to the riskiness of the class of business.

History: 1975 c. 275; 1977 c. 418 s. 929 (55); 1979 c. 93.

625.13 Filing of rates and consent to rate. (1) FILING PROCEDURE. Except as provided in sub. (2), every authorized insurer and every rate service organization licensed under s. 625.31 which has been designated by any insurer for the filing of rates under s. 625.15 (2) shall file with the commissioner all rates and supplementary rate information and all changes and amendments thereof made by it for use in this state within 30 days after they become effective.

(2) CONSENT TO RATE. Upon written application of the insured, stating the insured's reasons therefor, filed with and not disapproved by the commissioner within 10 days after filing, a rate in excess of that provided by a filing otherwise applicable may be applied to any specific risk. The rate may be disapproved without a hearing, subject to s. 601.62 (3). If disapproved, the rate otherwise applicable applies from the effective date of the policy, but the insurer may cancel the policy proportionally on 10 days' notice to the policyholder. If the insurer does not cancel the policy the insurer shall refund any excess premium from the effective date of the policy.

History: 1979 c. 93, 177; 1983 a. 36.

Legislative Council Note, 1979: This amendment to sub. (2) legitimizes a practice that is virtually universal throughout the country. Although it was not specifically provided for in ch. 625, the Office of the Commissioner of Insurance has assumed that ch. 625 intended to continue it and has accepted and handled "consent to rate" filings much as it did prior to the enactment of ch. 625. Adoption of the amendment makes it clear that the department practice is appropriate. [Bill 20-S]

625.14 Filings open to inspection. Each filing and any supporting information filed under this chapter shall, as soon as filed, be open to public inspection at any reasonable time. Copies may be obtained by any person on request and upon payment of a reasonable charge therefor.

625.15 Delegation of rate making and rate filing obligation. (1) RATE MAKING. An insurer may itself establish rates and supplementary rate information for any market segment based on the factors in s. 625.12, or it may use rates and supplementary rate information prepared by a rate service organization, with average expense factors determined by the rate service organization or with such modification for its own expense and loss experience as the credibility of that experience allows.

(2) RATE FILING. An insurer may discharge its obligation under s. 625.13 (1) by giving notice to the commissioner that it uses rates and supplementary rate information prepared by a designated rate service organization, with such information about modifications thereof as is necessary fully to inform the commissioner. The insurer's rates and supplementary rate information shall be those filed from time to time by the rate service organization, including any amendments thereto as filed, subject, however, to the modifications filed by the insurer.

History: 1979 c. 177 s. 55.

625.16 Medicare supplement policy and medicare replacement policy loss ratios. The commissioner may by rule establish reasonable minimum standards for loss ratios of medicare supplement policies and medicare replacement policies. The standards shall be based on incurred claims experience and earned premiums and be in accord with accepted actuarial principles so that benefits will be reasonable in relation to the premiums charged.

History: 1981 c. 82; 1985 a. 29.

625.21 Delaying effect of rates. (1) RULE INSTITUTING DELAYED EFFECT. If the commissioner finds that competition is not an effective regulator of the rates charged or that a substantial number of companies are competing irresponsibly through the rates charged, or that there are widespread violations of this chapter, in any kind or line of insurance or subdivision thereof or in any rating class or rating territory, he or she may promulgate a rule requiring that in the kind or line of insurance or subdivision thereof or rating class or rating territory comprehended by the finding any subsequent changes in the rates or supplementary rate information be filed with the commissioner at least 15 days before they become effective. The commissioner may extend the waiting period for not to exceed 15 additional days by written notice to the filer before the first 15-day period expires.

(2) SUPPORTING DATA. By rule, the commissioner may require the filing of supporting data as to any or all kinds or lines of insurance or subdivisions thereof or classes of risks or combinations thereof as he deems necessary for the proper functioning of the rate monitoring and regulating process. The supporting data shall include:

(a) The experience and judgment of the filer, and, to the extent it wishes or the commissioner requires, of other insurers or rate service organizations;

(b) Its interpretation of any statistical data relied upon;

(c) Descriptions of the actuarial and statistical methods employed in setting the rates; and

(d) Any other relevant matters required by the commissioner.

(3) EXPIRATION OF RULE. A rule promulgated under sub. (1) shall expire no more than one year after issue. The commissioner may renew it after a hearing and appropriate findings under sub. (1).

(4) SUPPORTING INFORMATION. Whenever a filing is not accompanied by the information the commissioner requires under sub. (2), the commissioner may so inform the insurer

and the filing shall be deemed to be made when the information is furnished.

History: 1979 c. 102.

625.22 Disapproval of rates. (1) ORDER IN EVENT OF VIOLATION. If the commissioner finds after a hearing that a rate is not in compliance with s. 625.11, the commissioner shall order that its use be discontinued for any policy issued or renewed after a date specified in the order.

(2) TIMING OF ORDER. The order under sub. (1) shall be issued within 30 days after the close of the hearing or within such reasonable time extension as the commissioner may fix.

(3) APPROVAL OF SUBSTITUTED RATE. Within one year after the effective date of an order under sub. (1), no rate promulgated to replace a disapproved one may be used until it has been filed with the commissioner and not disapproved within 30 days thereafter.

(4) INTERIM RATES. Whenever an insurer has no legally effective rates as a result of the commissioner's disapproval of rates or other act, the commissioner shall on request specify interim rates for the insurer that are high enough to protect the interests of all parties and may order that a specified portion of the premiums be placed in an escrow account approved by the commissioner. When new rates become legally effective, the commissioner shall order the escrowed funds or any overcharge in the interim rates to be distributed appropriately, except that refunds to policyholders that are trifling shall not be required.

History: 1979 c. 102 s. 236 (6), (21); 1979 c. 110.

625.23 Special restrictions on individual insurers. The commissioner may by order require that a particular insurer file any or all of its rates and supplementary rate information 15 days prior to their effective date, if and to the extent that he or she finds, after a hearing, that the protection of the interests of its insureds and the public in this state requires closer supervision of its rates because of the insurer's financial condition or rating practices. The commissioner may extend the waiting period for any filing for not to exceed 15 additional days by written notice to the insurer before the first 15-day period expires. A filing not disapproved before the expiration of the waiting period shall be deemed to meet the requirements of this chapter, subject to the possibility of subsequent disapproval under s. 625.22.

History: 1979 c. 102.

625.31 Operation and control of rate service organizations. (1) LICENSE REQUIRED. No rate service organization shall provide any service relating to the rates of any insurance subject to this chapter, and no insurer shall utilize the services of such organization for such purposes unless the organization has obtained a license under s. 625.32.

(2) AVAILABILITY OF SERVICES. No rate service organization shall refuse to supply any services for which it is licensed in this state to any insurer authorized to do business in this state and offering to pay the fair and usual compensation for the services.

625.32 Licensing. (1) APPLICATION. A rate service organization applying for a license as required by s. 625.31 shall include with its application:

(a) A copy of its constitution, charter, articles of organization, agreement, association or incorporation, and a copy of its bylaws, plan of operation and any other rules or regulations governing the conduct of its business;

(b) A list of its members and subscribers;

(c) The name and address of one or more residents of this state upon whom notices, process affecting it or orders of the commissioner may be served;

(d) A statement showing its technical qualifications for acting in the capacity for which it seeks a license; and

(e) Any other relevant information and documents that the commissioner may require.

(2) CHANGE OF CIRCUMSTANCES. Every organization which has applied for a license under sub. (1) shall thereafter promptly notify the commissioner of every material change in the facts or in the documents on which its application was based.

(3) GRANTING OF LICENSE. If the commissioner finds that the applicant and the natural persons through whom it acts are competent, trustworthy, and technically qualified to provide the services proposed, and that all requirements of law are met, he or she shall issue a license specifying the authorized activity of the applicant. The commissioner may not issue a license if the proposed activity would tend to create a monopoly or to lessen or destroy price competition.

(4) DURATION. Licenses issued pursuant to this section shall remain in effect until the licensee withdraws from the state or until the license is suspended or revoked.

(5) AMENDMENTS TO CONSTITUTION AND BYLAWS. Any amendment to a document filed under sub. (1) (a) shall be filed at least 30 days before it becomes effective. Failure to comply with this subsection shall be a ground for revocation of the license granted under sub. (3).

History: 1979 c. 102.

625.33 Binding agreements by insurers. No insurer shall assume any obligation to any person other than a policyholder or other companies under common control to use or adhere to certain rates or rules, and no other person shall impose any penalty or other adverse consequence for failure of an insurer to adhere to certain rates or rules.

625.34 Recording and reporting of experience. The commissioner shall promulgate or approve reasonable rules, including rules providing statistical plans, for use thereafter by all insurers in the recording and reporting of loss and expense experience, in order that the experience of such insurers may be made available to the commissioner. No insurer shall be required to record or report its experience on a classification basis inconsistent with its own rating system. The commissioner may designate one or more rate service organizations to assist the commissioner in gathering such experience and making compilations thereof, which shall be made available to the public.

History: 1979 c. 102 s. 236 (21).

Appendix 2

NEW YORK Flex-band Limits

Municipal liability	±15%
Public School liability	±15%
Child Care liability	±10%
Non-Profit Philanthropic and Civic Activity liability	±15%
Public Officials liability	±15%
Non-Profit IRC §501(c)(3) Directors and Officers	±10%
Other Directors and Officers liability	±20%
Professional liability	±20%
Other Errors and Omission liability	±20%
Recreational liability	±15%
Other Owners, Landlords and Tenants liability	±15%
Other Manufacturers and Contractors liability	±15%
Product liability	±20%
Completed Operations liability	±20%
Liquor Law liability	±15%
Non-Livery Commercial Motor Vehicle liability	±15%
CMP Combined Effect	±15%
Business Owners Policies	±15%
Business Auto Policies	±15%
High Limits Excess Liability Renewal Policies	±30%
'a' Rated Renewal Policies	±30%
All Other liability	±20%

VII. Bibliography

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3. National Association of Insurance Commissioners. "State Regulation of Insurance, A Statement Submitted to the United States Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly." Proceedings - 1960, Volume 1, pp. 53 ff., November 1959.

4. New York Insurance Department. The Public Interest Now in Property and Liability Insurance Regulation: A Report to Governor Nelson A. Rockefeller January 7, 1969.

5. Trupin, Aaron. "Monograph 4" - Open Rating in Insurance, "Issues in Insurance, Volume 1, edited by John D. Long." American Institute for Property and Liability Underwriters, Malvern, Pennsylvania, 1978.

6. United States General Accounting Office, Report to Congressional Requesters, Auto Insurance, State Regulation Affects Costs and Availability, August 5, 1986, GAO/OCE-86-2.

7. Carlson, Kathleen; Open Competition v. Prior Approval, Do Ratemaking Laws Make a Difference; Study commissioned by the Illinois Insurance Committee on Tort Reform, May 1986.

8. State of New York, Department of Insurance, Flexible-Rating System; Rating Plans; Tort Reform Refining Requirements, Regulation No. 129, NYCRR 161, September 10, 1986.

9. State of California, Department of Insurance, Bulletin No. 86-4, October 15, 1986.

10. State of Minnesota, Department of Commerce, Bulletin 86-6, May 6, 1986.

11. New Jersey Department of Insurance, Report to the Legislature on the Commercial Insurance Deregulation Act of 1982, April 1986.

12. Governor's Task Force on Liability, State of Oregon, Final Report on Recommendations to Ease the Liability Insurance Strain in Oregon, July 1, 1986.

13. Oregon Administrative Rules, Chapter 826 Insurance Division, Division 42 Rates and Ratemaking, September 24, 1986.

EXHIBIT 5
DATE 3/12/87
SB SB 52

TESTIMONY, SENATE BILL 52
MARCH 16, 1986
SUBMITTED BY BONNIE TIPPY, REPRESENTING THE ALLIANCE OF AMERICAN INSURERS AND DEE ANN BERNHARD, REGIONAL MANAGER, THE ALLIANCE OF AMERICAN INSURERS

The intent of this bill, and indeed of many of you, is to somehow stop the insurance cycle which many believe is what brought us to where we are today in terms of the availability and the affordability of insurance.

What you keep hearing from the Montana Trial Lawyers, both in this session and previously, is that the insurance cycle is solely to blame for our problems, and that the tort system has nothing to do with it at all.

This simply is not true. While the cycle can either mask or worsen the effects of a tort system which is out of control, it is true that insurance losses are driven by the long-term effects of the tort system.

The New York Governor's Advisory Commission On Liability Insurance recently issued Volume 2 of its report on the tort and insurance systems. The commission concluded: "The Short Term Swings and the prices charged for insurance are controlled in substantial part by the business cycle, but the bedrock trends in average underwriting costs around which these cycles gyrate have little or nothing to do with business cycle fluctuations."

The commission found a "surge" in the liability cost base in recent years as prevailing concepts of tort liability have been expanded. And there is ample documentation for these conclusions. According to ISO, after adjusting for inflation, the combined losses and expenses for all lines of insurance increased between 1967 and 1984 almost two times, or 96.4 percent. Commercial liability lines increased well over two times at 131 per cent and general liability including medical malpractice increased more than three times, at 201 percent. The facts show that paid losses, unaffected by reserving or expense loadings, have increased far faster than the gross national product.

There is no question that long-term premium increases reflect much more than the normal insurance business cycle. For decades, the insurance cycle has swung back and forth around constantly increasing losses. Simply stated, these losses are fueled by abuses of the tort system.

This bill attempts to save the insurance industry from itself, but we must realize that many factors affect the insurance cycle which absolutely no one has any control over whatsoever. Those include interest rates, inflation, taxation of captive insurers, the overall U.S. business cycle, the value of our dollar relative to other world currencies, the stock market and spiralling underwriting losses. Of all of the factors which have controlled surplus decline, the industry had some measure of control over only one- -spiralling underwriting losses. The industry has had little choice but to raise premium rates and withdraw from bad lines of business.

So what the companies did that added to today's problems was lower their rates too much, it was cut-throat competition, and the companies which attempted to stop the downward spiral in rates found themselves with catastrophic losses of market share.

This bill attempts to take care of this type of ruinous competition. But what will it really do if you choose to enact it? While chief supporters of this legislation claim that it will control downward rates, what they really seek to do is prevent rates from going higher, and this could drastically affect market stability and insurance availability.

Can this type of system work better than an open, free competition market? We say no, it cannot. Insurance, most particularly automobile insurance, is extremely market sensitive. Under this legislation, any time rates went under the band, a hearing would have to be held. Will this serve to lower prices, or to encourage insurers to keep them the same? Is it really in the best interest of Montana consumers to enact artificial price controls, other than allow a very competitive industry to compete fairly? We don't think so.

We believe that the Insurance Commissioner has enough authority now to keep insurers in line. However, her office has historically been underfunded, and she has been unable to exercise that authority to the fullest extent. Perhaps you could consider adequately funding her office to fully implement her current authority for the next two years. Then, in 1989, you can more fairly assess whether or not that is enough.

It is true that there is a liability crisis, and it is also understandable that you would want to balance tort reform with some form of adequate regulation of insurance companies. But to unfairly burden a highly competitive industry which is also in great distress at this time will only serve to make a bad situation worse. Help Commissioner Bennett to do the job you have already given her to do. I believe that you will find that with adequate funding, she can do it very well.

I urge that this committee act on this bill with a strong "do not pass" recommendation.

THE JOURNAL OF COMMERCE
January 15, 1987

Flex-Rating Held Doomed to Fail

By ALAN HERBERT
Journal of Commerce Staff

NEW YORK — The flex-rating system, a modified prior approval plan to permit commercial insurance rates to vary within set limits, "cannot work," Richard Stewart, a former New York insurance superintendent, told the Industry Conference presented by the Insurance Services Office and the Insurance Information Institute.

"The modern commercial insurance industry has too many pricing points ever to control" and rates are "far from the same as real market prices," said the chairman of Stewart Economics, a New York consulting firm. There are too many variables, he said, including coverages, deductibles, experience adjustments and underwriting standards.

"During the last price war, insurance company managements learned that they could not control their own prices with any precision," he said. "If management cannot control its own prices, then . . . no outside agency possibly can."

Mr. Stewart said flex-rating might have worked about 40 years ago, when book rates and market prices were closer, variations were limited and rating bureaus could compel uniformity. "Flex-rating lives in nostalgia even more than in hope," he said.

But if flex-rating is to be tried — as it is already in several states — the price is high, Mr. Stewart maintained.

"The only chance for price regulation to work is to kill price competition first, just in order to have something to regulate." The result: "No debits or credits, no discretion in the field, no surplus lines market, no risk management, and standard prices, commissions, deductibles . . . ."

STEWART: Flex-rating system is doomed to fail.

The least flexibility of price, he said, would be in special lines, those with the worst cost problems. "In just those areas, a price problem translates most quickly into an availability problem."

Mr. Stewart said flex-rating would not even work in very small commercial lines "where the reaction of customers to price rises has been political rather than financial (and) it would seem to answer an immediate clamor to do something."

Going back 40 years, he said, "would be to deprive small business of most of the advances in competition and sophistication made in commercial insurance" since then. One final cost of the "inevitably unsuccessful experiment with flex-rating," he told the industry audience, is that "it would come at a time when prices are leveling off and starting to decline (which) would really mean the effort to kill competition was unnecessary.

"But it might be taken as evidence it was working," he added.

EXHIBIT 4
DATE 3/16/87
HB 863

HB 863 is a bill under which units of government would receive a fair share of the net income from the play of Video Poker machines and Keno machines.

In the 1985 session, the legislature legalized the play of Video Poker for gambling purposes. Keno has been legal for a much longer period of time. Video Poker is licensed by the State of Montana. Keno machines are licensed only by local governments where the machines are located.

The State of Montana charges and collects a license fee of $1500 per machine for Video Poker. $1000 of this amount goes to the local government where the machine is located. $500 of the license fee is retained by the state. Before the distribution of those license fees, the State of Montana retains 5% for administration costs. So, in actuality, the split has been made on the basis of $1425 per machine. Local governments can also charge a local license fee of up to $1000 per machine in addition to the $1000 they receive from the state fee.

The bill I have for your consideration does some different things. It reduces the state license fee of $1500 down to $500. Of this fee, it retains 9% for administering the costs associated. The remainder will be sent to the local government where the machine is located. Because many places do not charge local license fees, this bill sets as a maximum $500 any local government can charge per machine. If we are going to have gambling in Montana, I think the

lower fee would encourage many taverns with little patronage to install machines. Local Government would be compensated for the loss of the $500 state license money by the amendment I am submitting with this bill. It gives 5% of the net revenue of each machine to local government. From the figures on the fiscal statement they would receive an average of $800 from each machine resulting in an increase of $300 per machine.

The bill further provides that 20% of the net from each machine would be appropriated to the Montana University system. The percentage system provides a fairer method of charging for the operation of the machines.

The fiscal statement gives no data on Keno machines because the State has not been involved in the licensing of Keno. HB 863 provides for a $100 license fee on Keno. It also provides the same split on the net proceeds of the machines -- 5% to local governments and 20% to the University system. $9 of the $100 license fee would be retained by the State of Montana for enforcing this act.

When the Video Poker machine bill was passed, we established very few rules for its operation. The law prohibits anyone under the age of 18 from a play. Only licensed taverns could have the machines. No other establishments are permitted so that taverns have become the sole beneficiaries of the law. This is entirely different in Nevada where service stations, small motels, grocery stores,

etc., as well as casinos have slot machines. Our present law authorizes the taverns to retain up to 20% of the money placed in the machines with a customer payback of 80%. That too, is generous as compared to New Jersey where casino type operations are legal. In New Jersey, the owners must pay back to the customer an average of at least 83%.

In doing some calculating with Montana's law, look at what happens on just 3 plays on a video poker machine. You play $1.00 and, on average, you get back 80 cents. Using that 80 cents on the second play, you lose another 16 cents so your dollar investment has shrunk to 64 cents. On the third play, using the remaining 64 cents, the 20% take loses you another 13 cents so in just three plays you are down to 51 cents. That's the way the law operates on average.

I invite you to look at the fiscal statement. The statement was prepared without this amendment so the total for the University System is the full 25% share instead of the amendment's share of 5% for local government and 20% for the university -- the same total of 25%. For the three quarters of 1988 remaining after the effective date of the bill, and the full year of 1989, there is projected a total of $84,100,500 net from video poker. Adoption of this bill would give the University System $16,820,100 and local governments an extra $4,205,025. The tavern owners would retain $63,075,373.

I realize I have taken quite a lot of time on this bill. It is an important bill. It can dramatically help the University System. Our colleges are hurting. You have heard a lot about MSU's School of Architecture, U of M's School of Pharmacy, etc. This money can help them. Besides that it gives more to local governments. By adding in the unknown income from Keno machines, this committee and this legislature, can be of great help in critical areas. And, there are many bucks left for the tavern owners -- three times what the University System and local government will receive.

I would like to present a close.

EXHIBIT 5
DATE 3/12/87
HB X863

Amend House Bill 863, Introduced Copy
Rep. Wallin

1. Title, line 9.
Following: "DISTRIBUTION"
Insert: "OF 80 PERCENT"
Following: "SYSTEM"
Insert: "AND THE BALANCE TO THE LICENSING CITY, TOWN, OR COUNTY"

2. Page 11, line 13.
Following: "contain"
Insert: "the name of the city, town, or county licensing the video poker machines and"

3. Page 11, line 15.
Following: "(4)"
Insert: "(a)"
Strike: "The"
Insert: "Eighty percent of the"

4. Page 11.
Following: line 20
Insert: "(b) The remaining 20% of the tax collected under (3) shall be remitted by the department to the licensing city, town, or county for deposit in its general fund."

3/12/87
XT01/wp/lee/amdhb863

EXHIBIT 6
DATE 3/16/87
HB 832

MONTANA MTA Tavern Association
Affiliated and Associated with the NLBA and the LBI
STATE HEADQUARTERS / 9 EDWARDS / HELENA, MONTANA 59601
P.O. BOX 851 / PHONE 442-5040

STATEMENT BY DONALD W. LARSON, LEGISLATIVE CHAIRMAN, MONTANA TAVERN ASSOCIATION, BEFORE THE HOUSE BUSINESS & LABOR COMMITTEE IN SUPPORT OF HOUSE BILL 832 (Monday - March 16, 1987):

Oppose 863 [illegible]

The Montana Tavern Association supports HB832 as introduced. We believe it will make it possible for the smaller taverns to have a poker machine, where they now might not have one because they cannot afford the present fees. When poker machines were legalized, there were fiscal projections made on 5,000 machines being licensed in the state. That never materialized because the license fees are too high and they have to be paid up front; whereas, in Representative Gould's bill, the license fees are lowered and the tax is paid only after it has been collected. With this bill, as introduced, there is a more realistic chance of meeting the 5,000 machine projection and return more money to state and local governments.

I would like, however, to caution the Committee against killing the goose that lays the golden egg, and to respectfully ask that you don't cripple the one part of our business that is productive enough to help subsidize our seriously deteriorated liquor operations. It is certainly no secret that the sale of liquor has declined for numerous reasons -- stricter DUI laws, changes in the public's drinking preferences, the economy in general. I happen to be one of the few lucky ones in the business today. My business is paid for so I don't have to meet the huge debt service most of our new operators...the young people who have invested their futures in the business...are facing

for the next number of years. I can state without hesitation, however, that even without debt service, I would have to terminate one or two of my employees if I didn't have the machines. Last week the Senate killed a bill that would have legalized the game of blackjack or 21 and provided some of our establishments with another source of revenue. That's not possible now.

It would be nice if just once we could be given a business status that would entitle us to some tax breaks, like so many other industries are getting or are having proposed, rather than always being selected out to pick up the tab. We want you to understand that we'll do our share, just as we've always done, but we simply can't afford to carry any more of the load until we get back on our feet. Remember that the statutes call for an 80% payout on poker machines so any tax... the 7.5% in this bill...has to be paid by the licensee out of the remaining 20%.

Maybe HB832 will give us the help we need and bring more money into state and local government coffers. We hope it does.

Donald W. Larson

DONALD W. LARSON
Legislative Chairman

DWL/md

Our industry opposes HB-863 - For the reasons we support 832 and are available to the sub committe for input.

EXHIBIT 1
DATE 3/16/87
HB 832

WITNESS STATEMENT

NAME LYNN M. SEELYE BILL NO. SB 2

ADDRESS P.O. Box 1693 Gt Falls MT DATE 3/16/87

WHOM DO YOU REPRESENT? SALISBURY LOUNGE

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

① OUR INDUSTRY already most highly TAXED; liquor tax 42%; licensing fees; NORMAL INCOME TAXES local taxes property taxes

② supportive of COMMUNITY AFFAIRS; no INDUSTRY is called upon to support local & state community Activities than our INDUSTRY
- a. SPORTS
- b. CHARITABLE
- c. TOURISM.

③ our INDUSTRY is facing stiffest competition yet.
- a. STATE lottery
- b. Independant INDIAN RESERVATIONS
- c. CHARITIES
- d. SISTER STATES - Nevada, Wash. N. Dakota

Conclusion:

We NEED opportunity to RECOVER on our capital INVESTMENTS & CAPITAL IMPROVEMENTS

be allowed to continue the EXPANSION of our INDIVIDUAL LABOR force

be allowed to ACCUMULATE RESERVES to meet INCREASED EXPENSES (INSURANCE; WORKMAN COMP; WAGES & to promote the VIRTUES of our STATE & its citizens. thru PARTICIPATION in COMMUNITY & CHARITABLE AFFAIRS & PROMOTION of TOURISM particularly in conjunction with the forthcoming Olympics We are a NEW business & NEED the support of our STATE

CS-34

EXHIBIT
DATE 3/12/97
HB 863

PROPOSED AMENDMENT TO
INTRODUCED (WHITE) COPY OF
HB 863
PRESENTED BY JACQUELINE N. TERRELL
ON BEHALF OF
BIG B BINGO, BILLINGS, MONTANA

1. Page 2, line 5
   Following: "premises"
   Insert: "or an establishment licensed under 23-5-421"

EXHIBIT
DATE 3/11/87
HB 863

WITNESS STATEMENT

NAME MATT THIEL BILL NO. 863

ADDRESS 676 N. DAVIS #103 DATE 3/16

WHOM DO YOU REPRESENT? ASSociated STUDents

SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

ASUM SUPPORTS HB 863

THE UNIV. SYSTEM Need @

11 MILLION per YEAR ~~for~~ above

THE GOVERNORS Budget JUST to stay

at its CURRENT level. (INCLUDING all cuts since HB500)

THIS Bill is one OF the few

opportunities to Maintain a State

SERVICE THAT Returns $5 FOR every

1 Spent.

EXHIBIT _____
DATE 3-10-21
HB 843

WITNESS STATEMENT

NAME Tom Hoaks BILL NO. HB 843

ADDRESS _____ DATE 3-10-21

WHOM DO YOU REPRESENT? Myself

SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I'm support of HB 843 as it is now
but if option could be setting to set
a limit I would prefer we have
a limit to it.

I'd like you to vote for this option
I'll be for the bill without
it but I'd like to see it
limited

HB 863

WE, THE UNDERSIGNED, ARE OPPOSED TO HOUSE BILL #863 WHICH LIMITS THE PLAYING OF KENO AND POKER MACHINES TO ESTABLISHMENTS WHICH ALSO SELL LIQUOR. THE PASSAGE OF THIS BILL WOULD GIVE BARS A MONOPOLY ON KENO PLAYING.

WE PLAY KENO IN A BINGO PARLOR WHICH DOES NOT SERVE ALCHOLIC BEVERAGES, AND WHICH DOES NOT ALLOW PATRONAGE OF ANYONE UNDER 18 YEARS OF AGE. (THIS IS NOT THE CASE IN MANY BARS) WE WOULD NOT LIKE TO HAVE THAT PRIVILEGE TAKEN FROM US.

Name	Address
Larry Ramsey Sr.	P.O. Box Pryor, Mt
Linda Round Trees Sr.	" " " "
Dana Bush	#3 Chestnut, Blgs, Mt.
Dan Ramsey	710 Yellowstone Bgs, Mt
Kathi Ramsey	915 Howard
Stanley D Fennell	2230 Canyon St Blgs Mt
Paula Fennell	331 S. River Fromberg Mt
Mary Sebastian	
Mark Williamson	744 Yellowstone - Blgs Mt
Steve Williamson	" "
Katherine Round Face	Pryor Mt
Kyle Carter	Pryor Mt
Robert Round Face	Lavon Pkwy
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
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Name	Address
[illegible]	403 So 31
[illegible]	305 So 31
[illegible]	611 Carriage Ln Apt 1
[illegible]	1404 Terrace Blvd
[illegible]	2572 Grand Ave
[illegible]	213 S. Central, #11
[illegible]	1220 Broadwater Blvd.
[illegible]	1220 Broadwater Blvd
[illegible]	1231 Lamont Blvd
[illegible]	1313 Lee C Blvd
[illegible]	1 [illegible] Co. 2 [illegible]
[illegible]	2007 So 31st Blvd Blvd
Sharon Yeager	2007 So 31's Blvd Blvd
[illegible]	[illegible]
[illegible]	Box 162 Wilsall MT
[illegible]	214 So 33rd Billings, MT
[illegible]	[illegible]
[illegible]	501 Central Ave Billings MT
[illegible]	215 14th St West Billings
[illegible]	Billings Mont
[illegible]	[illegible]
[illegible]	" "
[illegible]	215 - 14th West Blvd
[illegible]	30 Troy Custer Rt Billings MT
[illegible]	Billings MT.

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Name	Address
Arlo A Ly	206 2nd Ave Laurel
Kathy J. Lip	206 2nd Ave Laurel.
Irene Lipsey	651 Sahara Dr
Josephine [illegible] Jensen	2465 7th Ave No Blg
Vicky Bench	1016 Poly Dr - Blg 2
Nancy Baxter	4014 Hardin Rd
Donald Bartlett	3817 Kelsey
Margaret S Pearson	715 S 28th # 511
[illegible]	4135 Parkside
Shirley Baxter	4014 Hardin Rd Blg
[illegible]	208 So 34th Blgs
Diane Thiel	570 Casa Blg
Mary Jo Zimmerman	4533 Mitchell Billings
Venus B. Bettey	716 8th St W Billings
Nora Lautt	Route 4 - Billings
[illegible]	" " "

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Name	Address
[illegible]	501 [illegible]
[illegible]	[illegible]
[illegible]	[illegible]
Cindy [illegible]	420 Washington [illegible]
[illegible]	[illegible]
[illegible]	Box [illegible]
[illegible]	19 Redrock Drive Blgs MT.
[illegible]	2022 [illegible] Dr Billings MT
[illegible]	[illegible] #6 Billings
[illegible]	[illegible] Billings
[illegible]	[illegible] Billings
[illegible]	[illegible] Billings
[illegible]	[illegible]

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Name	Address
[illegible]	[illegible]
[illegible]	393 [illegible]
[illegible]	[illegible]
[illegible]	212 [illegible]
[illegible]	44 [illegible]
[illegible]	1208 Harvey Dr
[illegible]	Box 3162 [illegible]
[illegible]	Pryor, Mont
[illegible]	
[illegible]	

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Name	Address
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Name	Address
Jean Lynch	507 Washington
Beverly J Beaumont	503 Allison
[illegible]	1005 Lewis
[illegible]	50 Monty Dr
[illegible]	[illegible]
[illegible]	612½ N. 25th
[illegible]	4193 Ryan Ave
[illegible]	[illegible]
[illegible]	645 [illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
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[illegible]	[illegible]
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[illegible]	[illegible]

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Name	Address
[illegible]	[illegible]
[illegible]	[illegible]
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[illegible]	[illegible]
[illegible]	[illegible]
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WE PLAY KENO IN A BINGO PARLOR WHICH DOES NOT SERVE ALCHOLIC BEVERAGES, AND WHICH DOES NOT ALLOW PATRONAGE OF ANYONE UNDER 18 YEARS OF AGE. (THIS IS NOT THE CASE IN MANY BAR WE WOULD NOT LIKE TO HAVE THAT PRIVILEGE TAKEN FROM US.

Name	Address
[illegible]	[illegible]

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Name	Address
Dean Little Light	Lyon Mt.
Gene Bird Hat	" "
Andrew Little Light	" "
[illegible]	[illegible]
Doreen D. Blankenbeard	Browning mt.
Amy Merchant	Billings Mt.
[illegible]	Bog. Mt.
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

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Name	Address
Barbara Lee Brown	Bldg MT 59101
Steven Hartley	1305 Wyoming
Ruth Zapata	Bldg, MT
Steven Ford	Billings, MT
Tom Brown	Billings, MT
Ken Austin	Billings, MT
Doreen Fawns	Bldg. MT
Tom Fawns	Billings MT

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Name	Address
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
Bobbie Amos	619 N 17 Billings
Effie Young	Fish Colstrip Mont.
Ollie Mason	635 Valle Vista Billings
Robert Rainesfield	Lavon Blvd.
Regina Crosser	Billings Mont
Pamela Farm	Billings, MT

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Name	Address
Sandy Smith	P.O. Box 104 Lavina MT
Eric Kennedy	915 E 4th St Lavina MT
Floyd Nash	Lavina Mon, Inc.
Gloria A. Waters	Box 265, Lame Deer, MT. 5904
Etta Rose	P.O. Box 1634 Cody Wyo 834

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Name	Address
Helen McComb	825 Lee D. Apt. 210 Billings
Tamara Blackwell	P.O. Box 453 Lame Deer MT
Denise American Horse	P.O. Box 248 Lame Deer Mt.
Evelyn Curley	PO Box 109 Busby Mt. 59016
Veronica Black	3111 [illegible] Bill. Mt.
[illegible]	[illegible] Busby, Mt.
[illegible]	[illegible]
[illegible]	P.O. 177 Busby Mt
[illegible]	[illegible]
[illegible]	[illegible]

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Name	Address
Ethel Bergarde	515 2nd St West
Virginia Schaer	2037 Crowhurst Ln
Carol LaMere	516 4th St. West Bly
Jan Cattles	768 Fallon Lane
Ruth Funk	2115 Elliott Bldg
Dennis Funk	2114 Santa Fe Bldg
Harold Buchanan	Laurel, MT 59066
Rosie Parkhurst	Joliet MT 59041
Archie Mitchell	Box 62 Pryor MT 59066
Arlene Mitchell	Box 55 Lame Deer
Charles Todd	" " "
Theresa Big Hair	" " "
Wilma Jensen	2112 5th Ave North Bldg 2nd
Emelia Adams	[illegible]
Bert Adams	[illegible]
Ingrid Lemmon	[illegible]
Isabel Hoag	646 Pine B Billings
Mary Cattanach	710 Hallowell Billings
John R Cattanach	710 Hallowell Billings
[illegible]	710 Hallowell Billings
[illegible]	[illegible]
Harold W Ingraham	Rt 1 Box 2487 Laurel, Mont
Velma E Ingraham	" " " "

5

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Name	Address
Grady Bunts Arnow	Box #84 Pryor M.T.
Linda Bellelyeun	Box 23 Ashland MT

7

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Name	Address
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

EXHIBIT 5
DATE 3/13/87
HB 261

ONE APPROACH TO DISCOVERY

State laws regulating railroads have been steadily eroded and pre-empted by federal laws, rules and regulations. It is the purpose of this paper to explore an avenue still available to the state to gain information about some railroad activities which could impact the state's industry and economy -- whether favorably or adversely.

Until yesterday (March 12, 1987), rumors circulated daily about the imminent sale of Burlington Northern Railroad Co. lines known as the "southern route" extending from Laurel, MT to Sandpoint, ID. State officials and the public generally expressed concern about the terms and operating conditions of such a sale. Those concerns still exist and have become exacerbated due to the lack of specific information about the sale. Because of the pre-emption of state authority by federal laws, the legal right of the state to be informed of the terms of the sale has been questioned.

If a sale of the southern line resulted in diminished, terminated or abandoned rail services, the economic impact upon Montana's economy could be severe and permanent. Conversely, if such a sale resulted in truly competitive rail services in Montana, the economic benefits would be predictably substantial. For these reasons alone, there is a compelling public interest in the disclosure of the terms of sale and operation of the southern route.

I.

Because of the Staggers Act, the 4 Rs Act and ICC interpretations, rules and regulations, an action to enjoin any activities of BN are almost automatically transferred to ICC jurisdiction -- resulting in a slow and prolonged procedure. An injunction action would not appear to fetch a speedy disclosure of the terms of a sale.

An action based upon the land grant theory or the bond theory would also take a long time to proceed through court.

It is the purpose of this paper to explore the possibility of forcing disclosure with a writ of mandate and/or a writ of prohibition.

A writ of mandate may be issued to a corporation by the Montana Supreme Court or any district court "to compel the performance of an act which the law specifically enjoins as a duty." The writ must issue "where there is not a plain, speedy and adequate remedy in the ordinary course of law."

The key words here are "which the law specifically enjoins as a duty."

II.

IF H.B. 861 PASSES:

This statute would provide solid ground upon which to bring a petition for an writ of mandate to require BN to disclose the terms of any sale and operating contract or other lease or mortgage of a line of railroad.

III.

IF H.B. 861 FAILS:

There seems to be a very convincing argument that the state has standing to bring an action for a writ of mandate even without a specific law such as that provided by H.B. 861 based upon long established theories of public policies based upon public interests and rights.

1. BN is a quasi-public corporation. It is a private corporation which has accepted from the state of Montana a franchise to operate a railroad. Montana's 1889 Constitution, under which BN operated until 1972, stated that "(A)ll railroads shall be public highways. . .and all railroad. . .companies shall be common carriers and subject to legislative control." Art. XV, Sec. 5. We know that federal laws have pre-empted much of Montana's original jurisdiction and control, but I know of no federal law which would change this basic classification that a railroad is a quasi-public corporation. It was the intent of the 1972 Constitutional Convention to carry forward the language contained in Section 5, and although the language itself it not found in our new constitution, the provisions of sections 1 and 2 of Art. XIII of the 1972 Constitution were intended to provide sufficient guarantees.

2. Corporations by law have the power to contract, but it is well established that when a quasi-public corporation is involved, the freedom to contract is more limited. This results from its duty to the public; a duty which is paramount to private interests.

> "Thus, a quasi-public corporation, such as a railroad or canal company, or waterworks or gaslight company, which is given the power of eminent domain or other special privilege [such as operating on public lands granted to it] in return for the benefit which is to accrue to the public, and which for this reason owes special duties to the public, cannot enter into any contract. . .which will render it wholly or partially unable to perform such duties." Fletcher Cyclopedia Corporations, Vol. 6, Sec. 2578. (material in brackets added)

Any such contract is void as being contrary to public policy.

Mr. Justice Miller of the U.S. Supreme Court stated in Thomas v. West Jersey R. Co., 101 U.S. 71:

> "The principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration for the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

This law has been stated many times both before and after the Thomas Case. It is hardly necessary to say that a railroad company has no more right to enter into an illegal contract than any other corporation or person. The term "illegal" as used in this context means a contract forbidden by a general rule of law -- such as that above-stated. A contract against public policy is "illegal" and may be struck down in a court of law.

3. If the railroad seller and buyer refuse to disclose the terms of a sale and operating agreement to the state, no determination can be made in a timely manner as to whether the contract is hostile to the public interest.

A writ of mandate for disclosure of the terms of the sale

contract would be brought upon these grounds -- the state and the public have a compelling right to know the sale terms and the impact they will have, and a quasi-public corporation has the duty and obligation to disclose the terms of sale of its public services. This is particularly persuasive since ICC procedures may not make these documents available for inspection.

The writ of mandate is not aimed at preventing the contract or the sale. It is intended to force disclosure only, for the purposes of measuring its impact upon public policy.

of this constitution, or which may be hereafter incorporated, whenever in its opinion it may be injurious to the citizens of the state.

References

Cited or applied in Lewis v. Northern Pacific Ry. Co., 36 M 207, 219, 92 P 469; Barth v. Pock, 51 M 418, 429, 155 P 282.

Collateral References

Corporations⇐38, 41.

18 C.J.S. Corporations § 80.

13 Am. Jur. 229, Corporations, §§ 86 et seq.

Reinstatement of repealed, forfeited, expired or suspended corporate charter as validating acts in interim. 13 ALR 2d 1220.

Sec. 4. The legislative assembly shall provide by law that in all elections for directors or trustees of incorporated companies, every stockholder shall have the right to vote in person or by proxy the number of shares of stock owned by him for as many persons as there are directors or trustees to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit, and such directors or trustees shall not be elected in any other manner.

Operation and Effect

Inasmuch as corporations are the creatures of statute, it is within the power of the legislature to adopt either the share of stock or the individual owning stock as the unit of voting power, unless restrained by the constitution. The only constitutional provision upon the subject is found in this section, which establishes the share of stock as the unit of voting power in the election of trustees or directors of such corporations. Since this restriction is limited to a single purpose, the legislature is left free to establish either the share or the individual as the unit for any purpose other than the election of trustees or directors. Smith v. Iron Mountain Tunnel Co., 46 M 13, 15, 125 P 649.

