# MONTANA STATE SENATE JUDICIARY COMMITTEE MINUTES OF THE MEETING

## April 7, 1987

The fifty-sixth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on April 7, 1987, by Chairman Joe Mazurek in Room 325 of the Capitol.

ROLL CALL: All committee members were present.

CONSIDERATION OF HOUSE BILL 873: Senator Pinsoneault, District 27, introduced the bill for Representative Tom Hannah, who was absent because of personal business. Marc Racicot was introduced to explain the bill.

Marc Racicot, Attorney General's office, testified in support of the bill and explained it. He said it focuses on two main topics: 1) the felony murder rule; and 2) the burden of proof in mitigated homicide cases. explained the felony murder rule charges and convicts a person who commits a felony and a death occured during the felony. He stated the repeller is where the bill began, Section 11 repeals 45-5-101, which is unnecessary because the section that follows adequately defines the crimes of deliberate mitigated and negligent homicide. He stated this statute also produces mischief because it provides that criminal homicide must be committed purposely, knowingly or negligently, and that is not the case with felony murder. He commented everytime they get a felony murder case they end up arguing whether or not the murder has to occur as the result of actions of a product of purposeful, knowing, or negligent action. He said we tend to win, but this takes valuable time. He pointed out that because this statute is repealed, others have to be to be consistent with it, and that is sections 1, 7, 8, 9 and 10 in the bill. He said the main body of the bill is Section 2, because you have to have a mental state established for the underlying felony before a conviction. He pointed out this takes valuable time. He said Section 3, as amended, reflexes the M.S.C. opinion. He stated you must prove a voluntary act as to the felony, but not the homocide itself, and that is what the language does in this section. He said Section 4 redefines the crime of deliberate homicide by curing the

drafting weaknesses and making it consistant with the law announced by the Supreme Court and with the law the legislature intended in 1973. He pointed out on line 22 in Section 4, the words, "legally accountable" and in the old portion above legally accountable, it mentions "accomplice", which is taken out because the language of the code deals in terms of "legal accountability" and not "accomplice". He explained in Section 4 also that it specifies aggravated kidnapping can serve as an underlying felony for the felony murder rule. explained this is a doctrine called merger. He said in Section 5 there is an amendment to the mitigated homicide statute which cures the problem of a deliberate homicide if it is committed under circumstances which evidence mental distress, which there is a reasonable excuse. He said the M.S.C. left the burden of proof to no one because it was not in the statutes. He said Section 6 specifies that negligent homocide cannot be a lesser included offense of felony murder as does Section He said he would answer any questions.

PROPONENTS: There were no proponents.

OPPONENTS: There were no opponents, and no questions.

Senator Pinsoneault closed on the bill.

CONSIDERATION OF HOUSE BILL 861: Representative Kelly Addy, Billings, presented the bill because Rep. Nathe had decided not to carry the bill. He brought a map of the BN rail lines in Montana which would be affected by the sale of the Laurel to Sandpoint, Idaho line. He mentioned Whitehall to Butte rail was not in this purchase and he was trying to figure out how BN was going to do that. He felt this is one of the best things that can happen to Montana because it will bring in competition. He stated that farmers in Rep. Nathe's district on the highline, ship their grain down to Butte because it is cheaper to haul in trucks to Butte than putting it on the BN spur that goes by their front door. He said the hazard of a sale is if the sale is controlled by BN. He felt HB 861 provides the state with the terms and conditions of that sale, and on page 2 it files a notice of intent with the A.G., P.S.C., Consumers Council and the Department of Commerce. He said it would require representatives of these groups to come to some meetings. He said the notice of intent identifies the buyer and seller, a thorough description of the rail lines transferred, a copy of the Contract of Sale, labor agreements and any market and feasibility studies, together with a financial disclosure of the buyer. He said this will

determine if it is in the best interest of the shipping public of Montana. He felt this information will allow the state to go to the Interstate Commerce Commission if the state feels a sale is not in the best interest of the state. He said ICC can then review the sale before they approve it, because if they approve it seven days before an exemption is filed, there is no review to reverse their decision. If the state doesn't get to ICC early enough before the sale, then the state will not have any comment at all. He believed the bill will protect the shipping public in Montana.

PROPONENTS: Representative Bob Raney, Livingston, felt the state relies on a good railroad system. He felt BN was not concerned with the future of Montana. quoted Ron Marlenee in a letter he read to the committee (Exhibit 1) He pointed out the BN is about the BN. severing its own lifeline by selling 50% of its' mainline, transcontinental capability because of lack of profitability on that line. He did not agree with that. He also read a letter from Jane Mackall, Director of the He said BN's intent is to invest pro-(Exhibit 2) ceeds in other places besides Montana. He said people lease property from BN, and so will the new owner of the track allow these people to keep leasing. He stated this is the whole purpose of the bill, to let the public know what is going on with BN's plans. He commented there is little or no review that goes on if the sale is made by a non-railroad entity, and that is who BN wants to sell to. He read from the Mackall letter (Exhibit 2, paragraph 3). He said how can any citizen petition a sale when they have to have as much information as possible from a secret selling deal. He pointed out there is a difference between sale of a branch line and sale of a portion of the transcontinental railroad, which cuts BN's ability. He believes Montana should become more bold and speak out about this public utility that is in private ownership so its service will stay in Montana and be protected. He read from the Ron Marlenee letter (Exhibit 1, 5th paragraph). He concluded that the people want to make sure it is a viable buyer that will enter this state.

James T. Mular, Brotherhood of Railway/Airline Clerks, supported the bill. (Exhibits 3, 4, and 5)

Jim Murry, Executive Secretary of Montana AFL/CIO, testified in favor of the bill. (Exhibit 6)

William S. Hendershott, Citizen's Alliance To Save The Southline, testified in support of the bill. He said the group is made up of all kinds of groups. He said the group feels the ICC is not interested in the sale of these lines. He pointed out if the new owner doesn't have his own rolling stock, who will supply Montana with the cars should BN want to take them. asked who will be liable for a catastrophic accident on the railroad; maybe the state and the taxpayers. asked could they abandon the line altogether. stated that Montana is one of BN's biggest revenue states; over 1/2 billion in 1987, so why do they want to drop their quickest route to their southern and western markets. He said all their labor contracts come due in 1987; this selling of the line might be a union breaking tactic. He commented the financial status of these short line railroads are speculative. He believed the only way the state can protect itself in the legality of a sale is to know as much information as possible.