Refers Exclusively to Domestic Corporations

Held, that section 4, article XV of the state constitution, declaring that every stockholder shall have the right to vote his shares at elections for directors, refers exclusively to domestic corporations. Allen v. Montana Refining Co., 71 M 105, 119, 227 P 582.

Collateral References

Corporations⇐197-199, 283.

18 C.J.S. Corporations §§ 547 et seq., 720.

13 Am. Jur. 527, Corporations, § 487.

Sec. 5. All railroads shall be public highways, and all railroad, transportation and express companies shall be common carriers and subject to legislative control, and the legislative assembly shall have the power to regulate and control by law the rates of charges for the transportation of passengers and freight by such companies as common carriers from one point to another in the state. Any association or corporation, organized for the purpose, shall have the right to construct and operate a railroad between any designated points within this state and to connect at the state line with railroads of other states and territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad.

Operation and Effect

Under this section and section 7 of this article, a railroad, though built by a private corporation, and with its main line and spurs running convenient to private mines and ore houses, is none the less a public use, and may exercise the right of eminent domain. Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co., 16 M 504, 525, 41 P 232.

As one of the means of fostering and encouraging the development of the state

mineral resources in every reasonable way, the constitution has declared that all railroads shall be public highways, and all railroad companies shall be public carriers. Kipp v. Davis-Daly Copper Co., 41 M 509, 519, 110 P 237.

References

Cited or applied in State ex rel. Nolan v. Railway Companies, 21 M 221, 250, 53 P 623; John v. Northern Pacific Ry. Co., 42 M 18, 36, 111 P 632; City of Helena v. Helena Light & Ry. Co., 63 M 108, 119, 207 P 337; Heckaman v. Northern Pacific Ry. Co., 93 M 363, 377, 20 P 2d 258; Cashin v. Northern Pacific Ry. Co., 96 M 92, 103 et seq., 28 P 2d 862.

Collateral References

Carriers⇐1 et seq.; Railroads⇐4-6, 44-51.

13 C.J.S. Carriers §§ 6, 7, 15 et seq.; 74 C.J.S. Railroads §§ 3, 28, 45-56.

44 Am. Jur. 500-510, Railroads, §§ 278-288.

Persons engaged in business of renting motor vehicles without drivers (drive-it-yourself systems) as subject to regulations as carrier. 7 ALR 2d 463.

Right of public utility to discontinue line or branch on ground that it is unprofitable. 10 ALR 2d 1121.

Carrier's certificate of convenience and necessity, franchise, or permit as subject to transfer or encumbrance. 15 ALR 2d 883.

Sec. 6. No railroad corporation, express or other transportation company, or the lessees or managers thereof, shall consolidate its stock, property or franchises, with any other railroad corporation, express or other transportation company, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation; nor shall any officer of such railroad, express or other transportation company act as an officer of any other railroad, express, or other transportation company owning or having control of a parallel or competing line.

Operation and Effect

One railroad company can lease its road to a parallel and competing road for a term of ten years, and such a lease is not a consolidation of the two roads. State ex rel. Nolan v. Railway Companies, 21 M 221, 234, 53 P 623.

Id. When two railroad companies have but one common terminus, and are brought into competition between common terminal points by traffic arrangements with other roads, they are competing roads within the meaning of this section.

Granting of a certificate of necessity and convenience of the board of railroad commissioners to a motor-truck company, a subsidiary of and entirely owned by a railway company, permitting it to operate between certain points along the line of the railway as a substitute for rail service, held not an evasion of the provision of this section of the constitution, prohibiting consolidation of parallel or competing railway or transportation companies. Fulmer v. Board of Railroad Commrs., 96 M 22, 28, 28 P 2d 849.

References

Cited or applied in MacGinnis v. Boston & M. C. C. & S. M. Co., 29 M 428, 453, 75 P 89.

Collateral References

Carriers⇐17; Railroads⇐17, 141.

13 C.J.S. Carriers § 15; 74 C.J.S. Railroads §§ 15, 235.

Sec. 7. All individuals, associations, and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad, or transportation, or express company, between persons or places within this state; but excursion or commutation tickets may be issued and sold at special rates, provided such rates are the same to all persons. No railroad or transportation, or express company shall be allowed to charge, collect, or receive, under penalties which the legislative assembly shall prescribe, any greater charge or toll

for the transportation of freight or passengers to any place or station u its route or line, than it charges for the transportation of the same cla of freight or passengers to any more distant place or station upon it route or line within this state. No railroad, express, or transportation c pany, nor any lessee, manager, or other employee thereof, shall give preference to any individual, association or corporation, in furnishing car or motive power, or for the transportation of money or other express mat

Operation and Effect

A railroad company may not grant to one person the exclusive right to the use of a portion of its depot platform to deliver passengers departing, and to receive and solicit the patronage of incoming passengers, to the exclusion of all other persons from the exercise of such rights, as such grant is against public policy and contrary to the provisions of this section. Montana Union Ry. Co. v. Langlois, 9 M 419, 432, 24 P 209.

This provision, when considered in connection with section 5 of this article, demonstrates that the constitution, in its letter, its spirit, and its policy as well, classes all railroads, with their feeders, as public highways, subject to use by the public of right, amenable to the laws governing common carriers forever forbidding all obnoxious favoritisms between any who desire to use such highways. This stable written policy is doubtless the outgrowth of pernicious systems of discrimination and preferences which railroad corporations may have indulged in throughout the land where their powers are unrestrained by constitution or other restriction. Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co., 16 M 504, 526, 41 P 232; John v. Northern Pacific Ry. Co., 42 M 18, 36, 111 P 632.

This section and the cases of Rose v. Northern Pacific Ry. Co., 35 M 70, 88 P 767 and Brian v. Oregon Short Line R. R. Co., 40 M 109, 105 P 489, recognize the distinction between a ticket sold at the regular fare and one sold at a reduced fare or special price. Miley v. Northern Pacific Ry. Co., 41 M 51, 55, 108 P 5.

As one of the means of fostering and encouraging the development of the state's mineral resources in every reasonable way, the constitution has declared that all persons shall have equal right to have persons or property transported on and over railroad. Kipp v. Davis-Daly Copper Co. 41 M 509, 519, 110 P 237.

In view of this section, providing th all individuals shall have equal rights be transported over any railroad in state, provided that excursion or commu tion tickets may be issued and sold a special rates, section 72-615, making it unlawful for any common carrier to ch any person for any ticket a greater than is charged for a similar ticket of the same class, and section 94-35-252, makin every railroad corporation which fail observe any of the duties prescribed law in reference to railroads subject t fine, etc., the giving of all free passes, wit certain exceptions recognized by law, prohibited, so that the carriage of a p senger by a railroad company on issued without compensation to th ployee of another railroad company whic issued similar free passes for use by the former company's employees is illegal, hence a provision therein exempting carrier from liability for injuries cau by its negligence was a nullity. John v. Northern Pacific Ry. Co., 42 M 18, 36, 111 P 632.

Id. It is not permitted to a railr company arbitrarily to classify the patr of its road. Even the legislative assembly, in making classifications for taxation and license purposes, must exercise a reas able discretion in so doing.

References

Doney v. Northern Pacific Ry. Co. et al., 60 M 209, 226, 199 P 432.

Collateral References

Carriers⇐13, 198-200.
13 C.J.S. Carriers § 348 et seq.

Deviation by carrier in transportation property. 33 ALR 2d 145.

Sec. 8. No railroad, express, or other transportation company, in exi ence at the time of the adoption of this constitution, shall have the bene of any future legislation, without first filing in the office of the secretary of state an acceptance of the provisions of this constitution in binding for

Collateral References

Carriers⇐5.
13 C.J.S. Carriers § 19.

Citizens Alliance to Save the Southline
3/16/87 HB 861 Business & Labor
John Post

EXHIBIT 9
DATE 3/16/87
HB 861

I represent an organization recently formed in Livingston. The name of our organization is, Citizens Alliance to Save the South-line Our organization is made up of people from rail labor, local buisness people, retired railroaders, and many other concerned citizens. Our community has already been hurt by the closure of the roundhouse and now we could lose much more. The purpose of our group has been divided into four goals, they are:

1) To stop the sale through legislation and/or obtain legislation to provide job protection for the affected employees.

2) Gather information about the sale.

3) Disseminate accurate and correct information for people adversely affected by the sale, this would be employees, shippers, communities, and the press.

4) Have open meetings to put out information and obtain ideas from others.

We have many concerns about this sale. Our foremost concern is the loss of jobs. It is possible that the state could see the loss of over 900 middle class jobs by 1988 if this sale is allowed to go through unchecked. I hope you can see the amount of tax revenue that will be lost will be in the millions of dollars to our state.

Another group that could be adversely effected are the shippers. The shortline shipper will not own very much rolling stock and will be depended totally on the BN for cars and for the major amount of maintenance. What could happen if the BN does not wish to be supportive of this shortline sometime down the road. Recently at a derailment on a bridge over the Yellowstone River at Columbus.

One of the BN's higher level investigating officers stated to a fellow employee that if this had happened to a shortline railroad they probably would not have financially recovered. Imagine if this derailment had involved toxic materials. Who would have picked up the bill for cleaning up such an accident, probably the <u>tax payer</u>.

There are other questions that needed to be answered before this sale is allowed to continue. Will this put another large burden on railroad retirement, we have many Montana citizens on railroad retirement now. Should the I.C.C be able to rubber stamp a sale that will have such a large impact on our state. Finally, what is the main reason for this sale, is it a union busting move or is it another reprisal move by the BN against our state?

The BN's revenue was well over half a billion dollars last year. We feel that it is time the BN should begin to show some corporate responsibility and stop acting like a corporate blackmailer. If this sale goes through unchecked we will all suffer.

Who is going to subsidize this sale, we think it will be the shippers, Montana tax payers, labor, and communities like Livingston. We people of the Citizens Alliance To Save the Southline urge your immediate support and passage of HB 861 — Thank you

Robert B. Claytor, a retired chairman and chief executive officer of Norfolk Southern Corp. was interviewed by the Washington Post. Claytor said he felt there was great opportunity concerning trucking markets. He went on to say that, "we can not only beat the motor carriers as far as their rates are concerned, we can beat them for service." "We can get there before they do over the Interstate system..."

As for managements claims saying, they need to sell the line to meet trucking competition. In many instances the railroads are responding to trucking competition by buying up the competition.

The nation's largest non-union trucking company is owned by the Union Pacific, and it is no big secret that the B.N. operates their own trucking company, "Burlington Northern Motor Carriers."

Since the deregulation of piggyback traffic early in 1981, Burlington Northern's intermodal business has been on a continuous and rapid growth curve.

Starting with a volume of 200,000 trailers and containers in 1980, BN's IM traffic soared to 558,000 uints in 1985 and was expected to exceed 700,000 in 1986. In the first four months of 1986, volume was up 41% over 1985.

At the same time, BN also abandoned the traditional railroad posture of hostility to the motor carriers; instead it has sought to develop partnership relations with them.

Statements from Modern Railroads
Nov., 1986

EXHIBIT 10
DATE 3/16/87
HB 861

transportation

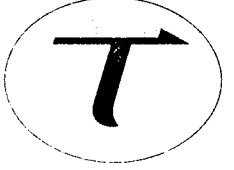
TESTIMONY BEFORE THE MONTANA STATE HOUSE OF REPRESENTATIVES
BUSINESS COMMITTEE
MARCH 16, 1987
SUBJECT: HB 861

Mr. Chairman and Members of the Committee,

My name is Gary Blakely, I am Local Chairman and Secretary - Treasurer of United Transportation Union Local 685 in Livingston. Thank you for allowing me to testify in favor of House Bill 861. We veiw the proposed sale of the Southern Line as a Union Busting tactic of Burlington Northern. Mr. Darius Gaskins, BN president, stated during his visit to Montana last week that local entrepreneurs can't make short lines successful financially if they are forced to assume BN's labor contracts. Yet the BN is making a very handsome profit from their railroad. How can a short line provide cheaper service , even with cutrate employees, when it will be sarting out in debt. I have copies of a publication named "STRAIGHT TRACK" put out by an orginization called Intercraft Association of Minnesota. They do research and information gathering for the railroad unions. I ask that the members of the committee take the time to read at least the cover story on BN profits. It tells quite a different story than the one the BN tells.

I also have a July 18, 1968 Park County News in which Louis W. Menk, President of the Northern Pacific stated "competition from highways, airlines and barges, all subsidized by the federal government, made consoidation and modernization an absolute must for railroads for survival." "Mergers of railroads are an economic eventuality and absolute necessity." In a speech given by Darius Gaskins to the Western Fuels Association in July 1986 he states, "Competition from the trucking industry and among railroads themselves has caused BN to look at ways to cut the cost of doing business. The company will let more employees go and will sell parts of its business to third parties who can perform those services less expensively." This is almost twenty years later and the railroads haven't changed their tune on survival. Not one word, this despite an increase of profits from $113.5 million in 1978 to $551.3 million in 1984. It is almost as if they are saying the merger was an unsuccessful success.

Mr. Gaskins stated that the BN had to negotiate concessions from the work force. I called our General Chairman, Don Wegler in St. Paul, and he said the BN has not offered up any proposals and that Mr. Gaskins would probably do better if he would quit negotiating with the newspapers and the legislature and tried it out with the unions.



transportation

The BN doesn't take advantage of the concessions they have now. I have here a letter sent to the company by my predecessor, Rep. Robert H. Raney, asking the company to sit down and negotiate a short crew agreement. This would cut the size of the crews from four to three. A 25% savings in labor to the company. This letter was sent October 20, 1986, before there was even a rumor of a sale, and to this date we have not had a formal reply on the request. We believe twenty years of crying wolf is enough. Lets stop it here and now. Thank you.

United Transportation Union

[illegible]

Mr. J.W. Isenberg, Supt.
Spokane Division
Burlington Northern Railroad
[illegible] First Avenue
[illegible], Washington 99204

October 20, 1986

Dear Sir:

Members of local 685 would like to make arrangements to meet with you to negotiate a short crew consist agreement.

It is our hope that we can arrive at an agreement that is satisfactory to both Burlington Northern Railroad and UTU local 685.

Please advise me if you are interested and what dates you [illegible] meet with [illegible] Livingston to discuss the issue.

Sincerely yours,

[illegible]

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible], Montana 59047

STRAIGHT TRACK

INTERCRAFT ASSOCIATION OF MINNESOTA NEWS

VOLUME IX ISSUE 1 JANUARY 1987

BN'S PROPAGANDA SEMINAR CRIES POOR - DEMANDS CUTS

BY JOHN FLAHERTY, L.C. [illegible] 144

BN management has taken their campaign to weaken our unions another step further with a video called "Survival Economics".

As in the past, with its failed Corporate Culture campaign and the Tom Matthews speaking tours, this video is just one more attempt to undermine our unions and the solidarity we enjoy among our different crafts.

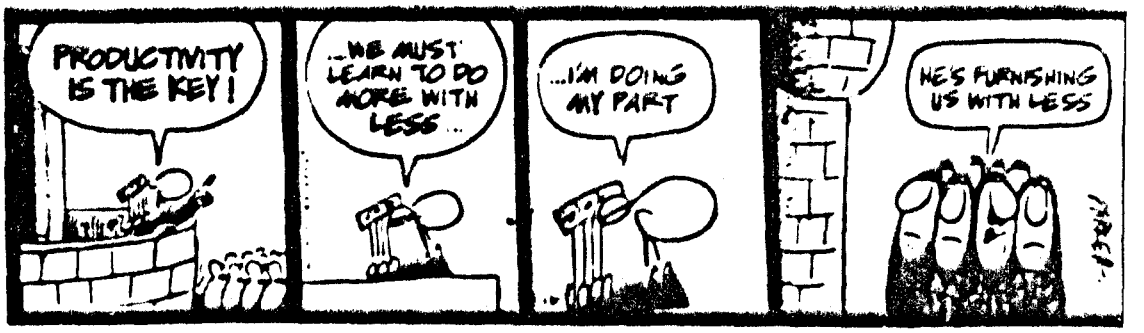
BN has invested considerable time and a huge amount of money -- paying $100 to each scheduled employee who attends this seminar -- in the hopes that this presentation will resign us to the fact that BN needs drastic concessions fr[illegible] its employees if it's going to survive in the future.

BN tells us the purpose of the video is to educate employees on the basic economic facts facing the railroads.

And according to BN video the basic economic facts are as follows: The railroad industry in general and Burlington Northern in particular are doing poorly. They have too many employees, costs are excessive, worker productivity is unsatisfactory, profits are low and the rate of return on investment to investors is inadequate to attract [illegible] capital.

As a result BN is being unable to match [illegible] competitors, especially the trucking industry which is [illegible] up transit time. railroad [illegible]

In conclusion BN's hired [illegible] product looking short of a [illegible] future and tell us to [illegible] our present [illegible] [illegible] [illegible] [illegible]



FORBES magazine (possibly the most prominent business publication in the U.S) in its June 30, 1986 issue,printed a major analysis of the rail industry. The article -- interestingly enough entitled "Here Come the Truckbusters"-- paints an entirely different picture right from its opening paragraphs.

"When World War II ended, 1.4 million people manned U.S. railroads. This year that same industry will carry 36% more tonnage than it did four decades ago, but with only 380,000 workers... one worker today does the work it once took six to do."

"Because of this almost incredible explosion of productivity", FORBES continues, "the railroads, an industry that predates even the Minnesotan era, have not only survived but flourished. Whereas the Dow Jones industrial average increased some 88% over the past decade, Standard & Poor's index of railroad stocks has increased some 200%. Instead of dying the railroads have shown astounding vigor."

So in the opinion of FORBES, railroads, far from presenting a dismal recent past and pessimistic future, reflect high profitability and attractiveness to investors that far out paces the stockmarket as a whole.

And to what do they attribute this outstanding success? The "almost incredible" productivity of its workforce. Or as they explain further in the article, "Sheer productivity has made the difference".

But it can be argued this is all opinion. What do the actual figures show? And what do the actual numbers show specifically with respect t[illegible] BN?

The actual figures give the li[illegible] to BN's entire video.

FORBES yearly puts out [illegible] issue in which it compiles extensiv[illegible] statistical data on the top [illegible] corporations and compares thei[illegible] performances on sales, profits productivity, etc.

BN's profits have increase[illegible] significantly from $113.5 million i[illegible] 1978 to $651.3 million in 1984. [illegible] profits during 1985, BN was rate[illegible] 34th of the top 500 largest companies. That's up from 41st th[illegible] previous year.

In sales BN ranked 65th. BN assets rank them well of the top 50 companies. And in comparison wit[illegible]

CONTINUED ON PAGE

PROVOKES STHIKE VOTE

BN SNEAKS IN SCAB ENGINES

STRAIGHT TRACK

INTERCRAFT ASSOCIATION OF MINNESOTA NEWS

VOLUME IV, ISSUE 1 JANUARY 1987

BN'S PROPAGANDA SEMINAR CRIES POOR - DEMANDS CUTS

BY JOHN FLAHERTY, L.C. BMWE 144

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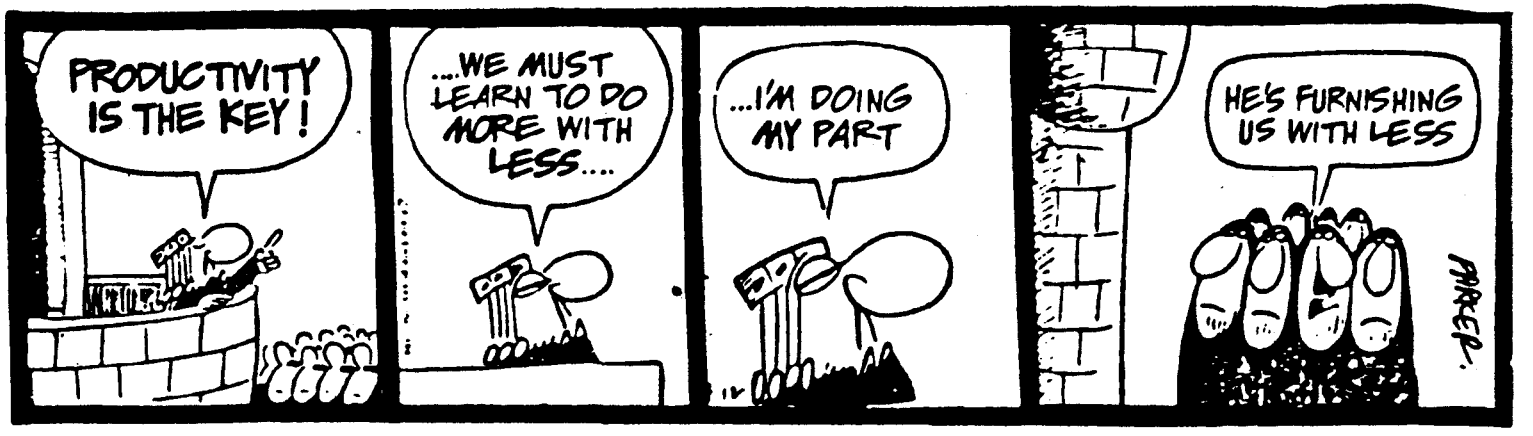

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The actual figures give the lie to BN's entire video.

FORBES yearly puts out a special issue in which it compiles extensive

EXHIBIT
DATE
HB

MONTANA CONSUMER COUNSEL

34 W. SIXTH AVENUE
HELENA, MONTANA 59620

STATE OF MONTANA

JAMES C. PAINE
CONSUMER COUNSEL
TELEPHONE (406) 444-2771

March 20, 1987

TO: Subcommittee on House Bill 861 - Business and Labor
Rep. Bruce Simon, Chairman

FROM: James C. Paine, Montana Consumer Counsel

RE: Comments on House Bill 861

The Montana Consumer Counsel supports this bill out of a concern for shippers and receivers on the purchased line. In the case of BN's Sandpoint to Laurel line, there are approximately 50 shippers and receivers on said line.

The Montana Consumer Counsel stressed inclusion of the severability clause in this bill because we recognize the legitimate question regarding the constitutionality of that portion of the bill requiring purchasers to assume existing labor contracts.

The Montana Consumer Counsel is not convinced that the disclosure provisions, however, run afoul of the Constitution.

Chamber of Commerce witness, Steve Brown, emphasized a District Court Opinion lost by the State Auditor's Office and currently on appeal to the Supreme Court. That decision held that no corporation or public office can claim a right of privacy on behalf of an individual.

The Montana Consumer Counsel, rather than relying on a District Court opinion, would rather rely on the Supreme Court's holding in Mountain States Telephone & Telegraph Co. v. Dept. of Public Service Regulation, 634 P.2d 181 (1981). The Court stated:

> "(4) We incline to agree with the District Court that the PSC would probably have applied equally the 'right to know' constitutional provision and required disclosure whether it had before it an individual or a corporation. Nevertheless, we put this possible corporate classification to rest, as an unequal application of the right to know provision, by stating that the demands of individual privacy of a corporation as well as of a person might clearly exceed the merits of public disclosure, and thus come within the exception of the right to know provision.
>
> We are reinforced in this conclusion by Mont. Const., Art. II, Sec. 10, which states: 'The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.'" (Ibid. at 188)

The question is, once information of a proprietary nature is submitted to the Attorney General, PSC, Department of Commerce or the Montana Consumer Counsel, can those agencies withhold disclosure of same to the public? The Montana Consumer Counsel submits that currently, there exists sound legal reasoning that concludes, yes, it could be withheld, if the individual privacy of a corporation outweighs the merits of public disclosure.

The Montana Consumer Counsel submits that providing this information would assist the agencies in determining the adverse consequences, if any there be, on the remaining shippers/receivers. While under an obligation to not divulge such information, the knowledge of same could be very valuable in the discovery phase of any resulting litigation, e.g., efforts to enjoin the sale or complaints regarding the discriminatory nature of rates or in the providing of service.

For these reasons, the Montana Consumer Counsel supports the concepts embodied in House Bill 861.

BURLINGTON NORTHERN RAILROAD

2200 First Interstate Center
999 Third Avenue
Seattle, Washington 98104-1105

March 16, 1987

EXHIBIT 12
DATE 3/16/87
HB 861

The Honorable Les Kitselman, Chairman
Business and Labor Committee
Montana House of Representatives
Capitol Station
Helena, Montana 59620

Dear Representative Kitselman:

I write to reaffirm the comments I made at the hearing this morning. As I told you and your committee, I am the Regional Vice President of the Burlington Northern Railroad and I am headquartered in Seattle.

I came to Helena to speak in opposition to HB 861, with most of my remarks directed toward Section 4 which would require that the new railroad operator take on the labor contracts of the previous owner. This bill, if passed, will have the effect of insuring that numerous railroad lines in the State of Montana will be abandoned at an accelerated rate. Contrary to what some people may say, HB 861 will not forstall line abandonments. In actual fact, this bill will return us to a program of having no alternative but abandonment. Let me say this as clearly as possible: HB 861 imperils service on all low volume rail in Montana by precluding the most viable option.

I became Regional Vice President in Seattle on January 1, 1983. From that date until July 1, 1986 (a period of three and one-half years) BNRR effected the abandonment of 573 miles of railroad on the region. Those were 573 miles of railroad that the Burlington Northern was simply unable to profitably operate. All the rail and ties have been picked up and the railroad no longer runs through the communities along those 573 miles.

I gave you the miles of abandonment ending in July of last year. Why? Because our abandonment program on this region has, for all practical purposes, stopped since that time. Our strategy has changed (as well as rules and regulations governing rail operations) to allow new operators to purchase and operate rail lines in a more economically efficient manner than the Burlington Northern can.

Our biggest expense is labor and, on this region, it approaches 55% of total costs. The average hourly wage for a Burlington Northern employee in 1986 (including fringe benefits) was $26.41! $26.41 per hour. What chance of success would a new operator have if he had to take on the existing labor costs. The marketplace should dictate labor costs.

During the 3rd and 4th quarter of 1986, Burlington Northern sold two segments on the region to shortline operators, one in Montana and one in central Washington. Both lines had a recent history of an eroding traffic base and under the old rules, at some point in time, would have been considered for abandonment. It would have been inevitable!

How are they doing today as the first quarter of 1987 comes to a close? I am happy to report that both are healthy and doing well. The Washington Central has increased the traffic by 15% already. John Green told your committee this morning of the increased efficiency and higher traffic volumes on Montana Western. In many cases local operators, closer to the work and the shippers, can do a better job of serving rail customers!

Since the Staggers Act of 1980, some 133 new shortlines have come into being. This is not a Montana phenomena and it is not a BN program. It is clearly an industry trend and today there are nearly 400 shortlines in the United States.

HB 861 gives the Montana Legislature an important choice: (1) Pass the bill and eliminate the possibilities for future successful short line operations in Montana and return to a program of line abandonments, or (2) Defeat the proposal and give the signal that Montana understands the importance of maintaining economical, efficient rail service through an entrepreneurial approach that is proving successful all across the United States.

I urge you to NOT PASS HB 861.

Sincerely,

W. W. Francis
Regional Vice President

wwf/g3171

EXHIBIT 13
DATE 3/25/87
HB. 861

March 16, 1987

Testimony on House Bill 861

Members of the committee, I am Mike Strawbridge, Vice President and General Manager for Ideal Basic Industries' Montana Division at Trident, Montana. I am here to speak in opposition to House Bill 861. Ideal employs over 100 people in the Montana Division. Besides shipping by truck, Ideal annually ships an average of 2000 rail cars of bulk cement to customers in Montana, surrounding states, and Canada. Additionally, Ideal receives 500 rail cars of coal each year needed to fuel the cement kiln. Without adequate rail service, Ideal would not be able to maintain a viable business in this state.

I have personally dealt with six different railroad companies across the country and unconditionally must express that the Burlington Northern is one of the best, if not the best, railroad company to deal with. Without their service, we could not cost effectively receive fuel for our production needs or ship our cement to out of state customers.

For clarification, Ideal as a company nor I as an individual, have any financial stake in the Burlington Northern. The relationship is purely one business depending on another.

It should come as no surprise to anyone that the Burlington Northern is attempting to sell their Montana rail lines. The laws of this state place many restrictions on the

BN, not found in other states, which hamper their ability to operate cost effectively. Now that the BN wants to remove itself from the oppression of state regulations, the state is attempting to stop the sale.

It should be interesting to compare the voting records of legislators to see which individuals voted against the BN on the rail road agent and caboose bills and which ones are now supporting the bill to prevent the BN from releasing itself from the non-productive effects of state regulations.

The BN has attempted to keep up with all the unproductive demands of state government. When the caboose bill came up for a vote in the Senate, one senator who voted no stated that "I voted no because nobody likes the BN." Is it really that hard to understand why the BN is selling their rail line with this type of attitude from many state government officials?

Another example is the concrete cross-tie plant proposal. Sincere attempts were made by Ideal and other companies to attract the plant and its 250 associated jobs to Montana. Lack of trust with the State government gave cross-tie revenues to Spokane, Washington.

I urge you to stop the constant assault on the Burlington Northern and vote against House Bill 861.

Thank you.

EXHIBIT 14
DATE 3/23/87
HB 861

G. STEVEN BROWN
ATTORNEY AT LAW
1313 ELEVENTH AVENUE
HELENA, MONTANA 59601
(406) 442-8711

March 23, 1987

The Honorable Bruce Simon
State Representative
Capitol Station
Helena, MT 59620

Re: HB 861

Dear Rep. Simon:

On behalf of the Montana Chamber of Commerce, I take this opportunity to outline the public policy and legal reasons why HB 861 should not be enacted.

The definition of "buyer" (section 1(1)) is ambiguous and not all inclusive. It currently includes a person, corporation, association or business entity. The term "association" is specifically defined in other sections of the Montana Code Annotated but not in HB 861 (e.g., sections 33-10-102, 33-10-202, 35-17-103 and 85-6-109). Likewise, "person" is not specifically defined and appears to be confined to individuals. The definition of "buyer" does not cover all potential buyers such as a political subdivision of the state of Montana or a labor organization.

The definition of "transaction" (section 1(4)) covers any "line of railroad", regardless of how small or isolated. It appears to cover even a minor spur or siding serving a small business or community. Such a definition is unduly broad.

The codification instruction in HB 861 is also very troublesome. Section 6 directs that the bill be codified in Title 69, Chapter 14, which is a section of state law currently administered by the Public Service Commission. Section 69-14-114, MCA, gives the PSC broad investigation powers. By codifying HB 861 in Title 69, Chapter 14, is it the intention of the Legislature to give the Public Service Commission authority to exercise its investigation and subpoena powers if the PSC is not satisfied with the responses to questions provided under Section 2? Are the buyer and seller also subject

to the PSC's enforcement and penalty powers under Chapter 69, Title 14?

Section 3(2) requires, among other things, a "financial disclosure of the buyer". The bill does not define "financial disclosure" and the term is not defined anywhere else in the Montana Code Annotated. The purchaser of a railroad line is faced with an unlimited inquiry into his finances, no matter how irrelevant the inquiry may be.

Section 3(3) contains a confidentiality provision. In light of the most recent district court decision on this issue, this provision provides small comfort. In the case of Belth v. Bennett, BDV-85-733, First Judicial District, Judge Gordon Bennett held that only individuals, and not corporations, are authorized to claim that certain documents are private and entitled to confidentiality under Article II, Section 9 of the Montana Constitution. While the Montana Supreme Court earlier held that corporations may make some claim of privacy when trade secrets are involved (Mountain States T. & T. v. Department of Public Service Regulation, ____ Mont. _____, 634 P.2d 181, 38 St. Rep. 1479 (1981)), there is no assurance that the Court would likewise find the confidentiality provision in HB 861 constitutional. The open-ended right of inquiry under the bill and the past rulings of the Attorney General liberally interpreting the public's right to know under Article II, Section 9 of the Montana Constituion also raise serious questions about the assurances of confidentiality in the bill.

Section 4 of HB 861 is an impermissible attempt to impair the right of a willing buyer and seller to negotiate the sale of railroad property. Section 4 requires that the buyer assume legal responsibility for all rights, duties, immunities and other privileges conferred by law on the seller as well any agreements between the seller, the state of Montana, a political subdivision, a shipper or any labor organization. In effect, no matter how onerous or uneconomical those pre-existing contractual obligations of the seller might be, the buyer succeeds to and is bound by those obligations. For example, Section 4 would require the buyer to assume all monetary and legal liability for cleaning up a pollution problem created by the seller. That would be the case even

though assumption of such an obligation might make the sale uneconomical. Such a result is not good public policy nor can it satisfy state and federal constitutional prohibitions against such contract impairments.

The Montana Chamber of Commerce respectfully requests that HB 861 be given a do not pass recommendation.

Sincerely,

Steve Brown

G. Steven Brown

GSB rs
cc: Montana Chamber of Commerce

EXHIBIT 15
DATE 3/19/87
HB 861

MONTANA WESTERN RAILWAY CO.

March 19, 1987

STATEMENT OF:
J. W. Greene, President of Montana Western Railway Co., and
Director of the American Short Line Association
in opposition to HB 861.

The Honorable Bruce Simon
Chairman of the Business and Labor
subcommittee hearing HB 861

Dear Mr. Chairman:

Because of time constraints we were unable to present to your subcommittee all of the information we had hoped to present. Therefore, I use this statement to your subcommittee to augment what had been presented orally.

HB 861 is both poor policy for the State of Montana and poor law. Federal law pre-empts all the relevant parts of this bill and can only lead to the state being embroiled in expensive legal challenges.

Further, as a matter of policy for our state, this bill eliminates all available options except abandonment.

From a policy position, I find it hard to believe the State of Montana wishes to encourage branch line abandonments. Yet that is exactly what this bill does.

Lastly, this legislation puts at risk all three of Montana's short lines. You have heard testimony that all three short lines may have to acquire additional trackage to prosper and expand. The record of all three of Montana's short lines is excellent. We have provided improved service to shippers, pay taxes to the state and the communities through which we operate, and provide good paying jobs for Montana citizens.

Therefore, for all the foregoing reasons, we respectfully request the members of this subcommittee to vote against HB 861.

Sincerely,

J. W. Greene

JWG/jdr

700½ Railroad St. • 406/782-1249 782-1240 • Butte, Montana 59701

EXHIBIT
DATE 3/16/87
HB 861

UNION PACIFIC RAILROAD COMPANY

MICHAEL H. WALSH
CHAIRMAN AND
CHIEF EXECUTIVE OFFICER

1416 DODGE STREET
OMAHA, NEBRASKA 68179

March 13, 1987

Representative Les Kitselman
Chairman
Montana House Business &
Labor Committee
Montana Legislature
Helena, MT 59601

Dear Mr. Chairman:

I am writing to convey Union Pacific's opposition to H.B. 861, which would impose a number of onerous requirements on the sale of railroad branch lines. We hope that you and the Members of your Committee will decide not to advance this proposal.

Union Pacific is not currently in the process of selling or abandoning our line from Pocatello, Idaho, to Butte. If future considerations so warrant, however, H.B. 861 would have the effect of forcing us to abandon rather than sell our trackage in Montana.

Since the Staggers Rail Act was enacted in 1980, some 133 new shortlines and small regional railroads have come into being. In many instances, these carriers have taken over trackage that larger railroads could not operate profitably and that would otherwise have been abandoned. There is no question that the renaissance of small railroads has been a positive development. Both railroad jobs and service to shippers located on branch lines has been preserved. Today, nearly 400 shortlines are in operation and employ about 12% of the total rail industry work force.

H.B. 861, by requiring that a new rail carrier "succeed to and be bound by" the selling railroad's collective bargaining agreements, would kill most branch

line sales. The key to the success of today's shortline is lower operating costs. While a number of shortlines are non-union, many others have retained labor organizations but have negotiated more flexible collective bargaining agreements. Small railroads cannot afford to narrowly limit the duties employees can perform on the basis of craft specifications. It is highly doubtful that any line would be sold if purchasers would be forced to inherit the high operating expenses that provoked the sale of the trackage in the first place.

The requirement under H.B. 861 that an acquiring carrier succeed to all rights and duties to a shipper could also cause problems, particularly with respect to contract rate agreements. The contract language could discourage carriers from entering into favorable rate agreements with shippers because of the uncertainty of potential liability if ownership of a line is transferred and the acquiring carrier is unable to fulfill the terms of a contract. In addition, any contract arrangements in effect at the time a line is sold would, as a practical matter, have to be renegotiated since a carrier purchasing a branch line would not, for example, be able to provide line-haul service.

Shortlines have not experienced significant difficulties in negotiating rate and route arrangements with their connections. Favorable arrangements are as much in the interest of the selling carrier as the purchasing carrier since the selling railroad stands to benefit by continuing to participate in the freight traffic that the acquiring carrier originates or terminates. Because of the importance of rate and route arrangements to both parties, these issues are generally negotiated prior to sale. A recent survey of shortlines by the Interstate Commerce Commission supports the assertion that shortlines have generally been pleased with their relationships with connections. Of the 127 shortlines and small railroads responding to the survey, 122 rated their relationships from fair to excellent or had no comment.

Finally, we are concerned that H.B. 861 would require a selling and a purchasing railroad to go through a detailed procedure involving the production of significant information about the transaction, including responding to requests for further information. This

complex procedure could greatly delay the consummation of branch line sales and force the selling carrier to absorb additional operating losses which could be avoided through abandonment.

I strongly encourage you to vote against H.B. 861. We believe that the substantial benefits of new shortlines for shippers, communities and shortline employees would be lost and Montana trackage abandoned if this legislation were to become law.

Very truly yours,

cc: Members of the House
Business and Labor Committee

EXHIBIT
DATE 3/17/87
HB 841

MONTANA STATE AFL-CIO
APRIL 29 1956

Box 1176, Helena, Montana

JAMES W. MURRY
EXECUTIVE SECRETARY

ZIP CODE 59624
406/442-1708

March 17, 1987

The Honorable Les Kitselman, Chair
House Business and Labor Committee
Montana House of Representatives
Capitol Station
Helena, Montana 59620

Dear Representative Kitselman:

I am writing this letter on behalf of the Montana State AFL-CIO urging adoption of House Bill 861. Because of scheduling conflicts, we were unable to attend the March 16, 1987, hearings on this matter. However, it is our conviction that House Bill 861 goes a long way towards protecting small towns, Mainstreet businesses dependent on rail service and railroad workers. We would like to go on record in support of House Bill 861.

There has been a great deal of worry recently over the potential effects of acutal and proposed rail line sales in Montana. These concerns center around loss of rail service and the abrogation of negotiated labor agreements. It is our belief that Montana's small towns and businesses should not be abandoned by railroads until all potential effects are thoroughly scrutinized. Because this bill requires disclosure of all financial and contractual information involved in rail line sales to the Attorney General, Public Service Commission, Consumer Counsel and the Department of Revenue, it will mean that potential impacts can be verified and studied.

Our major industries such as agriculture, timber and mining, as well as Mainstreet businesses depend on uninterrupted rail service to survive and prosper. Since BN has been reluctant to give any assurance that rail line sales will not mean discontinuation of services, any future rail line sales must not be made hastily. This bill protects towns and Mainstreet businesses and shippers by assuring that all agreements made before the rail line sale will be honored.

Our third concern is that under current ICC regulations on rail line sales, buyers are not legally bound to maintain previously negotiated and binding labor contracts. The primary purpose of rail line sales may then become the abrogation of union contractual agreements and the gutting of wages for railroad workers. These pay cuts will pose a significant hardship not only for these workers, but for the communities in which they live.

Drastic wage reductions impact our local economies no less significantly than major plant closures. This bill addresses this issue by guaranteeing that buyers must abide by previously negotiated labor contracts.

This bill is in the best interests of shippers, workers and Mainstreet businesses that depend on reliable and uninterrupted rail service. We urge you to give House Bill 861 a "do pass" recommendation.

Thank you for considering our comments.

With best regards, I am

Sincerely yours,

James W. Murry, Executive Secretary
Montana State AFL-CIO

cc: Members of the House Business and Labor Committee

EXHIBIT
DATE 3/13/87
HB 861

UNION PACIFIC RAILROAD COMPANY

MICHAEL H. WALSH
CHAIRMAN AND
CHIEF EXECUTIVE OFFICER

1416 DODGE STREET
OMAHA, NEBRASKA 68179

March 13, 1987

Representative Les Kitselman
Chairman
Montana House Business &
Labor Committee
Montana Legislature
Helena, MT 59601

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H.B. 861, by requiring that a new rail carrier "succeed to and be bound by" the selling railroad's collective bargaining agreements, would kill most branch

line sales. The key to the success of today's shortline is lower operating costs. While a number of shortlines are non-union, many others have retained labor organizations but have negotiated more flexible collective bargaining agreements. Small railroads cannot afford to narrowly limit the duties employees can perform on the basis of craft specifications. It is highly doubtful that any line would be sold if purchasers would be forced to inherit the high operating expenses that provoked the sale of the trackage in the first place.

The requirement under H.B. 861 that an acquiring carrier succeed to all rights and duties to a shipper could also cause problems, particularly with respect to contract rate agreements. The contract language could discourage carriers from entering into favorable rate agreements with shippers because of the uncertainty of potential liability if ownership of a line is transferred and the acquiring carrier is unable to fulfill the terms of a contract. In addition, any contract arrangements in effect at the time a line is sold would, as a practical matter, have to be renegotiated since a carrier purchasing a branch line would not, for example, be able to provide line-haul service.

Shortlines have not experienced significant difficulties in negotiating rate and route arrangements with their connections. Favorable arrangements are as much in the interest of the selling carrier as the purchasing carrier since the selling railroad stands to benefit by continuing to participate in the freight traffic that the acquiring carrier originates or terminates. Because of the importance of rate and route arrangements to both parties, these issues are generally negotiated prior to sale. A recent survey of shortlines by the Interstate Commerce Commission supports the assertion that shortlines have generally been pleased with their relationships with connections. Of the 127 shortlines and small railroads responding to the survey, 122 rated their relationships from fair to excellent or had no comment.

Finally, we are concerned that H.B. 861 would require a selling and a purchasing railroad to go through a detailed procedure involving the production of significant information about the transaction, including responding to requests for further information. This

complex procedure could greatly delay the consummation of branch line sales and force the selling carrier to absorb additional operating losses which could be avoided through abandonment.

I strongly encourage you to vote against H.B. 861. We believe that the substantial benefits of new shortlines for shippers, communities and shortline employees would be lost and Montana trackage abandoned if this legislation were to become law.

Very truly yours,

cc: Members of the House
Business and Labor Committee

EXHIBIT
DATE
HB

STATE
OF
MONTANA

ATTORNEY GENERAL
MIKE GREELY

JUSTICE BUILDING, 215 N. SANDERS, HELENA, MONTANA 59620
TELEPHONE (406) 444-2026

24 March 1987

Representative Bruce T. Simon
House of Representatives
State Capitol
Helena MT 59620

Dear Representative Simon:

You have requested a statement from this office concerning the prospective use of information received from a seller of a railroad pursuant to the provisions of House Bill 861, 1987 Montana Legislature.

Any such information would be reviewed to determine whether it was in compliance with all relevant laws on the subject.

Very truly yours,

JOE R. ROBERTS
Assistant Attorney General

EXHIBIT
DATE
HB

WEINER, MCCAFFREY, BRODSKY & KAPLAN, P.C.

ATTORNEYS AT LAW

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LESLIE C. BENDER*
JOHN DOCHERTY*

*NOT ADMITTED IN D.C.

SANFORD A. WITKOWSKI
COUNSEL

OTTO J. METZEL
JOSEPH D. FEENEY*
OF COUNSEL

March 18, 1987

The Honorable Les Kitselman
Chairman
Business and Labor Committee
Montana House of Representatives
Capitol Station
Helena, Montana 59620

Dear Mr. Chairman:

This letter is written on behalf of the Montana Western Railway Company, Inc., which we represent as special railroad counsel. My specialty practice is the representation of short line and regional railroads, particularly in all matters related to the acquisition of property from large railroads.

I have represented each of the purchasers of four properties of the Burlington Northern Railroad that were concluded within the last year: the Montana Western, the Arkansas & Missouri, the Washington Central and the Otter Tail Valley Railroads. Each of these companies is privately financed, is owned by individuals who are residents of the communities they serve, and is totally independent from Burlington Northern. In the short time that these railroads have been in existence, each of them has established very good relations with the communities it serves, its employees and its shippers. Most important, each has stimulated new traffic on its lines and expects to continue to do so, and in no case has any property been abandoned or even been proposed for abandonment.

For all these reasons, it is my judgment that these new railroads have demonstrated immediately the important benefits to the community of having a new railroad and that they offer

the best opportunity for preservation and enhancement of rail service. This is particularly true for a state such as Montana that relies so heavily on rail as the source of transportation for its principal resources, coal and grain.

The purpose of this letter is to comment on H.B. 861 which is now before your committee. The essence of this bill is that it would require that notice of and information with respect to a transfer of a railroad property be given to the State's representatives (sections 2 and 3) and that the buyer succeeds to and is bound by all contracts of the seller (section 4). In my judgment, both of these matters have been preempted by federal law.

As you know, Congress has granted to the Interstate Commerce Commission exclusive jurisdiction over rail carriers with certain exceptions not relevant here (49 U.S.C. §10501). Such jurisdiction includes the power to exempt a transaction from the requirements of the Interstate Commerce Act where the Commission determines that application of the Act (1) is not necessary to carry out the transportation policy of the Act, and (2) the transaction is of limited scope and application of the Act is not needed to protect shippers from abuse of market power. In 1980, Congress established as a transportation policy that the Commission reduce regulatory barriers to entry into the industry. 49 U.S.C. §10101a(7).

To that end, the ICC adopted on January 17, 1986, a new rule exempting new rail carriers, upon the filing of a notice with the Commission, from the review requirements of the Commission in order to acquire properties of existing carriers. Ex Parte 392 (Sub No.-1), 41 F.R. 2504. A copy of the Commission's order is enclosed for your consideration. In adopting this rule, the Commission specifically considered, and rejected, the requests of certain states to obtain prior notice and certain information with respect to the transactions covered by the rule. Since the Commission has exclusive jurisdiction with respect to the subjects covered by H.B. 861 and has exercised that jurisdiction, the State is preempted from adopting a contrary law. The U.S. Supreme Court has repeatedly affirmed this conclusion. See Chicago & N.W. Transp. v. Kalo Brick & Tile, 450 U.S. 311 (1981) ("The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment....Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity.")

In addition, section 4 of the Bill requires the new carrier to take the labor contracts of the seller. This is directly contrary to the rights of both the new carrier and its employees as established by the Railway Labor Act (45 U.S.C. §151 et seq.), which is the exclusive law governing relations between railroads and their employees. That law specifically prohibits any carrier from requiring any of its employees to sign any contract or agreement promising to join or not to join a labor organization (45 U.S.C. §152, Fifth), and grants to the employees the right to organize and bargain collectively through representatives of their own choosing (45 U.S.C. §152, Fourth).

With respect to the requirement that the new carrier accept all other contracts of the seller, this, too, is likely to be viewed as unconstitutional as an undue burden on interstate commerce proscribed by Article I, section 8. In many instances, a seller is required by the terms of its contracts to make them binding on its successors. In some cases, however, successorship is either specifically prohibited or is not discussed, leaving the parties free to decide whether such contracts should be assumed by the buyer. Dictation of a different result by the State would clearly be an unreasonable burden on all parties because of the interference in the bargained rights of the parties. States may enact legislation that burdens interstate commerce (as Montana's legislation most assuredly does) only if interstate commerce is indirectly regulated by the State (Montana regulates interstate common carriers directly) and only if the burden on interstate commerce is not excessive in relation to the local interests served by the statute. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

In sum, in my view H.B. 861 would not survive legal challenge. However, I also urge that its requirements are in any event bad public policy in that they will prevent Montana from continuing to benefit from these transactions, since the law would clearly prevent them by reason of the burdens discussed above. Moreover, from my experience not only with the purchasers of the properties from Burlington Northern, but also from the approximately 40 other buyers we have represented, both buyer and seller, upon reaching agreement but well in advance of closing, go to representatives of the state or states affected by the transaction to inform them of the transaction and its expected benefits. This is done as a matter of prudence and good community relations since neither party wishes to incur the opposition of the State or any of its subdivisions to the transaction. This was done in the case of Montana Western and would doubtless always be done by any

prudent buyer and seller. Therefore, the objective of the bill to inform the appropriate state officials seems unnecessary.

I hope these comments are useful. I regret that I am unable to appear personally before your committee at this time but I would be pleased to respond to whatever additional information requests you may have.

Cordially,

R. Lawrence McCaffrey, Jr.

RLM/jcs/7960D/5060

EXHIBIT
DATE

Soo Line Corporation

LARRY E. LONG, Assistant Vice President Government Affairs (612) 347-8271

March 13, 1987

VIA FEDERAL EXPRESS

The Honorable Les Kitselman
Montana Representative
Capitol Station
Helena, Montana 59620

Dear Representative Kitselman:

The Soo Line Railroad wishes to express its opposition to H.B. 861. Many light density rail lines cannot support Class I railroad expenses. Without a viable sales possibility the only remaining option for a line unable to support existing expenses would be abandonment. The adversarial process of abandonment benefits no one, not shippers, employees or railroads.

In the long run, regional and short line operators will preserve rail service and jobs. Iowa has a number of short line and regional railroads operating within the state, some of which have been operating for several years. Should you wish to discuss the short line experience with a state official, I would suggest calling Les Holland, Director, Rail and Water Division, Iowa Department of Transportation at (515) 239-1646.

Thank you for considering our views.

Very truly yours,

LEL/smh

LELL.017

EXHIBIT
DATE
HB

Louisiana-Pacific Corporation

P.O Box 389
Deer Lodge, Montana 59722
406/846-1600

March 16, 1987

Honorable Les Kitselman
Capitol Station
Helena, MT 59601

RE: House Bill 861

Dear Honorable Mr. Kitselman,

I am opposed to the House Bill 861. If enacted, it could eliminate short lines, allowing Burlington Northern and Union Pacific to abandon some of their branch lines, which would leave my company without rail service. Without the rail service it would effect 110 jobs at the sawmill and most of the logging operations around the community.

I am very pleased with the service and personal attention that the Montana Western Railway Co. has given us.

Sincerely,

Edward Newman

Edward Newman, Plant Manager
LOUISIANA-PACIFIC CORPORATION

EN/lmh

EXHIBIT
DATE 3/19/87
HB 861

DEPARTMENT OF COMMERCE
TRANSPORTATION DIVISION

TED SCHWINDEN, GOVERNOR
1424 9TH AVENUE
STATE OF MONTANA
(406) 444-3423
HELENA, MONTANA 59620-0401

March 19, 1987

Representative Bruce Simon
Sub-Committee Chairman
House Committee on Business and Labor

Dear Representative Simon:

As per your request, the information that the Department of Commerce would receive under the disclosure provisions in H.B. 861 would be used to access the impacts on the state's producers, shippers and transportation system. Information that will be important in the terms and conditions of sale include: marketing, tariffs, interline agreements, service provisions and car supply. The information should also allow a determination of who controls the shortline and its competitive effect on our transportation system.

The Department of Commerce is also vested with the responsibility of annually updating the state rail plan. The information regarding terms and conditions of sale are vital to our rail planning responsibilities.

H.B. 861 has been amended so that the information required can be used for legal purposes, if necessary. The confidentiality provisions of 861 will not prevent the state from using the information for legal purposes.

Also attached is some legal basis which we believe gives the state the legal right to know the terms and conditions of sales.

Sincerely,

William J. Fogarty

William J. Fogarty
Administrator
(406) 444-3423

FEB 11 [illegible]

EXHIBIT
DATE 3/16/87
HB 861

DEPARTMENT OF COMMERCE
TRANSPORTATION DIVISION

TED SCHWINDEN, GOVERNOR — [illegible] AVENUE

STATE OF MONTANA

[illegible] — HELENA, MONTANA [illegible]

File: 2-1-13

February 10, 1987

The Honorable Ron Marlenee
312 9th Street South
Great Falls, Montana 59405

ATTENTION: Caseworker/Mrs. Meadors

Dear Congressman:

At your request, I have reviewed the employment subsidies with reference to the Montana Western Railroad and the Job Service Officers of Deer Lodge and Silver Bow Counties. It appears that Montana Western is utilizing the federal-state job training program for three of its employees. It has been verified that the Job Service solicited Montana Western's participation in the program. The railroad originally approached Job Service looking for experienced railroad personnel and were asked to utilize the federal job training program.

Under the program, three employees are employed for twenty-six weeks. They receive 50 percent of their wages from the training program and the remainder from Montana Western. I do not know the current status of the employment contracts, but at the end of the twenty-six week term, the total employment subsidy will be $12,480.00.

Each employee receives $320.00 per week. Subsidy would be $160.00 from federal funds.

$$\frac{\text{Employees}}{3} \times \frac{\text{Wage}}{\$160} \times \frac{\text{Weeks}}{26} = \$12,480$$

This $12,480.00 will provide on-the-job training to three individuals to make them proficient railroad employees.

Job Service states that the program has been effective in finding employment for unskilled workers with chronic unemployment. Montana Western states that their three job trainees are working out very well.

[illegible] EQUAL OPPORTUNITY EMPLOYER [illegible]

Montana Western offered no other explanation of why they chose Job Service over other resources to recruit employees.

I hope this answers your questions to some extent. If we can be of further assistance, please let me know.

Sincerely,

John D. Craig, Chief
Intermodal Commodities Bureau
Transportation Division
(406) 444-3423

JDC/sc

RON MARLENEE
MONTANA

WASHINGTON OFFICE
408 CANNON HOUSE OFFICE BUILDING
WASHINGTON DC 20515
(202) 225-1555

Congress of the United States
House of Representatives
Washington, DC 20515

MONTANA OF
312 9TH STREET
GREAT FALLS, MT
(406) 453-
2717 FIRST AVE
BILLINGS, MT
(406) 657-
YOU
BOX

February 2, 1987

William J. Fogarty, Administrator
Transportation Division
Department of Commerce
1424 9th Avenue
Helena, MT 59601

Dear Bill:

As you know, I was recently invited to attend a meeting consisting of several union crafts regarding the proposed sale of the BN Southern Line. At this meeting I received a formal request to obtain the following information.

Apparently several of the union crafts believe that a substantial amount of federal and/or state dollars was provided for the operation and training of railroad employees now working for Mr. Green in Butte, Montana.

I would appreciate it if you would provide me with the actual dollar amount, if any, and its use in order that I may share this information with these individuals requesting it.

I would also like to take this opportunity to thank you for assisting my Casework Director, Kathy Meadors, in obtaining up-to-date information on the proposed sale. Your input was very helpful.

Please direct any correspondence concerning this inquiry to my district office located at the following address:

312 9th Street South
Great Falls, Montana 59405
Attention: Caseworker/Mrs. Meadors.

Sincerely,

Ron Marlenee

km/aw

COUNTIES

BIG HORN BLAINE CARBON CARTER CASCADE CHOUTEAU CUSTER DANIELS DAWSON FALLON FERGUS GARFIELD GOLDEN VALLEY HILL JUDITH BASIN
LIBERTY MCCONE MEAGHER MUSSELSHELL PETROLEUM PHILLIPS PONDERA POWDER RIVER PRAIRIE RICHLAND ROOSEVELT ROSEBUD
SHERIDAN STILLWATER SWEET GRASS TETON TOOLE TREASURE VALLEY WHEATLAND WIBAUX YELLOWSTONE

RON MARLENEE
Montana

WASHINGTON OFFICE
409 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3211

Congress of the United States
House of Representatives
Washington, DC 20515

February 11, 1987

Judith Bell
District Director
Railroad Retirement Board
P.O. Box 1351
Billings, Montana 59101

Dear Ms. Bell:

At the recent union meeting held in Great Falls on January 15th at which Mr. Kamenski from your office participated, I was asked if federal funds were provided for job training of my employees on the short lines now operating in Montana.

I wrote to the State Department of Transportation to obtain this information and I now enclose for your information and review, a copy of that response. Needless to say, daily, I am very dismayed to learn that the State Job Service agency has solicited Montana Western's participation in a federal/state job training program that would train these employees in railroading. I find this very hard to understand inasmuch as your agency has access to the names of these railroaders furloughed or unemployed who are experienced railroaders. To expend over $12,000 in training of this sort is inexcusable.

I am wondering if the Job Service is required to contact your agency and to coordinate or seek information about furloughed railroad employees. I cannot imagine that the Job Service is not aware that your agency is a valuable source.

I would appreciate any information you can provide about this particular process. Please direct any correspondence concerning this inquiry to my district office located at the following address:

312 9th Street South
Great Falls, Montana 5940[illegible]
Attention: Caseworker Miss Meadors.

Sincerely,

Ron Marlenee

km/aw

COUNTIES

BIG HORN BLAINE CARBON CARTER CASCADE CHOUTEAU CUSTER DANIELS DAWSON FALLON FERGUS GARFIELD GOLDEN VALLEY HILL JUDITH BASIN LIBERTY McCONE MEAGHER MUSSELSHELL PETROLEUM PHILLIPS POWDER RIVER POWDERIVER PRAIRIE ROOSEVELT ROSEBUD SHERIDAN STILLWATER SWEET GRASS TETON TOOLE TREASURE VALLEY WHEATLAND WIBAUX YELLOWSTONE

EXHIBIT
DATE 3/20/87
HB 861

PUBLIC SERVICE COMMISSION

2701 Prospect Avenue • Helena, Montana 59620
Telephone: (406) 444-6199

MEMORANDUM

TO: Representative Simon, House Committee on Business and Labor, Subcommittee Assigned to HB No. 861

FROM: Timothy R. Baker, Staff Attorney, Montana Public Service Commission TRB

DATE: March 20, 1987

RE: The Use by the PSC of the Information Provided to it Under HB No. 861

The proposed bill provides that prior to the transfer of a line of railroad, the seller and buyer shall provide certain documentation to the Commission. This documentation includes a "Notice of Intent," which by definition contains the following:

(a) A complete and accurate description of the identities of the buyer and seller.

(b) A thorough description of the railroad line to be transferred.

(c) A copy of the proposed sale contract, any market and feasibility studies, and a financial disclosure of the buyer.

In addition, HB No. 861 requires that representatives of the buyer and seller "attend meetings" with the Commission, to respond to questions and "requests for information in the proposed transaction."

As the agency responsible for the general supervision of all railroads operating within this state, it is the Commission's responsibility to insure that these railroads provide, maintain and operate sufficient train service for use by the citizens of the State of Montana. To protect these state interests, the Commission must often scrutinize actions taken by a railroad to insure that its ability to perform its duties under the law have not been impaired. A sale transaction, as contemplated by HB No. 861, is one such activity.

The Commission will use the information provided to it under HB No. 861 to assess the impacts of the sale upon the obligations of the railroads under applicable state laws. In general, sale transactions involving railroads are reviewed by the Interstate Commerce Commission (ICC), pursuant to the provisions of the Staggers Rail Act of 1980. If a review of the information provided reveals that the transaction may be harmful to state interests, the information would also be very helpful in persuading the ICC to examine the transaction and if necessary, attach such conditions to the sale as are in the interests of the state. In addition, and as part of its responsibilities, the Commission is empowered to establish rates for intrastate rail transportation. After such a sale transaction, there would exist a new rail carrier, which would probably need to establish intrastate rail rates. The information provided to the Commission under HB No. 861 would be of great assistance in reviewing any tariffed rates that are filed.

EXHIBIT
DATE 3/16/21
HB 861

Stopping Shortline Sales:
"And Then What"

by

Terry L. Anderson*

I. Introduction

The prospect for economic development in Montana has never been more dismal and the result is that state and local governments face a fiscal crisis that is not likely to disappear in the near future. The basic problem is that we in Montana have not been able to shed what historian Mike Malone has called "the historical roots of anti-corporate sentiment." We cling to a "fixed-pie mentality" of economic development; that is, "they" are getting rich at "our" expense.

There is no better example of this problem than the legislation before this committee regarding the sale of railroad shortlines. In an effort to protect existing jobs in the name of economic development, we are considering legislation that will stand in the way of job creation. This has been the name of the game in Montana for too long and it must change if we are to experience job creation, increasing incomes, and prosperity in the future.

The purpose of my remarks is to suggest why this legislation (HB 861) should be rejected in the interest of preserving jobs and rail service to the southern half of the state. I will first review the historical roots of our anti-corporate sentiment. In section III, I will review some basic

*Terry L. Anderson is a Professor of Economics at Montana State University. The remarks presented here do not necessarily reflect those of Montana State University or its administration.

lessons from economics regarding the importance of private contracting, and in section IV, I will discuss some evidence showing that shortlines can save jobs and service. In the final section, I will discuss the likely scenario if this legislation passes.

II. The Fixed-Pie Mentality

With an economy heavily dependent on non-renewable resources, it is not surprising that Montanans have a "fixed-pie mentality." One need only observe the Berkeley Pit in Butte or the dredge piles outside Virginia City to conjure up a picture of economic development as a zero-sum game; it appears that "they" have gotten rich at "our" expense. With such a view of economic development it is easy to understand the historical roots of Montana's anti-development attitude. From the earlier days of the state's history, the economy has been heavily influenced by mining and railroads which are both seen as extractive. As Michael Malone put it in the Montana Business Quarterly (Spring 1986),

> Railroads are mainly in the business of crossing open, uninhabited expanses, and mining corporations are probably the most extractive and exploitive of all industries in the sense that they remove things forever from the land and disturb the land when doing so.

But this fixed-pie view of economic development, even development carried out by railroad and mining corporations, could not be farther from reality. In a free society such as ours, all trades depend on mutual consent and result in gains from trade which Adam Smith told us 200 years ago are only limited by the extent of the market. To think only of the Copper Kings and the wealth they amassed from mining is to ignore the multitude of immigrants who came to Montana to take the mining jobs or to operate small businesses. For these immigrants, the incomes they earned from mining or railroads far exceeded what they could have

earned in their mother countries. It was the economic activity of the corporate owners and the workers that allowed us to inherit wealth greater than most societies will ever hope to attain. We seem to forget the gains from trade inherent in economic activity accrue to both parties of a transaction. To view economic development as one big Berkeley Pit from which only corporate interest "extract wealth" is incorrect. All parties to the development, corporate owners and laborers alike, have gained something.

Right or wrong, this fixed-pie mentality prevails in Montana. Again Professor Malone summarizes the problem:

> We still have an attitude similar to that of third-world nations that remember their colonial past and are determined not to be exploited again. Our severance taxes are probably the greatest symbol of that. And yet other states that were also "colonized" are beyond that attitude. Montana, pretty much alone in comparison with the other states, has been left with a legacy that is anti-corporate or at least anti-development, an attitude that is self defeating. . . . One has the feeling that Montana must go further to join the other states of the Union.
>
> If we don't, we face a real danger of passing so far out of the national mainstream that it means a rapidly diminishing quality of life and the loss of opportunity for ourselves and our children.

If we are to solve our economic problems in Montana, we must step into the 20th century and shed the anti-corporate sentiment. We must search for laws which encourage investment and create new jobs. We must avoid sending a signal to the rest of the world that we oppose flexibility in management and have an industrial policy that smacks of state socialism.

III. Encouraging Entrepreneurship

The beautiful thing about a market economy is that it allows entrepreneurs to sense the special circumstances of time and place and to take actions regarding those circumstances to improve the economy. In a market system, decision makers are continually on the lookout for new ways

of organizing production so as to reduce the cost and/or improve the quality of the good or service for the customer. Indeed this is the very process of economic growth.

Whenever government does anything that stands in the way of this entrepreneurship, we can be sure that overall output will be less and fewer resources including labor will be employed. When the founding fathers wrote the contract clause into the U.S. Constitution, they understood that it was the freedom of contract between the owners of inputs that unleashed the creative force of free enterprise. It is the owners of capital contracting with the owners of labor that ultimately results in gains from trade and the enlargement of the economic pie. Anything done to drive a wedge between the freedom of economic parties to contract causes the pie to grow less rapidly and eventually decline. We must remember that it is the freedom of contract that allows our society to adjust the changing circumstances in the economy so that we can remain productive and efficient.

IV. Selling Shortlines

In the legislation before this legislature regarding the sale of short railroad lines, we see the fixed-pie mentality confronting the importance of freedom of contract and entrepreneurial spirit. With headlines announcing the "imminent" sale of the Burlington Northern southern line across Montana, the concern has arisen that we will lose jobs and rail service unless we pass laws to prevent or at least control this sale. Unfortunately we have not looked ahead and asked what positive results such a sale might generate.

The sale of shortlines is nothing new across the country. As an article in the St. Paul Pioneer Press Dispatch put it, "Regionals Bring Customers Back." Throughout the midwest, Class I railroads are selling off

smaller lines to operators who can run them more efficiently and make a profit. The result has been that jobs have been saved and service has been improved. An article in Modern Railroads summarized the importance of shortline sales.

> But it's clear that the new regionals so far are working and doing exactly what is in the labor's real interest; saving jobs. Instead of collapsing under deadening work rules, the new regionals, for the most part, are offering a stake in their companies in the form of profit sharing. Experienced workers are getting first choices and in order of seniority. Employment generally is up and service improved significantly. Communities are retaining rail service (and the tax Bases) where the threat of isolation was very real. Further, the new railroads, frequently with state help, are putting money into track and plant to firm their economic bases. Accordingly, if labor's bid for "protection" is successful it could easily kill the trend if only because the competition [trucking] is immune to a similar restriction. . . . Ominously, last year labor protection cost the industry almost $400 million, or 20 percent of net income. It may behove rail labor, however, to consider that, in the last 5 years, 133 new shortlines were formed vs. only 75 in the period 1950-1980. That works out to about 14,000 jobs that might not exist for anyone's protection.

The legislation being considered here is not likely to help protect jobs because it will make it harder for shortlines to be formed. The shortline concept gives the entrepreneur a way of taking a line that may not be profitable and expanding the economic pie. In order to do this the entrepreneur must have freedom of contract. He or she must be able to negotiate with the owners of labor inputs to make the new organization work. Government cannot possibly know what type of contract is best. The fact that the Class I railroad wishes to sell suggests that the existing contract do not work. To bind the new buyer to the old contract is to defeat the purpose of entrepreneurship in the first place.

V. Restricting Shortline Sales

All too often legislators forget to ask what I like to call the "And then what?" question. Ecologists understand that if something changes in the environment there are likely to be other changes that will follow. It

is no different with legislation. If a law is passed, it is inevitable that some other changes will occur.

And what will happen if shortline sales are hampered? The most likely result is that the Class I carriers will eventually abandon their lessor unprofitable lines and concentrate on the more profitable ones. Regulations and labor costs have continually risen for railroads, making it very difficult for them to compete in a deregulated market. The possibilities of selling shortlines gives the Class I carriers a way to deal with these problems and allows entrepreneurs an opportunity to preserve jobs and service. If the lines are not as profitable, the railroads will be willing to capitalize this fact into the sales price of the asset thus making it possible for another operator to make it work. If the sale is thwarted, the major carrier will eventually be forced to abandon the route. When we ask the "and then what" question, we may find that this legislation will ensure that we lose service and jobs.

VI. Conclusion

A few years ago I testified before a legislative committee regarding plant closing legislation that was being considered. At that time I pointed out that restrictions on plant closings are also restrictions on plant openings. By interfering with decisions that must be left to business managers, we send a message to potential investors in Montana that this is no place to consider doing business. The legislation before this committee is no different. It will not preserve jobs or service, and it will send the wrong signal to the rest of the world. We will not be able to photograph the firms that do not locate here because of this signal or interview the workers who are not employed by these plants, but we can be sure that we will reduce the creation of new jobs and deter investment. Please ask the "and then what" question.

EXHIBIT
DATE 3/26/87
HB 861

BROWNING, KALECZYC, BERRY & HOVEN, P.C.
ATTORNEYS AT LAW
28 NORTH LAST CHANCE GULCH
POST OFFICE BOX 1697
HELENA, MONTANA 59624

TELEPHONE
(406) 449-6220
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R. STEPHEN BROWNING*
STANLEY T. KALECZYC*
LEO BERRY
J. DANIEL HOVEN
LISA LECKIE
OLIVER H. GOE
SUSAN C. WITTE

*MEMBER OF MONTANA AND THE DISTRICT OF COLUMBIA BARS

MEMORANDUM

To: House Business and Labor Committee
Subcommittee on HB 861

From: Leo Berry

Date: March 23, 1987

As per the Chairman's request, this memorandum will summarize the Burlington Northern Railroad's position on HB 861 and will provide the subcommittee with copies of the pertinent documents and cases.

There are two issues involved in passage of HB 861. One is a policy issue and the other is a legal issue. Assuming for the moment that the State of Montana has the authority to implement the requirements of HB 861, it is not in Montana's best interests to do so. HB 861 essentially contains three things:

1. notice to the State of a potential sale;
2. disclosure of financial and other information;
3. assumption by the buyer of existing labor & other agreements;

The future operation of branch and short lines in Montana presents three options:

1. continued operation;
2. sale to a short line operator;
3. abandonment.

If traffic declines or remains static and costs increase, pressure will bear to dispose of the lines. That will take the form of either a sale or abandonment. HB 861, from a practical standpoint, eliminates the option of a sale. As a result, abandonment is left as the only option in such a circumstance. That option is not beneficial to the communities along the line, the shippers or the railroad workers. From a public policy position, it does not make sense to eliminate, what would otherwise be a viable option for continued rail service.

The legal issues surrounding HB 861 are serious. The proponents of HB 861 have placed the Committee in an untenable position having to decide major legal issues. Although nothing is certain in the legal arena, the State's ability to impose the requirements of HB 861 is very doubtful. The United States Constitution's supremacy clause does not allow a state to thwart federal intent.

A state can act in a field, such as rail service, as long as it does not interfere with the federal intent. However, state's efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity. Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). In passing the Interstate Commerce Act Congress determined that multiple control in matters affecting interstate railroad transportation was detrimental to the public interest. Kalo Brick, at 320. The Interstate Commerce Commission (ICC) has taken specific action in the area of sales of rail properties to non-carriers. The preemption of state involvement in the sale of short lines is recognized in the attached letter from PSC Commissioner, Tom Monahan to the ICC. That letter was written specifically in relation to the sale of the line between Butte and Garrison to the Western Montana Railroad. Attached is a copy of an ICC ruling, Ex Parte 392, which severely restricts what a state can do in the area of short line sales. The principle of federal preemption prevents the state from negating a legitimate federal action. ICC Ruling 392 specifically addresses the very items in HB 861.

1. additional notice to the state;
2. disclosure of more financial and operation information; and,
3. labor protection.

The relevant parts of the order have been highlighted for your convenience. As you can see on pages 2, 5, and 7, the ICC considered each issue that HB 861 attempts to address. It specifically decided not to provide additional notice to the states, require disclosure of financial and operation information or require the assumption of labor contacts by the buyer. Montana, as a state, may disagree with the ICC decision, but federal preemption prevents the state from imposing conditions on such railroad sales which are in contradiction of the ICC ruling.

The proponents of HB 861 erroneously rely on the case of Hayfield Northern Railroad Co., Inc. v. Chicago and Northern Western Transportation Co., 467 U.S. 622 (1984). The proponents have argued that the case supports the enactment of HB 861. In fact, the case stands for just the opposite proposition. In that case a state statute was allowed to apply to an abandoned rail line, but only after the ICC had relinquished jurisdiction over the line. The Supreme Court noted that, had the ICC retained jurisdiction, application of the state statute would almost certainly be preempted. The state cannot undo an action of the ICC. Id. at 633, footnote 11. HB 861 attempts to undo the affects of ICC decision Ex Parte 392.

Under Ex Parte 392, the ICC continues to exercise jurisdiction over the sale transaction and in fact can revoke the exception provided for. The ICC can, after the sale, award labor protection through a petition process. The Ninth Circuit Court of Appeals in a recent decision, ruled that it is within the discretion of the ICC to award labor protection. Railway Labor Executives Association v. United States of America, et al., Nos. 84-7684; 85-7577, Slip. op. filed March 4, 1987, (9th Cir.)

EXHIBIT
DATE
HB

PUBLIC SERVICE COMMISSION

2701 Prospect Avenue • Helena, Montana 59
Telephone: (406) 444-6165

Tom Monahan, Commissioner
District 2

August 27, 1986

Donald Shaw
Act. Dep. Dir., Rail Section
Room 2144
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423

Dear Mr. Shaw:

The Burlington Northern Railway Company (BN) has agreed to sell their rights and interests in 70.58 miles of railroad line between Butte, Montana and Garrison, Montana plus the branch line between Butte and Newcomb, Montana to a company called Montana Western Railway Company. (WMR)

Because the state of Montana is preemted by the federal government from scrutinizing this sale, we must depend upon the Interstate Commerce Commission to defend our rights and insure that the safety of Montana citizens and property will not be jeopardized by this sale. Unfortunately, I have seen no evidence to this point that the I.C.C. is going to take any action to insure that WMR is financially or technically capable of maintaining the standard of service that Montana demands and which has been provided to this date by BN. In fact, BN has already notified affected employees that they will be terminated by September 15th, an action they would certainly not take if there was any possibility of I.C.C. intervention which would delay the sale and transfer.

Bluntly, Mr. Shaw, judging from I.C.C. Chairman Heather Gradison's recent comment that "BN is one of the finest-run corporations in the country" and that "the chairman of the Burlington Northern is one of the most honorable gentlemen you could ever find", I am not surprised that the I.C.C. is not going to do anything which would frustrate an action of the BN.

There are a host of vital questions which should be answered before miles of railroad line running through

dozens of Montana cities are turned over to an unknown and untried operator.

I protest this unscrutinized sale as vigorously as possible and ask you to delay final action until an I.C.C. hearing on the matter is held in Montana.

Sincerely,

Tom Monahan
Commissioner

cc:
Senator John Melcher
Senator Max Baucus
Representative Ron Marlenee
Representative Pat Williams
Joe Brand

EXHIBIT
DATE
HB
EP/ECD
16

SERVICE DATE
JAN 15 1986

EC

THE DECISION WILL BE INCLUDED IN THE BOUND VOLUMES OF THE ICC 2d SERIES OF PRINTED REPORTS

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 392 (Sub-No. 1)

CLASS EXEMPTION FOR THE ACQUISITION AND OPERATION OF RAIL LINES UNDER 49 U.S.C. 10901

Decided: December 19, 1985

The Commission adopts final rules exempting from regulation all acquisitions and operations under 49 U.S.C. 10901, except where a class I railroad abandons a line and another class I railroad then acquires the line where the transaction results in a major market extension.

DECISION

BY THE COMMISSION:

On August 28, 1985, we published a Notice of Proposed Rules (NPR) (50 Fed. Reg. 34880) to exempt from regulation acquisitions and operations[1/] under 49 U.S.C. 10901.[2/] Noncarriers require Commission approval under section 10901 to acquire or operate a rail line in interstate commerce. Existing carriers require approval under section 10901 to acquire or operate a line owned by a noncarrier and to acquire and operate previously abandoned lines of an existing carrier.[3/] Application Proc.-Construct., Acq. or Oper. R. Lines, 365 I.C.C. 516, 518 (1982) (Application Proc.), and 49 C.F.R. 1150.1. Section 10901 also governs a change in operators. The regulations governing section 10901 transactions are set forth at 49 C.F.R. 1150.

The NPR expanded a proposal filed by Anacostia & Pacific Corp. (APC) seeking exemption for noncarrier acquisitions and operations, where the noncarrier would be a class III carrier after completion of the transaction. With one exception, the NPR proposed to exempt from regulation all acquisitions and operations under 49 U.S.C. 10901, including: (1) acquisition of trackage rights governed by 10901; (2) acquisition by a noncarrier of rail property that would be operated by a third party; (3) operation by a new carrier of rail property acquired by a third party; and (4) a change in operators on the line. The exemption would not apply when another class I railroad abandons a line and a class I railroad then acquires the line in a transaction that would result in a major market extension as defined at 49 C.F.R. 1180.3(c).

The NPR proposed to amend the regulations at 49 C.F.R. 1150 by adding Subpart D, Exempt Transactions. The proposed regulations required the filing of a notice of exemption that

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1/ The terms "acquire" and "operate" include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate.

2/ This proposal does not include railroad construction, which is also governed by section 10901.

3/ Acquisition of an active rail line where both buyer and seller are carriers is governed by 49 U.S.C. 11343.

would be effective 7 days after it is filed. The Commission would publish the notice in the Federal Register within 30 days of the filing. The NPR states that the exemption would be revoked if the notice contained false or misleading information.

We noted in the NPR that in recent years most requests for authority under section 10901 have been exemptions rather than applications, and that virtually all of the exemption requests have been granted. We concluded tentatively that a case-by-case handling of these exemptions involved a burdensome and unnecessary expenditure of resources both by individual petitioners and by the Commission. We invited comments on both APC's exemption request and the expanded exemption proposal.

Twenty-two comments were filed,[4]/ the overwhelming majority in support, because those parties concluded that the exemption would expedite and reduce the costs of entry, help maintain service, and eliminate any uncertainty in negotiations with potential purchasers, especially those unfamiliar with the regulatory process. Some State agencies request that they be served with a copy of the notice, and argue that there be a longer comment period and that more financial and operational information should be filed. The opposing unions argue that this exemption is a drastic change in railroad regulation without adequate support in the record. They also argue that the Commission should impose employee protective conditions.

As discussed below, we will adopt the proposal. The new rules are set forth in the Appendix.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10505, the Commission must exempt transactions when regulation is unnecessary to implement the rail transportation policy and the matter is of limited scope or will not result in an abuse of market power.[5]/ Congress clearly intended that we grant exemptions and rely on "after the fact" remedies, including revocation,[6]/ to correct any abuses of market power. The fundamental purpose of the exemption process was to allow the Commission to grant exemptions from those

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[4]/ Comments were filed by: Association of American Railroads; Southern Pacific Transportation Company and St. Louis Southwestern Railway Company; Tuscola & Saginaw Bay Railway Company, Inc.; Railtex Inc.; Indiana Hi-Rail Corporation; Rail Management and Consulting Corporation; Illinois Central Gulf Railroad Company; L. B. Foster Company; Jackson & Jessup; Iowa Northern Railway Company; Consolidated Rail Corporation; American Short Line Railroad Association; New York Department of Transportation; Michigan Department of Transportation; Pinsly Railroads; General Electric Credit Corporation; Railway Labor Executives' Association; Board of Trade of the City of Chicago; Illinois Department of Transportation; Alabama Public Service Commission; Illinois Commerce Commission; and United Transportation Union;

[5]/ For a discussion of the legislative history of the Commission's exemptive power, see Simmons v. ICC, 697 F.2d 326, 334-342 (D.C. Cir. 1982).

[6]/ H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980).

requirements of the Act where deregulation would be consistent with the policies of Congress.7/

The use of exemption here fulfills this legislative directive. This class exemption is designed to merely codify existing practice; exemption is presently the standard method used to acquire Commission approval for acquisitions and operations. It is designed to meet the need for expeditious handling of a large number of requests that are rarely opposed. In most instances, the transactions under this proposal will involve resumed or continued rail service with no change in operations. This exemption is designed to reduce regulatory delay and costs.

Several protestants argue that the findings needed to grant an exemption under section 10505 cannot be made for all, or substantially all, acquisitions and operations normally governed by section 10901. They cite two cases to support this proposition, citing Finance Docket No. 30663, Chicago Cen. & P.R.R. Co.--Purchase (Portion), Trackage Rights, and Securities Exemption (Chicago), set for modified procedure in decision (not printed) served September 17, 1985; and Finance Docket No. 30439, Gulf & Miss. R.R. Corp.-Purchase (Portion) - Exemption - I.C.G. R.R. Co., (Gulf) (not printed), served January 2, 1985. However, in Gulf and Chicago the Commission made the required findings and granted an exemption. The Commission has yet to decide a single case involving the type of limited transactions included here, in which it could not make the required findings. However, the fact that in the future there may be a few proposals out of hundreds that require an investigation does not preclude us from concluding that regulation of substantially all of these transactions is not necessary to carry out the national rail transportation policy. This conclusion is completely consistent with the legislative directive concerning the Commission's exemption power.

Under the new rule, class exemptions may still be reviewed by the Commission. Any affected party can file a petition to revoke under section 10505(d) and attempt to show that regulation is necessary to carry out the rail transportation policy. In light of the explicit legislative directive to grant exemptions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present. Accordingly, we reject protestants' argument that an after-the-fact remedy is not satisfactory. Transactions under this class exemption involve the transfer of discrete, defined property that would not be "lost" in the property of the acquirer. Thus, any transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy.

Some protestants fear that this proposal will be used by class I railroads to divest themselves of marginally profitable lines. They are concerned that this will result in a transfer of ownership to a party who is not financially viable or lead to inferior service. The three cases cited to support this concern

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7/ Id.

involved purchases of lines that were being abandoned.[8/] In these cases, if it were not for the operations by the shortline, rail service would have ended at an earlier date, and there was no negative impact on service to the public as a result of the transactions. Additionally, insolvency by three small railroads attempting to improve unprofitable lines of class I railroads that were to be abandoned is not indicative of the financial stability of numerous other shortlines.

Commentors' concerns about the financial viability of new carriers are not supported by any specific evidence. Illinois Department of Transportation states that its records show that the Commission has approved 10 exemption petitions in Illinois. Six have resulted in apparently viable operations; the two carriers that failed (Prairie Trunk and Prairie Central) acquired lines that were being abandoned; and two did not consumate the transactions. While some new operations may, of course, not succeed in revitalizing unprofitable or marginal lines, we are not aware of many that have failed.

Moreover, we do not agree that the transfer of an active rail line under this exemption would result in a "de facto" abandonment, as argued by some protestants. Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier serves shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer before a financial crisis (with attendant plans for abandonment) helps assure continued viable service.