Mary Wright, Consumer Counsel, submitted a memorandum in support of the bill. (Exhibit 7)

Gary Blakely, United Transportation Union, supported the bill. (Exhibit 8)

Robert Vandervere, concerned citizen lobbyist, supported the bill.

Terry Murphy, Montana Farmers Union, testified that rail transportation is important in this state, but it is not so important who the owner may be, as keeping rail transportation available. He felt the economic viability of a short line would be enhanced if a proportionate share of the land grant was included in the sale of the rail property because that land was given by the United States Government for providing service to the interior of this country.

Wayne Budt, Administrator, Transportation Division, PSC, testified in support of the bill. (Exhibit 9)

Senator Van Valkenburg, Senate District 30, distributed to the committee, copies of letters he had sent on this subject. (Exhibit 10)

Lavina Lubenus, WIFE, supported HB 861.

Joe Brand, United Transportation Union, supported HB 861. He read a letter from Irvin Buchholz, Manager of ConAgra in Fergus Falls, Minnesota. (Exhibit 11) Mr. Brand stated here in Montana when a trucking company wants to merge, they have to go through the same process with the PSC. He said the bill doesn't stop the sale of the railroad, but makes sure the buyer is sound and viable.

Kimberly Kvadoher, Attorney General's Office, testified on behalf of Patrick Driscoll. She stated the Attorney General's office takes no position on the bill and they don't oppose or support the bill. She said if the Attorney General received confidential information, they would review the information in detail to determine whether the proposed transaction was in compliance with any relevant laws on the subject.

OPPONENTS: John N. Etchart, Sioux Line, Union Pacific, Montana Western Railroad, Burlington Northern, Central Montana Railroad, said Northeastern farmers don't ship to Butte. He responded to the comment that BN merged in the 1960's and then in the 1980's severed their property. He asked what surviving business hasn't changed in the last 20 years. He directed a comment toward Senator Galt about the idea of the shortline services beginning 10 years ago, thus, the Milwaukee could have serviced central Montana. He said shortline railroads are not a Montana or BN phenomena. He pointed out all large railroads are rationalizing the compensation and staffing levels on marginal business segments of track in order to retain service on that track. He said lower rates, better and more local service and growing business on those lines are the new trend. He distributed letters to the committee from businesses who will be affected by this legislation. (Exhibit 12--7 letters) He said if Montana discourages shortline railroad, it encourages abandonment. He felt the legislation will be challenged in court on constitutional grounds and Montana will be known for having a railroad enactment, which no other state has. He said this legislation would apply to all shortline transactions in Montana, and would be an impediment to each perspective purchaser.

Leo Berry, Burlington Northern, stated the U. S. Congress did a major overhaul of railroad industry in 1980 to salvage the system. He said Congress told the ICC to set up a process where non-railroad people could enter into the business and they wanted to set up a process that would avoid abandonment. He explained the ICC set

up an exemption process which exempted these types of sales from a Class I carrier, like BN, to a non-carrier. He said it exempted them from regulation and then set up a review process after the transaction took place. He handed out the administrative process under which the ICC set up this exemption process, ExParte #392. (Exhibit 13) He also distributed copies of amendments (Exhibit 14) He explained the amendments to HB 861. will give selling and transaction information only to the Public Service Commission, and on page 2, line 2, the 30 days prior notice resulted because there was no time limit in the bill. He thought (2) on page 3 was too broad on what kind of questions. He felt the sale contract, page 3, line 19, is a confidential deed and should not be given to anyone.

Steve Brown, Montana Chamber of Commerce, stated the bill requires much more than thought and Montana should have control of this area. He felt the PSC has no right to view a sale of the BN line. He said there is an absence of authority and there is no compelling interest. Mr. Brown said it would be the first time there is a pre-disclosure before any litigation. He said the requirement of disclosing and testifying in front of the ICC would break the privacy right of the Constitution. Mr. Brown told the committee they are working with a non-constitutional bill because it does not codify with Title 69, Chapter 14. He pointed out in Article 2, Section 9 of the Constitution, it gives broad disclosure rights and Article 2, Section 10 gives great privilege to privacy. He suggested the bill puts a burden on investors in our state. He explained in the end if the bill passes, the courts will make the real decisions. Mr. Brown also stated there should be a penalty on the Attorney General and the entities if they disclose this information to anyone. He gave amendments to the committee. (Exhibit 15)

Senator Gene Thayer, District 19, stated he is a grain shipper. He felt the bill was too board and did not agree businesses divulge all their business matters to the whole public.

DISCUSSION BY THE COMMITTEE ON HB 861: Senator Crippen asked Kim Kvadoher if the Attorney General's office did research on this bill. She responded that she had been asked to attend the hearing 45 minutes before the meeting, but she would do some research on it, especially on the disclosure part of the bill.

Senator Bishop asked Terry Murphy if he thought a new owner might abandon a line. Mr. Murphy replied he has great concern that if the buyer was not a sound business, then there would be more of a chance of abandonment.

Representative Addy closed by saying the bill is for equal footing in a railroad line transaction. He said it is true the ICC feels the states should not have the opportunity to get this information through an extended notice period. He said on page 8 of the EXparte #392, Leo Berry quit reading to soon because one of the reasons the ICC denies access to that information is: "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." We note that, as a practical matter, state and local governments received actual notice well before the proposal is filed. "Additionally, no notice is given today before an individual exemption request is filed, and experience has shown that no hardship results."