Finally, we note that shortlines are dependent on local traffic for their survival, and thus have a greater incentive than class I carriers to provide local shippers with service tailored to their needs. Notably, no shipper opposes this class exemption. Shortlines frequently are able to reduce operating costs and thus keep rates competitive. No evidence was submitted to refute the tentative conclusion in the NPR at page 4 that:

> The transfer of abandoned or underused rail property for more efficient use by a railroad can be beneficial to the shippers on the line, to the community that the line runs through, and to the selling railroad. When a transfer occurs, shippers receive continued, if not enhanced service, while the selling railroad continues to receive the feeder traffic generated by the line at its junction point with the new operator.

We affirm this conclusion.

The NPR, at page 5, also contained a clear statement that employee protection would not be imposed on this class of transactions:

8/ Prairie Trunk Railway-Acquisition and Operation, 348 I.C.C. 432 (1977); Finance Docket No. 30039, Prairie Central Railway

> We have consistently rejected these requests [for labor protection], reaffirming our long-standing, and judicially approved policy of not imposing labor protective conditions on acquisitions and operations under section 10901. We have stated that the policy of supporting continued operation of abandoned lines or abandonable rail lines is so strong that we will not impose labor protection even on established carriers acquiring or operating such lines. See, e.g., Tennessee Central Ry. Co.-Abandonment, 334 I.C.C. 235 (1969); and Finance Docket No. 29923, Acq. of Line of Chicago, R.I. & P. Ry. Co.-Ft. Worth-Dallas, Tx (not printed), served June 3, 1982. It is our established policy that the imposition of labor protective conditions on acquisitions and operations under 10901 could seriously jeopardize the economics of continued rail operations and result in the abandonment of the property with the attendant loss of both service and jobs on the line. [footnote omitted.] In conclusion, we would not impose protective conditions if an application or individual exemption were filed. We propose to follow that policy should this class exemption be adopted. * * * *

The Commission's well established discretion to impose labor protection under 49 U.S.C. 10901 was recently confirmed in Black v. ICC, 762 F.2d 106, 111 (D.C. Cir. 1985), citing Railway Labor Executives' Ass'n v. United States, 697 F.2d 285, 296 (10th Cir. 1983); Simmons v. ICC, 697 F.2d 326, 340 (D.C. Cir. 1982); and In re Chicago, Milwaukee, St. P. & P. R.R., 658 F.2d 1149, 1169 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). The Railway Labor Executives' Association (RLEA) and United Transportation Union (UTU) offer no persuasive argument that employee protection under 10901 is mandatory. Instead, they argue that the Commission cannot exercise its discretion by making a class-wide finding that employee protection will not be imposed. If discretion could not be exercised by a class finding, it would be virtually impossible for an agency to use rulemaking instead of individual adjudication in dealing with a particular category of cases. "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). Accord, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524-525 (1978); National Small Shipments Traffic Conf. v. ICC, 725 F.2d 1442, 1447-48 (D.C. Cir. 1984).

Exercising our discretion to not impose employee protection on this class of transactions is consistent with congressional intent.[9]/ In drafting the Staggers Act, Congress chose not to burden certain new operators with labor protection costs. For example, the acquirer of a rail line under 49 U.S.C. 10910, the feeder rail program, can elect to be exempt from nearly all

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9/ The legislative history of the Staggers Act reflects a deliberate congressional option for "discretionary" rather than "mandatory" labor protection in section 10901. H.R. Rep. No. 1430, supra n. 6, at 115-16.

provisions of the Interstate Commerce Act, including the labor protection provisions of 49 U.S.C. 10903.[10]/

Additionally, 49 U.S.C. 10905, the provision governing offers of financial assistance, is silent on the issue of employee protection. After an analysis of congressional intent, the Commission exercised its discretion and did not impose employee protection on section 10905 transactions. Illinois Central Gulf R. Co.-Abandonment, 366 I.C.C. 911 (1983) aff'd, Simmons v. I.C.C. 760 F.2d 126 (7th Cir. 1985), pending cert., No. 85-438. We concluded at page 914:

> When this statute [10905] was enacted, Congress stated that one of its goals was to assist shippers who are sincerely interested in improving rail service. [citation omitted]. [Employee protective] conditions are inconsistent with these goals since they will render acquisition more costly and, therefore, deter efforts which otherwise are to be encouraged. [footnote omitted.]

Employee protection is also inconsistent with our goals in granting this class exemption and would discourage acquisitions and operations that should be encouraged. The record supports a conclusion that the acquirer would not be able to complete the transaction if those conditions were imposed.[11]/. RLEA and UTU have not demonstrated a need for employee protection either in past individual exemption requests or in this class exemption. There is no reason to impose the potential expense and burden of employee protection on an acquirer where there is not likely to be a demonstrated need.

To date most exemptions have involved abandoned lines, and employee protective conditions had already been imposed on the abandoning-selling carrier in the abandonment proceeding. In those instances not involving abandoned lines, labor has on occasion requested that conditions be imposed on a selling carrier. Prior to the late 1970's, the Commission did not have a clear policy concerning imposing employee protective conditions on a seller. With the bankruptcy of Chicago, Rock Island and Pacific Railway Company, Debtor (William M. Gibbons, Trustee), (Rock Island) and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, many shortlines sought to acquire marginal or abandoned lines. Faced with the need to encourage continuation of rail service, the Commission adopted the present policy of not imposing conditions

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10/ Discussed in detail in Simmons v. I.C.C., supra n. 5, at 341.

on the buyer or the seller.[12] We reasoned that there are costs associated with labor protection, and these costs would result in an increased selling price. Thus, the acquirer would indirectly bear these costs. In addition, in transactions under section 10901, operations are continuing and jobs for rail employees will continue to be available. Thus, railroads seeking to rid themselves of marginal lines should be encouraged to sell to shippers, shortlines, communities, and other mainline carriers who seek to continue operations over these lines. If labor protective conditions are imposed, the economic justification for transfer of a line is diminished if not negated. Accordingly, for these reasons and the reasons discussed above, no conditions will be imposed as a matter of course on the seller in a proposal using this class exemption.

In view of labor's lack of demonstrated need, the availability of revocation, congressional and Commission policies encouraging continued rail operations, and the likelihood that labor conditions would jeopardize the transaction and the economics of continued operations, we will exercise our discretion and not impose employee protective conditions on this class of transactions.

In an extraordinary case, a protesting labor union may seek protection by way of a petition to revoke under 10505(d). If an exceptional showing of circumstances justifying the imposition of labor protection is made, the Commission is empowered to revoke the exemption, in whole or in part, and impose labor protection. However, we will respond summarily to unsupported or otherwise pro forma requests for labor protection.

Several railroads argue that the Commission's authority to impose labor protection is limited by the plain language of section 10901(e) to situations where a "rail carrier propose[s] both to construct and operate a new railroad line pursuant to this section." (emphasis added.) In view of our general holding, we need not and will not resolve this here. We note only that, while amendments to the Interstate Commerce Act reflect a disinclination towards routinely - imposed labor protection, our regulatory authority is both express and implied and early cases on the subject find implied authority to impose labor protection. See United States v. Lowden, 308 U.S. 225, 239-40 (1939).

RLEA and UTU also argue that it is "premature" to adopt an exemption that is at odds with legal arguments made by RLEA and UTU in several cases pending review. However, pending court cases cannot restrict an agency's docket in the manner advocated; settled principles of administrative law preclude that. The Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. 2342, et seq., confers "exclusive jurisdiction" on a single court of

appeals to enjoin or set aside a particular Commission rule or order, 28 U.S.C. 2349, and to stay the agency's order pendente lite or permanently. Id. That jurisdiction does not extend to other Commission proceedings, even those premised on the validity of an order under judicial challenge. Thus, the Commission is under no legal obligation to stay its present administrative proceeding until various court cases are decided. Additionally, the arguments advanced in the cases cited by RLEA and UTU do not persuade us that the legal positions adopted in this exemption proceeding are in error.13/

RLEA and UTU further challenge the inclusion of "incidental trackage rights" in this class exemption. For clarity, we define "incidental trackage rights" as a grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party, that occurs at the time of the acquisition or operation. For the reasons noted above, the pending case cited by RLEA, RLEA v. ICC, et al., D.C. Cir., No. 85-1443, does not make our action premature (RLEA has now moved for voluntary dismissal). Recently, in Black v. ICC, supra, at 110-11, 114-15, the D.C. Circuit reaffirmed two Seventh Circuit decisions that section 11343 governs only transactions between two or more carriers (In Re Chicago, Milwaukee St. P. & P.R.R., supra, and Illinois v. United States, supra). Thus, trackage rights involving only one carrier or an abandoned line are properly included in this class exemption.

A few States are concerned that this proposal will result in a shortened time period for comment before the proposal becomes effective. Generally, exemptions have a 30-day effective date; however, many exemptions include a request for an immediate effective date that is usually granted. Our experience has shown that there is generally strong support for individual exemption requests to be handled expeditiously so that rail service will not be interrupted. It has been our experience that affected shippers and communities do not seek a longer period for comment, even when the decision is effective immediately. Although the comment period is rarely used to oppose individual exemptions, a few State agencies nevertheless seek to have the proposed rules modified to include a notice and comment period. We conclude that there has been no showing of a benefit from a notice and comment period that outweighs the benefit of expeditious handling. Doing so would be inconsistent with the intent of this class exemption - to streamline current procedures. We note that, as a practical matter, State and local governments receive actual notice well before the proposal is filed. Local interests and government entities are often involved in the early stages of these proposals and frequently provide funding and loan guarantees. Additionally, no notice is given today before an individual exemption request is filed, and experience has shown that no hardship results.

Finally, we will clarify a statement in the NPR that if the notice of exemption contains false or misleading information it will be revoked. Consistent with other class exemptions, if the notice contains false or misleading information it is void ab initio [See 49 C.F.R. 1152.50(d)(3)]. Revocation, as discussed above, is a remedy available under 10505(d). These petitions may be filed pursuant to 49 C.F.R. Part 1115 or Part 1117. This minor modification is included in the final rule.

We also clarify that this exemption includes a change in operators, either carrier or non-carrier, if the lease remains a 10901 transaction.

A number of parties suggested that the information required in the notice be broadened to include more detailed financial and operating data. Others request that we require, among other things, negotation between competing carriers. We have reviewed our experience under the many individual exemptions proceedings we have decided to date. The vast majority of these cases have been processed with far less financial and operating information, to the apparent satisfaction of the affected shipper and carrier parties. Moreover, those directly involved (including the state) are, in fact, well aware of the financial condition of the potential acquirer, expected traffic revenues, volume and commodities, as well as intended operation.

We have considered the proposed rules with these conclusions in mind, and will eliminate proposed rules 1150.33(f) and (h) as unnecessary and potentially misleading. We also do not think it would be productive to impose a negotiation requirement in all cases despite the fact that only the very rare case rises any competitive issues. While we do not minimize these concerns, we believe the revocation procedure is adequate and appropriate to handle the few unique cases, and a petition for stay can also be filed in the exceptional case. We have and will continue to handle these cases expeditiously.

We conclude that exemption of these transactions will foster the rail transportation policy of 49 U.S.C. 10101a by minimizing the need for Federal regulatory control over the rail transportation system, ensuring the development and continuation of a sound rail transportation system, fostering sound economic conditions in transportation, reducing regulatory barriers to entry, and encouraging efficient rail management. Therefore, we find that the continued regulation of acquisitions and operations under 49 U.S.C. 10901 is not necessary to carry out the national rail transportation policy.

We further find that these transactions will not result in an abuse of market power. Proposals under this class exemption generally will maintain the status quo and will not change the competitive situation. The vital interests of shippers, communities, and carriers will be served by this exemption because it will result in the continuation of service that might otherwise be lost. Accordingly, we adopt the NPR.

Other exemptions that may be relevant to a proposal under this Subpart are the class exemption for control at 49 C.F.R. 1180.2(d)(1) and (2), and the exemption from securities regulation at 49 C.F.R. 1175.

We find:

1. Regulation of acquisitions and operations of railroads under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy and is not necessary to protect shippers from the abuse of market power.

2. We affirm the conclusions expressed in the NPR that this action will not have a significant economic impact on a substantial number of small entities, because it imposes no new requirements on them.

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

Authority: 49 U.S.C. 10321, 10505, and 10901; and 5 U.S.C. 553.

It is ordered:

1. We adopt the Notice of Proposed Rulemaking and amend Part 1150 of the Code of Federal Regulations as set forth in the Appendix to this decision.

2. This decision is effective February 17, 1986.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Taylor, Sterrett, Andre, Lamboley, and Strenio. Vice Chairman Simmons concurred with a separate expression. Commissioner Lamboley concurred in part, and dissented in part with a separate expression.

(SEAL)

James H. Bayne
Secretary

MEETING MINUTES
WORKERS COMPENSATION SUBCOMMITTEE
MARCH 16, 1987

The meeting of the Workers' Compensation Subcommittee was called to order at 12:15 a.m. on March 16, 1987 in room 312f of the state capitol building by Chairman Bill Glaser.

All members were present.

MEDIATION

(2a:314) Bob Robinson, administrator of the Workers' Compensation Division (WCD), presented an overview of the dispute language in the legislation on pages 15 and 16. In an attempt to eliminate unnecessary litigation and the abuses of using the court, the WC Advisory Council developed language to determine that a dispute had occurred. Mr. Robinson stated that currently there are a certain number of attorneys who will not deal with the claims examiner or the insurance company but ask for maximum benefits even before the claimant has reached maximum healing. He stated at this point the insurer cannot respond to make a valid counter offer because not all of the evidence is gathered. He said under the current system, the attorney can make the demand before the evidence is available, the insurer cannot respond or does not give in to the maximum demand, and the case is placed on the court docket. After it is on the docket, the information gathering process begins. To the extent the case is not settled prior to the date of hearing, it goes to the court, and if the court awards a portion of the requested amount, the attorneys fees are translated from 25% of additional benefits to 33%, an incentive to not work with the claims examiner but to get to the court even before the insurer has adequate evidence.

He stated the council adopted the language in section 8 to provide for a resolution of disputes in a case before it goes before a mediator. The legislation states the claimant making the demand shall present the insurance company with a specific written demand with explanation and documentary evidence to enable the company to evaluate the demand, and the party receiving the demand shall respond in writing within 15 working days of receipt. If they don't respond or provide an acceptable response the claimant can then go to mediation.

(2a:381) He stated the court has adopted a "five minute rule" that basically says that if you have a dispute that couldn't be resolved within five (5) minutes, it was a valid dispute and could be placed on the court docket. The court,

because of that, is used as leverage. He added this language states that before the court can be used as leverage, the insurance company must be presented with the demand or a basis from which to respond. The insurance company is then given 15 days to respond in writing. If they do not respond or do not provide an acceptable response, the claimant can then go to mediation. If an individual is not satisfied with the information provided by the insurance company, and they have documentation and the basis for a dispute, they can move into mediation.

(1a:417) Bob Jensen, administrator of the Employment Relations Division, Department of Labor and Industry, and the five (5) member board of personnel appeals, which administers the Collective Bargaining Act for public employees, spoke on the mediation process in SB 315.

Mr Jensen states there were differences between the intent of mediation in the bill and what might usually be considered part of a mediation process. When the bill passed the senate, the need for a preliminary meeting on the issue of mediation developed and a steering committee was formed of representatives, claims attorneys, insurers, organized labor, the workers' compensation court, staff from WCD and the Department of Labor. He then presented the committee with exhibit 1 on the areas discussed. Exhibit 1 delineates the purpose of the mediation process as described in section 52 of the bill, with the addition that the process must be speedy and fair to allow the parties involved to feel comfortable and that they are getting a "square deal".

He stated the handout describes two (2) or three (3) of the basic responsibilities of mediators, as he sees it, under SB 315 and how this responsibility differs from other mediation processes.

He stated the steering committee also discussed the qualifications and selection of mediators, and discussed the appropriate personal traits that an individual would require, skills, and a general presence of authority. The committee felt that technical competence was the most important trait a mediator would require to perform this job. It was suggested that initially the mediators be contracted rather than staff to establish credibility, with contracted mediators training staff mediators six (6) months or one (1) year later in the technical areas, so that the division would eventually end up with staff mediators.

(3a:013) Mr Jensen stated some consensus was reached by the committee on unrepresented claimants, and the need to develop a simple mediation request form and that the

mediator should help the claimant gather the appropriate information.

Item five (5) of exhibit 1 describes issues for rules and further discussion by the steering committee.

Some of the areas Mr Jensen covered were:

What constitutes appropriate and sufficient information.

He said in regard to page 16, line 8, rules and criteria needed to be developed for the grounds for dismissal by a mediator. Several members of the committee felt it was important for both sides to be represented at this point to make it easier for the mediator to deal with the dismissal.

Other language he felt needed to be addressed in rules or statute and through further discussion by the steering committee was the content of a mediator's report following mediation and non-cooperation, the mediator's notes - what type of notes and should they be included in the claimants file; the need to define the "insurer" and "claimant" parties and who has access to information, "dispute", what constitutes "all relevant evidence", "may petition" should be a simple process, what type of information is required for petitioning; "representation" and unrepresented claimants, and who can be a representative. He added an important point is the need to establish time lines for the mediator's recommendation after the parties have presented their information and evidence. The committee had discussed this point at some length as to appropriate time lines in this process. Discussed were 30 to 60 days from the time of request of mediation is filed for the gathering of information and for the actual conference, 15 - 20 days for the mediator to make a recommendation.

Mr Jensen said the question came up in committee as to whether the other parties have access and availability to the division files.

(3a:210) He noted the mediator's responsibility to see that the appropriate evidence is offered for mediation, as this evidence must include that which would be present if the case were being presented to the workers compensation judge.

In response to a question from Rep Driscoll, Mr Robinson clarified the intent of section 8 as disputes between the insurer and employer, i.e. classification, independent contractor/employee issue, not disputes concerning benefits.

Rep Driscoll noted that as he sees it the process of mediation is structured primarily to deal with temporary total

benefits. He stated there are no time limits, and presented a scenario of a worker who is injured and the insurer or employer denies liability, he has no access to the procedure, he contacts the division, gets a form, and starts the mediation process. He asked how long it would be before there is a face to face meeting between the insurer and the injured party and where will that meeting be held? He added the average worker does not know who the employer's insurance company is, and if the employer does not cooperate and give him that information or will not fill out the forms and he ends up contacting the division, what section of the legislation would apply, section 8 or section 52? Jim Murphy, bureau chief of the state fund, stated that if the individual states he has been injured and the employer will not help him, the division looks to see if the employer has coverage. If there is coverage, the division would provide an accident form within 24 hours. He stated the employee is not responsible to get the employer's report in the first place. The insurance carrier would request that report, and if the report wasn't forthcoming, by another section of this statute the insurance carrier has 30 days to accept or deny liability. The carrier can accept liability without an employers report. The case would end up in mediation when the insurance carrier actually made a decision and said they denied the claim, and at that point the claimant could dispute and go forward to mediation.

Rep Driscoll asked what type of time limits were involved for this process. He noted 30 days had transpired between the time of injury and the determination of liability by the carrier, the worker has no lost time money. He now requests mediation. How long before he gets a mediator, and will he have to come to Helena for the mediation process?

Mr Murphy stated this is a subject that has to be in the rules. In the steering committee the discussion was 30 to 60 days as outside time limits between the time a request for petition is filed and they would get to mediation and 10 to 20 days for the mediator's recommendation. As far as where mediation would be held, this area was not really discussed. It could be set up in various areas, i.e., a rotation going out to various cities on a monthly basis.

Rep Driscoll stated it was very important that in considering that a worker would be without income for up to 90 or 100 days, that the mediation be held in their home town, as he couldn't afford to travel to Helena.

Rep Driscoll asked if an injured worker is receiving temporary total benefits, and the insurer wishes to take the benefits away, will the same procedure be used and the same time limits be enforced. Mr Robinson stated another section

of law in the Workers Compensation Act states that if an insurer reduces benefits and there is a dispute over that reduction, the claimant can ask the division to issue an order demanding that the insurer continue to pay those benefits for 49 days, during which time the dispute should be resolved.

Rep Driscoll asked if liability was denied, and the case went to mediation, the mediator agreed with the injured worker that they should be getting benefits, and the worker had hired an attorney, who pays the attorney. Mr Robinson stated that as long as it is not in the court the claimant pays the attorney, because the benefits would be gained through his efforts. If the case goes to court and the court determines there was unreasonable action taken by the insurance company, then those legal costs and fees can be assessed against the insurer.

The meeting was adjourned at 1:05 (3a:430)

Bill Glaser, Chairman

bg/gmc/3.16 DRAFT

DAILY ROLL CALL

WORKERS COMPENSATION SUBCOMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 16, 1987

NAME	PRESENT	ABSENT	EXCUSED
Rep William Glaser	X		
Rep Jerry Driscoll	X		
Rep Larry Grinde	X		
Rep Jerry Nisbet	X		
Rep Clyde Smith	X		

EXHIBIT 1
DATE 3-16-87
SB 315

MEDIATION - WORKER'S COMPENSATION

1. Purpose: To prevent when possible the filing in the worker's compensation court of actions by claimants or insurers, if an equitable and reasonable resolution may be affected at an earlier stage. (Section 52)
   - must be speedy and fair

2. Responsibility of Mediators:
   A. Dismiss petitions if Section 8 not complied with
   B. Assure that all relevant evidence is brought forth
   C. Suggest possible solutions
   D. Recommend a solution
   E. Prepare report on non-cooperation

3. Qualifications and Selection of Mediators:
   A. Basic Qualifications
      - impartiality
      - appropriate personal traits
      - technical competence.
   B. Staff or contract mediators
      - initial training
      - maintenance training
      - compensation
      - coordination

4. Unrepresented Claimants:
   A. Simple mediation request form
   B. Mediator should assist

5. Issues for Rules and Further Discussion by the Steering Committee:
   A. Information
      - all relevant evidence
      - completeness for section 8
      - availability of Worker`s Compensation files to all parties
      - medical (often not timely)

   B. Grounds for mediator's dismissal of petition (consideration of represented and unrepresented claimants)

   C. Mediators report (following mediation and non-cooperation)

   D. Mediator's notes (should they be included in the file)

   E. Role of mediator - unrepresented claimants

F. Mediation request form (what information should be included) simple

G. Definition of representative (union representative or non attorney

H. Definition of dispute

I. Proper parties

J. Time lines for mediation process

K. Conduct of mediation proceedings

WORKERS' COMPENSATION MEDIATOR

Duties and Responsibilities:

1. With neutrality, persuasion which maintains personal integrity and professional presence as well as technical competency in subject matter:

- Provide mediation to insurers and claimants on issues concerning workers' compensation benefits.

- Facilitate exchange of information between parties and assure relevant issues are brought forth in mediation.

2. Establish and implement procedural functions to provide necessary forum for dispute settlement.

- Arrange and schedule meetings.

- Conduct joint and/or individual meetings - chair meetings as needed and maintain order.

- Exercise judgment to propose discussion sequence and grouping of major and minor issues.

3. Establish and maintain communication channels.

- Arrange for qualified top level direct communications with appropriate parties and/or authorities.

- Inform parties of mediator's assessment of positions.

- Facilitate communications by urging face-to-face negotiations.

4. Take the affirmative and make substantive recommendations on issues.

- Persuade parties to prioritize their positions on the issues.

- Offer creative suggestions on specific issues.

- Advise and assist parties in development and presentation of proposals and counter-proposals.

- Counsel parties on their legal requirement to attempt mediation.

Knowledges, Skills and Abilities:

1. Thorough knowledge of state cases and regulations pertaining to workers' compensation laws. Technical knowledge of medical terms and conditions. Articulateness in making one's self understood.

2. Ability to display and maintain neutrality; to establish and maintain responsiveness, credibility, confidence, tact, cooperation, confidentiality, and sensitivity with advisory parties; to persuade, prioritize, advise, assist and facilitate communication to determine materiality, relevancy and credibility; and to write clearly and concisely in simple comprehensive language.

3. The knowledge, skills and abilities are typically acquired through a combination of education and experience equivalent to a Bachelor's Degree in Business Administration or a related field with coursework in law or medicine and four years of professional work in such areas as labor law, labor relations, mediations or negotiations, all of which must have been at the level that would provide the knowledges, skills and abilities required for this position.

We have therefore issued a directive for a protective order in this case. In it is the result of the balancing process that we have described above. The order gives the PSC fullaccess to all information needed by it in its regulatory duties with the right in the commission to preserve that information in its offices. Likewise, we have provided that the Consumer Counsel may receive such information and preserve the same in its office. We have made the same information available to any party, corporate or private, participating in the rate hearings before the PSC, subject to provisions which protect the confidentiality of the trade secret information. We are confident that such provisions provide consumers with adequate knowledge to participate fully in the commission's proceedings while at the same time protecting the interests of the utility. See Pennzoil Co., 534 F.2d at 632.

DUE PROCESS - FOURTEENTH AMENDMENT - EQUAL PROTECTION

The PSC held in its order denying a protective order on April 30, 1979 (and upheld its ruling on a motion for reconsideration) that "Mountain States Telephone and Telegraph Company is not to be considered an individual under Article II, Section 9, of the Montana Constitution."

The commission ruling took Mountain Bell out of the exception, contained in Mont. Const., Art. II, sec. 9, which states that the "right to know" does not apply "in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

The District Court, sitting in review of the PSC order declined to follow the PSC's rationale as to whether Mountain Bell was entitled to the benefit of the exception. Instead the District Court determined that the PSC would have applied the "right to know" provision even-handedly, both to individuals and to corporations, and that therefore, the PSC would not have made any distinction between individuals and corporations as classes. The District Court concluded therefore that no equal protection question was presented to it by the ruling.

The District Court appears to base its denial of a protective order upon the premise that it is constitutionally permissible for the state in the exercise of a lawful governmental function, to regulate utility rates, and for its citizens to know how the state regulates such rates by full access to the information before regulators.

We incline to agree with the District Court that the PSC would probably have applied equally the "right to know" constitutional provision and required disclosure whether it had before it an individual or a corporation. Nevertheless, we put this possible corporate classification to rest, as an unequal application of the right to know provision, by stating that the demands of individual privacy of a corporation as well as of a person might clearly exceed the merits of public disclosure, and thus come within the exception of the right to know provision.

We are reinforced in this conclusion by Mont. Const., Art. II, Sec. 10, which states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

Showing a compelling state interest is an equal protection test, and it comes into play if the statute or state constitution affects a fundamental right. Schilb v. Kuebel (1971), 404 U.S. 357, 365, 92 S.Ct. 479, 484, 30 L.Ed.2d 502, 511, reh.den. 405 U.S. 948, 92 S.Ct. 930, 30 L.Ed.2d 818.

Since we have determined that a trade secret is a species of private property, the right to hold that property is a fundamental right. If the PSC were to be upheld in its ruling that the 1972 Mont. Const., Art. II, Sec. 9, covers individuals but not corporations, it would be necessary that we find a compelling state interest for such classification to avoid the implications of the equal protection clause of the Fourteenth Amendment. We find no such compelling state interest. A corporation is a "person" within the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution. First Nat. Bank of Boston v. Bellotti (1978), 435 U.S. 765, 780, 98 S.Ct. 1407, 1418, 55 L.Ed.2d 707, 720, reh.den. 438 U.S. 907, 98 S.Ct. 3126, 57 L.Ed.2d 1150.

Even, however, if we were to agree with the District Court that no pernicious classification by the PSC is involved in this case because of its even-handed application of the right to know provision, we cannot escape the implications of the Fourteenth Amendment under our finding that a due process violation occurred in the refusal of the protective order. The Fourteenth Amendment does far more than extend equal protection in the application of state law. It also provides that no state " shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Our state constitution also guarantees due process, 1972 Mont. Const., Art. II, Sec. 17, and equal protection of the laws, Mont. Const., Art. II, Sec. 4. The application by the PSC of Montana's right to know provision in this instance created a conflict of that provision with the due process and equal protection clauses of the state constitution.

It is not difficult to resolve the conflict if we keep in mind the federal constitutional provisions. The due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution also conflict with Montana's right to know provision as applied here by the PSC. It is appropriate that state rules respecting due process principles be in harmony with federal rules on the same subject, in the same area. Matter of M.D.Y.R. (1978), 177 Mont. 521, 532, 582 P.2d 758, 765. By holding that the due process clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment require us to provide protection to Mountain Bell for its trade secrets to the extent not necessary for regulation, we confirm the police power of the state to regulate utilities, we resolve the seeming internal conflict in our state constitution created by the PSC in the application of the right to know provision, and we pay due accord to the due process requirements of the U.S. Constitution.

INFORMATIONAL RIGHTS OF THE PSC AND THE CONSUMER COUNSEL

It should be noted that in our protective order, we have placed no

fetters upon the rights of the PSC and the Consumer Counsel to obtain from Mountain Bell all information, including trade secret data, upon which its application for increased revenues is based. The police power of this state in the regulation of public utilities is sufficient basis to justify the unhampered rights of these state agencies to receive such information. We have confirmed the rights of these agencies to hold the information in their office files. Any party to the ratemaking process shall have access to the trade secret information to be used by their expert witnesses in the ratemaking determination. Further dissemination of the information we leave to the discretion of the PSC, to be released, or not released, in the exercise by the PSC of its ratemaking functions. We have thus balanced the rights that all citizens acquired under the right to know provision of the state constitution with the purpose and function for which our laws compel disclosure by utilities of trade secrets. The right to know provision was designed to prevent the elevation of a state czar or oligarchy; it was not designed for, nor will we substitute, the tyranny of a proletariat.

By our holding here we have declared that the PSC and utilities appearing before it are not presented a Hobson's choice. The utility can hold and enjoy its private property to the extent not necessary to be divulged in the ratemaking process. The Consumer Counsel, representing the consuming public, has full access to the necessary information. Any other citizen, under our order, may also have access to the trade secret, provided his or her interest relates to the ratemaking function of the PSC.

The judgment of the District Court is reversed. This opinion shall be a declaratory judgment on the rights of the parties. We retain jurisdiction of this proceedings as recited in the attached order. No costs to any party.

. . . . .

O R D E R

PER CURIAM:

This is an appeal from a judgment for the defendants-respondents entered in the First Judicial District Court, Lewis and Clark County, on December 3, 1980.

Briefs have been received and oral argument by all parties had before this Court on June 9, 1981, and the matter thereupon taken under advisement.

The Court has concluded that plaintiff-appellants are entitled to protective relief; however, the constitutional issues raised in the cause are too complex, require extended discussion, and the court's opinion will not be issued for at least thirty days.

In the interest of expediting the proceedings before the Public Service Commission which underlie the declaratory action in the District Court, the Court deems it appropriate to issue this interlocutory order pending issuance of its final opinion;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The judgment entered in favor of the defendants on December 3, 1980, in cause no. 43992 in the District Court of the First Judicial District, in and for the County of Lewis and Clark, be and the same is hereby reversed, vacated and set aside.

2. The said District Court is hereby required and ordered to enter judgment in favor of the plaintiffs-appellants in said District Court. Said judgment shall include an order directed to the Department of Public Service Regulation, the Public Service Commission of the State of Montana, directing that the said Public Service Commission shall make and enter in the underlying proceedings before it the following order:

"O R D E R

"THE COMMISSION ORDERS THAT:

"1. All documents, data, information, studies and other matters furnished pursuant to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery that are claimed to be trade secret, privileged or confidential nature shall be furnished pursuant to the terms of this Order, and shall be treated by all persons accorded access thereto pursuant to this Order as constituting trade secret, confidential or privileged commercial and financial information (hereinafter referred to as 'Confidential Information'), and shall neither be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Order.

"2. All Confidential Information made available pursuant to this Order shall be given solely to counsel for the parties, and shall not be used or disclosed except for purposes of this proceeding; provided, however, that access to any specific Confidential Information may be authorized by said counsel, solely for the purpose of this proceeding, to those persons indicated by the parties as being their experts in this matter. Any such expert may not be an officer, director or employee (except legal counsel) of the parties, or an officer, director, employee or stockholder or member of an association or corporation of which any party is a member, subsidiary or affiliate. Any member of the Public Service Commission, and any member of its staff, the Consumer Counsel, and any member of its staff may have access to any Confidential Information made available pursuant to this Order.

"3. Prior to giving access to Confidential Information as contemplated in Paragraph 2 above to any expert, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to such person, and prior to disclosure such person shall agree in writing

to comply with and be bound by this Order; and said counsel shall, at the time of the review of such information and data, or as soon thereafter as practicable, deliver to counsel for the party furnishing said information and data a copy of such written agreement (which shall show signatory's full name, permanent address, and employer).

"4. Where feasible, Confidential Information will be marked as such and delivered to counsel. In the alternative, the Confidential Information may be made available for inspection and be reviewed by counsel and experts as defined in paragraph 2 herein in a place and a time mutually agreed on by the parties, or as directed by the Public Service Commission.

"5. In the event that the parties hereto are unable to agree that certain documents, data, information, studies or other matters constitute trade secret, confidential or privileged commercial and financial information, the party objecting to the trade secret claim shall forthwith submit the said matters to the Commission for its review pursuant to this Order. When the Commission rules on the question of whether any documents, data information, studies or other matters submitted to them for review and determination are Confidential Information, the Commission will enter an order resolving the issue.

"6. All counsel for the Commission, the staff of the Commission and the staff of the Consumer Counsel and his attorneys shall be bound by the terms of this Order.

"7. Those parts of any writing, depositions reduced to writing, written examination, interrogatories and answers thereto, or other written references to Confidential Information in the course of discovery, if filed with the Commission, will be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties or, after notice to the parties and hearing, pursuant to the Order of the Commission and/or final order of a Court having jurisdiction.

"All written Confidential Information coming into the possession of the Consumer Counsel under this order may be retained by him in his office files, but shall be withheld from inspection by others, except for his staff and his counsel, unless released by the Public Service Commission and/or a final order of a court under this paragraph 7, and subject always to the terms of paragraph 8 of this Order.

"8. All persons who may be entitled to receive, or who are afforded access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of this proceeding, and then solely as contemplated herein, and shall take reasonable precautions to keep the Confidential Information secure and in accordance with the purposes and intent of this Order.

"9. The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or cross-examination on the grounds of relevancy or materiality.

"10. This Order shall in no way constitute any waiver of the rights of any party herein to contest any assertion or finding of trade secret, confidentiality or privilege, and to appeal any such determination of the Commission or such assertion by a party.

"11. Upon completion of this proceeding, including any administrative or judicial review thereof, all Confidential Information, whether the original or any duplication or copy thereof, furnished under the terms of this Protective Order, and finally determined to be confidential or trade secret, shall be returned to the party furnishing such Confidential Information made part of the record in this proceeding shall remain in the possession of the Commission, and may remain in the possession of the Consumer Counsel as above provided in Paragraph 7.

"12. The provisions of this Order are specifically intended to apply to data or information supplied by or from any party to this proceeding and any nonparty that supplies documents pursuant to process issued by this Commission.

"13. This Order shall be effective forthwith."

3. If any provision of the foregoing order required to be entered by the Public Service Commission shall impede or make impossible the performance of the lawful duties of the Public Service Commission, or the Montana Consumer Counsel in a manner not heretofore argued in this cause, such parties are hereby granted express permission to file directly in this Court such motions as may be appropriate to amend or vacate the offending provisions of said order, and this Court retains jurisdiction of the cause for that purpose.

4. This Court further retains jurisdiction of the cause for the purpose of issuing an opinion herein and for such further and other relief or judgment as may be appropriate in the premises.

DATED this 9th day of July, 1981.

s/ Frank I. Haswell, Chief Justice
s/ Gene B. Daly, Justice
s/ John Conway Harrison, Justice
s/ Frank B. Morrison, Jr., Justice
s/ John C. Sheehy, Justice
s/ Fred J. Weber, Justice
s/ Robert M. Holter, District Judge, sitting for Justice Shea

EXHIBIT
DATE 3/16/13
HB 861

HOUSE BILL No. 861

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE DISCLOSURE TO THE ATTORNEY GENERAL, PUBLIC SERVICE COMMISSION, CONSUMER COUNSEL, AND DEPARTMENT OF ~~REVENUE~~ COMMERCE OF CERTAIN INFORMATION ON THE BUYER AND SELLER OF A LINE OF RAILROAD; REQUIRING THE BUYER TO SUCCEED TO THE SELLER'S LEGAL AND CONTRACTUAL RIGHTS AND DUTIES; APPROPRIATING MONEY FROM THE GENERAL FUND FOR ADMINISTRATION OF THE ACT; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Definitions. As used in (Sections 2 through 4), the following definitions apply:

(1) "Buyer" means a person, corporation, association, or business entity that acquires a line of railroad, by purchase, lease, or other agreement, to continue the commercial transportation of goods or passengers.

(2) "Labor organization" means any organization or association of any kind in which employees participate and that exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment.

(3) "Seller" means a person, corporation, association, or business entity that transfers a line of railroad by sale, lease, or other agreement.

(4) "Transaction" means the limited purchase, sale, or transfer of part of a line of railroad.

Section 2. Conditions for transfer of line of railroad. Prior to the transfer of a line of railroad, the seller and buyer shall:

(1) file a notice of intent and other information, as described in (section 3), with the attorney general, the commission, ~~and~~ the consumer counsel~~;~~, and department of commerce.

(2) require representatives to attend meetings, upon reasonable notice, with the attorney general, the commission, the department of commerce, and the consumer counsel to respond to questions and requests for information on the proposed transaction;

~~(3) file with the department of revenue a disclosure of the tax consequences of the proposed transaction; and~~

~~(4) require representatives to attend meetings, upon reasonable notice, with the department of revenue to answer questions reasonably related to the tax consequences of the proposed transaction.~~

Section 3. Notice of intent -- confidentiality. (1) The notice of intent filed in accordance with (section 2) must contain:

(a) a complete and accurate description of the identities of the buyer and seller; and

(b) a thorough description of the railroad line to be transferred.

(2) A copy of the proposed sale contract, any market and feasibility studies, and a financial disclosure of the buyer must be attached to the notice of intent.

(3) Information contained in the notice of intent and in the attached material, ~~and in the tax disclosure to the department of revenue~~ is confidential and may not be disclosed to anyone other than the buyer, seller, or recipients of the information as provided in (section 2)~~.~~, or for law enforcement purposes.

Section 4. Preservation of contracts. With respect to the line of railroad transferred, the buyer succeeds to and is bound by:

(1) all rights, duties, immunities, and other priviliges conferred by law on the seller; and

(2) any agreement between the seller and:

(a) the state or a political subdivision of the state;

(b) a shipper located in the state; and

(c) any labor organization.

Section 5. Appropriation. There is appropriated from the general fund $500 each to the attorney general, public service commission, consumer counsel, and department of

~~revenue~~ commerce for administration of this act.

Section 6. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section ~~6~~7. Codification instruction. Sections 1 through 4 are intended to be codified as an integral part of Title 69, chapter 14, and the provisions of Title 69, chapter 14, apply to sections 1 through 4.

Section ~~7~~8. Effective date. This act is effective on passage and approval.

-End-

affects some of the parties and allowed to stand as to other parties.[1] In the case of an indivisible contract, a party seeking cancellation for any reason cannot cling to the portion favorable to him and reject the balance, the rescission must operate on the contract in its entirety or not at all.[2]

1. Shields v Barrow (US) 17 How 130, 15 L ed 158.

2. Hayutin v Weintraub, 207 Cal App 2d 497, 24 Cal Rptr 761; Westhafer v Patterson, 120 Ind 459, 22 NE 414.

There is a distinction between the rescission and the reformation of a written instrument; in the case of rescission the whole contract is set aside but in the case of reformation only the part improperly introduced into the instrument is altered or expunged, and the instrument as reformed will stand. Green v Stone, 54 NJ Eq 387, 34 A 1099.

M. K.

CARRIERS

Scope of Topic: This article discusses the law of carriers of property and persons generally, including the necessity of offering service with proper facilities to the public without discrimination; the right and duty to collect rates, fares and charges, and demurrage; certificates of public convenience and necessity; the duties and liabilities of a carrier in reference to property which it accepts for transportation; its obligations under bills of lading or shipping receipts; nondelivery or misdelivery, and loss of, or damage to, goods in shipment; connecting carriers; liability for injury to, or death of, a passenger; limitation of liability of carriers of persons or property; and rights, duties, and liabilities relating to baggage.

Treated elsewhere are the subjects of interstate and intrastate commerce generally (see COMMERCE); distinctive matters pertaining to certain types of carriers (see 8 Am Jur 2d, AVIATION; SHIPPING); the powers and functions of public bodies and commissions in the establishment of rates and charges (see PUBLIC UTILITIES); the effect of a bill of lading as a document of title, apart from its effect as between the carrier and a consignor, consignee, or third person (see Am Jur 2d, COMMERCIAL CODE; SALES); the taxation of carriers (see TAXATION); and matters relating to the corporate organization and management of transportation companies, their rights of way, their relations with their own employees, their liability for injuries to others than passengers, and various other questions which are not confined to their character, function, and operation as carriers of property and passengers (see such topics as 7 and 8 Am Jur 2d, AUTOMOBILES AND HIGHWAY TRAFFIC; 8 Am Jur 2d, AVIATION; CORPORATIONS; EMINENT DOMAIN; FOREIGN CORPORATIONS; LABOR AND LABOR RELATIONS; MASTER AND SERVANT; RAILROADS; etc.).

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IN GENERAL

PART ONE

IN GENERAL

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PART ONE

IN GENERAL

I. DEFINITIONS AND DISTINCTIONS

§ 1. Carriers, generally.

A carrier, according to the legal usage of the term, is one who undertakes to transport persons or property from place to place.[1] Carriers are classified (1) with respect to their nature or character and consequent rights, duties, and liabilities, as private carriers and common carriers,[2] and (2) with respect to the subjects of carriage, as carriers of property[3] and carriers of persons.[4]

§ 2. Common carriers, and factors affecting status as such.

A common carrier may be defined, very generally, as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally.[5] The dominant and controlling factor in determining the status of one as a common carrier is his public profession or holding out, by words or by a course of conduct, as to the service offered or performed,[6] with the result that he may be held liable for refusal, if there is no valid excuse, to carry for all who apply.[7] The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently,[8] and he is regarded, in some respects, as a public servant.[9] Hence, one performing transportation service for himself only is not a common carrier.[10] One does not have the status of a common carrier where he undertakes carriage for a particular group or class of persons under a special contractual arrangement,[11] or for a particular person only.[12]

1. Higginbotham v Public Belt R. Com. (La App) 181 So 65, reh den 181 So 221, affd 192 La 525, 188 So 395.

2. People v Duntley, 217 Cal 150, 17 P2d 715; Western & A. R. Co. v Waldrip, 18 Ga App 263, 89 SE 346; Crane v Railway Express Agency, 369 Ill 110, 15 NE2d 866; Bookhart v Greenlease-Lied Motor Co. 215 Iowa 990, 244 NW 721, 82 ALR 1359; Automobile Ins. Co. v Cochran, 262 Mich 605, 247 NW 755; Bernardi Greater Shows v Boston & M. R. Co. 86 NH 146, 165 A 124; United Parcel Service v Public Service Com. 240 Wis 603, 4 NW2d 138, 5 NW2d 635.

As to the definition and general requisites of common carriers, see §§ 2–7, infra.

As to the definition of private carriers, see § 8, infra.

3. §§ 225 et seq., infra.

4. §§ 733 et seq., infra.

5. Washington ex rel. Stimson Lumber Co. v Kuykendall, 275 US 207, 72 L ed 241, 48 S Ct 41; Liverpool & G. W. Steam Co. v Phenix Ins. Co. (The Montana) 129 US 397, 32 L ed 788, 9 S Ct 469; New York C. R. Co. v Lockwood, 17 Wall (US) 357, 21 L ed 627; Semon v Royal Indem. Co. (DC La) 179 F Supp 403, affd (CA5) 279 F2d 737; Kelly v General Electric Co. (DC Pa) 110 F Supp 4, affd (CA3) 204 F2d 692, cert den 346 US 886, 98 L ed 390, 74 S Ct 137; North American Acci. Ins. Co. v Pitts, 213 Ala 102, 104 So 21, 40 ALR 1171; Illinois C. R. Co. v Frankenberg, 54 Ill 88; Goodman v New York, N. H. & H. R. Co. 295 Mass 330, 3 NE2d 777, 106 ALR 1151; State ex rel. State R. Com. v Ramsey, 151 Neb 333, 37 NW2d 502; Shelden v Robinson, 7 NH 157; Jackson Architectural Iron Works v Hurlbut, 158 NY 34, 52 NE 665; Travis v Dickey, 96 Okla 256, 222 P 527; Anderson v Smith-Powers Logging Co. 71 Or 276, 139 P 736; Honeyman v Oregon & C. R. Co. 13 Or 352, 10 P 628; Dairymen's Co-op. Sales Asso. v Public Serv. Com. 318 Pa 381, 177 A 770, 98 ALR 218; Riggsby v Tritton, 143 Va 903, 129 SE 493, 45 ALR 280; Cushing v White, 101 Wash 172, 172 P 229.

Within the federal statute limiting the hours of service of employees of common carriers, a common carrier is anyone engaged in the business of carrying persons and property from one place to another for compensation, for all who apply to have their goods transported or to be transported in person. United States v Ramsey (CA8) 197 F 144.

Practice Aids.—Instruction to jury defining common carrier of goods. 5 Am Jur Pl & Pr Forms 5:1661.

6. United States v California, 297 US 175, 80 L ed 567, 56 S Ct 421; Bank of Kentucky v Adams Exp. Co. 93 US 174, 23 L ed 872; New York C. R. Co. v Lockwood, 17 Wall (US) 357, 21 L ed 627; Georgia L. Ins. Co. v Easter, 189 Ala 472, 66 So 514; Circle Express Co. v Iowa State Commerce Com. 249 Iowa 651, 86 NW2d 868; Davis v Chesapeake & O. R. Co. 122 Ky 528, 92 SW 339; Ney v Haun, 131 Va 557, 109 SE 438, 18 ALR 1310; State ex rel. Stimson Timber Co. v Kuykendall, 137 Wash 602, 243 P 834, 55 ALR 954, affd 275 US 207, 72 L ed 241, 48 S Ct 41.

A common carrier is one whose occupation is the transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public, indifferently, in the particular line or department in which he is engaged; the true test is whether the given undertaking is a part of the business engaged in by the carrier, which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment. Cushing v White, 101 Wash 172, 172 P 229.

7. Santa Fe, P. & P. R. Co. v Grant Bros. Constr. Co. 13 Ariz 186, 108 P 467, revd on other grounds 228 US 177, 57 L ed 787, 33 S Ct 474; McIntyre v Harrison, 172 Ga 65, 157 SE 499; Senters v Ratliff's Admrs. 278 Ky 290, 128 SW2d 724; Erwin Mills, Inc. v Williams, 238 Miss 335, 118 So 2d 339; Campbell v A. B. C. Storage & Van Co. 187 Mo App 565, 174 SW 140; State ex rel. Utilities Com. v Gulf-Atlantic Towing Corp. 251 NC 105, 110 SE2d 886.

8. McCallum v United States (CA9) 298 F 373, 38 ALR 1143, cert den 266 US 606, 69 L ed 464, 45 S Ct 92; Kelly v General Electric Co. (DC Pa) 110 F Supp 4, affd (CA3) 204 F2d 692, cert den 346 US 886, 98 L ed 390, 74 S Ct 137; Central R. & Bkg. Co. v Lampley, 76 Ala 357; Ocean S. S. Co. v Savannah Locomotive Works & Supply Co. 131 Ga 831, 63 SE 577; Rathbun v Ocean Acci. & G. Corp. 299 Ill 562, 132 NE 754; Higginbotham v Public Belt R. Com. (La App) 181 So 65, reh den 181 So 221, affd 192 La 525, 188 So 395; Ohio Oil Co. v Fowler, 232 Miss 694, 100 So 2d 128; Jackson Architectural Iron Works v Hurlbut, 158 NY 34, 52 NE 665; Travis v Dickey, 96 Okla 256, 222 P 527; Thompson-Houston Electric Co. v Simon, 20 Or 60, 25 P 147; Dairymen's Co-op. Sales Asso. v Public Serv. Com. 318 Pa 381, 177 A 770, 98 ALR 218; Hogan v Nashville Interurban R. Co. 131 Tenn 244, 174 SW 1118; Chevallier v Straham, 2 Tex 115; Riggsby v Tritton, 143 Va 903, 129 SE 493, 45 ALR 280; Cushing v White, 101 Wash 172, 172 P 229.

9. Semon v Royal Indem. Co. (DC La) 179 F Supp 403, affd (CA5) 279 F2d 737; Rathbun v Ocean Acci. & G. Corp. 299 Ill 562, 132 NE 754; Walton v A. B. C. Fireproof Warehouse Co. 235 Mo App 939, 151 SW2d 494; Samuis v Stewart, 20 Ohio 69; Travis v Dickey, 96 Okla 256, 222 P 527; Portland v Western U. Teleg. Co. 75 Or 37, 146 P 148; Reaves v Western U. Teleg. Co. 110 SC 233, 96 SE 295.

10. Associated Pipe Line Co. v Railroad Commission, 176 Cal 518, 169 P 62; State ex rel. Fatzer v Sinclair Pipe Line Co. 180 Kan 425, 304 P2d 930; Weller v Kolb's Bakery & Dairy, Inc. 176 Md 191, 4 A2d 130; Bayard v North Cent. Gas Co. 161 Neb 819, 83 NW 2d 861; Collins-Dietz-Morris Co. v State Corp. Commission, 154 Okla 121, 7 P2d 123, 80 ALR 561.

A co-operative association which furnishes transportation service for its own members, but not for others, is not a common carrier. Rutledge Co-op. Asso. v Baughman, 153 Md 297, 138 A 29, 56 ALR 1012.

But a corporation organized for profit, the capital stock of which comprised a number of authorized shares, which offered to furnish transportation service to such exhibitors of films as might desire to subscribe for its shares, was deemed to be a common carrier. Affiliated Serv. Corp. v Public Utilities Commission, 127 Ohio St 47, 186 NE 703, 103 ALR 264.

11. Georgia L. Ins. Co. v Easter, 189 Ala 472, 66 So 514; Gornstein v Priver, 64 Cal App 219, 221 P 396; Ace-High Dresses v J. C. Trucking Co. 122 Conn 578, 191 A 536, 112 ALR 86; State ex rel. Board of R. Comrs. v Carlson, 217 Iowa 854, 251 NW 160; Faucher v Wilson, 68 NH 338, 38 A 1002.

One contracting to carry the guests of a summer camp between the camp and a specified city upon tickets furnished by the camp is not a public carrier subject to regulation by the public service commission, although he uses the public highways for the purpose. State ex rel. Public Utilities Commission v Nelson, 65 Utah 457, 238 P 237, 42 ALR 819.

Annotation: 18 ALR 1320; 112 ALR 97.

One who is employed by a co-operative marketing or sales association, or similar association, under a special contract to haul the products of its members to the associa-

Nor, although one solicits patronage from the public generally, is he a common carrier where he reserves the right arbitrarily to accept or reject the offered business.[13]

The fact that one furnishing transportation service does not make written contracts with his patrons[14] or does not advertise[15] does not affect his status as a common carrier.

The common law imposes no obligation on a common carrier to continue in business, and unless such obligation is imposed by statute or by provision in the carrier's charter, he may cease operations at his pleasure, subject, however, to any contractual obligations which he may have assumed.[16] The right of public utilities, rendering carrier service under a public franchise, to discontinue or abandon their services or operations is treated under other titles.[17]

§ 3. — Compensation.

No person is a common carrier who does not carry for hire—that is, who does not receive, or is not entitled to receive, any compensation for his services[18] —and this rule is not changed by the fact that something is bestowed as a gratuity or voluntary gift; under such circumstances one is not a common carrier but a mere mandatory.[19] It is not necessary, however, in order that one may be classified as a common carrier that there be an express contract to pay for the services of the carrier,[20] or that the rate of compensation should be fixed,[1] although it has been held that one is not a common carrier where

tion's plant for a specified consideration, is not a common carrier, especially where the contract contains a prohibition against hauling the property of persons not members of the association. Davis v People, 70 Colo 642, 247 P 801; Dairymen's Co-op. Sales Asso. v Public Service Com. 318 Pa 381, 177 A 770, 98 ALR 218.

12. Fish v Chapman, 2 Ga 349; Faucher v Wilson, 68 NH 338, 38 A 1002.
Annotation: 18 ALR 1317; 112 ALR 93.

13. Aero Mayflower Transit Co. v Georgia Public Service Com. 179 Ga 431, 176 SE 487, affd 295 US 285, 79 L ed 1439, 55 S Ct 709; Erwin Mills, Inc. v Williams, 238 Miss 335, 118 So 2d 359; Weaver v Public Service Com. 40 Wyo 462, 278 P 542.

The mere fact that a carrier invites all and sundry persons to employ him does not render him a common carrier where he reserves the right of accepting or rejecting their offers of goods for carriage, whether his vehicles are full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability to carry. Georgia Public Service Com. v Taylor, 172 Ga 100, 157 SE 515.

14. Nolan v Public Utilities Com. 41 Cal 2d 392, 260 P2d 790; Bingaman v Public Service Com. 105 Pa Super 272, 161 A 892.

15. Smith v State, 199 Ind 217, 156 NE 513; Circle Express Co. v Iowa State Commerce Com. 249 Iowa 651, 86 NW2d 883; Klawansky v Public Service Com. 123 Pa Super 375, 187 A 248.

16. Pacific Teleph. & Teleg. Co. v Tax Commission, 297 US 403, 80 L ed 760, 56 S Ct 522, 105 ALR 1; Lucking v Detroit & C. Nav. Co. 265 US 346, 68 L ed 1047, 44 S Ct 504.

The Interstate Commerce Act imposes no duty on a carrier by water to continue operation of a particular route. Lucking v Detroit & C. Nav. Co., supra.

17. See PUBLIC UTILITIES and articles referred to therein relating to particular utilities.

18. Central R. & Bkg. Co. v Lampley, 76 Ala 357; Rogers v Kennebec S. B. Co. 86 Me 261, 29 A 1069; Bayard v North Cent. Gas Co. 164 Neb 819, 83 NW2d 861; Lesesne v Atlantic Coast L. R. Co. 114 SC 95, 103 SE 147; Haynie v Baylor, 18 Tex 498.

19. Knox v Rives, 14 Ala 249.

20. Gray v Missouri River Packet Co. 64 Mo 47; Littlejohn v Jones, 27 SCL (2 McMull) 365.

1. Johnson Exp. Co. v Chicago, 136 Ill App 368; Jackson Architectural Iron Works v Hurlbut, 158 NY 34, 52 NE 665; Anderson v Yellow Cab Co. 179 Wis 300, 191 NW 748, 31 ALR 1197; Shlkany v Salt Creek Transp. Co. 48 Wyo 190, 45 P2d 645.
Annotation: 18 ALR 1318; 112 ALR 96.

An interstate transport company has been held to be a common carrier, notwithstanding it did not have any established or published rates on file with any commission, and when called upon to haul a load, inquired as to the kind of commodity, the distance to be carried, the risk involved, and the price of carriage as

he furnishes transportation under a reserved right to fix the rate in each individual case.[2]

§ 4. — Persons or property carried.

A common carrier has the right to determine what particular line of business he will follow, and his obligation to carry is coextensive with, and limited by, his holding out as to the subjects of carriage. Thus, it is not essential to the status of one as a common carrier that he carry all kinds of property offered to him.[3] If he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed. Moreover, if he elects to carry freight only, he will be under no obligation to carry passengers, and vice versa.[4]

§ 5. — Exclusiveness and regularity of business.

While common carriers undertake to carry for the public generally as a business, it is not necessary, in order to make them such, that this should be their exclusive occupation. They may combine it with another or several vocations, and still be common carriers and subject to the extraordinary liabilities which have been imposed on them in consequence of the public nature of their employment.[5] The doctrine that in order to be a common carrier one must hold himself out as ready to engage in the transportation of goods or passengers for hire as a business, not as a casual occupation pro hac vice,[6] comprehends only those cases where the carrier does not hold himself out to carry for the

set for such commodity by the Interstate Commerce Commission, before setting its own price therefor, where it appeared that it held itself out to the public as a common carrier for the purpose of hauling goods and merchandise for hire. Transformer Corp. of America v Hinchcliff, 279 Ill App 152.

2. Home Ins. Co. v Riddell (CA5 Miss) 252 F2d 1; Automobile Ins. Co. v Cochran, 262 Mich 605, 247 NW 755.

3. Bowles v Wieter (DC Ill) 65 F Supp 359; Alabama G. S. R. Co. v Herring, 234 Ala 238, 174 So 502; Kansas P. R. Co. v Nichols, 9 Kan 235; Campbell v A. B. C. Storage & Van Co. 187 Mo App 565, 174 SW 140; State ex rel. Utilities Com. v Gulf-Atlantic Towing Corp. 251 NC 105, 110 SE2d 886.

4. Knox v Rives, 14 Ala 249; Rathbun v Ocean Acci. & G. Corp. 299 Ill 562, 132 NE 754, 19 ALR 140; State v Rosenstein, 217 Iowa 985, 252 NW 251; Crescent Coal Co. v Louisville & N. R. Co. 143 Ky 73, 135 SW 768; Levi v Lynn & B. R. Co. 11 Allen (Mass) 300; Powell v Mills, 30 Miss 231; Anderson v Smith-Powers Logging Co. 71 Or 276, 139 P 736; Kirby v Western U. Teleg. Co. 4 SD 105, 55 NW 759.

5. Fish v Chapman, 2 Ga 349; Jackson Architectural Iron Works v Hurlbut, 158 NY 34; Reaves v Western U. Teleg. Co. 110 SC 233, 96 SE 295; Kimball v Rutland & B. R. Co. 26 Vt 247.

There is no reason why the carrier who occasionally assumes to transport goods for the public should be exempted from any of the risks incurred by those who make the carrying business their constant or principal occupation. For the time being he shares all the advantages arising from the business, and as the extraordinary responsibilities of a common carrier are imposed by the policy and not the justice of the law, this policy should be uniform in its operation, imparting equal benefits and inflicting like burdens upon all who assume the capacity of public carriers, whether temporarily or permanently, periodically or continuously. Chevallier v Straham, 2 Tex 115.

6. Shoemaker v Kingsbury, 12 Wall (US) 369, 20 L ed 432; Fish v Chapman, 2 Ga 349; Samms v Stewart, 20 Ohio 69; Anderson v Smith-Powers Logging Co. 71 Or 276, 139 P 736.
Annotation: 18 ALR 1318.

Contractors for building a railroad, carrying a passenger casually on a construction train, are private carriers only. Shoemaker v Kingsbury, 12 Wall (US) 369, 20 L ed 432.

Persons engaged in the trailer business who, in making occasional trips to pick up and haul back trailers from the point of manufacture, accept, for transportation to that point, passengers procured by a travel agency making a business of bringing together automobile owners contemplating trips and persons desiring transportation to the same point, are not common carriers. Larson v Aetna L. Ins. Co. 19 Wash 2d 601, 143 P2d 850, 149 ALR 1289.

public but merely makes a contract to furnish transportation for a particular person or persons.[7]

It is not necessary, in order to constitute one a common carrier, that he make regular trips.[8] Moreover, a common carrier does not divest himself of that status because he may on occasion refuse to perform services for which he is equipped.[9]

§ 6. — Fixed route or termini.

To constitute a public conveyance a common carrier, it is not necessary that it should move between fixed termini or even on fixed routes.[10] It is held, however, in some jurisdictions, that to constitute one a common carrier in a particular instance, the carriage must be over a route or within a territory over or within which there has been a general undertaking by the person—a holding of himself out as undertaking—to carry goods for the public generally, as a business;[11] but in other jurisdictions the contrary rule prevails.[12]

§ 7. — Ownership or control of means of transportation; agency for others.

To constitute a common carrier, it is not essential that the person or corporation undertaking such service own the means of transportation.[13] Hence, one whose business is for hire to take goods from the custody of their owner, assume entire possession and control of them, transport them from place to place, and deliver them at a point of destination to consignees or agents there authorized to receive them, is a common carrier, although he contracts with others to transport the goods in vehicles of which they are the owners, and the movements of which he himself does not manage or control.[14]

A common carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another.[15]

7. Steele v McTyer, 31 Ala 667 (ovrld on another point in Boon & Co. v The Belfast, 40 Ala 184); Fish v Chapman, 2 Ga 349; March v Concord R. Corp. 29 NH 9; Swindler v Hilliard, 31 SCL (2 Rich) 286.

Annotation: 18 ALR 1317, 1318; 112 ALR 94.

8. Claypool v Lightning Delivery Co. 38 Ariz 262, 299 P 126; Walton v A. B. C. Fireproof Warehouse Co. 235 Mo App 939, 151 SW2d 494; Campbell v A. B. C. Storage & Van Co. 187 Mo App 565, 174 SW 140.

Annotation: 18 ALR 1319; 112 ALR 95.

9. Stoner v Underseth, 85 Mont 11, 277 P 437; Dairymen's Co-op. Sales Asso. v Public Serv. Commission, 318 Pa 381, 177 A 770, 98 ALR 218; Cornish v Pennsylvania Public Utility Com. 134 Pa Super 565, 4 A2d 569; Cushing v White, 101 Wash 172, 172 P 229.

10. Walton v A. B. C. Fireproof Warehouse Co. 235 Mo App 939, 151 SW2d 491; Anderson v Yellow Cab Co. 179 Wis 300, 191 NW 718, 31 ALR 1197.

Annotation: 18 ALR 1319; 112 ALR 95.

See, in this respect, the status of taxicabs as common carriers, § 14, infra.

11. Ney v Haun, 131 Va 557, 109 SE 438, 18 ALR 1310, holding that a transfer man licensed to do business in a particular city where he is a common carrier is not such a carrier with respect to a load of goods which he specially contracts to transport between two other cities.

12. Farley v Lavary, 107 Ky 523, 54 SW 840 (holding that a licensed carrier within a city, hauling for all persons who require his services, is liable as a common carrier while carrying goods outside the city under an agreement to take them to a certain point, without any further contract, although he could not have been compelled to carry outside the city); Walton v A. B. C. Fireproof Warehouse Co. 235 Mo App 939, 151 SW2d 494.

13. J. H. Cownie Glove Co. v Merchants' Dispatch Transp. Co. 130 Iowa 327, 106 NW 749; Walton v A. B. C. Fireproof Warehouse Co. 235 Mo App 939, 151 SW2d 491; Highway Freight Forwarding Co. v Public Service Com. 108 Pa Super 178, 164 A 835.

14. Christenson v American Exp. Co. 15 Minn 270, Gil 208; Kettenhofen v Globe Transfer & Storage Co. 70 Wash 645, 127 P 295.

See, in this respect, express and dispatch companies, and forwarders, as common carriers, §§ 15, 16, infra.

15. Union Stock Yard & Transit Co. v United States, 308 US 213, 84 L ed 198, 60 S Ct 193; United States v Brooklyn Eastern Dist. Terminal, 249 US 296, 63 L ed 613, 39 S Ct 283, 16 ALR 527.

The fact that the railroad of one who carries property from place to place over a definite route, as agent for a common carrier, is short, does not prevent it from being a common carrier, nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad company with which it has contracted prevent it from being a common carrier. United States v Brooklyn Eastern Dist. Terminal, supra.

16. Ace-High Dresses v J. C. Trucking Co. 122 Conn 578, 191 A 536, 112 ALR 86; Heuer Truck Lines v Brownlee, 239 Iowa 267, 31 NW2d 375; Stoner v Underseth, 85 Mont 11, 277 P 437; Bayard v North Cent. Gas Co. 164 Neb 819, 83 NW2d 861; State ex rel. Utilities Com. v Gulf-Atlantic Towing Corp. 251 NC 105, 110 SE2d 886.

17. Home Ins. Co. v Riddell (CA5 Miss) 252 F2d 1; Kelly v General Electric Co. (DC Pa) 110 F Supp 4, affd (CA3) 201 F2d 692, cert den 346 US 886, 98 L ed 390, 74 S Ct 137; Circle Express Co. v Iowa State Commerce Com. 249 Iowa 651, 86 NW2d 888; Public Utilities Com. v Johnson Motor Transport, 147 Me 138, 84 A2d 142; State ex rel. Utilities Com. v Gulf-Atlantic Towing Corp. 251 NC 105, 110 SE2d 886; Rogers v Crespi & Co. (Tex Civ App) 259 SW2d 928; Realty Purchasing Co. v Public Service Com. 9 Utah 2d 375, 345 P2d 606; Miles v Emmeluw Co-op. Creamery Corp. 12 Wash 2d 377, 121 P2d 915.

18. § 516, infra.

19. § 2, supra.

20. §§ 507 et seq., infra.

§ 8. Private carriers.

A private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property or persons from one place to another either gratuitously or for hire.[16] Private carriers are distinguished from common carriers in respect of (1) the obligation to carry and (2) the liability for loss or injury. Private carriers do not undertake to carry for all persons indiscriminately but transport only for those with whom they seem fit to contract,[17] and are liable for only such loss or injury as results from a failure to exercise ordinary care,[18] whereas common carriers undertake to carry any and all members of the public who desire such service,[19] and are liable as insurers for the loss or injury of property, with certain exceptions,[20] and for injuries to passengers resulting from a failure to exercise the highest degree of practicable care and diligence consistent with the mode of transportation and the normal prosecution of the carrier's business.[1]

What constitutes a common or a private carrier is a question of law, but whether a carrier is actually serving as a private, rather than a common, carrier is a question of fact.[2] Whether a particular transportation service is undertaken in the capacity of a private or of a common carrier must be determined by reference to the character of the business actually carried on by the carrier,[3] and also by the nature of the service to be performed in the particular instance.[4]

One who transports property from place to place over a definite route as

1. §§ 916 et seq., infra.

2. State ex rel. Board of R. Comrs. v Rosenstein, 217 Iowa 935, 252 NW 251; Public Utilities Com. v Johnson Motor Transport, 147 Me 138, 84 A2d 142; Cooperative Legislative Committee v Public Utilities Com. 149 Ohio St 511, 80 NE2d 159; Affiliated Serv. Corp. v Public Utilities Commission, 127 Ohio St 47, 186 NE 703, 103 ALR 264; Miles v Emmeluw Co-op. Creamery Corp. 12 Wash 2d 377, 121 P2d 915.

3. Chicago N. W. R. Co. v Davenport (CA5 Tex) 205 F2d 539, cert den 346 US 930, 98 L ed 422, 74 S Ct 320; Dairymen's Co-op. Sales Asso. v Public Serv. Commission, 318 Pa 381, 177 A 770, 98 ALR 218; Cushing v White, 101 Wash 172, 172 P 229.

4. Kettenhofen v Globe Transfer & Storage Co. 70 Wash 645, 127 P 295.

The operator of a limousine service between an airport and several hotels pursuant to contracts with airline companies to provide adequate service for airline passengers, crews, and employees was not engaged in a common carrier operation under the guise of a contract carrier. Realty Purchasing Co. v Public Service Com. 9 Utah 2d 375, 345 P2d 606.

agent for a common carrier may, under some circumstances, be a private carrier.[6]

§ 9. — Common carrier acting as private carrier.

The mere fact that a common carrier makes some special arrangement with some person or company for the transportation of persons or property over its line in a particular way, or under certain conditions, does not necessarily divest it of its character as a common carrier or convert it into a bailee for hire.[6] A common carrier cannot, by special agreement with the shipper, make itself a private carrier with respect to those subjects of carriage it is bound to transport.[7] However, a common carrier may become a private carrier, or a bailee for hire, when as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry.[8] But the same facilities cannot be used at the same time in both the common carrier and private carrier operations.[9]

II. PARTICULAR PERSONS AND INSTRUMENTALITIES AS COMMON CARRIERS

§ 10. Generally.

In this division is discussed the status as common carriers of particular persons or instrumentalities in the light of the definitions and distinctions set forth in the preceding division,[10] except in those instances in which this particular question is treated in other articles in this work, as in the case of aircraft and transportation by air,[11] boom and log-driving companies,[12] elevators and escalators,[13] garage and livery keepers,[14] so-called "scenic railways" and similar contrivances,[15] telegraph and telephone companies,[16] towboats, vessels, and other types of watercraft,[17] and wharfingers.[18]

Operators of hacks and similar vehicles used for public transportation,[19] and of inclines or similar devices for transporting freight from one conveyance to another,[20] have been held to be common carriers.

A corporation engaged in the business of furnishing messengers in a city for hire, but which does not assume any control of the work in which the messengers are to be employed, is not a common carrier.[1] The character of a common carrier may, however, attach to one by virtue of his actual performance of delivery service through a messenger or delivery boy acting as his employee.[2]

§ 11. Railroads and railways.

Whether a railroad is or is not a common carrier depends upon the character of its service and upon the consequent right of the public to the use of its transportation facilities, and not upon the mere fact of its existence or the extent of its business.[3] In most cases, railroads come within the definition of a common carrier, and are generally so classified,[4] unless there is something in their

5. United States v Brooklyn Eastern Dist. Terminal, 249 US 296, 63 L ed 613, 39 S Ct 283, 16 ALR 527; Kentucky & I. Bridge Co. v Louisville & N. R. Co. (CC) 37 F 567.

6. Liverpool & G. W. Steam Co. v Phenix Ins. Co. 129 US 397, 32 L ed 788, 9 S Ct 469; New York C. R. Co. v Lockwood, 17 Wall (US) 357, 21 L ed 627; Mears v New York, N. H. & H. R. Co. 75 Conn 171, 52 A 610; Davis v Chesapeake & O. R. Co. 122 Ky 528, 92 SW 339.

A railroad company does not lose its character of common carrier by a special contract to transport over its road the messengers and packages of a particular express company, although it could not have been compelled to undertake such transportation. Davis v Chesapeake & O. R. Co., supra.

7. Denver & R. G. W. R. Co. v Linck (CA10 Utah) 56 F2d 957; Victory Sparkler & Specialty Co. v Baird & D. Co. (CA2 NY) 6 F2d 29; Heuer Truck Lines v Brownlee, 239 Iowa 267, 31 NW2d 375; Campbell v A. B. C. Storage & Van Co. 187 Mo App 565, 174 SW 140; Brown v Bonesteele, 218 Or 312, 344 P2d 928; Memphis News Pub. Co. v Southern R. Co. 110 Tenn 684, 75 SW 941.

For effects of agreements limiting liability as to goods, see §§ 537–576, infra

For effects of agreements limiting liability as to passengers, see §§ 942 et seq., infra.

8. New York C. R. Co. v Lockwood, 17 Wall (US) 357, 21 L ed 627; Chicago, M. & St. P. R. Co. v Wallace (CA7) 66 F 506; Alabama G. S. R. Co. v Herring, 234 Ala 238, 174 So 502; Russell v Pittsburg, C. C. & St. L. R. Co. 157 Ind 305, 61 NE 678; Davis v Chesapeake & O. R. Co. 122 Ky 528, 92 SW 339; Buckley v Bangor & A. R. Co. 113 Me 164, 93 A 65; Honeyman v Oregon & C. R. Co. 13 Or 352, 10 P 628; Coleman v Pennsylvania R. Co. 242 Pa 301, 89 A 87; Memphis News Pub. Co. v Southern R. Co. 110 Tenn 684, 75 SW 941; Graham v Dean (Tex Civ App) 186 SW2d 692, ctfd ques ans 144 Tex 61, 188 SW2d 372.

If the undertaking is a single transaction, not a part of the general business or occupation engaged in, as advertised and held out to the general public, the individual or company furnishing such service is, so far as that particular transaction is concerned, a private and not a common carrier. Cushing v White, 101 Wash 172, 172 P 229.

9. Heuer Truck Lines v Brownlee, 239 Iowa 267, 31 NW2d 375; Public Utilities Com. v Johnson Motor Transport, 147 Me 138, 84 A2d 142; Hubert v Public Service Com. 118 Pa Super 128, 180 A 23.

10. §§ 2, 7, supra.

11. See 8 Am Jur 2d, AVIATION § 38.

12. See LOGS AND TIMBER.

13. See ELEVATORS AND ESCALATORS (1st ed § 3).

14. See GARAGES AND FILLING AND PARKING STATIONS (1st ed § 35).

15. See 4 Am Jur 2d, AMUSEMENTS AND EXHIBITIONS § 90.

16. See TELEGRAPHS AND TELEPHONES (1st ed §§ 9, 102, 106).

17. See SHIPPING (1st ed §§ 344 et seq.).

Particularly as to ferries, see FERRIES (1st ed § 40).

18. See WHARVES (1st ed § 16).

19. Georgia L. Ins. Co. v Easter, 189 Ala 472, 66 So 514; Rathbun v Ocean Acci. & G. Corp. 299 Ill 562, 132 NE 754, 19 ALR 140; Bonce v Dubuque Street R. Co. 53 Iowa 278, 5 NW 177; Cole v Goodwin, 19 Wend (NY) 251; Peixotti v M'Laughlin, 32 SCL (1 Strobh) 468.

20. Joest v Clarendon & R. Packet Co. 122 Ark 353, 183 SW 759.

1. Haskell v Boston Dist. Messenger Co. 190 Mass 189, 76 NE 215.

2. Where a telegraph company, as part of its public employment, holds itself out as ready to engage in carrying from place to place as directed within a city, notes, small packages, etc., undertaking to perform such service for hire as a business, furnishing messengers at all times except when they are otherwise engaged in delivering telegraph messages, it has been held to be a common carrier in respect to such packages as can reasonably be transported by messengers. Portland v Western U. Teleg. Co. 75 Or 37, 146 P 148.

Generally, as to telegraph companies as common carriers, see TELEGRAPHS AND TELEPHONES (1st ed §§ 9, 102, 106).

3. Tap Line Cases (United States v Louisiana & P. R. Co.) 234 US 1, 58 L ed 1185, 34 S Ct 741; Shoemaker v Kingsbury, 12 Wall (US) 369, 20 L ed 432.

A railroad company's character as common carrier can extend only to the road which it may be incorporated to construct or may operate by virtue of its charter, and when it constructs a branch line, the question as to whether it becomes a common carrier as to such line depends upon the character of use to which it is put. Avinger v South Carolina R. Co. 29 SC 265, 7 SE 493.

4. Atchison, T. & S. F. R. Co. v Denver & N. O. R. Co. 110 US 667, 28 L ed 291, 4 S Ct 185; Winona & St. P. R. Co. v Blake, 94 US 180, 24 L ed 99; Mobile & G. R. Co. v Prewitt, 46 Ala 63; East Tennessee & G. R. Co. v Whittle, 27 Ga 535; Illinois C. R. Co. v Frankenberg, 54 Ill 88; Bansemer v Toledo & W. R. Co. 25 Ind 434; Missouri P. R. Co. v Vandeventer, 26 Neb 222, 41 NW 998; Messenger v Pennsylvania R. Co. 36 NJL 407; Thompson-Houston Electric Co. v Simon, 20 Or 60, 25 P 147; Sandford v Catawissa, W. & E. R. Co. 24 Pa 378; Blumenthal v Brainerd, 38 Vt 402.

Railroad companies are quasi-public corporations, created for the purpose of exercising the functions and performing the duties of common carriers. Louisville & N. R. Co. v Pittsburg & K. Coal Co. 111 Ky 960, 64 SW 969.

The facts that railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire bring them within all the rules of the common law and make them eminently common carriers. Nor-

charters to relieve them from the responsibilities of that character.[5] Indeed, in many jurisdictions it is declared either by the constitution or by statute that railroad companies are common carriers.[6]

A railroad company engaged in the general business of a common carrier cannot, without regard to the convenience of the public, classify or divide its trackage into divisions or parts and say that on one part it is a common carrier and on another it is not.[7] However, at the same time, a common-carrier railroad may have what may be called yard facilities, including switches, spurs, and sidetracks, for its convenience in the handling, storing, and distribution of its cars and freight, and it would not be obliged as a common carrier to transport from one point to another in these yards, or on these spurs or switches, freight for the convenience of shippers who might desire to have freight hauled from one point on a switch or spur in the yard to another point in the yard.[8]

Railroads which are built and operated solely for private purposes and which have no public franchise, such as railroads operated by industrial plants,[9] are not to be classed as common carriers.[10]

Street railways, whether carrying passengers[11] or goods,[12] are generally considered to be common carriers.

One conducting the business of a public railroad or railway in the capacity of a receiver, trustee, assignee, or other fiduciary is himself regarded as a common carrier, and is subject, in his official or representative character, to the duties and liabilities attaching to a common carrier.[13]

§ 12. — Industrial, logging, and mining railroads.

Industrial companies operating a railroad within the limits of their own plants are not generally considered to be common carriers.[14] Similarly, logging

way Plains Co. v Boston & M. R. Co. 1 Gray (Mass) 263.

Practice Aids.—Instruction defining common carrier by rail. 5 Am Jur Pl & Pr Forms 5:1521, 5:1661.

5. East Tennessee & G. R. Co. v Whittle, 27 Ga 535.

6. Wade v Lutcher & M. Cypress Lumber Co. (CA5) 74 F 517; Falvey v Georgia R. Co. 76 Ga 597.

7. Brownell v Old Colony R. Co. 164 Mass 29, 41 NE 107.

The carrier cannot arbitrarily, and without any relation to the use to which it is put, designate a part of its track or system as "yards or switching limits," and then say that it owes no duty as a common carrier in this district except such as it may choose to assume, or say that it will or will not, as suits its pleasure or convenience, perform service as a common carrier in this territory. Crescent Coal Co. v Louisville & N. R. Co. 143 Ky 73, 135 SW 768.

8. Crescent Coal Co. v Louisville & N. R. Co., supra.

9. § 12, infra.

10. Shoemaker v Kingsbury, 12 Wall (US) 369, 20 L ed 432, holding that a railroad built and operated solely for the purpose of transporting material and workmen in the construction of another railroad was not a common carrier.

11. Bevard v Lincoln Traction Co. 74 Neb 802, 105 NW 635; Spellman v Lincoln Rapid Transit Co. 36 Neb 890, 55 NW 270.

12. Levi v Lynn & B. R. Co. 93 Mass (11 Allen) 300.

13. United States v Nixon, 235 US 231, 59 L ed 207, 35 S Ct 49 (holding that receivers operating a railway were common carriers within the meaning of the federal quarantine statute); United States v Ramsey (CA8) 197 F 144; Blumenthal v Brainerd, 38 Vt 402; Sprague v Smith, 29 Vt 421.

14. Co-operative Legislative Committee of R. Brotherhoods v Public Utilities Com. 149 Ohio St 511, 37 Ohio Ops 240, 80 NE2d 159, holding that where a corporation engaged in the manufacture of steel owns and maintains numerous railroad tracks within the limits of its plant, over which tracks its own locomotives are operated solely in the switching of cars specially designed for the handling of scrap steel, lime ores, and other materials and products used in the business of steel manufacturing and in the switching of standard freight cars throughout the plant, such use of the locomotives does not make the manufacturing corporation a common carrier.

or mining companies operating a railroad for the purpose of transporting only their own products are not ordinarily considered to be common carriers.[15] The existence or exercise of the power of eminent domain in the construction of a logging or mining railroad does not necessarily, of itself, impress it with the character of a common carrier,[16] unless it is expressly so provided by statute.[17] State constitutional provisions making all railroads public highways or common carriers have generally been construed as not applying to logging or mining roads operated primarily for the purpose of serving the industrial enterprises of the owners.[18] However, where an industrial, logging, or mining company extends its railroad operations to serve the public indiscriminately for hire, or holds itself out as willing to do so, it becomes a common carrier.[19]

§ 13. Terminal or switching companies; stockyards.

It is well settled that terminal companies are common carriers whenever they hold themselves out to be such and constantly act in that capacity and are so dealt with by railroad companies generally.[20] So too, a company engaged

15. E. E. Taenzer & Co. v Chicago, R. I. & P. R. Co. (CA6 Tenn) 170 F 240; Edgar Lumber Co. v Cornie Stave Co. 95 Ark 449, 130 SW 452; Anderson v Smith-Powers Logging Co. 71 Or 276, 139 P 736.

Annotation: 67 ALR 588.

If a logging railroad was not constructed for use by the public, the mere fact of issuance of a temporary permit to the logging company, subject to revocation at any time, and intended for the operation of the road for carriage of passengers and freight, did not necessarily clothe it with the character of a common carrier. Pacific Spruce Corp. v McCoy (DC Or) 294 F 711, affd (CA9) 1 F2d 853.

The fact that a lumber company, in operating its logging train, rendered casual service to several third parties in hauling freight for them under special contract, did not make it a common carrier. Dawkins Lumber Co. v L. Carpenter & Co. 213 Ky 795, 281 SW 1013.

16. Codd v McGoldrick Lumber Co. 48 Idaho 1, 279 P 298, 67 ALR 580, holding that a lumber company which, in building a logging railroad in connection with its business, has resorted to eminent domain proceedings to procure a portion of the right of way, does not assume the obligation of a common carrier to transport goods for any who may seek such transportation, where the state constitution, by declaring the necessary use of lands for irrigation reservoirs or ditches or for the drainage or working of mines "or any other use necessary to the complete development of the material resources of the state" to be a public use, confers the right to exercise the power of eminent domain for individual uses.

Annotation: 67 ALR 597.

17. See Threlkeld v Third Judicial Dist. Ct. 36 NM 350, 15 P2d 671, 86 ALR 547, holding that by reason of the state statutes the condemnation of land for a right of way for a logging railroad subjects the logging company to the laws governing common carriers.

18. Wade v Lutcher & M. Cypress Lumber Co. (CA5) 74 F 517; Codd v McGoldrick Lumber Co. 48 Idaho 1, 279 P 298, 67 ALR 580.

Annotation: 67 ALR 595.

But see Chapman v Trinity Valley & N. R. Co. (Tex Civ App) 138 SW 440, error dismd.

19. Smitherman & McDonald, Inc. v Mansfield Hardwood Lumber Co. (DC Ark) 6 F2d 29; Codd v McGoldrick Lumber Co. 48 Idaho 1, 279 P 298, 67 ALR 580.