CONSIDERATION OF HOUSE BILL 890: Representative Dave Brown presented Rep. Hannah's House Bill 890, which makes permanent the increase in licensing fees for automobiles and light trucks that was established on a temporary basis in 1985 to fund district courts. this bill, each county would be allowed to keep 85% of the district court fee collected. Rep. Brown stated the distribution and expenses that Missoula County had last year made House Bill 890 come about. He felt there were some matters to be changed in the bill, and on page 5, line 12 and line 17 they took out psychiatric examinations, which should be put back in the bill and the salaries of the court reporters should be put back in. He distributed a handout explaining the formula of the bill. (Exhibit 16)

<u>PROPONENTS</u>: Newell Anderson, Administrator of Local Government Assistance Division of the Montana Department of Commerce, supported the bill. (Exhibit 17)

OPPONENTS: Tom Harrison, Montana Clerks of Court Assn., stated the attempt of the bill is to change the reimbursement system from a criminal justice system to a straight line return of 85% of the \$7 fee. He said 15% of the pool is too little to pay the reimburseable costs in those

counties. He stated the 7 large counties keep 85% of their vehicle fees and stay out of the criminal reimbursement area. He said the smaller counties will not get any degree of insurance or assure that the costs of a trial will be met other than the county itself because of the state pool of 15%. He stated Rep. Hannah would like to go from an 80% to 30% reimbursement at the end of the year; if there was money to do more than 30% to the smaller counties, then additional money would He said Ravalli County had 7 murder come to them. cases in 1982 and went on the reimbursement program and received the same amount as Missoula County. He echoed what Mr. Newell Anderson said about how no one knows what county will have a murder case. He said it was tried in the House to increase the 15% to 25%, but it did not pass. He commented on several big trials in Montana and their costs. He said it creates counties to have a winning status one year and a loosing status another year.

Carole Carey, Montana Clerk of Court, handed out printouts from the Department of Commerce on vehicle fees
collected and district court mill levies. (Exhibits 18
& 19). She said it is a bad piece of legislation because what the state has now is a good self-insurance
program. She said 85% for some counties is not very
much because a mill might not bring in that much. She
was not happy about the psychiatric examination portion
stricken from the bill. She said the first thing after
entering a courtroom that a defense attorney asks for
is a psychiatric examination. She explained that is
terribly expensive; \$7,000 for the first time. She felt
the court reporters salary will dig into the counties'
funds again. She read a letter in closing from Gary
A. Ryder, Deputy County Attorney of Rosebud County.
(Exhibit 20)

Richard Vandiver, 4th Judicial District, gave the committee a summary of Missoula County's criminal case expense. (Exhibit 21) He said Missoula County kept a vigorous prosecution policy requiring trials instead of plea-bargaining cases. He explained this policy, plus the high number of complex criminal cases have caused the costs to rise. He said it discriminates against counties over 30,000 population by removing the safety net which insures counties ability to pay their district court expenses when they have complex trials. He said HB 890 will change a program that has been implemented only in a year and a half. He felt it was too short a

period to change it. He said changing it will have an adverse effect on the funding of all large counties and the district courts of the state have not exhausted the fund in fiscal year 1986, and 1987 looks like it won't.

John Poundstone, Montana Clerks of Court, said the crimes committed, for which reimbursement is possible under the existing presented program, are committed against the people of Montana. He believes the present law is working.

Gordon Morris, Montana Association of Counties, opposed the bill because it brought out the worst in people because they are self-serving and greedy and this bill brings that out.

DISCUSSION BY THE COMMITTEE ON HB 890: Senator Blaylock asked if Mr. Newell Anderson was a proponent or opponent.

Senator Mazurek asked why there was such a high house bill number on it, and did it come with retaliation against Missoula County. He noticed all the signers were from the big counties. Mr. Morris said the bill dates back before session began with the interest expressed by Rep. Dorothy Bradley. He said he assured her the program in regards to Missoula was high because of ligitimate court costs. He stated Rep. Bradley discontinued any thought of a bill. He commented Rep. Mercer and Rep. Hannah co-authored the bill during this session.

ADJOURNMENT: The committee adjourned at 12:20 p.m.

SENATOR JOE MAZUREK, Chairman

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## SUMMARY OF HB873 (HANNAH) (Prepared by Senate Judiciary Committee staff)

HB873 generally revises and clarifies the laws relating to homicide. The bill repeals 45-5-101, MCA, which provides that "a person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being" and further provides that "criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide". Current law is confusing because all three types of homicide are called "criminal" homicide throughout the MCA. Most of the amending sections of the bill are changes reflecting the repeal of the term "criminal homicide" and clarifying that homicide is either deliberate, mitigated deliberate, or negligent homicide.

- Section 1. Amends 41-5-305. Amends Youth Court Act to delete reference to "criminal" homicide [Page 1].
- Section 2. Amends 45-2-103. Amends criminal law statute relating to general requirements of criminal act and mental state. Clarifies mental state as element of a crime, with the exception of "felony murder" in which case the offender must have the requisite mental state only as to the underlying felony (not the homicide that occurs during the commission of the felony) [Page 3].
- Section 3. Amends 45-2-202. Amends criminal law statute relating to requirement of a voluntary act as element of a crime by clarifying that there is an exception for "felony murder" for which there must be a voluntary act only as to the underlying felony [Page 5].
- Section 4. Amends 45-5-102. Amends criminal law statute relating to deliberate homicide. Deletes reference to mitigated deliberate homicide and "criminal" homicide and clarifies "felony murder" rule [Page 5].
- Section 5. Amends 45-5-103. Amends criminal law statute relating to mitigated deliberate homicide. Clarifies that mitigating circumstances are an affirmative defense that must be proved by the defendant by a preponderance of the evidence [Pages 6 and 7]. Further provides that mitigated deliberate homicide is not an included offense of "felony murder" [Page 7].
- Section 6. Amends 45-5-104. Amends criminal law statute relating to negligent homicide. Deletes reference to "criminal" homicide and provides that negligent homicide is not an included offense of "felony murder" [Page 7].
- Section 7. Amends 46-18-201. Amends criminal procedure statute relating to sentences that may be imposed. Changes two internal references to reflect changes in subsection numbering in other sections of the bill [Page 10, lines 3 and 8].
- Section 8. Amends 46-18-231. Amends criminal procedure statute relating to fines in felony and misdemeanor cases. Changes an internal reference to relect change in subsection numbering in another section of the bill [Page 11].

(OVER)

- Section 9. Amends 50-20-108. Amends a section of Montana Abortion Control Act (Title 50, chapter 20, MCA). Deletes reference to "criminal" homicide and makes internal reference changes necessary to reflect changes to criminal law statutes (above) [Page 12].
- Section 10. Amends 50-20-112. Amends section of Montana Abortion Control Act relating to penalties. Deletes reference to "criminal" homicide and makes changes necessary to reflect changes to criminal law statutes (above) [Pages 12 and 13].
  - Section 11. Repeals 45-5-101 (see introductory paragraph).