Annotation: 67 ALR 590.

The fact that the company has not exercised the right of eminent domain, or that it did not maintain any station, and that the railroad line was only a temporary structure, would not preclude a logging company from being a common carrier, if it held itself out as such. Dawkins Lumber Co. v L. Carpenter & Co. 213 Ky 795, 281 SW 1013.

Tap-line railroads connecting industrial enterprises with trunk-line railroads, although owned by the persons who also own such enterprises, which they principally serve, must be regarded as common carriers of the freight belonging to the owners of such tap lines as well as of nonproprietary traffic where such tap-line roads are organized as common carriers under the state laws and are so treated by the public authorities of the state, are engaged in carrying for hire the goods of those who see fit to employ them, are authorized to exercise the right of eminent domain by the state of their incorporation, and are treated and dealt with as common carriers by connecting systems of other carriers. United States v Butler County R. Co. 234 US 29, 58 L ed 1196, 34 S Ct 748; Tap Line Cases (United States v Louisiana & P. R. Co.) 234 US 1, 58 L ed 1185, 34 S Ct 741.

20. United States v California, 297 US 175, 80 L ed 567, 56 S Ct 421; Terminal R. Asso. v

in switching and delivering railroad cars between freight terminals and private sidings is a common carrier.[1] On the other hand, a company which voluntarily contracts to switch cars over its tracks between two or more railways, for which service it collects a certain switching charge, but charges no traffic rates on the freight transported or transferred in the cars in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman.[2]

In a number of cases, stockyard companies have been declared to be common carriers in the transportation of livestock over tracks connecting their plants and facilities with trunk lines.[3]

§ 14. Buses, jitneys, and taxicabs.

Persons operating motorbuses or jitneys over a well-defined route between certain termini and for a uniform fare, accepting as passengers without discrimination all who apply for passage, up to the limit of the capacity of the vehicle, are common carriers.[4] On the other hand, those who operate a bus or jitney in accordance with the terms of a contract, for the benefit of a particular class, and not for the benefit of the public generally, are not common carriers.[5] But where it appears that although a contract to carry a particular class exists, the class designated is so large and general as to admit practically all applying for passage, the operator of the bus is a common carrier.[6]

Persons owning and operating public taxicabs for the transportation of passengers, holding themselves out as willing to carry persons generally for hire, are "common carriers,"[7] even though they do not at all times operate the same number of cabs, and though they reject undesirable persons and fix their own rates or fares, do not move between fixed termini upon fixed routes, and receive only those who engage a cab, even when room remains in the conveyance.[8]

§ 15. Express and dispatch companies.

Express companies which are engaged in the business of transporting money, goods, and other small but valuable parcels for the public generally, as compared to the large mass of freight usually carried by railroads and ships, are generally considered to be common carriers.[9] In some jurisdictions, they are declared by statutory or constitutional provision to be common carriers and subject to all the liabilities to which common carriers are subject.[10]

United States, 266 US 17, 69 L ed 150, 45 S Ct 5; United States v Chicago, B. & Q. R. Co. (CA8 Colo) 293 F 185; State ex rel. Burr v Jacksonville Terminal Co. 90 Fla 721, 106 So 576; Waldum v Lake Superior Terminal & Transfer R. Co. 169 Wis 137, 170 NW 729.

Annotation: 54 ALR 620.

A navigation corporation engaged in conducting the usual terminal operation for a number of interstate railways, including the transportation between its docks, warehouses, and points on any of such railways of all property that is offered, is a common carrier although all the services rendered are performed under contract with such railway companies as agent for them, and not on its own account, and all the freight transported is contained only in cars furnished by the railroad companies with which it has contracts. United States v Brooklyn Eastern Dist. Terminal, 249 US 296, 63 L ed 613, 39 S Ct 283, 16 ALR 527.

1. Batchelder & S. Co. v Union Freight R. Co. 259 Mass 368, 156 NE 698, 54 ALR 616, cert den 275 US 556, 72 L ed 424, 48 S Ct 117.

2. Kentucky & I. Bridge Co. v Louisville & N. R. Co. (CC) 37 F 567.

3. United States v Union Stock Yard & Transit Co. 226 US 286, 57 L ed 226, 33 S Ct 83, holding that a stockyard company which was organized for the purpose of maintaining a stockyard with the usual facilities, and was authorized to and did own and operate a railroad system transporting cars to and from trunk lines in the course of their transportation from points beyond the state and to points outside the state, did not, by freeing itself from the operation of the railroad system by leasing it to another company—the stockyard company and the leasing company being owned by a holding company—lose its character as a common carrier, all the companies being such because of the character of service rendered by them, their joint operation and division of profits, and their common ownership by the holding company.

A corporation engaged in operating stockyards, owning a track between such yards and the railroad over which stock is transported thereto, and making a charge to the railroad companies for each car moved over such track, in accordance with a tariff which it has filed with the Interstate Commerce Commission, is to be regarded as engaging in business as a common carrier. State ex rel. Dawson v Kansas City Stock Yards Co. 94 Kan 96, 145 P 831.

A stockyards company holding itself out to the public as performing loading and unloading services and acting as terminal for shippers and line-haul railroads is, even though it acts merely as agent and performs no railhaul services itself either directly or indirectly, a "common carrier" engaged in "the transportation of . . . property wholly by railroad" within the meaning of the Interstate Commerce Act defining a "railroad" as including "terminal facilities" (49 USC § 1(3)) and providing that transportation of livestock "wholly by railroad" shall include the loading and reloading of inbound shipments and the receipt and loading of outbound shipments (49 USC § 15(5)) Union Stock Yard & Transit Co. v United States, 308 US 213, 84 L ed 198, 60 S Ct 193.

4. Desser v Wichita, 96 Kan 820, 153 P 1194; Brown v Homer-Doyline Bus Lines (La App) 23 So 2d 348; Hinds v Steere, 209 Mass 442, 95 NE 844; Kloran v Drogin, 99 NJL 422, 123 A 760, 31 ALR 1191; Public Service Com. v Booth, 170 App Div 590, 156 NYS 140; Memphis v State, 133 Tenn 83, 179 SW 631; Riggsby v Tritton, 143 Va 903, 129 SE 493, 45 ALR 280; Cushing v White, 101 Wash 172, 172 P 229.

Annotation: 42 ALR 854.

5. Gornstein v Priver, 64 Cal App 249, 221 P 396; Jacksonville Bus Line Co. v Watson, 349 Ill App 462 (abstract), 110 NE2d 834; Roberts v Knoxville Transit Lines, 36 Tenn App 595, 259 SW2d 883.

Annotation: 42 ALR 855.

A motorbus operator who contracts with the proprietors of a summer camp to transport guests and persons intending to become guests from the city is not a common carrier of passengers, and is therefore not subject to the jurisdiction or regulation of the public utilities commission. State ex rel. Public Utilities Commission v Nelson, 65 Utah 457, 238 P 237, 42 ALR 849.

6. State v Ferry Line Auto Bus Co. 93 Wash 614, 161 P 467.

7. Terminal Taxicab Co. v Kutz, 241 US 252, 60 L ed 984, 36 S Ct 583; Brooks v Sun Cab Co. 208 Md 236, 117 A2d 554; Korner v Cosgrove, 108 Ohio St 484, 141 NE 267, 31 ALR 1193; Jenkins v General Cab Co. 175 Tenn 409, 135 SW2d 448; Carlton v Boudar, 118 Va 521, 88 SE 174, 4 ALR 1480; Cushing v White, 101 Wash 172, 172 P 229; Scales v Boynton Cab Co. 198 Wis 293, 223 NW 836, 69 ALR 978.

To constitute a taxicab a common carrier, it is not necessary that it come within the definition of a public utility so as to be subjected to the rules and regulations of a public utility commission. Anderson v Yellow Cab Co. 179 Wis 300, 191 NW 748, 31 ALR 1197.

8. Anderson v Fidelity & C. Co. 228 NY 475, 127 NE 584, 9 ALR 1544; Anderson v Yellow Cab Co. 179 Wis 300, 191 NW 748, 31 ALR 1197.

The word "taxi" or "taxicab" refers to a motor-driven passenger conveyance propelled by electric or gas power, held for public hire, at designated places, charging upon a time or distance basis, carrying passengers to destinations without following any fixed routes, and performing a service similar to that rendered by horse-drawn cabs or hackney carriages. Tuggle v Parker, 159 Kan 572, 156 P2d 533; Columbia v Alexander, 125 SC 530, 119 SE 241, 32 ALR 746; Memphis v State, 133 Tenn 83, 179 SW 631; Park Hotel Co. v Ketchum, 184 Wis 182, 199 NW 219, 33 ALR 351.

But a public taxicab company, while transporting school children pursuant to a special contract with a school district, was considered to be a private carrier owing only ordinary care in the transportation of its passengers. Hopkins v Yellow Cab Co. 114 Cal App 2d 391, 250 P2d 330.

9. Bank of Kentucky v Adams Exp. Co. 93 US 174, 23 L ed 872; Southern Exp. Co. v Crook, 44 Ala 468; Hayes v Wells, F. & Co. 23 Cal 185; Railway Express Agency v Cook, 198 Ga 715, 32 SE2d 822; Baldwin v American Exp. Co. 23 Ill 197; Christenson v American Exp. Co. 15 Minn 270; Alsop v Southern Exp. Co. 104 NC 278, 10 SE 297; Hutchinson v United States Exp. Co. 63 W Va 128, 59 SE 949.

Practice Aids.—Instruction to jury defining common carrier of goods. 5 Am Jur Pl & Pr Forms 5:1661.

10. United States v Adams Exp. Co. 229 US 381, 57 L ed 1237, 33 S Ct 878; American Exp. Co. v Hockett, 30 Ind 250; American R. Exp. Co. v Wright, 128 Miss 593, 91 So 342, 23 ALR 127.

Under a statute including express companies in the term "common carrier," they are common carriers only of property, not of persons, or of persons and property, and they have no duty to carry persons in their express cars. Crane v Railway Express Agency, 369 Ill 110, 15 NE2d 866.

For the purposes of the Railroad Retirement Tax Act, a "carrier" is defined as an express

In some instances, express companies have attempted to escape from liability as common carriers by assuming other names, such as forwarders, transportation companies, etc., and by contracting to convey the goods in that character, but the courts have held that the name or style under which they assume to carry on business is immaterial, the real nature of their occupation and of the legal duties and obligations which it involves being ascertained from a consideration of the kind of services which they hold themselves out to the public as ready to render to those who may have occasion to employ them.[11]

Dispatch companies which do not own or control any means of conveyance, but which engage in the business of transporting goods through the agency and over the lines of other carriers selected by them, are common carriers.[12]

§ 16. Forwarders.

In some cases it has been held that a "forwarder"[13] who acts merely as an agent of a shipper in arranging for the transportation of goods and has no other interest in the goods is not a common carrier.[14] However, in other cases it has been held that a forwarder who so conducts his business as to lead the public to believe that he is a carrier and is employed as a carrier to ship goods by persons who have no knowledge of his true character, is a common carrier.[15] In particular, it has been held that where a forwarder solicits goods in less than carload lots, accumulates them, and arranges with another carrier to transport the goods at carload rates, he is a common carrier.[16]

Whether or not forwarders are common carriers sometimes depends on the specific terminology or general purposes of the controlling statutes.[17]

company, sleeping-car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act. 26 USC § 3231(g).

11. Bank of Kentucky v Adams Exp. Co. 93 US 174, 23 L ed 872; Buckland v Adams Exp. Co. 97 Mass 124; Christenson v American Exp. Co. 15 Minn 270, Gil 208.

12. Merchants' Despatch Transp. Co. v Bolles, 80 Ill 473; Stewart v Merchants' Despatch Transp. Co. 47 Iowa 229; Shelton v Merchants' Dispatch Transp. Co. 59 NY 258; Merchants' Dispatch Transp. Co. v Bloch, 86 Tenn 392, 6 SW 881.

13. The term "forwarder" originally applied to one who, without owning or controlling the actual means of carriage, such as ships, railroad cars, etc., arranged for the transportation of the goods of a consignor in the ships or vehicles of an actual carrier. Mansfield v Chicago Title & T. Co. (CA7 Ill) 199 F 95. With the appearance of the practice by railroad companies of offering shippers greatly reduced freight rates for shipments in carload quantities, a modern concept of the term arose, as one who picked up the less-than-a-carload shipment at the shipper's place of business and engaged to deliver it safely at its ultimate destination, charging a rate covering the entire transportation and making its profit by consolidating the shipment with others in carload quantities to take advantage of the spread between the carload rates paid by him to the railroad and the higher rates, approximating less-than-carload rates, which he charged the various shippers. United States v Chicago Heights Trucking Co. 310 US 344, 84 L ed 1243, 60 S Ct 931.

14. Schloss v Wood, 11 Colo 287, 17 P 910; Roberts v Turner, 12 Johns (NY) 232.
Annotation: 141 ALR 920.

15. Slutzkin v Gerhard & Hey, 199 App Div 5, 191 NYS 104.

16. Heath v Judson Freight Forwarding Co. 47 Cal App 426, 190 P 839; Bare v American Forwarding Co. 146 Ill App 388, affd 242 Ill 298, 89 NE 1021; Kettenhofen v Globe Transfer & Storage Co. 70 Wash 645, 127 P 295.
Annotation: 141 ALR 922.

17. American Transp. Co. v Insurance Co. of N. A. 300 Mich 230, 1 NW2d 521, 141 ALR 913; Motor Freight v Public Utilities Com. 120 Ohio St 1, 165 NE 355.
Annotation: 141 ALR 920.

Under the Freight Forwarder Act, a freight forwarder, with respect to its relations with its customers, is subject to regulations applicable to a common carrier, and with respect to its relations with other common carriers, has the status of a shipper. Chicago, M. St. P. & P. R. Co. v Acme Fast Freight, Inc. 336 US 465, 93 L ed 817, 69 S Ct 692.

For definition of "freight forwarders" under the Freight Forwarder Act, see § 12, infra.

§ 17. Storage and moving companies, truckers, carters, etc.

A storage and moving company that holds itself out as engaged in the general business of moving for all who choose to employ it is, as to that part of its business, a common carrier.[18] Similarly, it is generally held that draymen, truckmen, wagoners, cartmen, and other persons who undertake to carry goods for hire for the public generally and as a common employment in a particular locality or from one place to another are common carriers.[19] The fact that a truckman has no regular tariff of charges for his work, but fixes a special price for each job, does not change the relationship if he holds himself out as willing to serve the public generally, without discrimination.[20] However, where such a carrier does not deal with the public indiscriminately as a matter of routine, but, in effect, makes an individual bargain in each case, he is considered a private carrier.[1]

Whether one engaged in the business of local transportation acts as a common carrier in the performance of a contract for transportation of property to or from a point outside the locality within which he is licensed or accustomed to do business has been affirmed in some instances,[2] but denied in others.[3]

§ 18. Persons furnishing or leasing cars or vehicles to others.

One who undertakes, not to carry persons or property, but merely to furnish the means of conveyance to another, is not a common carrier.[4] For example, sleeping car companies which furnish sleeping cars to railroad companies are not considered to be common carriers,[5] unless they are given the status of common carriers by constitutional or statutory provisions.[6] Similarly, one who merely

18. A. Arnold & Son Transfer & Storage Co. v Weisiger, 224 Ky 659, 6 SW2d 1084; Collier v Langan & Taylor Storage & Moving Co. 147 Mo App 700, 127 SW 435; Lloyd v Haugh & K. Storage & Transfer Co. 223 Pa 148, 72 A 516; Kettenhofen v Globe Transfer & Storage Co. 70 Wash 645, 127 P 295; Gates v Bekins, 44 Wash 422, 87 P 505.

For warehousemen as common carriers, see WAREHOUSES (1st ed § 6).

19. Hinchliffe v Wenig Teaming Co. 274 Ill 417, 113 NE 707; Caye v Pool, 108 Ky 124, 55 SW 887; Astrella v Laffey, 222 Mass 469, 111 NE 681; Lawson v Judge of Recorder's Ct. 175 Mich 375, 141 NW 623; Model Clothing Co. v Columbia Transfer Co. 158 Mo App 481, 139 SW 242; Philleo v Sanford, 17 Tex 227; Benson v Oregon Short Line R. Co. 35 Utah 241, 99 P 1072; Brown Shoe Co. v Hardin, 77 W Va 611, 87 SE 1014.

A duly licensed public cartman, having a regular stand upon a public street to accept such business as may be offered, is a common carrier and, as such, liable for loss through theft of goods delivered to him for transportation, although he was free from negligence on his part, and the bulk of his business came from a certain class of merchants in the neighborhood of his stand. Stevenson v Hartman, 231 NY 378, 132 NE 121, 18 ALR 1314.

20. Red Ball Transit Co. v Marshall (DC) 8 F2d 635, app dismd 273 US 782, 71 L ed 890, 47 S Ct 569; Jackson Architectural Iron Works v Hurlbut, 158 NY 34, 52 NE 665.

1. Ace-High Dresses v J. C. Trucking Co. 122 Conn 578, 191 A 536, 112 ALR 66; Fish v Chapman, 2 Ga 349; Goodman v New York, N. H. & H. R. Co. 295 Mass 330, 3 NE2d 777, 106 ALR 1151; Faucher v Wilson, 68 NH 338, 38 A 1002; Gerhard & Hey, Inc. v Cattaraugus Tanning Co. 241 NY 413, 150 NE 500.

A cartman who transferred goods between the lines of two connecting carriers was not a common carrier where he was but a transfer agent of the initial company. Hooper v Chicago & N. W. R. Co. 27 Wis 81.

2. Farley v Lavary, 107 Ky 523, 54 SW 840.

3. Ney v Haun, 131 Va 557, 109 SE 438, 18 ALR 1310.

4. United States ex rel. Chicago, N. Y. & B. Refrigerator Co. v Interstate Commerce Commission, 265 US 292, 68 L ed 1024, 44 S Ct 558; Gracie v Palmer, 8 Wheat (US) 605, 5 L ed 696; Rathbun v Ocean Acci. & G. Corp. 299 Ill 562, 132 NE 754, 19 ALR 140.

5. Calhoun v Pullman Palace Car Co. (CC Tenn) 149 F 546; Woodruff Sleeping & Parlor Coach Co. v Diehl, 84 Ind 474; Pullman Palace Car Co. v Gavin, 93 Tenn 53, 23 SW 70.

6. Myers v Pullman Co. 149 Ky 776, 149 SW 1002; Pullman Co. v Kelly, 86 Miss 87, 38 So 317.

furnishes railroad companies with special types of cars, such as refrigerated cars for carrying perishable fruits, is not considered to be a common carrier.[7]

Those engaged in the business of renting out motor vehicles without drivers —that is, those operating "drive-it-yourself" systems—are not considered to be common carriers.[8]

§ 19. Pipeline companies.

Companies operating pipelines as a business to serve the public indiscriminately, or holding themselves out as willing to do so, are common carriers.[9] In some instances, they are declared by statute to be common carriers,[10] although it should be noted that it is not competent for the state arbitrarily to impose the character or status of a common carrier upon a mere private carrier or other person who has not devoted his property to such a public use.[11]

A pipeline company transporting its own property exclusively is not a common carrier.[12] However, it has been held that a proprietor of an oil company was a common carrier, notwithstanding it transported only such oil as it produced or purchased, where the sale to it of the products of outside producers was practically compelled by reason of its ownership and control of the interstate pipelines.[13]

III. REGULATION AND CONTROL OF CARRIER'S OPERATIONS

A. Governmental Regulation and Control, in General

§ 20. Generally.

This subdivision contains a discussion of the governmental power to regulate and control carrier operations generally.[14] Matters pertaining to the power to regulate and control particular agencies of transportation are discussed in separate articles pertaining thereto.[15] This subdivision also contains a discussion of the general rules relating to the validity,[16] construction,[17] and enforcement[18] of governmental regulations relating to carriers. Subsequent subdivisions of this article contain a discussion of particular aspects of carrier operations subject to governmental regulation and control.

§ 21. Power to regulate common carriers, generally.

The doctrine that common carriers, in the exercise of their public functions, are subject to governmental control and regulation has become so well established as to be regarded as one of the fundamentals of the law.[19] They hold their several properties and exercise their respective privileges and franchises subject to governmental control and regulation, which include not only the regulation of the manner and the mode in which they may transact their business, but also the price which may be charged for their services in transporting property or passengers.[20] Where a carrier devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created; he may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control.[1] In fact, since if carrier service is not properly rendered, it causes loss and inconvenience to the public and perhaps endangers the lives and property of all those to whom it is extended, it is a fundamental duty of the government rigidly to require a proper rendering of this useful public service.[2]

7. Ellis v Interstate Commerce Commission, 237 US 434, 59 L ed 1036, 35 S Ct 645.

8. Roeske v Lamb, 39 NM 111, 41 P2d 522; Hodge Drive-It-Yourself Co. v Cincinnati, 123 Ohio St 284, 175 NE 196, 77 ALR 889, affd 284 US 335, 76 L ed 323, 52 S Ct 144; Dymond Cab Co. v Branson, 191 Okla 604, 131 P2d 1007.

An undertaker maintaining automobiles for the carrying of people to funerals does not, by letting them to others for hire, become a carrier of passengers. Hochspeier v Industrial Bd. 278 Ill 523, 116 NE 121.

9. Producers Transp. Co. v Railroad Commission, 251 US 228, 64 L ed 239, 40 S Ct 131; Hall v Cumberland Pipe Line Co. 193 Ky 728, 237 SW 405; Ohio Oil Co. v Fowler, 232 Miss 694, 100 So 2d 128.

10. Producers Transp. Co. v Railroad Commission, 251 US 228, 64 L ed 239, 40 S Ct 131 (California statute); Pipe Line Cases (United States v Ohio Oil Co.) 234 US 548, 58 L ed 1459, 34 S Ct 956 (Interstate Commerce Act); Montana-Dakota Utilities Co. v Federal Power Com. (CA8) 169 F2d 392, cert den 335 US 853, 93 L ed 401, 69 S Ct 82 (Leasing and Natural Gas Acts); Texas Co. v Commonwealth, 303 Ky 590, 198 SW2d 316; Gulf Oil Corp. v State (Okla) 360 P2d 933.

Where a foreign corporation enters a state and constructs and operates a pipeline therein, with knowledge that its statutes make every pipeline operator a common carrier, it will not be heard to complain thereafter that an order directing it to transport oil of a competitor deprives it of its property without due process of law. Pierce Oil Corp. v Phoenix Ref. Co. 259 US 125, 66 L ed 855, 42 S Ct 440.

11. § 23, infra.

12. Interstate Natural Gas Co. v Louisiana Public Service Com. (DC La) 34 F Supp 980; Associated Pipe Line Co. v Railroad Commission, 176 Cal 518, 169 P 62; Tidewater Pipe Co. v Board of Review, 311 Ill 375, 143 NE 87; State ex rel. Fatzer v Sinclair Pipe Line Co. 180 Kan 425, 304 P2d 930.

13. Pipe Line Cases (United States v Ohio Oil Co.) 234 US 548, 58 L ed 1459, 34 S Ct 956.

14. §§ 21 et seq., infra.

15. See 7 Am Jur 2d, Automobiles and Highway Traffic §§ 10 et seq.; 8 Am Jur 2d, Aviation §§ 9 et seq.; Railroads (1st ed §§ 29 et seq.); and Shipping (1st ed §§ 6 et seq.).

See also generally, Commerce (1st ed §§ 8 et seq.); and Public Utilities (1st ed §§ 10 et seq.).

16. §§ 28, 29, infra.

17. § 30, infra.

18. §§ 31, 32, infra.

19. Mississippi R. Commission v Mobile & O. R. 244 US 388, 61 L ed 1216, 37 S Ct 602; Wilson v New, 243 US 332, 61 L ed 755, 37 S Ct 298; Michigan C. R. Co. v Michigan R. Commission, 236 US 615, 59 L ed 750, 35 S Ct 422; Northern P. R. Co. v North Dakota, 236 US 585, 59 L ed 735, 35 S Ct 429; Missouri P. R. Co. v Nebraska, 217 US 196, 54 L ed 727, 30 S Ct 461; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969; Railroad Commission v Louisville & N. R. Co. 140 Ga 817, 80 SE 327; Chicago R. Co. v Commerce Commission, 336 Ill 51, 167 NE 810, 67 ALR 938; Com. v Abell, 275 Ky 802, 122 SW2d 757; State ex rel. Simpson v Chicago, M. & St. P. R. Co. 118 Minn 380, 137 NW 2; State v Pacific Exp. Co. 80 Neb 823, 115 NW 619; Hocking Valley R. Co. v Public Utilities Commission, 92 Ohio St 9, 110 NE 521; Chicago, R. I. & P. R. Co. v State, 67 Okla 10, 168 P 239; Pennsylvania R. Co. v Philadelphia County, 220 Pa 100, 68 A 676; Oregon Short Line R. Co. v Davidson, 33 Utah 370, 94 P 10.

20. Boston & M. R. Co. v Hooker, 233 US 97, 58 L ed 868, 34 S Ct 526; Southern P. Co. v Railroad Commission, 13 Cal 2d 89, 87 P2d 1055.

Governmental regulation under a state constitution providing that all services of a public nature performed under statutory authority by a common carrier and the rates charged therefor are subject to duly authorized and properly exercised governmental regulation, to correct abuses and to prevent unjust discrimination and excessive charges, may be subject, by statute, to applicable limitations under state and federal constitutions. State v Georgia Southern & F. R. Co. 139 Fla 115, 190 So 527, 123 ALR 914.

1. Lyon v Railroad Commission, 183 Cal 145, 190 P 795, 11 ALR 249; Chicago v O'Connell, 278 Ill 591, 116 NE 210, 8 ALR 916; Commonwealth v Abell, 275 Ky 802, 122 SW2d 757; Marshall v Bush, 102 Neb 279, 167 NW 59; State ex rel. Stimson Timber Co. v Kuykendall, 137 Wash 602, 243 P 834, 55 ALR 954, affd 275 US 207, 72 L ed 241, 48 S Ct 41; Puget Sound Electric R. Co. v Railroad Commission, 65 Wash 75, 117 P 739.

2. Wilson v New, 243 US 332, 61 L ed 755, 37 S Ct 298; Northern P. R. Co. v North Dakota, 236 US 585, 59 L ed 735, 35 S Ct 429; Charlotte, C. & A. R. Co. v Gibbes, 142 US 386, 35 L ed 1051, 12 S Ct 255; State ex rel. Wells v Jacksonville Terminal Co. 96 Fla 295, 117 So 869, 59 ALR 324; Bentler v Cincinnati, C. & E. R. Co. 180 Ky 497, 203 SW 199; Hocking Valley R. Co. v Public Utilities Commission, 92 Ohio St 9, 110 NE 521; Puget Sound Electric R.

The power to regulate carrier operations by direct action is legislative rather than judicial in its nature.[3]

§ 22. — Extent and limits of power.

For the purposes of public regulation, there is a fundamental distinction between the acts of common carriers in the performance of their public duties as such, and those done in the exercise of their purely private right to manage and control their own property in matters not embraced within their public duties.[4] With respect to matters pertaining to the exercise of their public functions, it may be stated generally that the right of regulation extends so far as may be necessary to satisfy the reasonable requirements of the public service undertaken or engaged in to meet the just demands of the public to be served.[5] The power to regulate common carriers is not necessarily destroyed because such regulations may to some extent affect the power to contract, or even contracts already made.[6] The right to regulate common carriers may, however, be restricted by the contract obligation imposed by the charter or statute under which the companies are incorporated,[7] and is subject, of course, to the constitutional restrictions against the impairment of vested rights or the denial of the equal protection of the laws or of due process of law,[8] the property of such companies being entitled to protection against unlawful invasion as much as the property of private persons.[9] Arbitrary and unreasonable regulations cannot be made. The action of a state which, in effect, deprives the carrier of its property rights in a manner or to an extent not contemplated by law, as a limitation upon the rights of those devoting their property to public use, though under the form of regulations, is in law a deprivation of property without due process of law.[10]

Co. v Railroad Commission, 65 Wash 75, 117 P 739.

3. Hammond Lumber Co. v Public Serv. Commission, 96 Or 595, 189 P 639, 9 ALR 1223.

4. Atchison, T. & S. F. R. Co. v Railroad Commission, 283 US 380, 75 L ed 1128, 51 S Ct 553; Chicago, M. & St. P. R. Co. v Wisconsin, 238 US 491, 59 L ed 1423, 35 S Ct 869; Interstate Commerce Commission v Chicago G. W. R. Co. 209 US 108, 52 L ed 705, 28 S Ct 493; State ex rel. Postal Teleg. Cable Co. v Wells, 96 Fla 591, 118 So 731, 60 ALR 1072.

Save as to the duties that it owes to the public, a common carrier has as complete dominion over its property as any other owner. Memphis News Pub. Co. v Southern R. Co. 110 Tenn 684, 75 SW 941.

5. State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969.

6. Railroad Commission v Louisville & N. R. Co. 140 Ga 817, 80 SE 327.

7. As to regulation of rates as affected by franchise or charter provisions, see PUBLIC UTILITIES.

8. Interstate Commerce Commission v Oregon-Washington R. & Nav. Co. 288 US 14, 77 L ed 588, 53 S Ct 266; Atchison, T. & S. F. R. Co. v Railroad Commission, 283 US 380, 75 L ed 1128, 51 S Ct 553; Norfolk & W. R. Co. v Conley, 236 US 605, 59 L ed 745, 35 S Ct 437; Northern P. R. Co. v North Dakota, 236 US 585, 59 L ed 735, 35 S Ct 429; Atlantic Coast Line R. Co. v Goachman, 59 Fla 130, 52 So 377; Chicago v O'Connell, 278 Ill 591, 116 NE 210, 8 ALR 916; State ex rel. Simpson v Chicago, M. & St. P. R. Co. 118 Minn 380, 137 NW 2; Puget Sound Traction, Light & P. Co. v Public Serv. Commission, 100 Wash 329, 170 P 1014, 5 ALR 30.

9. Hollywood Chamber of Commerce v Railroad Commission, 192 Cal 307, 219 P 983, 30 ALR 68; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969.

10. Chicago, R. I. & P. R. Co. v United States, 284 US 80, 76 L ed 177, 52 S Ct 87; Atchison, T. & S. F. R. Co. v Railroad Commission, 283 US 380, 75 L ed 1128, 51 S Ct 553; Colorado v United States, 271 US 153, 70 L ed 878, 46 S Ct 452; Norfolk & W. R. Co. v Public Serv. Commission, 265 US 70, 68 L ed 904, 44 S Ct 439; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969; State v Chicago, M. & St. P. R. Co. 68 Minn 381, 71 NW 400.

§ 23. Power to regulate private carriers, generally.

Under the power to regulate common carriers, a state has no power to regulate, directly or indirectly, private carriers.[11] The state cannot impose upon a private carrier the duties and liabilities of a common carrier, since that would be a taking of private property for public use without compensation and with denial of due process of law; and for the same reason the state cannot arbitrarily change the status of a private carrier to that of a public carrier.[12] Hence, a state cannot compel private carriers upon its highways to submit to regulations of the public service commission, the effect of which will be practically to require them to become public carriers.[13]

Where, however, the right to engage in the transportation business is dependent upon a grant from the state, it is competent for the state, in making such grant, to impose the condition that the grantee shall exercise such privilege in the capacity of a common carrier.[14] Also, a statute may impose on contract carriers regulations of the nature of those frequently imposed on common carriers, so long as it does not require the contract carrier to devote his property to the service of the public.[15]

§ 24. Federal regulation.

Under the power of the federal government to regulate interstate commerce,[16] carriers engaged in interstate commerce are subject to its regulation and control.[17] The federal government exercised its power over interstate carriers by the enactment of the Interstate Commerce Act of 1887,[18] which applies primarily to common carriers engaged in interstate transportation of passengers and property by railroad.[19] This act has been amended several

11. Frost & F. Trucking Co. v Railroad Commission, 271 US 583, 70 L ed 1101, 46 S Ct 605, 47 ALR 457; Michigan Pub. Utilities Commission v Duke, 266 US 570, 69 L ed 445, 45 S Ct 191, 36 ALR 1105; Williamson v Mitchell Auto Co. 181 Ark 693, 27 SW2d 96.

12. Thompson v Consolidated Gas Utilities Corp. 300 US 55, 81 L ed 510, 57 S Ct 364; Washington ex rel. Stimson Lumber Co. v Kuykendall, 275 US 207, 72 L ed 241, 48 S Ct 41; Frost & F. Trucking Co. v Railroad Commission, 271 US 583, 70 L ed 1101, 46 S Ct 605, 47 ALR 457; Michigan Public Utilities Commission v Duke, 266 US 570, 69 L ed 445, 45 S Ct 191, 36 ALR 1105; Malone v Van Etten, 67 Idaho 294, 178 P2d 382; Bayard v North Cent. Gas Co. 164 Neb 819, 83 NW2d 861; Motor Haulage Co. v Maltbie, 293 NY 338, 57 NE2d 41, 161 ALR 401; Equipment Finance Corp. v Scheidt, 249 NC 334, 106 SE2d 555; Affiliated Serv. Corp. v Public Utilities Commission, 127 Ohio St 47, 186 NE 703, 103 ALR 264; Dairymen's Co-op. Sales Asso. v Public Serv. Commission, 318 Pa 381, 177 A 770, 98 ALR 218; State ex rel. Public Utilities Commission v Nelson, 65 Utah 457, 238 P 237, 42 ALR 819; Miles v Enumclaw Co-op. Creamery Corp. 12 Wash 2d 377, 121 P2d 945.

Annotation: 109 ALR 556, s. 175 ALR 1337.

13. Purple Truck Garage Co. v Campbell, 119 Or 484, 250 P 213, 51 ALR 816.

14. Pierce Oil Corp. v Phoenix Ref. Co. 259 US 125, 66 L ed 855, 42 S Ct 440.

15. Deppman v Murray (DC Wash) 5 F Supp 661.

A state statute imposing conditions on the use of highways by motor vehicle carriers may not be construed as an attempt to convert private contract carriers by motor into common carriers, and thus take their property for a public use without adequate compensation and deprive them of their property without due process of law, where, although the regulations imposed upon the two classes are in some instances similar, if not identical, the provisions applicable to contract carriers are distinctly set forth and separately stated, and the statute does not compel private contractors to assume the duties and obligations of common carriers or interfere with their freedom to limit their business to that of carrying under a private contract. Stephenson v Binford, 287 US 251, 77 L ed 288, 53 S Ct 181, 87 ALR 721.

16. US Const Art 1, § 8.

For the text of the United States Constitution, see Am Jur 2d DESK BOOK, Document 1.

17. Houston, E. & W. T. R. Co. v United States, 234 US 342, 58 L ed 1341, 34 S Ct 833.

18. 49 USC §§ 1 et seq.

19. For discussion of carriers and instru-

times—important amendments being made by the Federal Motor Carrier Act of 1935,[20] covering transportation of passengers or property by motor carriers engaged in interstate or foreign commerce,[1] the Water Carrier Act of 1940,[2] covering water carriers engaged in interstate or foreign commerce,[3] and the Freight Forwarder Act of 1942,[4] covering freight forwarders.[5]

The Interstate Commerce Commission is the agency created to carry out and enforce the provisions of the Interstate Commerce Act, and its various amendments.[6]

It is the declared national policy of Congress to provide for fair and impartial regulation of all modes of transportation, recognizing and preserving the inherent advantages of each; to promote safe, adequate, economical, and efficient service and to foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; to co-operate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, co-ordinating, and preserving a national transportation system by water, highway, and rail, as well as by other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.[7]

§ 25. State regulation.

Under our dual system of federal and state governments, the inherent sovereign power to regulate intrastate transportation by common carriers is reserved to the states.[8] Within the limitations of the state constitution, the authority of the legislature is supreme in the regulation of intrastate transportation by common carriers, unless the regulation in effect deprives a person or corporation of property without due process of law, denies the equal protection of the laws, directly and materially burdens interstate commerce,

mentalities covered by the Act, see §§ 38-44, infra.

20. 49 USC §§ 301 et seq.

1. For discussion of this provision, see § 40, infra.

2. § 44, infra.

3. For discussion on this point, see SHIPPING.

4. 49 USC §§ 1001 et seq.

5. For discussion on this point, see § 42, infra.

6. For a general discussion of the Interstate Commerce Commission, see §§ 33 et seq., infra.

7. Act Sept. 18, 1940, Ch 722, title I § 1, 54 Stat 899, amending Chapters 1, 8, 12, 13, and 19 of Title 49 of the United States Code.

8. Southern P. Co. v Arizona, 249 US 472, 63 L ed 713, 39 S Ct 313; Chicago & N. W. R. Co. v Ochs, 249 US 416, 63 L ed 679, 39 S Ct 343; Gulf, C. & S. F. R. Co. v Texas, 246 US 58, 62 L ed 574, 38 S Ct 236; Puget Sound Traction, Light & P. Co. v Reynolds, 244 US 574, 61 L ed 1325, 37 S Ct 705, 5 ALR 13; Mississippi R. Com. v Mobile & O. R. Co. 244 US 388, 61 L ed 1216, 37 S Ct 602; Atchison, T. & S. F. R. Co. v Railroad Com. 173 Cal 577, 160 P 828, 2 ALR 975, error disnd 245 US 638, 62 L ed 525, 38 S Ct 191; State ex rel. Railroad Comrs. v Florida East Coast R. Co. 69 Fla 480, 68 So 729; Railroad Com. v Louisville & N. R. Co. 140 Ga 817, 80 SE 327; Chicago v O'Connell, 278 Ill 591, 116 NE 210, 8 ALR 916; Commonwealth v South Covington & C. Street R. Co. 181 Ky 459, 205 SW 581, 6 ALR 118; State ex rel. Nebraska State R. Com. v Missouri P. R. Co. 100 Neb 700, 161 NW 270; Chicago, R. I. & P. R. Co. v State, 67 Okla 10, 168 P 239; Puritan Coal Min. Co. v Pennsylvania R. Co. 237 Pa 420, 85 A 426, affd 237 US 121, 59 L ed 867, 35 S Ct 484; Memphis v State, 133 Tenn 83, 179 SW 631; State v Central Vermont R. Co. 81 Vt 463, 71 A 194; Puget Sound Traction, Light & P. Co. v Public Serv. Com. 100 Wash 329, 170 P 1014, 5 ALR 30; Baltimore & O. R. Co. v Public Serv. Com. 81 W Va 457, 94 SE 545.

Generally, as to the power of the states to regulate intrastate commerce, see COMMERCE (1st ed §§ 18 et seq.).

in violation of the Constitution of the United States, or violates some other provision of the Federal Constitution or laws.[9]

Although authority to regulate within a given sphere may exist in both the United States and the individual states, when the former calls into play constitutional authority within such general sphere, the necessary effect of doing so is that, to the extent that any conflict arises, the state power is limited.[10] It is well settled, however, that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce,[11] does not of itself, and in the absence of specific action by the Commission or by Congress itself, interfere with the authority of the states to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce is thereby incidentally affected, so long as it is not directly burdened or interfered with.[12] Moreover, Congress, in enacting the Federal Motor Carrier Act,[13] manifested the intention that the Interstate Commerce Commission should co-operate with the various states in the administration of the federal law; that the federal law should not displace entirely the state laws upon the subject, and that it was only where there was an actual and distinct conflict between the laws that the state law would be displaced, and then only that part of the state law in actual conflict with the federal law.[14]

9. Georgia R. & Bkg. Co. v Smith, 128 US 174, 32 L ed 377, 9 S Ct 47; State ex rel. Wells v Jacksonville Terminal Co. 96 Fla 295, 117 So 869, 59 ALR 324; Railroad Commission v Louisville & N. R. Co. 140 Ga 817, 80 SE 327; Michigan C. R. Co. v Michigan R. Com. 183 Mich 6, 148 NW 800; Range Sand-Lime Brick Co. v Great Northern R. Co. 137 Minn 314, 163 NW 656; Davison v Chicago & N. W. R. Co. 100 Neb 462, 160 NW 877; Chicago, R. I. & P. R. Co. v State, 67 Okla 10, 168 P 239.

An interstate carrier, in so far as its business and functions are purely intrastate, has the same rights, powers, and privileges and is subject to the same liabilities as a carrier organized under the business laws of the state and operating a line wholly within its territorial limits. Baltimore & O. R. Co. v Public Serv. Com. 81 W Va 457, 94 SE 545.

The Federal Constitution does not render a carrier by motorbus between points in different states immune from state regulation with respect to intrastate business. Haselton v Interstate Stage Lines, 82 NH 327, 133 A 451.

10. Northern P. R. Co. v North Dakota, 250 US 135, 63 L ed 897, 39 S Ct 502; Boston & M. R. Co. v Hooker, 233 US 97, 58 L ed 868, 34 S Ct 526; Railroad Com. v Worthington, 225 US 101, 56 L ed 1004, 32 S Ct 653; Chicago, I. & L. R. Co. v United States, 219 US 486, 55 L ed 305, 31 S Ct 272; Central of Georgia R. Co. v Augusta Brokerage Co. 122 Ga 646, 50 SE 473.

In developing interstate commerce agencies, Congress can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce that it deems necessary or desirable. Railroad Commission v Chicago, B. & Q. R. Co. 257 US 563, 66 L ed 371, 42 S Ct 232, 22 ALR 1086.

State regulation of a common carrier, though applied directly to its intrastate business only, must, if it is in fact a burden on the carrier's interstate business, yield to the paramount power of Congress to assure adequate interstate service. Pacific Tel. & Tel. Co. v Tax Com. 297 US 403, 80 L ed 760, 56 S Ct 522, 105 ALR 1.

11. § 33, infra.

12. Atchison, T. & S. F. R. Co. v Railroad Com. 283 US 380, 75 L ed 1128, 51 S Ct 553; Louisville & N. R. Co. v Higdon, 234 US 592, 58 L ed 1484, 34 S Ct 913; Missouri, K. & T. R. Co. v Harris, 234 US 412, 58 L ed 1377, 34 S Ct 790; Grand Trunk R. Co. v Michigan R. Com. 231 US 457, 58 L ed 310, 34 S Ct 152; State ex rel. Burr v Seaboard Air Line R. Co. 89 Fla 419, 104 So 602, 39 ALR 1362; Atchison, T. & S. F. R. Co. v State, 71 Okla 167, 176 P 393, 11 ALR 992; Norfolk & W. R. Co. v Public Serv. Com. 82 W Va 408, 96 SE 62, 8 ALR 155.

13. § 40, infra.

14. Southwestern Greyhound Lines v Railroad Com. 128 Tex 560, 99 SW2d 263, 109 ALR 1235.

A state has no power to impose criminal sanctions upon an interstate motor carrier certified by the Interstate Commerce Commission for its failure to obtain state certification for its alleged intrastate operations consisting in the transportation, via its out-of-state headquarters, of shipments between points in the state, since such sanctions would be tantamount to a partial suspension of the carrier's federally granted certificate; this is so even

The fact that a carrier is a foreign corporation does not exempt it from regulation and control by the state in which it is carrying on the business of a common carrier. If the rule were otherwise, all carriers would escape from state regulation except in the state of their creation.[15]

§ 26. Administrative regulation.

The matter of the regulation of common carriers is primarily a legislative function, but experience has demonstrated the inability of the various legislative assemblies to cope with the problem; hence the power is generally delegated to commissions and other administrative bodies created for that purpose,[16] and, as a general matter, this does not violate the constitutional prohibition against the delegation of legislative power.[17] This conclusion has been sustained by drawing a distinction between the power to pass a law, necessarily legislative, and the power to adopt rules and regulations to carry into effect a law already passed, which is not necessarily legislative.[18] Moreover, it is well recognized that the doctrine of separation of powers does not preclude a certain degree of admixture of legislative, executive, and judicial powers in commissions and administrative bodies.[19] In some instances the state constitution has provided for the establishment of a commission with legislative, judicial, and executive functions.[20]

Matters pertaining to the general powers and duties of public service or public utilities commissions are dealt with in another article.[21] Matters pertaining to the general powers and duties of the Interstate Commerce Commission over carriers are dealt with in a subsequent subdivision of this article.[22]

§ 27. Records, reports, etc., of carriers.

Statutes in many jurisdictions require carriers to keep records of their transactions and to make reports of their business to the public authorities. The regulatory commission is sometimes authorized to prescribe the forms of the carriers' accounts, records, and memoranda, and is given access thereto.[1] A state statute requiring every railroad company incorporated or doing business in the state to make reports to a commission does not conflict with the federal statute requiring railroad companies to make certain reports to the Interstate Commerce Commission.[2]

though the alleged intrastate operations constitute only a minor portion of the carrier's business. Service Storage & Transfer Co. v Virginia, 359 US 171, 3 L ed 2d 717, 79 S Ct 714.

15. St. Louis & S. F. R. Co. v Gill, 54 Ark 101, 15 SW 18, affd 156 US 649, 39 L ed 567, 15 S Ct 484; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969.

16. Atchison, T. & S. F. R. Co. v Railroad Com. 283 US 380, 75 L ed 1128, 51 S Ct 553; State ex rel. Wells v Jacksonville Terminal Co. 96 Fla 295, 117 So 869, 59 ALR 324; Seward v Denver & R. G. R. Co. 17 NM 557, 131 P 980; St. Clair v Tamaqua & P. Electric R. Co. 259 Pa 462, 103 A 287, 5 ALR 20.

17. United States v Illinois C. R. Co. 291 US 457, 78 L ed 909, 54 S Ct 471; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969; Hammond Lumber Co. v Public Serv. Com. 96 Or 595, 189 P 639, 9 ALR 1223; St. Clair v Tamaqua & P. Electric R. Co. 259 Pa 462, 103 A 287, 5 ALR 20; State ex rel. Public Serv. Com. v Baltimore & O. R. Co. 76 W Va 399, 85 SE 714.

18. See 1 Am Jur 2d, Administrative Law § 126; Constitutional Law (1st ed §§ 240 et seq.).

19. See 1 Am Jur 2d, Administrative Law § 77.

20. Commonwealth v Atlantic Coast Line R. Co. 106 Va 61, 55 SE 572.

21. See Public Utilities (1st ed §§ 192 et seq.).

22. §§ 33 et seq., infra.

1. For provisions of the Interstate Commerce Act in this respect, see § 35, infra.

2. People v Chicago, I. & L. R. Co. 223 Ill 581, 79 NE 144.

A carrier doing business outside the state of its origin may be compelled to give to the state in which it is doing business, information as to its property and business within that state as a basis for public regulation, but not as to property and business out of the state, nor as to its interstate business, except so far as necessary to enable the state authorities to discharge their duties as to intrastate business.[3]

It has been held that a municipal corporation may require the owners of public moving vans to file with the police commissioners a report of the persons for whom they move household goods, and the places from and to which the goods are taken.[4] On the other hand, an ordinance requiring the movers to file records of the destination of household goods moved by them has been held not to be reasonable in that the information required to be furnished does not have relation to any purpose of regulating the business of moving.[5]

§ 28. Validity of regulations.

The validity of legislative enactments for the control and regulation of common carriers is determined by the general rules applicable in other cases, which are comprehensively treated in a separate article.[6] As in other cases generally, such provisions are subject to constitutional limitations and must not be unreasonable[7] or discriminatory in their operation.[8] In determining whether a rule or regulation promulgated by the legislative authority, in its terms or in its practical operation and effect, is unreasonable and denies to the carrier its constitutional property rights, all the facts and circumstances affecting the rights of all interested parties should be considered,[9] including the just requirements of the public service, the classification and extent and relation of the subject regulated, and the effect of the burden on the entire business of the carrier.[10]

The validity of regulations relating to particular matters are considered in the sections in this article dealing with those matters.

§ 29. — Classification and discrimination.

The principle of constitutional law that regulatory statutes which unjustly or arbitrarily discriminate between persons or corporations that are similarly conditioned with reference to the duties regulated, violate the organic provisions securing property rights,[11] is applicable to regulations affecting carriers. The state in classifying persons or corporations and their occupations as com-

3. State ex rel. Railroad & W. Com. v United States Exp. Co. 81 Minn 87, 83 NW 465.

4. Lawson v Judge of Recorder's Ct. (Lawson v Connolly), 175 Mich 375, 141 NW 623; Wagner v St. Louis, 284 Mo 410, 224 SW 413, 12 ALR 495.

Annotation: 12 ALR 499, s. 20 ALR 210.

Charter authority to regulate all persons engaged in any business, occupation, calling, profession, or trade, empowers a municipal corporation to require furniture movers to file a record of their transactions. Wagner v St. Louis, supra.

5. Chicago v Hebard Exp. & Van Co. 301 Ill 570, 134 NE 27, 20 ALR 206, distinguishing Lawson v Judge of Recorder's Ct., supra.

Statutory authority to regulate draymen and to prescribe their compensation does not include power to require them to file records of the destination of household goods moved by them. Chicago v Hebard Exp. & Van Co., supra.

6. See Constitutional Law.

7. § 22, supra.

8. § 29, infra.

9. Louisville & N. R. Co. v Railroad Comrs. 63 Fla 491, 58 So 543.

10. State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969.

11. See Constitutional Law (1st ed §§ 468 et seq.).

on carriers must adopt a classification which has just relation to, or reasonable basis in, essential differences and circumstances with reference to the object regulated; all those who are similarly situated or who have similar duties and obligations should be included in one class, at least where there are practical differences to warrant special classification in the interests of the general welfare.[12]

In determining the legality of classifications of carriers for legislative regulation, the subject to be regulated, the character, extent, and purpose of the regulation, the classes of persons legally and naturally affected by the regulation, and the particular classification and regulation adopted by the statute should be considered.[13] A classification of carriers having a basis in practical convenience is not unconstitutional because lacking in purely theoretical or scientific uniformity.[14] Material and substantial differences in operating conditions, in the manner of operation, in the location or length of the line or route operated, or in the character of traffic may constitute a valid basis of classification.[15] Thus, in the particulars where the legal duties of carriers operating railroads essentially differ from those of other common carriers, they may be separately classified for legislative regulation without offending the due process of law and the equal protection of the laws clauses of the organic law.[16] Where there is doubt as to the validity of a particular classification, the legislative will should be enforced in deference to the lawmaking power.[17]

30. General principles as to construction of regulations.

The general rules governing the construction and interpretation of constitutional[18] and statutory[19] provisions generally are applicable in the construction of provisions relating to the control and regulation of common carriers. The first consideration is to give effect to the objects and purposes of their enactment.[20] Such provisions, insofar as they are intended to secure the proper performance of the carriers' public duties, and to prevent discrimination, are generally regarded as remedial and subject to the rule of liberal construction.[1]

12. Seaboard Air Line R. Co. v Simon, 56 Fla 545, 47 So 1001; Commonwealth v Interstate Consol. Street R. Co. 187 Mass 436, 73 NE 530.

Carriers are not unconstitutionally discriminated against by a freight tariff prescribed by a state commission which gives the benefit of low rough material rates on a particular commodity only where the shipper transports, over the same line that brought in the rough material, a certain percentage of the manufactured product. Arkadelphia Mill. Co. v St. Louis S. W. R. Co. 249 US 134, 63 L ed 517, 39 S Ct 237.

13. Continental Baking Co. v Woodring, 286 US 352, 76 L ed 1155, 52 S Ct 595, 81 ALR 1402; Seaboard Air Line R. Co. v Simon, 56 Fla 545, 47 So 1001.

14. Continental Baking Co. v Woodring, 286 US 352, 76 L ed 1155, 52 S Ct 595, 81 ALR 1402.

15. Consumers' League v Colorado & S. R. Co. 53 Colo 54, 125 P 577; Puget Sound Electric R. Co. v Railroad Com. 65 Wash 75, 117 P 739.

16. Gulf, C. & S. F. R. Co. v Ellis, 165 US 150, 41 L ed 666, 17 S Ct 255; Seaboard Air Line R. Co. v Simon, 56 Fla 545, 47 So 1001.

Annotation: 139 ALR 977.

17. Gulf, C. & S. F. R. Co. v Ellis, 165 US 150, 41 L ed 666, 17 S Ct 255; Seaboard Air Line R. Co. v Simon, 56 Fla 545, 47 So 1001; St. Louis S. W. R. Co. v State, 113 Tex 570, 261 SW 996, 33 ALR 367.

18. See CONSTITUTIONAL LAW (1st ed §§ 49 et seq.).

19. See STATUTES (1st ed §§ 217 et seq.).

20. Consumers' League v Colorado & S. R. Co. 53 Colo 54, 125 P 577; Hilton Lumber Co. v Atlantic Coast Line R. Co. 141 NC 171, 53 SE 823.

1. Spiller v Atchison, T. & S. F. R. Co. 253 US 117, 64 L ed 810, 40 S Ct 466; Pennsylvania Co. v United States, 236 US 351, 59 L ed 616, 35 S Ct 370; Consumers' League v Colorado & S. R. Co. 53 Colo 54, 125 P 577; Haselton v Interstate Stage Lines, 82 NH 327, 133 A 451, 47 ALR 218; Hilton Lumber Co. v Atlantic Coast Line R. Co. 141 NC 171, 53 SE 823.

Insofar, however, as such provisions affect the enjoyment of the carriers' property rights the rule of strict construction is generally applicable, as in other cases.[2] But, in any event, regulatory statutes will not be given a construction that would render them invalid, if such construction can reasonably be avoided.[3]

The construction and application of the provisions of federal legislation present federal questions, with respect to which the decisions of the federal courts are controlling.[4]

§ 31. Enforcement of regulations.

The customary method of enforcing compliance with governmental regulations is by the imposition of penalties for the violation thereof.[5] Penalties properly proportioned to the offense, for the commission of which they may be inflicted, are lawful.[6] There are limits, however, beyond which legislation and penalties may not go, even in cases where the classification is concededly legitimate and the subject matter admittedly proper.[17] A law is invalid on its face where the penalties for disobedience are fines so enormous or imprisonment so severe as to intimidate the carrier and its officers from resorting to the courts to test the validity of the legislation;[8] but the rule is otherwise where a fair opportunity to make such test is afforded.[9]

The provisions of state statutes imposing penalties for the violation of regulations, as applied to interstate traffic, are generally regarded as not constituting an unlawful interference with interstate commerce and are therefore gen-

2. Interstate Commerce Com. v Cincinnati, N. O. & T. P. R. Co. 167 US 479, 42 L ed 243, 17 S Ct 896.

13. Schultz v Parker, 158 Iowa 42, 139 NW 173; Haselton v Interstate Stage Lines, 82 NH 327, 133 A 451, 47 ALR 218.

4. Missouri, K. & T. R. Co. v Harriman Bros. 227 US 657, 57 L ed 690, 33 S Ct 397; Cooke v Northern P. R. Co. 32 ND 340, 155 NW 867.

5. Pittsburgh, C. & St. L. R. Co. v Moore, 33 Ohio St 384.

The purpose of a penalty is not solely to compel a carrier to make pecuniary compensation to the person injured, but for the more important purpose of enforcing the performance by the carrier of its duties. Reid v Southern R. Co. 150 NC 753, 64 SE 874.

As to penalties for violation of regulations against discrimination, see infra, § 213; for overcharges, see infra, § 124; for failure to pay claim within specified time, see infra, § 657; for refusal to receive and transport property, see infra, § 251; for violation of regulations with respect to the transportation and care of livestock, see infra, § 362.

6. Atlantic Coast Line R. Co. v Coachman, 59 Fla 130, 52 So 377; Alexander v Chicago, M. & St. P. R. Co. 282 Mo 236, 221 SW 712, 11 ALR 867.

7. Atlantic Coast Line R. Co. v Coachman, 59 Fla 130, 52 So 377.

8. St. Louis, I. M. & S. R. Co. v Williams, 251 US 63, 64 L ed 139, 40 S Ct 71; Missouri P. R. Co. v Tucker, 230 US 340, 57 L ed 1510, 33 S Ct 961; Ex parte Young, 209 US 123, 52 L ed 714, 28 S Ct 441; State v v Crawford, 74 Wash 248, 133 P 590.

The cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders; they are based upon the proposition that penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. A statute which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an ex post facto law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must, at his own risk, pass upon the question. He must either obey what may finally be held to be a void order or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid. Wadley S. R. Co. v Georgia, 235 US 651, 59 L ed 405, 35 S Ct 214.

9. Chesapeake & O. R. Co. v Conley, 230 US 513, 57 L ed 1597, 33 S Ct 985.

rally upheld, insofar as they are not in conflict with, or superseded by, federal legislation on the subject.[10]

Mandamus is available to compel compliance with regulations affecting the public.[11] Injunction may also be employed to prevent a carrier from violating rate regulations.[12] Mandamus and injunction as remedies for the prevention of discrimination,[13] and for compelling performance of the carrier's duties,[14] are treated in subsequent portions of the article.

§ 32. — Enjoining enforcement; defenses.

In most jurisdictions, in order to protect itself against unlawful regulations, a carrier may resort to the preventive remedies afforded by a court of equity[15] or it may await proceedings to enforce compliance with such regulations and defend upon the ground of their invalidity.[16] Under some circumstances, proceedings for the enforcement of a penalty may be enjoined,[17] although there may be instances in which the court may refuse to grant an injunction upon grounds which are available to the carrier as grounds of defense in an action at law for the enforcement of the penalty.[18]

In proceedings to recover or impose a penalty for a violation of regulatory statutes, if the fact of violation is due to an honest mistake, the carrier cannot be held responsible,[19] unless the mistake is as to a fact that the carrier is in duty bound to know, such as the distance between stations.[20]

10. Atlantic Coast Line R. Co. v Mazursky, 216 US 122, 54 L ed 411, 30 S Ct 378; Gulf, C. & S. F. R. Co. v Hefley, 158 US 98, 39 L ed 910, 15 S Ct 802.

Interstate carriers, in the absence of federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits. Minnesota Rate Cases, 230 US 352, 57 L ed 1511, 33 S Ct 729.

11. Atty. Gen. v Old Colony R. Co. 160 Mass 62, 35 NE 252.

12. § 123, infra.

13. § 214, infra.

14. § 252, infra.

15. Baltimore & O. R. Co. v United States, 298 US 349, 80 L ed 1209, 56 S Ct 797; Paducah v Paducah R. Co. 261 US 267, 67 L ed 647, 43 S Ct 335; Arkadelphia Mill. Co. v St. Louis S. W. R. Co. 249 US 134, 63 L ed 517, 39 S Ct 237; Missouri v Chicago, B. & Q. R. Co. 241 US 533, 60 L ed 1148, 36 S Ct 715.

16. Missouri v Chicago, B. & Q. R. Co., supra; St. Louis & S. F. R. Co. v Gill, 156 US 649, 39 L ed 567, 15 S Ct 484.

17. The failure of a railroad company to apply to a state public service commission for leave to discontinue a portion of its service, as required by a state statute, before discontinuing certain trains, such omission being with a view to testing the constitutionality of the statute, does not justify exposing it and its officers to the severe penalties prescribed in case the abandonment is wilful, and an order restraining the enforcement of such penalties will be continued until proceedings may be had before the commission. St. Louis-San Francisco R. Co. v Alabama Pub. Serv. Com. 279 US 560, 73 L ed 843, 49 S Ct 383.

18. Hampton v St. Louis, I. M. & S. R. Co. 227 US 456, 57 L ed 596, 33 S Ct 263, holding that an interstate railway carrier which has refused to furnish cars for intrastate transportation, as required by a statute, cannot test the constitutionality of such statute, as affecting interstate commerce, in a suit in equity to enjoin the bringing of actions at law to recover the penalties prescribed for violations of its provisions, where, as construed by the highest state court, the provisions of the statute which affect interstate commerce are separable from the remaining provisions, and the statute permits any reasonable excuse for a failure to furnish cars on demand to be interposed in the actions at law.

Grounds for injunctive relief generally, see INJUNCTIONS (Rev ed §§ 24 et seq.).

19. United States v Northern P. R. Co. 242 US 190, 61 L ed 240, 37 S Ct 22.

20. Chicago, R. I. & P. R. Co. v McDermott, 106 Ark 170, 152 SW 983.

B. INTERSTATE COMMERCE COMMISSION

1. IN GENERAL

§ 33. Generally.

The Interstate Commerce Commission was created in 1887 by the Interstate Commerce Act[1] in order to bring into existence a body which, from its special character, would be best fitted to deal with interstate carriers and, among other things, to determine whether, upon the facts in a given case, there was an unjust discrimination against interstate commerce.[2] The Commission is a body corporate with legal capacity to be a party plaintiff or defendant in the United States courts; it is not a citizen of any state, but has the same relation to one state as to another.[3] Although it exercises quasi-judicial powers,[4] it is not a judicial body,[5] but is an administrative board invested with administrative powers of supervision and investigation.[6] The Commission has been given exclusive jurisdiction of administrative matters, for the reason that in dealing therewith it does not decide questions of law or judicial questions, but questions of the reasonableness of rules, procedure, and business supervision on which opinions may well differ.[7]

The Interstate Commerce Commission has broad and sweeping powers over carriers engaged in interstate commerce,[8] and a wide range of administrative discretion as to the details to be used in carrying out purposes and directions of the Interstate Commerce Act,[9] although it operates in a field limited by constitutional rights and legislative requirements.[10] It may perform numerous and varied functions in the enforcement of the Interstate Commerce Act and its amendments,[11] but its powers are limited to the realm of interstate commerce[12] and, of course, it may not compel the performance by a carrier of acts which the latter legally cannot perform.[13]

1. 49 USC § 11, originally enacted as Act Feb. 4, 1887, 24 Stat at L 383, Ch 104, § 11.

For organization chart of the Interstate Commerce Commission, see Am Jur 2d DESK BOOK, Document 47.

2. United States v Chicago Heights Trucking Co. 310 US 344, 84 L ed 1243, 60 S Ct 931; Florida v United States, 292 US 1, 78 L ed 1077, 54 S Ct 603.

3. Texas & P. R. Co. v Interstate Commerce Com. 162 US 197, 40 L ed 940, 16 S Ct 666.

4. Baer Bros. Mercantile Co. v Denver & R. G. R. Co. 233 US 479, 58 L ed 1055, 34 S Ct 641 (holding that the Commission, in awarding reparation, acts in a quasi-judicial capacity); Interstate Commerce Com. v United States, 224 US 474, 56 L ed 849, 32 S Ct 556.

5. Spiller v Atchison, T. & S. F. R. Co. 253 US 117, 64 L ed 810, 40 S Ct 466; Interstate Commerce Com. v Brimson, 154 US 447, 38 L ed 1047, 14 S Ct 1125; Kentucky & I. Bridge Co. v Louisville & N. R. Co. (CC) 37 F 567.

6. United States v Atlanta, B. & C. R. Co. 282 US 522, 75 L ed 513, 51 S Ct 237; Interstate Commerce Com. v United States, 224 US 474, 56 L ed 849, 32 S Ct 556; Louisville & N. R. Co. v F. W. Cook Brewing Co. 223 US 70, 56 L ed 355, 32 S Ct 189.

7. Gulf & S. I. R. Co. v Buddendorft, 110 Miss 752, 70 So 704.

8. §§ 38-44, infra.

9. Atchison, T. & S. F. R. Co. v United States, 284 US 248, 76 L ed 273, 52 S Ct 146; Texas & P. R. Co. v Interstate Commerce Com. 162 US 197, 40 L ed 940, 16 S Ct 666.

10. Atchison, T. & S. F. R. Co. v United States, 284 US 248, 76 L ed 273, 52 S Ct 146.

11. United States v Atlanta, B. & C. R. Co. 282 US 522, 75 L ed 513, 51 S Ct 237.

12. Atchison, T. & S. F. R. Co. v United States, 284 US 248, 76 L ed 273, 52 S Ct 146; United States v Chicago, M. St. P. & P. R. Co. 282 US 311, 75 L ed 359, 51 S Ct 159.

The propriety of the exertion of the Commission's authority in regard to intrastate rates must be tested by its relation to the purpose for which such authority was granted and with suitable regard for the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise

EXHIBIT
DATE
HB

ONE APPROACH TO DISCOVERY

State laws regulating railroads have been steadily eroded and pre-empted by federal laws, rules and regulations. It is the purpose of this paper to explore an avenue still available to the state to gain information about some railroad activities which could impact the state's industry and economy -- whether favorably or adversely.

Until yesterday (March 12, 1987), rumors circulated daily about the imminent sale of Burlington Northern Railroad Co. lines known as the "southern route" extending from Laurel, MT to Sandpoint, ID. State officials and the public generally expressed concern about the terms and operating conditions of such a sale. Those concerns still exist and have become exacerbated due to the lack of specific information about the sale. Because of the pre-emption of state authority by federal laws, the legal right of the state to be informed of the terms of the sale has been questioned.

If a sale of the southern line resulted in diminished, terminated or abandoned rail services, the economic impact upon Montana's economy could be severe and permanent. Conversely, if such a sale resulted in truly competitive rail services in Montana, the economic benefits would be predictably substantial. For these reasons alone, there is a compelling public interest in the disclosure of the terms of sale and operation of the southern route.

I.

Because of the Staggers Act, the 4 Rs Act and ICC interpretations, rules and regulations, an action to enjoin any activities of BN are almost automatically transferred to ICC jurisdiction -- resulting in a slow and prolonged procedure. An injunction action would not appear to fetch a speedy disclosure of the terms of a sale.

An action based upon the land grant theory or the bond theory would also take a long time to proceed through court.

It is the purpose of this paper to explore the possibility of forcing disclosure with a writ of mandate and/or a writ of prohibition.

A writ of mandate may be issued to a corporation by the Montana Supreme Court or any district court "to compel the performance of an act which the law specifically enjoins as a duty." The writ must issue "where there is not a plain, speedy and adequate remedy in the ordinary course of law."

The key words here are "which the law specifically enjoins as a duty."

II.

IF H.B. 861 PASSES:

This statute would provide solid ground upon which to bring a petition for an writ of mandate to require BN to disclose the terms of any sale and operating contract or other lease or mortgage of a line of railroad.

III.

IF H.B. 861 FAILS:

There seems to be a very convincing argument that the state has standing to bring an action for a writ of mandate even without a specific law such as that provided by H.B. 861 based upon long established theories of public policies based upon public interests and rights.

1. BN is a quasi-public corporation. It is a private corporation which has accepted from the state of Montana a franchise to operate a railroad. Montana's 1889 Constitution, under which BN operated until 1972, stated that "(A)ll railroads shall be public highways. . .and all railroad. . .companies shall be common carriers and subject to legislative control." Art. XV, Sec. 5. We know that federal laws have pre-empted much of Montana's original jurisdiction and control, but I know of no federal law which would change this basic classification that a railroad is a quasi-public corporation. It was the intent of the 1972 Constitutional Convention to carry forward the language contained in Section 5, and although the language itself it not found in our new constitution, the provisions of sections 1 and 2 of Art. XIII of the 1972 Constitution were intended to provide sufficient guarantees.

2. Corporations by law have the power to contract, but it is well established that when a quasi-public corporation is involved, the freedom to contract is more limited. This results from its duty to the public; a duty which is paramount to private interests.

> "Thus, a quasi-public corporation, such as a railroad or canal company, or waterworks or gaslight company, which is given the power of eminent domain or other special privilege [such as operating on public lands granted to it] in return for the benefit which is to accrue to the public, and which for this reason owes special duties to the public, cannot enter into any contract. . .which will render it wholly or partially unable to perform such duties." Fletcher Cyclopedia Corporations, Vol. 6, Sec. 2578. (material in brackets added)

Any such contract is void as being contrary to public policy.

Mr. Justice Miller of the U.S. Supreme Court stated in Thomas v. West Jersey R. Co., 101 U.S. 71:

> "The principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration for the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

This law has been stated many times both before and after the Thomas Case. It is hardly necessary to say that a railroad company has no more right to enter into an illegal contract than any other corporation or person. The term "illegal" as used in this context means a contract forbidden by a general rule of law -- such as that above-stated. A contract against public policy is "illegal" and may be struck down in a court of law.

3. If the railroad seller and buyer refuse to disclose the terms of a sale and operating agreement to the state, no determination can be made in a timely manner as to whether the contract is hostile to the public interest.

A writ of mandate for disclosure of the terms of the sale

contract would be brought upon these grounds -- the state and the public have a compelling right to know the sale terms and the impact they will have, and a quasi-public corporation has the duty and obligation to disclose the terms of sale of its public services. This is particularly persuasive since ICC procedures may not make these documents available for inspection.

The writ of mandate is not aimed at preventing the contract or the sale. It is intended to force disclosure only, for the purposes of measuring its impact upon public policy.

of this constitution, or which may be hereafter incorporated, whenever in its opinion it may be injurious to the citizens of the state.

References

Cited or applied in Lewis v. Northern Pacific Ry. Co., 36 M 207, 219, 92 P 469; Barth v. Pock, 51 M 418, 429, 155 P 282.

Collateral References

Corporations⊂=38, 41.

18 C.J.S. Corporations § 80.

13 Am. Jur. 229, Corporations, §§ 86 et seq.

Reinstatement of repealed, forfeited, expired or suspended corporate charter as validating acts in interim. 13 ALR 2d 1220.

Sec. 4. The legislative assembly shall provide by law that in all elections for directors or trustees of incorporated companies, every stockholder shall have the right to vote in person or by proxy the number of shares of stock owned by him for as many persons as there are directors or trustees to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit, and such directors or trustees shall not be elected in any other manner.

Operation and Effect

Inasmuch as corporations are the creatures of statute, it is within the power of the legislature to adopt either the share of stock or the individual owning stock as the unit of voting power, unless restrained by the constitution. The only constitutional provision upon the subject is found in this section, which establishes the share of stock as the unit of voting power in the election of trustees or directors of such corporations. Since this restriction is limited to a single purpose, the legislature is left free to establish either the share or the individual as the unit for any purpose other than the election of trustees or directors. Smith v. Iron Mountain Tunnel Co., 46 M 13, 15, 125 P 649.

Refers Exclusively to Domestic Corporations

Held, that section 4, article XV of the state constitution, declaring that every stockholder shall have the right to vote his shares at elections for directors, refers exclusively to domestic corporations. Allen v. Montana Refining Co., 71 M 105, 119, 227 P 582.

Collateral References

Corporations⊂=197-199, 283.

18 C.J.S. Corporations §§ 547 et seq., 720.

13 Am. Jur. 527, Corporations, § 487.

Sec. 5. All railroads shall be public highways, and all railroad, transportation and express companies shall be common carriers and subject to legislative control, and the legislative assembly shall have the power to regulate and control by law the rates of charges for the transportation of passengers and freight by such companies as common carriers from one point to another in the state. Any association or corporation, organized for the purpose, shall have the right to construct and operate a railroad between any designated points within this state and to connect at the state line with railroads of other states and territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad.

Operation and Effect

Under this section and section 7 of this article, a railroad, though built by a private corporation, and with its main line and spurs running convenient to private mines and ore houses, is none the less a public use, and may exercise the right of eminent domain. Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co., 16 M 504, 525, 41 P 232.

As one of the means of fostering and encouraging the development of the state's

mineral resources in every reasonable way, the constitution has declared that all railroads shall be public highways, and all railroad companies shall be public carriers. Kipp v. Davis-Daly Copper Co., 41 M 509, 519, 110 P 237.

References

Cited or applied in State ex rel. Nolan v. Railway Companies, 21 M 221, 250, 53 P 623; John v. Northern Pacific Ry. Co., 42 M 18, 36, 111 P 632; City of Helena v. Helena Light & Ry. Co., 63 M 108, 119, 207 P 337; Heckaman v. Northern Pacific Ry. Co., 93 M 363, 377, 20 P 2d 258; Cashin v. Northern Pacific Ry. Co., 96 M 92, 103 et seq., 28 P 2d 862.

Collateral References

Carriers⇐1 et seq.; Railroads⇐1 6, 44 51.

13 C.J.S. Carriers §§ 6, 7, 15 et seq.; 74 C.J.S. Railroads §§ 3, 28, 45 56.

44 Am. Jur. 500-510, Railroads, §§ 278-288.

Persons engaged in business of renting motor vehicles without drivers (drive it yourself systems) as subject to regulations as carrier. 7 ALR 2d 463.

Right of public utility to discontinue line or branch on ground that it is unprofitable. 10 ALR 2d 1121.

Carrier's certificate of convenience and necessity, franchise, or permit as subject to transfer or encumbrance. 15 ALR 2d 883.

Sec. 6. No railroad corporation, express or other transportation company, or the lessees or managers thereof, shall consolidate its stock, property or franchises, with any other railroad corporation, express or other transportation company, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation; nor shall any officer of such railroad, express or other transportation company act as an officer of any other railroad, express, or other transportation company owning or having control of a parallel or competing line.

Operation and Effect

One railroad company can lease its road to a parallel and competing road for a term of ten years, and such a lease is not a consolidation of the two roads. State ex rel. Nolan v. Railway Companies, 21 M 221, 234, 53 P 623.

Id. When two railroad companies have but one common terminus, and are brought into competition between common terminal points by traffic arrangements with other roads, they are competing roads within the meaning of this section.

Granting of a certificate of necessity and convenience of the board of railroad commissioners to a motor-truck company, a subsidiary of and entirely owned by a railway company, permitting it to operate between certain points along the line of the railway as a substitute for rail service, held not an evasion of the provision of this section of the constitution, prohibiting consolidation of parallel or competing railway or transportation companies. Fulmer v. Board of Railroad Commrs., 96 M 22, 28, 28 P 2d 849.

References

Cited or applied in MacGinnis v. Boston & M. C. C. & S. M. Co., 29 M 428, 453, 75 P 89.

Collateral References

Carriers⇐17; Railroads⇐17, 141.

13 C.J.S. Carriers § 15; 74 C.J.S. Railroads §§ 15, 235.

Sec. 7. All individuals, associations, and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad, or transportation, or express company, between persons or places within this state; but excursion or commutation tickets may be issued and sold at special rates, provided such rates are the same to all persons. No railroad or transportation, or express company shall be allowed to charge, collect, or receive, under penalties which the legislative assembly shall prescribe, any greater charge or toll

for the transportation of freight or passengers to any place or station upon its route or line, than it charges for the transportation of the same class of freight or passengers to any more distant place or station upon its route or line within this state. No railroad, express, or transportation company, nor any lessee, manager, or other employee thereof, shall give any preference to any individual, association or corporation, in furnishing cars or motive power, or for the transportation of money or other express matter or property transported on and over any railroad. Kipp v. Davis-Daly Copper Co., 41 M 509, 519, 110 P 237.

Operation and Effect

A railroad company may not grant to one person the exclusive right to the use of a portion of its depot platform to deliver passengers departing, and to receive and solicit the patronage of incoming passengers, to the exclusion of all other persons from the exercise of such rights, as such grant is against public policy and contrary to the provisions of this section. Montana Union Ry. Co. v. Langlois, 9 M 419, 432, 24 P 209.

This provision, when considered in connection with section 5 of this article, demonstrates that the constitution, in its letter, its spirit, and its policy as well, classes all railroads, with their feeders, as public highways, subject to use by the public of right, amenable to the laws governing common carriers forever forbidding all obnoxious favoritisms between any who desire to use such highways. This stable written policy is doubtless the outgrowth of pernicious systems of discrimination and preferences which railroad corporations may have indulged in throughout the land where their powers are unrestrained by constitution or other restriction. Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co., 16 M 504, 526, 41 P 232; John v. Northern Pacific Ry. Co., 42 M 18, 36, 111 P 632.

This section and the cases of Rose v. Northern Pacific Ry. Co., 35 M 70, 88 P 767 and Brian v. Oregon Short Line R. R. Co., 40 M 109, 105 P 489, recognize the distinction between a ticket sold at the regular fare and one sold at a reduced fare or special price. Miley v. Northern Pacific Ry. Co., 41 M 51, 55, 108 P 5.

As one of the means of fostering and encouraging the development of the state's mineral resources in every reasonable way, the constitution has declared that all persons shall have equal right to have persons

In view of this section, providing that all individuals shall have equal rights to be transported over any railroad in the state, provided that excursion or commutation tickets may be issued and sold at special rates, section 72-615, making it unlawful for any common carrier to charge any person for any ticket a greater sum than is charged for a similar ticket of the same class, and section 94-35-252, making every railroad corporation which fails to observe any of the duties prescribed by law in reference to railroads subject to a fine, etc., the giving of all free passes, with certain exceptions recognized by law, is prohibited, so that the carriage of a passenger by a railroad company on a pass issued without compensation to the employee of another railroad company which issued similar free passes for use by the former company's employees is illegal, and hence a provision therein exempting the carrier from liability for injuries caused by its negligence was a nullity. John v. Northern Pacific Ry. Co., 42 M 18, 36, 111 P 632.

Id. It is not permitted to a railroad company arbitrarily to classify the patrons of its road. Even the legislative assembly, in making classifications for taxation and license purposes, must exercise a reasonable discretion in so doing.

References

Doney v. Northern Pacific Ry. Co. et al., 60 M 209, 226, 199 P 432.

Collateral References

Carriers⇐13, 198-200.
13 C.J.S. Carriers § 348 et seq.

Deviation by carrier in transportation of property. 33 ALR 2d 145.

Sec. 8. No railroad, express, or other transportation company, in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation, without first filing in the office of the secretary of state an acceptance of the provisions of this constitution in binding form.

Collateral References

Carriers⇐5.
13 C.J.S. Carriers § 19.

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. HOUSE BILL NO. 861 DATE MARCH 16, 1987

SPONSOR REP. DENNIS NATHE

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]	[illegible]	X	
[illegible]	CITIZEN ALLIANCE TO SAVE OUR SHORELINE	X	
[illegible]	[illegible]	X	
[illegible]	[illegible]		X
[illegible]	[illegible]		X
[illegible]	[illegible]		X
[illegible]	[illegible]	X	
CARY M. BLAKELY	UNITED TRANSPORTATION UNION LOCAL 685 - LEGISLATIVE	X	
[illegible]	[illegible]		X
[illegible]	[illegible]	X	
[illegible]	[illegible]	X	
WALT ALLEN	SELF	X	
[illegible]	[illegible]	X	
[illegible]	[illegible]		
[illegible]	[illegible]	X	
[illegible]	[illegible]	X	
Bob Thomas	Self	X	
[illegible]	[illegible]	X	
[illegible]	[illegible]	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. House Bill No. 861 DATE MARCH 16, 1987

SPONSOR REP. DENNIS NATHE

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
			X
			X
James Paine	MT. Consumer Counsel	—	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

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CS-33

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. HOUSE BILL NO. 832 DATE MARCH 16, 1987

SPONSOR REP. BUDD GOULD

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	
[illegible]	MTA	✓	
[illegible]	[illegible]	✓	
[illegible]	MTA	✓	
[illegible]	MTA	X	
Phil Benson	MT Music	X	
[illegible]	[illegible]	✓	
[illegible]	[illegible]	X	
[illegible]	[illegible]	—	
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	X
[illegible]	[illegible]		
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	
Lee Waggins	LRI		
[illegible]	DNRC MIG-BOZEMAN	✓	

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VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. HB 832 DATE MARCH 16, 1987

SPONSOR REP. BUDD GOULD

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Lou Perino	Butte	✓	
Dennis Phillips	Butte	✓	
Lee Jones	Hln		X
Mark Faroni	Butte		X

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VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. HOUSE BILL NO. 863 DATE MARCH 16, 1987

SPONSOR REP. NORM WALLIN

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Phil Benson	MT Music		X
JIM BERGSTROM	OFFICE BAR		

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FO

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VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. House Bill 863 DATE March 16, 1987

SPONSOR Rep. Norm Wallin

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
			X
			X
MATT FULTZ	MSU Students	X	
		X	
			X
			X
			X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. SENATE BILL NO. 52 DATE MARCH 16, 1987

SPONSOR SENATOR ROBERT BROWN

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
			X
			X
			X
			X
			X
			X
			X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VICE CHAIRMAN SIMMONS, concurring:

I would have granted the notice requirement proposed by some States. I cannot agree with the majority's conclusion that there has been no showing of a benefit from a notice and comment period. Recently, State governments have become actively involved in attracting new businesses and helping marginal businesses already there. New railroads may still have to comply with certain State laws or regulations dealing with such matters as incorporation, and some may need help in financing new operations or locating new shippers to their lines. A simple, inexpensive notice provision directed toward designated State agencies may ease and expedite matters for new and struggling rail operations.

Except for the small disagreement expressed above, I approve this class exemption. As the decision states, it will encourage and enhance several goals of the national rail policy. This exemption is designed to encourage viable new class III railroads. In order to make the system work, however, large railroads must help. They must consider the special financial needs of the new short lines and the efficiencies they may produce. To promote the national rail policy and the public interest, large railroads should, when possible, quote and participate in joint rates which provide fair divisions to their new short line connections.

COMMISSIONER LAMBOLEY, concurring in part, dissenting in part:

I believe exemption is appropriate for the class of transactions generally associated with the establishment, or continuation of short line rail service. Such integrated transactions have customarily included proposals for acquisition or substitution, operation, and control combined with incidental trackage rights agreements, as well as necessary financing arrangements. Recognizing the need to facilitate continued, even competitive, rail service, we have in the past customarily granted exemption from relevant statutes on a case by case basis to achieve that purpose based on appropriate findings under Section 10505.

The class exemption here granted flows from the aggregate of those cases, but should not be read to encompass those more expansive situations which are not of limited scope, nor otherwise without concern for potential market abuse.1/

Moreover, while exemption is appropriate, I am persuaded by certain comments that it should include service of notice on State authorities together with relevant financial and operational information. Such informational notice would provide knowledge to aid those economically interested in evaluating the impact and viability of the proposed transactions.