C:\LANE\WP\SUMHB873.

## SUMMARY OF HB890 (HANNAH) (Prepared by Senate Judiciary Committee staff)

HB890 makes permanent the increase in licensing fees for automobiles and light trucks that was established on a temporary basis in 1985 to fund district courts. This fee is scheduled to terminate on July 1, 1987. Under current law, 100% of this special fee goes to the state which pays the salaries of court reporters and certain district court costs related to criminal cases. Under this bill, each county would be allowed to keep 85% of the district court fee collected. The counties would be responsible for paying court reporter salaries and all public defender costs (instead of only a portion). The remaining 15% would be transferred to the state to be used only to pay state reimbursement for criminal cases in counties having a population of 30,000 or less and which have expended all district court fees collected from the special district court fees.

- <u>Section 1.</u> Amends 3-5-602 relating to salary and expenses of court reporters. Requires counties to pay salary and expenses of court reporters instead of the state [Page 2].
- Section 2. Amends 3-5-604 relating to transcript of proceedings. Requires counties to pay cost of criminal transcripts instead of the state, except when there is state reimbursement (as discussed above) [Pages 4 and 5].
- Section 3. Amends 3-5-901 relating to state assumption of certain district court expenses. Provides for state reimbursement of certain costs in criminal cases to counties having a population of 30,000 or less, subject to the availability of funding [Page 5], and provides for the state to distribute to counties with a population of over 30,000 the balance, if any, of the state's share of the special district court fees [Page 6].
- Section 4. Amends 3-5-902 relating to fiscal administration for payment of court expenses. Deletes requirement of annual auditing of district court expenses [Page 7].
- Section 5. NEW. Provides that motor vehicle fees received by a county either directly, or indirectly from the state may be used only for district court costs and provides that funds received directly can be used in the year received or in the future [Page 8].
- Section 6. Amends 3-5-903 relating to reimbursement for juror and witness fees. Clarifies language to reflect that state pays these costs only in certain instances under this bill [Page 9].
- Section 7. Amends 46-8-202 relating to public defender's office. Provides that the costs of a public defender's office shall be a county expense, instead of a state expense, except when the county receives state reimbursement (as discussed above) [Page 9].

(OVER)

- Section 8. Amends 7-6-2511 relating to county levy for

district court expenses. Allows county levy for district court expenses to include salary and expenses for district court judges [Page 10]. Under current law, the state pays these costs and the levy can not include these costs.

- Section 9. Amends 46-11-319 relating to expenses of grand jury. Clarifies that the state will reimburse juror and witness fees only in certain cases under this bill [Page 11].
- Section 10. Amends 46-14-221 relating to a criminal defendant's fitness to proceed and expenses. Clarifies that state reimburses only in certain cases under this bill [Page 13].
- <u>Section 11.</u> Amends 46-15-104 relating to expenses of witnesses. Clarifies that state reimburses only in certain cases under this bill [Page 13].
- Section 12. Amends 61-3-509 relating to disposition of taxes and fees in lieu of tax. Provides for counties to transfer 15% of light vehicle license fee to the state and retain 85% [Pages 14 and 15]. The 15% to be used for state reimbursement for criminal cases for counties having population of 30,000 or less.
- Section 13. Amends Chapter 685, Laws of 1985. Repeals July 1, 1987, termination date from 1985 bill that increased light vehicle license fee for district court funding.
- Section 14. Amends Chapter 702, Laws of 1985. Repeals July 1, 1987, termination date from 1985 bill that increased light vehicle license fee for block grant program.
- Section 15. Amends Chapter 1, Special Laws of 1985. Repeals July 1, 1987, termination date from the June, 1985 special session bill that reinserted the inflation computation into the light motor vehicle fee system.
- Section 16. NEW. Appropriates the money received by the state from the district court fee from the state general fund to the Department of Commerce to pay state reimbursement as provided in this bill. This is a biennial appropriation.
- Section 17. Section 5 to be codified in the part of MCA relating to state funding for district courts.
  - Section 18. Extension of authority.
  - Section 19. Effective dates.

COMMENTS: Section 8 which was added to the bill in the House does not make sense.

C:\LANE\WP\SUMHB890.

RON MARLENEE MONTANA

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## Congress of the United States House of Representatives

Washington, DC 20515

March 30, 1987

Bob Rainy Montana House of Representatives Capitol Station Helena, Montana 59620

MONTANA OFFICES: 312 9TH STREET, SOUTH GREAT FALLS MT 59405 (406) 453-3264

2717 FIRST AVENUE, NORTH BILLINGS, MT 59101 (406) 657-6753 TOLL FREE 800-332-5965

SENATE JUDICIARY

EXHIBIT NO.

Dear Bob:

Thank you for taking the time to contact me regarding the proposed sale of the southern route of Burlington Northern Railroad.

Burlington Northern's management hierarchy seems to give little consideration to its employees or jobs in its zealous pursuit of corporate profits. The Livingston shop shutdown, the short-notice Billings office closure, the grain car shortage, the branch line abandonments and the southern route sale are all examples of BN's callous approach to doing business.

BN management seems to have a policy of extortion, legitimized by their virtual monopoly, when it comes to extracting tariffs from farmers, cutting jobs of employees, and providing services to shippers. A phrase I coined in the past was corporate terrorism and it still applies.

The sale of the southern route could jeopardize up to 900 jobs, and while that doesn't seem to bother BN, it bothers me. As you may know, I have introduced legislation, H.R. 1128, proposing to suspend for 18 months the sale of branch line by Class I carriers whose rail lines pass through Montana. The bill is pending in the Energy and Commerce Subcommittee on Commerce, Transportation, and Tourism.

Before any sale is completed I feel certain criteria must be met, including specific assurances for employee protection, assurances for shippers that their products will be moved at a reasonable price, and assurances that normal rail operations will not be disrupted. The track has been designated as a national defense route, which is one reason why it is especially important that if a sale is consummated, we must be quaranteed that the new owner is able maintain a solvent railroad.