1/ See e.g., FD No. 30439 Gulf & Miss. R.R. Corp. - Purchase Exemption I.C.C. R.R.; (not printed) served January 2, 1985 and FD No. 30663 Chicago Cent. & Pac. R.R. Co. - Purchase Trackage Rights and Securities Exemption I (not printed) served September 17, 1985 and II (not printed) served December 24, 1985. In both cases the Commission ultimately granted exemptions. However, it did so in each instance, only after commencing investigation and discovery coupled with the subsequent withdrawal of opposition reflecting negociated settlement of market issues allowing the Commission to find and conclude that the proposed transactions were essentially free from potential market abuse. Indeed, had those circumstances not occurred, exemption would not have been

Finally, I do not share the majority's analysis of employee protection issues. Although Section 10901, employee protective conditions are matters within the Commission's discretion, this exemption fails to either articulate the criteria or identify the circumstances upon which such discretion is exercised in favor of these conditions. Rather, the Commission in essence finds that it has not imposed such conditions in the past, and holds that it anticipates no need to do so in the future, although it does allude to the possibility in an "extraordinary case."

Precedent other than that historically recalled in the decision, evidences recent Commission and judicial approval for the imposition of protective conditions in Section 10901 cases.2/

Moreover, this exemption presumes that all relevant transactions fall within Section 10901. However, prior cases evidence that Section 11343 may apply to aspects of the integrated transactions generally proposed. Thus labor protection is required.3/

The majority seems to view the labor protection issue only in the context of employees as being represented by a labor organization and an assessment of the cost impact based on negotiated labor agreements.

2/ See e.g., Durango & Silverton N.G.R. Co. - Acquisition & Operations 363 ICC 292 (1979), aff'd RLEA v. U.S. 697 F2d 285 (10th Cir. 1983); Prairie Truck Railway - Acquisition and Operation, 348 ICC 832 (1977) aff'd People of State of Illinois v. U.S. 604 F2d 519 (7th Cir. 1979); see also Cadillac & Lake City Ry Co. - Acquisition & Operation, 320 ICC 617 (1964).

3/ See e.g., FD No. 30682, Hammermill Paper Co. - Exemption (not printed) served August 21, 1985 and FD No. 30657, Green Hills Rural Development, Inc. & Chillicothe Southern Railroad Co. supra.

This exemption expressly includes the substitution of one operator for another, which may merely involve the replacement of one short line operation by another, neither of which may necessarily have employees represented by any labor organization or working under a labor agreement.4/ Consequently, assumptions regarding cost impact based solely on collective bargaining agreements are inaccurate.

In my view, the decision on the employee protection issue is overbroad and without substantial evidentiary support for its conclusions.5/ The class exemption need not include a blanket prospective finding that employee protective conditions are unnecessary. This approach does little to reduce the prospects of future litigation and jeopardizes the benefits this exemption otherwise seeks to provide by facilitating continued rail transportation service.6/ I would have preferred disposition of this issue on a basis that allows a time limited submission and decision on employee protection prior to the effective date of exemption.7/ This, I believe would avoid the more complex revocation proceedings or problems similar to those experienced in the handling of the Maryland Midland case, supra, n. 5.

4/ See e.g., FD No. 30657 Green Hills Rural Development, Inc. & Chillicothe So. Ry Co. - Exemption (not printed) served January 10, 1986, FD No. 30457 San Diego & Imperial Valley R.R. Co., (not printed) served October 7, 1985; FD No. 30709 Canonie Atlantic Co. and Canonie, Inc. - Exemption (not printed) served September 11, 1985.

5/ The decision also fails to address remedial procedures and burden of proof in the event revocation is sought in any particular instance to which the class exemption may arguably apply.

6/ See e.g., No. 30237 Maryland Midland Group, Inc. - Exemption (not printed) served September 19, 1983, reopening denied (not printed) served March 14, 1985, review filed May 17, 1985 UTU v ICC Case No. 85-1304 (D.C. Cir.), voluntarily reopened by Commission (not printed) served October 3, 1985.

7/ Cf Motor Carrier Exemption at 49 CFR 1186.1 et seq.; codifying Ex Parte No. 55 (Sub-No. 57), Exemption of Certain Transactions Under 49 U.S.C. 11343, 1CC 2d, served December 11, 1984.

APPENDIX

Title 49, Subtitle B, Chapter X, Part 1150 of the Code of Federal Regulations will be amended as follows:

Subpart D - Exempt Transactions

Subpart D Exempt Transactions

1150.31 Scope of exemption.

Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (See 1150.1, supra). This exemption also includes: (1) acquisition by a noncarrier of rail property that would be operated by a third party; (2) operation by a new carrier of rail property acquired by a third party; (3) a change in operators on the line; and (4) acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at 49 C.F.R. 1180.3(c).

Other exemptions that may be relevant to a proposal under this Subpart are the exemption for control at 49 C.F.R. 1180.2(d)(1) and (2), and the exemption from securities regulation at 49 C.F.R. 1175.

1150.32 Procedures and relevant dates

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in 1150.34, for publication in the Federal Register.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the Federal Register within 30 days of the filing. A change in operators would follow the provisions at 49 C.F.R. 1150.34, and notice must be given to shippers.

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

1150.33 Information to be contained in notice.

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

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

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

(d) the operator of the property;

(e) a brief summary of the proposed transaction, including (i) the name and address of the railroad transferring the subject property, (ii) the proposed time schedule for consummation of the transaction, (iii) the mile-posts of the subject property, including any branch lines, and (iv) the total route miles being acquired;

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

1150.34 Caption Summary

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

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

Finance Docket No.

(1)--EXEMPTION (2) -- (3)

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

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

By the Commission, Chairman Gradison, Vice Chairman Simmon, Commissioners Taylor, Sterrett, Andre, Lamboley, and Strenio. Vice Chairman Simmons concurred with a separate expression. Commissioner Lamboley concurred in part, and dissented in part with a separate expression.

James H. Bayne
Secretary

(SEAL)

Key to symbols:

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

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

(3) The transferor.

(4) Describe the line.

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

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

EC

THE DECISION WILL BE INCLUDED IN THE BOUND VOLUMES OF THE ICC 2d SERIES OF PRINTED REPORTS

ED/ECD 16

SERVICE DATE
JAN 15 1986

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 392 (Sub-No. 1)

CLASS EXEMPTION FOR THE ACQUISITION AND OPERATION OF RAIL LINES UNDER 49 U.S.C. 10901

Decided: December 19, 1985

The Commission adopts final rules exempting from regulation all acquisitions and operations under 49 U.S.C. 10901, except where a class I railroad abandons a line and another class I railroad then acquires the line where the transaction results in a major market extension.

DECISION

BY THE COMMISSION:

On August 28, 1985, we published a Notice of Proposed Rules (NPR) (50 Fed. Reg. 34880) to exempt from regulation acquisitions and operations[1/] under 49 U.S.C. 10901.[2/] Noncarriers require Commission approval under section 10901 to acquire or operate a rail line in interstate commerce. Existing carriers require approval under section 10901 to acquire or operate a line owned by a noncarrier and to acquire and operate previously abandoned lines of an existing carrier.[3/] Application Proc.-Construct., Acq. or Oper. R. Lines, 365 I.C.C. 516, 518 (1982) (Application Proc.), and 49 C.F.R. 1150.1. Section 10901 also governs a change in operators. The regulations governing section 10901 transactions are set forth at 49 C.F.R. 1150.

The NPR expanded a proposal filed by Anacostia & Pacific Corp. (APC) seeking exemption for noncarrier acquisitions and operations, where the noncarrier would be a class III carrier after completion of the transaction. With one exception, the NPR proposed to exempt from regulation all acquisitions and operations under 49 U.S.C. 10901, including: (1) acquisition of trackage rights governed by 10901; (2) acquisition by a noncarrier of rail property that would be operated by a third party; (3) operation by a new carrier of rail property acquired by a third party; and (4) a change in operators on the line. The exemption would not apply when another class I railroad abandons a line and a class I railroad then acquires the line in a transaction that would result in a major market extension as defined at 49 C.F.R. 1180.3(c).

The NPR proposed to amend the regulations at 49 C.F.R. 1150 by adding Subpart D, Exempt Transactions. The proposed regulations required the filing of a notice of exemption that

---

1/ The terms "acquire" and "operate" include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate.

2/ This proposal does not include railroad construction, which is also governed by section 10901.

3/ Acquisition of an active rail line where both buyer and seller are carriers is governed by 49 U.S.C. 11343.

For Publication

EXHIBIT
DATE
HB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents.

RAILTEX, INC., and SAN DIEGO & IMPERIAL RAILROAD COMPANY, INC.,
Respondent-Intervenors.

Nos. 84-7684; 85-7577
ICC No. 30457
OPINION

Argued and Submitted
November 4, 1986—Pasadena, California

Filed March 4, 1987

Before: Arthur L. Alarcon, Melvin Brunetti and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

Petition for Review
of a Decision of the Interstate Commerce Commission

SUMMARY

Railroads

Petition for review of decision of the Interstate Commerce Commission. Affirmed in part and remanded in part.

This action arises from the Interstate Commerce Commission's (Commission) refusal to impose labor protective conditions on intervenor Railtex and its newly-formed and wholly-owned subsidiary, the San Diego & Imperial Valley Railroad Company, (Imperial). The Metropolitan Transit Development Board (MTDB) selected Imperial to replace Kyle Railways' wholly-owned subsidiary, Transportation Company as the provider of common carrier freight service for the Southern California lines in question. The Commission granted Imperial's petition for an exemption from labor protective conditions.

[1] It is undisputed that Imperial was not a carrier prior to its making the contract to operate the tracks in question. [2] While it is true that 49 U.S.C. § 10901 only mentions a line that is extended or additional, the Commission has not unreasonably interpreted the statute to include a contract to operate an existing line. [3] Once the transaction is classified as falling within section 10901, the Commission has discretion as to whether or not to impose labor protective conditions. This court cannot say that the Commission abused its discretion in declining to impose the conditions.

[4] MTDB, Kyle and Transportation Company occupy a position analogus to that of a vendor in the transfer of operations to Imperial. Petitioner Railway Labor Executives' Association should have the opportunity to attempt to make an exceptional showing to justify labor protection as to MTDB, Kyle, and Transportation Company.

COUNSEL

John O'B. Clarke, Washington, D.C., for the petitioner.

Dennis Starks, Washington, D.C., for the respondents.

P. Lawrence McCaffrey, Jr., Washington, D.C., for the respondent-intervenors.

OPINION

NOONAN, Circuit Judge:

Railway Labor Executives' Association (RLEA) petitions for a review of the Interstate Commerce Commission (the Commission) refusal to impose labor protective conditions on Railtex and its subsidiary, the San Diego & Imperial Valley Railroad Company, Inc. (Imperial). We agree with the Commission that Imperial is a new carrier exempt under 49 U.S.C. § 1981 from the mandatory labor protective provisions of 49 U.S.C. § 11343 and that the Commission did not abuse its discretion in declining to impose such conditions. We remand the case to the Commission to permit RLEA to petition the Commission under Section 10505(d) to revoke its denial of labor protection as to related carriers and to permit the Commission to consider such a petition if it is filed.

Background. Another railroad, San Diego and Arizona Eastern Railway (Railway), formerly operated the lines in question in Southern California. Railway was a subsidiary of the Southern Pacific Transportation Company (SP). After a tropical storm struck the San Diego region and damaged a portion of Railway's lines in 1976, SP sought to abandon the entire operation; its application was denied by the Commission. SP then sold the stock of Railway to the Metropolitan Transit Development Board (MTDB) with MTDB agreeing that common carrier freight service would be provided by a short line operator under a lease and management contract. MTDB selected Kyle Railways, Inc. (Kyle) to operate the lines. This arrangement was approved by the Commission in 1979. Railway continued to be the legal owner of the lines. Kyle operated the lines through its wholly-owned subsidiary Transportation Company (Transportation).

Operating results were disappointing and in late 1983 Transportation sought approval to discontinue its service and Railway sought abandonment of service. Their joint application was denied by the Commission on April 30, 1984. MTDB then solicited proposals to replace Kyle and its subsidiary. Railtex, Inc., a Texas-based freight car leasing company, applied to be the replacement through its newly-formed and wholly-owned subsidiary, Imperial. MTDB accepted this proposal. Imperial petitioned for an exemption from labor protective conditions. On October 7, 1985 the Commission granted this request.

Issues. Is Imperial as a new carrier exempt from the mandatory labor protective conditions imposed by 49 U.S.C. §§ 11343, 11347?

Did the Commission abuse its discretion in refusing to impose labor protective conditions?

[1] *Analysis.* It is undisputed that Imperial was not a carrier prior to its making the contract to operate the tracks of Railway. Under established law a new carrier's application to operate is treated by the Commission under Section 10901. [illegible] 11343 has been construed to apply only to acquisitions involving two or more existing carriers, not to a transaction between a carrier and a new entrant. *RLEA v. ICC*, 784 F.2d 959, 968 (9th Cir. 1986); *accord. RLEA v. United States*, 791 F.2d 994, 1004 (2nd Cir. 1986). Under these precedents there can be no doubt that Section 10901 was the correct section to apply in this case.

[2] RLEA in its brief stresses that the Congress in § 11343(a)(2) spoke "directly to the type of transaction" here involved, namely "a contract to operate property of another carrier," in contrast § 10901(a)(3) refers only to approval to "operate an extended or additional railroad line." But while it is true that § 10901 only mentions a line that is "extended

or additional," the Commission has not unreasonably interpreted the statute to include a contract to operate an existing line. Such interpretation is appropriate when the Commission is dealing with a non-carrier that is becoming an entrant and so has no existing lines of its own. We cannot say that the Commission's interpretation of the statute was arbitrary or unreasonable. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[3] Once the transaction is classified as falling within § 10901, the Commission has discretion as to whether or not to impose labor protective conditions. RLEA points to serious hardship suffered by senior employees of Railway because of the Commission declining to impose these conditions. It is, however, within the authority of the Commission to balance the effect of its decision on railway labor against the costs that such conditions would impose on the carrier. Given the financial difficulties of running this railroad, we cannot say that the Commission abused its discretion in declining to impose the conditions. The Commission's brief conclusory statements justifying its decision are, in the context, enough, even if they are "barely sufficient." *RLEA v. ICC*, 784 F.2d 959, 971 (9th Cir. 1986).

[4] MTDB, Kyle and Transporation occupy a position analogous to that of a vendor in the transfer of operations to Imperial and Railtex. Precedent exists for imposing labor protective conditions on a vendor. *Durango*, 363 I.C.C. 295-296 (1979). When the Commission did not discuss at all the propriety of imposing labor protections on a vendor, its orders were remanded for consideration of this point. *RLEA v. ICC* 784 F.2d 959, 971 (9th Cir. 1986). The failure to address the issues, to articulate the relevant factors, and to balance them was held to make the orders arbitrary and capricious. Even though by rule of the Commission no protective conditions will now be imposed "as a matter of course" on the vendor, the rule recognizes that an exceptional showing of

labor protection might be justified. *Class Exemption for the Construction and Operation of Rail Lines*, 49 U.S.C. § 10901, Ex Parte No. 392 (December 1985) (*Ex Parte 392*). RLEA should have the opportunity to attempt to make such an exceptional showing as to MDTB, Kyle, and Transportation. *RLEA v. ICC* at 973.

Affirmed in part and remanded in part.

EXHIBIT
DATE
HB

Service Date:

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application of The MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY (Mountain Bell) For Authority to Increase Rates and for Approval of Tariff Changes for Telecommunications Service.	))))))	UTILITY DIVISION DOCKET NO. 82.2.8

PROTECTIVE ORDER

On April 9, 1982, Applicant, Mountain Bell filed a motion requesting that the Commission enter a protective order in this Docket.

The situation, issues and grounds giving rise to Mountain Bell's motion are basically identical to those addressed by the Montana Supreme Court in the case of Mountain States Telephone and Telegraph Company, et al. v. Department of Public Service Regulation, et al., ___Mont.___, 634 P.2d 181, 38 St. Rept. 1479 (1981). Pursuant to the findings handed down in that case, the Commission is compelled to enter a Protective Order.

Mountain Bell's Objections to Montana Consumer Counsel Data Requests (First Set) by their own terms having been rendered moot upon the issuance of a Protective Order, the same are hereby denied. Mountain Bell is directed to Answer the subject data requests consistent with the provisions of the Protective Order entered herein.

It is further ordered that the following Protective Order shall be in effect throughout the proceedings in Docket No. 82.2.8:

1. (a) Confidential Information. All documents, data, information, studies and other materials furnished pursuant to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery that are claimed to be of a trade secret, privileged or confidential nature shall be furnished pursuant to the terms of this Order, and shall be treated by all persons accorded access thereto pursuant to this Order as constituting trade secret, confidential or privileged commercial and financial information (hereinafter referred to as "Confidential Information"), and shall neither be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Order. All material claimed to be Confidential Information shall be so marked by the party or affiliate by stamping the same with a designation indicating its trade secret, proprietary or confidential nature.

(b) Use of Confidential Information and Persons Entitled to Review. All Confidential Information made available pursuant to this Order shall be given solely to counsel for the parties, and shall not be used or disclosed except for purposes of this proceeding; provided, however, that access to any specific Confidential Information may be authorized by said counsel, solely for the purpose of this proceeding, to those persons indicated by the parties as being their experts in this matter. Any such expert may not be an officer, director or employee (except legal counsel) of the parties, or an officer, director, employee or stockholder or member of an association or cor-

poration of which any party is a member, subsidiary or affiliate. Any member of the Public Service Commission, and any member of its staff, the Consumer Counsel, and any member of his staff may have access to any Confidential Information made available pursuant to this Order, and shall be bound by the terms of this Order.

(c) Nondisclosure Agreement. Prior to giving access to Confidential Information as contemplated in paragraph 2 above to any expert, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to such person, and prior to disclosure such person shall agree in writing to comply with and be bound by this Order. In connection therewith, Confidential Information shall not be disclosed to any person who has not signed a nondisclosure agreement in the form which is attached hereto and incorporated herein as Exhibit "A." Court reporters shall also sign an Exhibit "A." The nondisclosure agreement (Exhibit "A") shall require the person to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that they have reviewed the same and have consented to be bound by its terms. The agreement shall contain the signatory's full name, permanent address and employer, and the name of the party with whom the signatory is associated. Such agreement shall be delivered to counsel for the providing party and the Commission.

(d) Delivery of Documentation. Where feasible, Confidential Information will be marked as such and delivered to counsel. In the alternative, the Confidential Information may be made available for inspection and be reviewed by counsel and experts as defined in paragraph 1 herein in a place and a time mutually agreed on by the parties, or as directed by the Public Service Commission.

2. Challenge to Confidentiality. (a) This Order establishes a procedure for the expeditious handling of information that a party claims is confidential; it shall not be construed as an agreement or ruling on the confidentiality of any such document.

(b) In the event that the parties hereto are unable to agree that certain documents, data, information, studies or other matters constitute trade secret, confidential or privileged commercial and financial information, the party objecting to the trade secret claim shall forthwith submit the said matters to the Commission for its review pursuant to this Order. When the Commission rules on the question of whether any documents, data, information, studies or other matters submitted to them for review and determination are Confidential Information, the Commission will enter an order resolving the issue.

(c) Any party at any time upon ten (10) days prior notice may seek by appropriate pleading to have documents that have been designated as Confidential Information or which were accepted into the sealed record in accordance with this Order

removed from the protective requirements of this Order or from the sealed record and placed in the public record. If the confidential or proprietary nature of this information is challenged, resolution of the issue shall be made by a hearing examiner and/or the Commission after proceedings in camera, which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such confidential matter shall be present. The record of such in camera hearings shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 82.2.8." It shall be transcribed only upon agreement by the parties or Order of the Hearing Examiner or the Commission, and in that event shall be separately bound, segregated, sealed, and withheld from inspection by any person not bound by the terms of this Order, unless and until released from the restrictions of this Order either through agreement of the parties, or after notice to the parties and hearing, pursuant to an Order of the Hearing Examiner or the Commission. In the event that the Hearing Examiner or the Commission should rule in response to such a pleading that any information should be removed from the protective requirements of this Order or from the protection of the sealed record, the parties, at the request of the providing party and to enable the providing party to seek a stay or other relief, shall not disclose such information or use it in the public record for five (5) business days.

3. (a) Receipt into Evidence. Provision is hereby made for receipt of evidence in this proceeding under seal. At least ten (10) days prior to the use of or substantive reference to any Confidential Information as evidence, the party intending to such use Information shall make that intention known to the providing party. The requesting party and the providing party shall make a good faith effort to reach an agreement so the information can be used in a manner which will not reveal its trade secret, confidential or proprietary nature. If such efforts fail, the providing party shall separately identify, within five (5) business days, which portions, if any, of the documents to be offered or referenced on the record containing Confidential Information shall be placed in the sealed record. Only one (1) copy of documents designated by the providing party to be placed in the sealed record shall be made and only for that purpose. Otherwise, parties shall make only general references to Confidential Information in these proceedings.

(b) Seal. While in the custody of the Commission, these materials shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 82.2.8," and due to their trade secret nature they shall not be considered as records in the possession or retained by the Commission within the meaning of the open meetings or public records statutes.

(c) In-camera Hearing. Any Confidential Information which must be orally disclosed to be placed in the sealed record in this

proceeding shall be offered in an in-camera hearing, attended only by persons authorized to have access to the Information under this Order. Similarly, cross-examination on or making substantive reference to Confidential Information as well as that portion of the record containing references thereto shall be marked and treated as provided herein.

(d) Appeal. Sealed portions of the record in this proceeding may be forwarded to any court of competent jurisdiction on appeal in accordance with applicable rules and regulations, but under seal as designated herein for the information and use of the Court.

(f) Return. Unless otherwise ordered, Confidential Information, including transcripts of any depositions to which a claim of confidentiality is made, shall remain under seal, shall continue to be subject to the protective requirements of this Order, and shall be returned to counsel for the providing party within 30 days after final settlement or conclusion of this matter including administrative or judicial review thereof.

4. Use in Pleadings. Where reference to Confidential Information in the sealed record is required in pleadings, cross-examinations, briefs, argument or motions (except as provided in paragraph 4), it shall be by citation of title or exhibit number or by some other nonconfidential description. Any further use of or substantive references to Confidential Information shall be placed in a separate section of the pleading or brief and submitted to the Hearing Examiner or the Commission under seal. This sealed section shall

be served only on counsel of record (one copy each), who have signed an Exhibit "A." All the protections afforded in this Order apply to materials prepared and distributed under this paragraph.

5. (a) Use in Decisions and Orders. The Hearing Examiner or the Commission will attempt to refer to Confidential Information in only a general or conclusionary form and will avoid reproduction in any decision of Confidential Information to the greatest possible extent. If it is necessary for a determination in this proceeding to discuss Confidential Information other than in a general or conclusionary form, it shall be placed in a separate section of the Order or Decision under seal. This sealed section shall be served only on counsel of record (one copy each) who have signed an Exhibit "A." Counsel for other parties shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission once they have signed an Exhibit "A."

(b) Summary for Record. If deemed necessary by the Commission, the providing party shall prepare a written summary of the Confidential Information referred to in the Decision or Order to be placed on the public record.

6. Segregation of Files. Those parts of any writing, depositions reduced to writing, written examination, interrogatories and answers thereto, or other written references to Confidential Information in the course of discovery, if filed with the Commission, will be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not

bound by the terms of this Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties or, after notice to the parties and hearing, pursuant to the Order of the Commission and/or final order of a Court having jurisdiction. All written Confidential Information coming into the possession of the Consumer Counsel under this order may be retained by him in his office files, but shall be withheld from inspection by others, except for his staff and his counsel, unless released by the Public Service Commission and/or a final order of a court under this paragraph 6 and subject always to the terms of paragraph 7 of this Order.

7. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of this proceeding, and then solely as contemplated herein, and shall take reasonable precautions to keep the Confidential Information secure and in accordance with the purposes and intent of this Order.

8. Reservation of Rights. The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests

for information or cross-examination on the grounds of relevancy or materiality.

This Order shall in no way constitute any waiver of the rights of any party herein to contest any assertion or finding of trade secret, confidentiality or privilege, and to appeal any such determination of the Commission or such assertion by a party.

9. The provisions of this Order are specifically intended to apply to data or information supplied by or from any party to this proceeding, and any nonparty that supplies documents pursuant to process issued by this Commission.

DONE AND DATED this 19th day of April, 1982 by a vote of - .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

GORDON E. BOLLINGER, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

CLYDE JARVIS, Commissioner

THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Madeline L. Cottrill
Secretary

(SEAL)

NOTE: You may be entitled to judicial review of the final decision in this matter. If no Motion for Reconsideration is filed, judicial review may be obtained by filing a petition for review within thirty (30) days from the service of this order. If a Motion for Reconsideration is filed, a Commission order is final for purpose of appeal upon the entry of a ruling on that motion, or upon the passage of ten (10) days following the filing of that motion. cf. the Montana Administrative Procedure Act, esp. Sec. 2-4-702, MCA; and Commission Rules of Practice and Procedure, esp. 38.2.4806, ARM.

EXHIBIT "A"

I have reviewed the foregoing Protective Order dated April 19, 1982, in Docket No. 82.2.8, and agree to be bound by the terms and conditions of such order.

_____
Name

_____
Residence Address

_____
Employer or Firm

_____
Business Address

_____
Party

_____
Date

S T A T E R E P O R T E R
Box 749
Helena, Montana

VOLUME 38

NO. 80-448

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, et al.,

Plaintiff and Appellant,

MOUNTAIN STATES LEGAL FOUNDATION, et al.,

Intervenors and Appellants,

v.

THE DEPARTMENT OF PUBLIC SERVICE REGULATION, THE PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA, et al.,

Defendants and Respondents

Submitted: Jun. 9, 1981
Decided: Sep. 8, 1981

PUBLIC UTILITIES, Petition for Declaratory Judgment by Telephone Company that the Public Service Commission issue a Protective Order preserving the Confidentiality of Certain Trade Secrets Claimed to be a Valuable Property Right--CONSTITUTIONAL LAW

Appealed from the First Judicial District Court, Lewis and Clark County, Hon. Gordon Bennett, Judge

For Appellants: J. Walter Hyer, Helena
Hughes, Bennett, Kellner and Sullivan, Helena

For Intervenors: Maxwell Miller and R. Norman Cramer, Denver

For Respondents: Eileen E. Shore, PSC, Helena
James Payne, Helena
John C. Allen, Montana Consumer Counsel, Helena
Roger Tippy, Helena
Alan Joscelyn, Helena
John R. Kline, Helena

Mr. Hyer argued the case orally for Appellants; Mr. Miller and Mr. Cramer for Intervenors; and Ms. Shore and Mr. Allen for Respondents.

Opinion by Justice Sheehy; Chief Justice Haswell and Justices Daly, Harrison, Weber, Morrison and Hon. Robert M. Holter, sitting for Justice Shea, concurred.

Reversed.

____P.2d____

Mountain States T & T Co., Plaintiff and Appellant, v.
Department of Public Service Regulation, Defendants and Respondents
38 St. Rep. 1479

Mr. Justice Sheehy delivered the Opinion of the Court.

This appeal arises out of the denial by the District Court, First Judicial District, Lewis and Clark County, of a petition for declaratory judgment by Mountain States Telephone and Telegraph Company (Mountain Bell) that the Public Service Commission (PSC) issue a protective order preserving the confidentiality of certain trade secrets claimed by Mountain Bell to be a valuable property right.

Mountain Bell is a public utility incorporated in Colorado, offering regulated telephone services, and other servises in the State of Montana. The Public Service Commission is the arm of state government charged with the duty of regulating public utilities. The Montana Consumer Counsel (MCC), working with the Consumer Committee (both provided for in Title 5, Ch. 15, MCA) is given the statutory authority to appear at public hearings conducted by the PSC as the representative of the consuming public in all matters which in any way affect the consuming public. Section 69-2-201, MCA.

Mountain Bell filed an application for a rate increase for its regulated services before the PSC. MCC and the other defendants-respondents appeared before the PSC in opposition to the application for increases. During the course of discovery, MCC served upon Mountain Bell certain data requests. Mountain Bell filed objections to the data requests contending that the requested information consisted of trade secrets, and proprietary and confidential business information. Mountain Bell offered to make the information available to the commission and the MCC subject to the commission's entry of a proposed protective order.

The PSC denied Mountain Bell's motion for a protective order on the grounds that a corporation is not entitled to the protection of the individual privacy exception under 1972 Mont. Const., Art. II, sec. 9, and that parties of record should be able to examine any and all documents in a rate increase proceeding before the PSC.

After final denial by the PSC of the motion for a protective order, Mountain Bell filed an action for judicial review and declaratory relief in the District Court. The facts were stipulated to for the purpose of submitting pure legal issues to the District Court for summary judgment. Leave to intervene was granted the plaintiff-intervenors who also join as appellants in this cause.

Mountain Bell and intervenors filed motions for summary judgment. The District Court denied the motions for summary judgment, and ordered that general judgment be entered in the cause for all the defendants. From this summary disposition of the cause appeal was duly perfected.

Mountain Bell states the issue presented to us for review in this paragraph:

"Whether certain identified provisions of Montana Constitutional and statutory law, which mandate public disclosure and dissemination of regulated utility trade secret property whenever such information is

necessary to a rate determination of the Public Service Commission, are in fatal contravention to other Montana Constitutional guarantees and the protections and guarantees of the Fifth and Fourteenth Amendments to and the equal protection and interstate commerce clauses of the United States Constitution."

On July 9, 1981, we issued an interlocutory order in this cause, in effect requiring the issuance of a protective order regarding Mountain Bell's trade secret property. A copy of that interlocutory order is attached hereto. We undertake in this opinion to explain the reasons for our interlocutory order, and to issue a declaratory judgment in favor of Mountain Bell.

There is no doubt raised by any party to these proceedings that the trade secret information is essential to the PSC to make a determination on Mountain Bell's application for revenue increases, and that Mountain Bell relies on the trade secret information in support of its application for revenue increases. The dispute centers solely around Mountain Bell's contention that in submitting the information requested upon discovery, it is entitled to a protective order preserving the confidentiality of the trade secret information from Mountain Bell's unregulated competitors.

Mountain Bell contends that the trade secret information is property which should be protected against compelled public disclosure to competitors, and asserts five grounds why certain Montana statutes and provisions of the 1972 Montana Constitution are unconstitutional, facially and as applied. The intervenors assert unconstitutionality under the Fourth and Fifth Amendments of the United States Constitution.

We refer first to the state constitutional section and the statutes which Mountain Bell contends are unconstitutional on their face and as applied here. The 1972 Mont. Const., Art. II, sec. 9 (the citizen's "right to know"), provides the right in all persons to examine documents or to observe the deliberations of all public bodies "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Section 69-3-105, MCA (the citizen's right to inspect), makes all records in the possession of the PSC open to the public at reasonable times subject to withholding only in the interest of the public for a period not exceeding 90 days. Section 2-6-102, MCA (the citizen's right to inspect and copy records), opens the records of all public bodies in this state to inspection and copying, except as otherwise provided by statute, and gives any citizen the right to a certified copy of any such document upon payment of legal fees.

Basically, the principal legal reason given by the PSC for its denial of a protective order was that Mountain Bell was not entitled to the individual privacy provided for in the exception clause of the 1972 Mont. Const., Art. II, sec. 9. The PSC concluded that the constitutional section did not guarantee individual privacy to corporations. The District Court examined in detail the order of the PSC, and outlined for itself the issues to be decided by it in this cause in the following fashion:

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"While we agree with the Commission's principle, we cannot agree that the principle strips a private corporation of all rights to protect its trade secrets in Montana. The provisions of a constitution, as well as a statute, must be read together and effect must be given to all of them, insofar as possible. While the privacy interest of the corporation may not be placed in the balance in considering the public's 'right to know' guaranteed by Article II, Section 9 of our constitution, the right of the corporation to due process of law before being deprived of its property (Article II, Section 17), the right of the corporation to compensation in the event it is deprived of its property for a public purpose (Article II, Section 29), possibly its right to remain secure against unreasonable searches and seizures (Article II, Section 11) and even the right to enforce its unenumerated rights (Article II, Section 34) are not necessarily abrogated by its lack of entitlement under the 'right to know' provision. Nor, of course, are any rights guaranteed corporations by the U.S. Constitution. To protect any or all of these rights, the Public Service Commission might, in a proper case, issue a protective order despite the corporation's exclusion from protection under Art. II, Section 9. That section is therefore not facially defective, nor should it be held decisive in this case on the question of whether the plaintiff is entitled to a protective order.

"If the plaintiff is not necessarily excluded from entitlement to a protective order by Article II, Section 9, the next question is whether it is entitled, contrary to the specific statutes of Montana (inter alia MCA sections 69-2-203(2), 69-3-105, 2-6-102 and 2-6-104), to a protective order in this particular proceeding before the Public Service Commission. In relation to that question, part of the second legal reason given by the Public Service Commission is most pertinent and compelling: 'Parties of record in this proceeding should be able to examine any and all documents upon which the Commission will base its decision and upon which Applicant relies in filing its request for increased revenues ***'" District Court Opinion and Order, dated October 2, 1980.

The first task facing the District Court, and now facing us, is whether a trade secret of the kind involved here is property subject to constitutional protections. The District Court concluded it was. The District Court then further concluded, in effect, that because Mountain Bell is a public utility, subject to regulation, when it applied to the PSC for an increase of its revenues for its regulated services, Mountain Bell was required to divulge to the PSC and to the public all pertinent information upon which its application for rate increases was based and that such compelled disclosure did not violate any state or federal constitutional rights of Mountain Bell.

As we examine the constitutional problems brought up in this appeal, it becomes obvious to us that if the denial of a protective order has the effect of violating any one of Mountain Bell's constitutional rights as contended in this action, then such protective order ought to be granted if by so granting, the unconstitutional effect is obviated.

We have concluded that we agree with the District Court that trade

secret information of the kind involved here is a species of property that is entitled to constitutional protection; but we have further concluded that the provisions of our state constitution and statutes, when applied to deny the protective order in this case, have the effect of violating, as applied, the equal protection clause of the Fourteenth Amendment of the federal constitution, and the due process clauses of the state and federal constitutions. We leave for decision to some other case and time whether the remaining constitutional arguments of Mountain Bell have validity.

TRADE SECRETS AS PROPERTY

We are given no record here as to what it is we have categorized as "trade secret"; that is, whether it is an idea, design, system or implement, or combination of these. The respondents make no point of this, conceding, and we accept their concession, that some process resulting from Mountain Bell's reasearch and development gives Mountain Bell a competitive edge as to the communications services it offers. This however, leads respondents to the argument that disclosure of the trade secret does not necessarily deprive Mountain Bell of the use of its trade secret. Regardless of disclosure, say the respondents, Mountain Bell still has the use of its trade secret available and that disclosure therefore does not take away from Mountain Bell any property of value. On that basis, respondents claim tha the trade secret as such is not entitled to constitutional protection.

The intervenors point out that the respondents have not appealed from the finding of the District Court that trade secrets are protectable property. However, a determination that a trade secret is protectable property is sine qua non to our decision and in any event, is a matter which we must consider under Rule 14, M.R.App.Civ.P.

To be short about it, we agree with the District Court, which pointed out that the Ninth Circuit case of Tri-Tron Intern. v. Velto (9th Cir. 1975), 525 F.2d 432, upheld the decision of the Montana Federal District Court recognizing as a compensable tort the deprivation of a trade secret through a breach of faith. Also, the Montana Rules of Civil Procedure recognize trade secrets as protectable. Rule 26, (C)(7), M.R.CIv.P. The District Corut concluded:

"To insist in the face of all this that Montana, or any other state, should eschew recognition of a trade secret as property would be to insist on a legal fabrication unsullied by reality." District Court Opinion and Order, dated October 2, 1980.

It is obvious to us that a trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless or of less value to its owner if disclosure of the information to the public and to one's competitors were compelled. Surely, if an individual owned a trade secret and sought protection against compelled disclosure, we would hold such private property protectable under the exception in 1972 Mont. Const., Art. II, sec. 9, ("cases in which the demand of individual privacy clearly

exceeds the merits of public disclosure"), to the extent necessary under the circumstances. Whether a corporate owner of a trade secret is entitled to the same exception we will discuss below.

COMPELLED DISCLOSURE AND DUE PROCESS

It is conceded that there is constitutional and statutory authority for compelled disclosure of trade secret information to the PSC and the Consumer Counsel. Indeed, Mountain Bell offers to disclose such information to those agencies, subject to the issuance of a protective order.

The Consumer Counsel is a constitutional agency having the duty of representing consumer interests in hearings before the PSC. 1972 Mont. Const., Art. XIII, sec. 2.

By statute, the Consumer Counsel has all the investigatory powers necessary to perform its duties and it may examine under oath in any PSC proceedings any employee of a regulated company and the business and corporate records of such a company in accordance with the law and in the exercise of its duties. Section 69-2-203, MCA. Since it is conceded by Mountain Bell that its application before the PSC for increased revenues is based in part upon its trade secret process, it is obvious that the Consumer Counsel, in the exercise of its duties, has a full statutory right to the disclosure by Mountain Bell of its trade secret information.

The PSC is vested with "full power of supervision, regulation, and control of . . . public utilities." Section 69-3-102, MCA. It has authority to inquire into the management of the business of all public utilities, keeping itself informed as to the method in which the same is conducted. It has the right to obtain from any public utility all necessary information to enable the PSC to perform its duties. Section 69-3-106, MCA. The PSC has jurisdiction to set rates to be charged by public utilities for their regulated services. Sections 69-3-301 and 69-3-302, MCA.

The compelled disclosure, therefore, of a trade secret owned by a public utility, where such information is necessary to the proper exercise of the duties of the PSC or the Consumer Counsel is not a "taking" or a deprivation under either the state of federal due process clauses. U.S. Const., Amend. V' 1972 Mont. Const., Art. II, sec. 17. (See, Great Northern Utilities Co. v. Public Service Comm'n. (1930), 88 Mont. 130, 293 P. 294, for a discussion of the constitutionality of the power of the PSC to regulate utility rates.)

The constitutional rub lies, as Mountain Bell contends, in the compelled disclosure of the information to all of the public--including Mountain Bell's nonregulated competitors--beyond the state agencies. The District Court and the PSC concluded that such compelled disclosure was required under the right to know and right to inspect constitutional and statutory provisions of Montana.

As we have noted, section 69-3-105, MCA provides that records of

every nature in the possession of the PSC are open to the public at reasonable times, except for a minor provision that the PSC might withhold the information for not more than 90 days. Section 2-6-102, MCA, gives every citizen a right to inspect and get copies of any public writings. The term "public writings" would include all documents filed with the PSC. Section 2-6-101(2), MCA. Most importantly, the District Court and the PSC applied the 1972 Mont. Const., Art. II, Sec. 9--the constitutional "right to know" provision--so as to compel disclosure to any citizen of all information in regulatory proceedings.

This is a classic case for the application of the "means end test" wherein the power of the state to interpose its authority on behalf of the public is balanced against the constitutional requirement of due process in the protection, in this case, of private property. Lawton v. Steele (1894), 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385. Courts are not required to follow one extreme or the other of colliding constitutional rights; judicial protection of the confidentiality of the trade secret information is proper where both the needs of the public and the protection of private property can equally be served. See, F.C.C. v. Schreiber (1965), 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383. We find it possible to protect fully the ownership of the trade secret information and at the same time, supply fully the need of the state agencies for the information required in the exercise of their duties. We find that an order can be fashioned in such manner that the state public agencies can perform their duties with the fullest available information and at the same time disclose to the public all information required to enable citizens to determine the propriety of governmental actions affecting them. As the court stated in Pennzoil Co. v. Federal Power Commission (5th Cir. 1976), 534 F.2d 627:

"Implicit in Schreiber is the proposition that the balancing of the public and private interests might compel secrecy, 381 U.S. at 296, 85 S.Ct. 1459. Therefore, in reviewing this case we must likewise determine whether the Commission abused its discretion in balancing the public and private interests." 534 F.2d at 631.

Here, neither the District Court nor the PSC balanced the competing public and private interests presented in this case. Rather, they determined that if the data was necessary for the determination by the PSC, that fact alone made it necessary to disclose all of the information to all of the parties, including persons not necessarily interested in the ratemaking process. Such a construction may lead in this case to the destruction of a property right based on materiality rather than on a consideration of whether full public disclosure is based upon a reasonable and rational means to achieve the purpose inherent in the right to know provision. Moore v. City of East Cleveland, Ohio (1977), 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531; Nectow v. City of Cambridge (1928), 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842; Tyson & Bro.--United Theatre Ticket Offices v. Baton (1927), 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718; Norfolk & W. Ry. Co. v. Public Service Commission (1924), 265 U.S. 70, 44 S.Ct. 439, 68 L.Ed. 904; Jay Burns Baking Co. v. Bryan (1924), 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813; Adams v. Tanner (1917), 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336.

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. HOUSE BILL NO. 862 DATE MARCH 16, 1987

SPONSOR REP. CAL WINSLOW

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]	[illegible]		[illegible]
[illegible]	[illegible]		X
Phil Benson	MT Music		X
[illegible]	[illegible]		[illegible]
[illegible]	[illegible]	V	
[illegible]	[illegible]		
John LaHr	MEA	V	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.