I have already asked the Chairman of the Interstate Commerce Commission to exercise her authority over this possible sale. The ICC is entrusted with the responsibility of administering the Staggers Rail Act, a law which deregulated the railroads. While the railroads are largely deregulated, the Staggers Rail Act contains specific provisions to oversee railroad sales and to protect captive shippers. I want the ICC to enforce those provisions and I am a cosponsor of legislation which proposes to amend the Staggers Act making it amiable to shippers.

Thanks again for contacting me, and if I can be of further assistance to you in the future, please dop't hesitate to contact me.

Sincere

COUNTIES

100TH CONGRESS 1ST SESSION

## H.R. 1128

To suspend for 18 months the sale of branch lines owned by certain rail carriers.

## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 18, 1987

Mr. Marlenee introduced the following bill; which was referred to the Committee on Energy and Commerce

## A BILL

To suspend for 18 months the sale of branch lines owned by certain rail carriers.

- 1 Be it enacted by the Senate and House of Representa-
- 2 tives of the United States of America in Congress assembled,
- 3 That no branch line owned by a class I rail carrier which
- 4 passes through the State of Montana may be sold by such rail
- 5 carrier until the expiration of 18 months after the date of the
- 6 enactment of this Act.

# Congressional Record

## MONTANA ECONOMY CANNOT ABSORB LOSS OF JOBS

## HON. RON MARLENEE

OF MONTANA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, February 11, 1987

Mr. MARLENEE. Mr. Speaker, today I'm introducing legislation which proposes to put a hold on the sale of any railroad track that passes through the State of Montana.

Burlington Northern Railroad is considering selling 450 miles of track running from Laurel, MT, to Sandpoint, ID. This route is called the southern route and it's sale could jeopardize up to 900 jobs. Burlington Northern's pursuit of profit at any cost has meant the loss of 435 jobs within the past year, and now we are faced with an additional loss of 900 jobs. Last year BN shut down a shop in Livingston and they consolidated their regional headquarters closing the office in Billings—this meant the loss of a payroll in excess of \$10 million.

The economy in Montana is in no shape to absorb the loss of another 900 jobs. I met with railroad workers in my district recently to discuss the labor problems caused by the Laurei to Sandpoint route sale. At that meeting, it became apparent legislation was needed that would put on hold the sale of the southern line until Congress has decided the issue of employee protection.

Last session, Congress came very close to approving legislation which would offer employee protection for railroad workers whose jobs are adversely affected by the sale of branch lines by major rail carriers. This provision was part of the Conrail bill but was later dropped in the conference committee.

There is a nationwide trend of class 1 carriers to sell off their branch lines. Before the whole railroad industry is restructured, I think we need to look at the system wide repercussions of the branch line sales and their affect on rail labor. The numbers of railroad workers in the work force has dropped off dramabcally bringing to light many changes for the railroad and its workers.

The sale is still speculative at this point, and before any sale is completed I feel certain criteria must be met, including specific assurances for employee protection, assurances for shippers that their products will be moved at a reasonable price, and assurances that normal rail operations will not be disrupted. The track has been designated as a national defense route, which is one reason why it is especially important that if a sale is consummated, we must be guaranteed that the new owner is able to maintain a solvent railroad.

The Interstate Commerce Commission's role in this sale is basically nonexistent. No single Government agency has the jurisdiction over all the considerations that these shortline sales bring up. As a remedy to at least part of the problem—employee protection—I feel it is up to Congress to accept the obligation to put a hold on any rail sales in Montana until Congress can make a final decision on employee protection.

## Interstate Commerce Commission

Washington, D.C. 20423

March 26, 1987

SENATE JUDICIARY

EXHIBIT NO.

DATE ( 1001 / 1981

BILL NO. HB 861

Honorable Bob Raney Montana House of Representatives Capitol Station Helena, MT 59620-0144

Dear Representative Raney:

Thank you for your recent letter concerning possible sale by the Burlington Northern Railroad Company (BN) of the line between Laurel, Mont., and Sandpoint, Idaho.

No proposal to transfer this line has been filed with the Commission. Thus, for the moment, you need not make any efforts toward stopping or postponing a sale. If, however, a sale is actually proposed, it would probably be filed under a class exemption that the Commission has adopted for acquisitions by non-carriers of active rail lines. To qualify for the exemption, an applicant files a verified notice with the Commission, and the exemption becomes effective seven days later. Public notice of the exemption is published in the Federal Register within 30 days after notice is filed.

After notice is published, any person (including State or local governments, shippers, and employees) may file a petition to revoke the exemption, in whole or in part, at any time. To be successful, the petition would address: (1) why more detailed scrutiny of the sale is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; or (2) why regulation is needed to protect shippers from the abuse of market power. Under the first factor, shippers could demonstrate, for example, that the acquiring party is not capable of providing necessary services. Absent unusual circumstances, a decision on whether to revoke is based on the petition(s) and any reply from the parties to the sale. Thus, if you or your constituents wish to oppose the transaction, the petition should contain as much information as possible, since it is unlikely that oral hearing procedures would be used. Help in preparing such a petition can be obtained from the Commission's Office of Public Assistance at (202) 275-7597.

OFFICE OF PROCEEDINGS

Honorable Bob Raney Page 2

Generally, it has been the Commission's experience that the sale of branch lines by large carriers to new short-line operators have been beneficial to all parties concerned. acquirers bring new vitality to the line and typically provide service that is more responsive to shippers' needs, often at lower rates. They know that the good will of shippers on the line is critical to their success, and they usually work closely with shippers, both before and after a sale.

In addition, shippers may have a financial interest in the short-line carrier and can closely monitor its operation. Communities benefit by having a viable short-line to serve shippers, provide employment, and attract new business. the selling carrier benefits by being able to reinvest the proceeds from the sale more productively elsewhere on its system.

Sincerely yours, South is thru fright, Jane F. Mackall Mot originating in Montana Jane F. Mackall We are not talking branch unes, we are talking the main line of a transcontinental Railroad. Nearly all service on the Jane F. Machael

MOTIVE

PARTIAL TESTIMONY OF JAMES TO MULAR BEFORE MONT SENATE JUDICIARY COMMITTEE APRIL 7th 1989 IN RE. TO HBBLO)

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.

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DATE April 7 1987

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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.

SENATE JUDICIARY		
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## IF H.B. 861 FATLS:

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)11 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.

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"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, due performance of those functions being the consideration for the public grant, any contract which disables the those functions. corporation from performing undertakes, without the consent of the state, to transfer others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, 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

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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.

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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 1990.

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

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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 ityourself 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

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

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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 claof freight or passengers to any more distant place or station upon itroute 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 caror motive power, or for the transportation of money or other express matter

### 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 any railroad. Kipp v. Davis-Daly Copper Co. 41 M 509, 519, 110 P 237.

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 un lawful for any common carrier to charge any person for any ticket a greater sunthan 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, i-prohibited, so that the carriage of a pas senger by a railroad company on a pasissued without compensation to the em ployee 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.

III 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.

#### Reference

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 ÅLR 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.

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Attachment Australia

Service Date:

EXHIBIT NO. 4

DATE PARISH T. 1987

BILL NO. HB 861

# 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.
  - Information and Persons Entitled (b) Use of Confidential All Confidential Information made available pursuant Review. 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-SENTE Surrelant

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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.

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- (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. <u>Challenge to Confidentiality</u>. (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

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removed from the protective requirements of this Order or from the sealed record and placed in the public record. 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. 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.

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- 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. 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 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) <u>Seal</u>. 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) <u>In-camera Hearing</u>. Any Confidential Information which must be orally disclosed to be placed in the sealed record in this SENATE JUDICIARY

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proceeding shall be offered in an <u>in-camera</u> 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. <u>Use in Pleadings</u>. 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

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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) <u>Summary for Record</u>. 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. <u>Segregation of Files</u>. 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 SENATE JUDICIARY

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DITE 4-7-87

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

SENATE JUDICIARY

EYHIBIT NO. 4

4-7-87

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

SENATE JUDICIARY EXHIBIT NO. 4

DATE 4-7-87

BILL NO 1/2 -

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.

SENATE JUDICIARY

EXHIBIT NO.\_\_\_\_

DATE 4-7-87

## 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 Addres	S		
•			
Employer or Firm			
•		ø	
Business Address			
			,
Party			
Date			

SENATE JUDICIARY

EXHIBIT NO. 4

DATE 4-7-87

BILL NO. 4. R. O. .

Attachment Bunks!

SENATE JUDICIARY

### 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. 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 as constituting trade secret, confidential or this Order 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) Confidential Information and Persons Use of Entitled 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-

EXHIBIT NO. 5

DATE 4-7-87

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. 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.

SENATE JUDICIARY

SYMBOT NO. 5

DATE 4-7-87

BILL NO. H.B. 86/

- (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 SENATE JUDICIANT

EXHIBIT NO. 5

DATE 4-7-87

removed from the protective requirements of this Order or from the sealed record and placed in the public record. 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. 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.

SENATE JUDICIARY

EXHIBIT NO. 5

DATE 4-7-87

- Receipt into Evidence. Provision is hereby made for receipt 3. 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 The requesting party and the providing providing party. 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 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.
  - Seal. While in the custody of the Commission, these materials (b) 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.
  - In-camera Hearing. Any Confidential Information which must (c) be orally disclosed to be placed in the sealed record in this SENATE JUDICIARY

proceeding shall be offered in an <u>in-camera</u> 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. <u>Use in Pleadings</u>. 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

SENATE JUDICIARY

EXHIBIT NO. 5

DATE 4-7-87

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) <u>Summary for Record</u>. 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. <u>Segregation of Files</u>. 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 SENATE JUDICIARY

EXHIBIT NO. 5

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

SENATE JUDICIARY

EXHIBIT NO. 5

DATE 4-7-87

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

4 - 1-87 H.B. 86 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.

SENATE JUDICIARY

EXHIBIT NO.\_\_\_\_\_

DATE 4-7-87

BILL NO. H. B. 86/

## 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		
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Duelin and Add		
Business Address		
Dante	·	<del></del>
Party	÷	
Date		

EXHIST NO. 5

DATE 4-7-87

RILL NO. LL P. P. 1



SENATE JUDICIARY

EXHIBIT NO

BILL NO.

ZIP CODE 59624 406/442-1708

- Box 1176, Helena, Montana

JAMES W. MURRY EXECUTIVE SECRETARY

TESTIMONY OF JIM MURRY ON HOUSE BILL 861 BEFORE THE SENATE JUDICIARY COMMITTEE. APRIL 7, 1987

Good morning, Mr. Chairman and members of the committee. For the record, my name is Jim Murry and I am the executive secretary of the Montana State AFL-CIO. We are appearing before you today to testify in support of House Bill 861.

There has been much concern lately over potential effects of actual and proposed rail line sales in Montana. Discussions center around possible cutbacks in rail service and the abrogation of contractual agreements. It is our firm belief that House Bill 861 serves the best interests of shippers, workers and Mainstreet businesses by assessing the effects of rail line sales.

Members of the committee, we are all aware that our state is confronting severe economic problems. In these difficult economic times, it's essential that we maintain adequate transportation systems. Because Montana's major industries -- agriculture, timber and mining, as well as Mainstreet businesses -- all depend upon reliable and uninterrupted rail service to survive and prosper.

Unfortunately, deregulation has thrown our nation's railroad industry into turmoil. Burlington Northern, Montana's major rail carrier, recently sold one branch line between Butte and Garrison. BN is also contemplating selling additional trackage from Billings to Denver and from Laurel to Sandpoint, Idaho.

BN has been extremely reluctant to reveal its future plans to the public. Our state regulatory agencies, political subdivisions, employees and shippers, . have been kept in the dark. BN spokesman Howard Kallio only added to the uncertainty when he recently described BN's status. He said, "It's been stable . . . It just may change."

Members of the committee, BN's reticence to place its cards on the table has left shippers and employees wondering whether or not rail service will continue.

We hoped that House Bill 861's provisions would be more expansive. As it stands, House Bill 861 requires that buyers and sellers file confidential notices of intent with the Attorney General, the Public Service Commission, the Consumer Counsel and the Department of Commerce. However, information contained in these notices of intent still allows government agencies to adequately assess the potential impacts of all rail line sales.

Continuity in transportation services is in everyone's best interest. Therefore, it's imperative that all available information is closely scrutinized before any rail line is sold. We believe that House Bill 861 is a step forward in examining and studying the impacts of rail line sales on communities, businesses, shippers and workers. We urge that you support House Bill 861.

SENATE JUDICIARY

EXHIBIT NO.\_\_ 6

DATE 4-7-87

BILL NO. H.B. 861

SENATE JUDICIARY

### MONTANA CONSUMER COUNSELEHIBIT NO.

34 W. SIXTH AVENUE HELENA, MONTANA 59620 DATE (1987)
BILL NO. HB86/



# STATE OF MONTANA

JAMES C. PAINE CONSUMER COUNSEL TELEPHONE (406) 444-2771 LEGISLATIVE CONSUMER COMMITTEE
SEN CHET ELAYLOCK
SEN STAN STEPHENS
REP. JOE QUILLIC:
REP EARL LORY

April 6, 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 know' to 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 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.

SENATE JUDICIARY

EXHIBIT NO. 7

DATE 4-7-87

BILL NO. H.B. 86/



EXH.BIT NO. 8
DATE APART 1987
BILL NO. HB 861

# TESTIMONY BEFORE THE MONTANA STATE SENATE JUDICIARY COMMITTEE APRIL 6, 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 Transporatation Union Local 685 in Livingston. Thank you for allowing me to testify in favor of House Bill 861. I represent 134 Trainmen stationed in Livingston. We are concerned about the secretive nature of short line sales. Many of these sales are believed to be paper sales used as a means to rid the railroad companies of their union contract. The BN has stated that high labor costs have made the Southern Line marginally profitable. They say this despite showing a profit increase from \$113.5 million in 1978 to \$551.3 million in 1984. The 1985 contract provided the BN with an average 20 percent reduction in overall pay for operating employees. Instead of using this savings to reduce shipping costs, it was, according to our sources, used to finance an 8 percent raise for 1985 salaries of upper management. In October 1986 a letter was written 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 train crews from four to three. A 25% savings in labor costs to the company. This letter was sent before the proposed sale was announced and to this date we have not had a formal reply. We feel this is finally a way for the BN to rid themselves of the railroad so they can reap the profits from the land grants.

We are further concerned by the proposed buyers lack of resources to back the proposed new company in the event of a catastrophic accident. If the company is starting on borrowed money one derailment could bankrupt it. By allowing the BN to remove their resources from the Southern Line will not make for better service but will jeopordize the solid foundation that is already in place. It is important for Montana'shipping future they know what is taking place. Thank you.

Testimony by Wayne Budt, Administrator, Transportation Division, PSC

TESTIMONY - HB861

DATE CAPITAL OF SIGNATURE OF THE SIGNATU

BILL NO. HB 861

I am appearing today on behalf of the Montana Public Service Commission. I am available as a representative of the Commission to answer any questions you may have with respect to this legislation. The Commission is generally frustrated with the actions of the Interstate Commerce Commission in rail regulation, and supports the intent of this legislation. The Commission is carefully monitoring the continuing development of this legislation as it proceeds through the legislative process, and will enthusiastically enforce any obligations and duties placed upon it by the legislature.

**PUBLIC SERVICE COMMISSION** 

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

Clyde Jarvis, Chairman Howard Ellis, Vice Chairman John Driscoll Tom Monahan Danny Oberg

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

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."

SENATE JUDICIARY

EXHIBIT NO. 9

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. 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.

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. To protect these state interests, the Commission must ofter scrutinize actions taken by a railroad to insure that its ability to perform its duties under the law have not been impaired. 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.

SENATE JUDICIARY
EXHIBIT NO. 9
DATE 4 - 7-87
BILL NO. H.B. 86 /

# Montana State Senate

### SENATOR FRED R. VAN VALKENBURG

HELENA ADDRESS: CAPITOL STATION HELENA, MONTANA 59620

HOME ADDRESS: 219 UNIVERSITY MISSOULA, MONTANA 59801



The Big Sky Country

DEMOCRATIC FLOOR LEADER

COMMITTEES:
LEGISLATIVE FINANCE
COMMITTEE
JOINT RULES COMMITTEE,
CHAIRMAN
SELECT COMMITTEE ON LONG
RANGE BUILDING & PLANNING

March 3, 1987

Darius Gaskins President, Burlington Northern Railroad 3800 Continental Plaza 777 Main Street Fort Worth, Texas 76102

Dear Mr. Gaskins:

Recent news reports in The Missoulian, my local paper, have indicated that a sale of the BN line between Sand Point, Idaho and Laurel, Montana is imminent. Those reports may or may not be accurate, however, many Montanans, including many legislators, are very concerned about the consequences of the sale of this portion of the BN line. Since the legislature is presently in session, I believe it would be helpful if you could come to Helena prior to the completion of any negotiations on this proposed sale to discuss legislators' concerns on this issue. As I've indicated previously, I believe that Montanans want to have a good working relationship with the BN. However, the uncertainty and lack of knowledge about the possible sale are of legitimate concern. Your willingness to discuss these issues prior to a sale would be very helpful in fostering that working relationship.

Thank you for your consideration.

Yours\_truly,

Fred Van Valkenburg

FVV/tv

cc: Senator Norman
Senator McCallum
Senator Aklestad
Representative Marks
Representative Vincent

SENATE JUDICIARY

EXHIBIT NO. 10

DATE (CALL / 1901)

BILL NO...#

Montana State Senate

### SENATOR FRED R. VAN VALKENBURG

HELENA ADDRESS: CAPITOL STATION HELENA, MONTANA 59620

HOME ADDRESS: 219 UNIVERSITY MISSOULA, MONTANA 59801



The Big Sky Country

DEMOCRATIC FLOOR LEADER COMMITTEES: **LEGISLATIVE FINANCE** COMMITTEE JOINT RULES COMMITTEE, CHAIRMAN SELECT COMMITTEE ON LONG **RANGE BUILDING & PLANNING** 

March 30, 1987

Mr. Dennis Washington P.O. Box 8182 Missoula, MT 59807

Dear Mr. Washington:

The Legislature is considering a bill (HB 861) which would affect the sale of the Burlington Northern's southern line from Laurel, Montana to Sandpoint, Idaho. The press reports that you are currently in serious negotiations with BN regarding that section of line.

I feel that we as a legislature need some information from you to insure that we have all available facts before acting on HB 861. I would appreciate you responding to the following questions as soon as possible:

- Are you negotiating the purchase of the BN route in question?
- Does that route include the line from Whitehall to Butte 2). over Homestake Pass and between Helena and Great Falls?
- Do you have any problems with the public disclosure 3). provisions regarding the sale currently in HB 861?
- Are you planning on buying the Southern Route outright 4). or do you plan on having BN "carry the paper" on the debt as they did with Montana Western?
- 5). Are you in these negotiations alone, are there other parties?

continued

SENATE JU	DICIARY
EXHIBIT NO.	10
	-7-87
	H.B. 861

Mr. Dennis Washington March 30, 1987 page two

6). When Montana Western went on line, it was a non-union operation. Other branch line operations, particularly in the south, were union operations with scale at 85-90% of current contracts, but with significant changes in work rules. Do either of the above descriptions reflect your approach to the Southern Route, or do you have some other approach?

I would appreciate your quick response to these questions. With the answers in hand, I am convinced that the Legislature can make a more informed judgement on HB 861.

Thank you.

Sincerely,

Fred Van Valkenburg

FVV/tv

cc: Governor Schwinden

Senator Norman

Senator Aklestad

Representative Marks

Representative Vincent

SENATE JUDICIARY

EXHIBIT NO. 10

DATE 4-7-87

BILL NO. H. B. 861

#### WASHINGTON CORPORATIONS

Dennis R. Washington - Chairman

101 INTERNATIONAL WAY POST OFFICE BOX 8182 MISSOULA, MONTANA 59807 TELEPHONE: 406/728 8118 TWX 910-963-2044

April 2, 1987

Washington GORPORATIONS

Senator Fred R. Van Valkenburg Capitol Station Heiena, Montana 59620 SENATE JUDICIARY

EXHIBIT NO.

DATE

BILL NO.

Dear Mr. Van Valkenburg:

Thank you for your letter and for providing me with the opportunity to address the issues concerning my potential involvement in the acquisition of Burlington Northern's southern line from Laurel, Montana to Sandpoint, Idaho. As you know I do not employ anyone to lobby for me in Helena, being philosophically opposed to such practices. However, I am concerned about the potential impact of HB 861 and appreciate your approach of "going to the source" rather than legislating in the dark.

The following is in response to your specific questions:

- 1) Yes, we are negotiating the purchase of the Laurel, Montana to Sandpoint, Idaho line from Burlington Northern.
- 2) The specific branch lines and associated rail assets to be acquired have not been completely and specifically identified; however, we do not at this time anticipate purchasing the Whitehall to Butte and Helena to Great Falls lines.
- 3) The public disclosure and notice requirements of HB 861 are alarming and chilling not only to myself but, in my opinion, to any potential private purchaser of a rail line in Montana. These provisions would require the public disclosure of information that is valuable, sensitive and proprietary and for business purposes must remain confidential.
- 4) Our present proposal as submitted to Burlington Northern is premised on a cash purchase. The purchase price would be funded through a combination of equity and debt; the debt portion would be obtained from major money center banks. Burlington Northern would in no way be involved in any financing or have any ownership interest in the new company or its assets.
- Additionally, Wertheim Schroder & Co. will have substantial ownership interest. Wertheim Schroder & Co. is a major investment banking firm in New York. There is also the possibility that the lending institutions would have options to obtain small equity positions.

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6) The operating and business plan would be similar to the approach taken by MidSouth Rail Corporation, which Wertheim Schroder & Co. assisted in structuring and in which company they are also an equity participant.

This plan anticipates a unionized work force utilizing primarily the existing Burlington Northern employee pool. The average pay scale would in all probability be in the range of 80-90% of current wages. For this proposed railroad to have economic viability there would have to be significant alterations of the current work rules.

If we acquire this line, it will be through a newly organized corporation controlled by me with the intention of having a long term Montana controlled and operated business.

I hope that this information will be helpful. In light of Montana's tarnished business reputation I think that it is very important that legislation such as HB 861 receives careful and thorough consideration and that any action be based on informed decisions.

Sincerely,

Dennis R. Washington

Chairman

DRW/hv

SENATE JUDICIARY
EXHIBIT NO. /C

DATE 4-7-87

BILL NO. 4.B. 861



Flour Milling Division 309 West Stanton Street, P.O. Box 723 Fergus Falls, Minnesota 56537 Telephone (218) 736-7581

SENATE JUDICIARY EXHIBIT NO. BILL NO.

3-17-87

TO WHOM IT MAY CONCERN:

I Irvin Buchholz Manager of Con Agra Inc., Fergus Falls, MN. for the past 20 years have been the Plant Manager.

As a result of our rail line becoming a short line railway namely Ottertail Valley Railroad running from Dilworth MM to Avon MM. approxitmatly 176 miles of track.

Since the short line railroad has started operating, the service on this line has deteriorated, compared to EN's operations when they were serving us.

The new owner Bill Mohatt promised at several different meetings there would be a lot better service and no demurrage or any kind or penality would be charged the shippers on this line. Since he has taken over Con Agra Inc., has been charged for the month of January 1987, \$6360.00 demurrage bill. This one months demurrage charge is more then we have paid at this location for the past several years.

Since the short line operation began service, there has been no maintenace to the track, because they no longer have a section crew anywhere on the line. Also, there is a saftey factor involved, they have no one flagging the crossing when the engines are doing the switching as our mill is located downtown Ferrus Falls, M., and there is several business places where people walk and drive over this crossing daily.

ly experience with short line rail service has been very undesirable and recommend legislation to protect the public's interest.

IRVIN BUCHHOLZ

PIANT MANAGER

IB/rk

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# KELLOGG COMMISSION CO.

IINNEAPOLIS 4N 800-752-4228 f MN 800-328-4390

**DULUTH** 218-722-2123

BILLINGS, MONT. 800-824-9541

Asby Mn - Farmer Elavatar hein es no Communication The OT. Un when Care are leased the shipper is never lified of the acknowlegment. c'hain Essert are not in raftey factors in the operation Cark of experies. The B.N in Craw were always professional. wate has not been out to see of farmer Elector atorsby as Tis elete 3-17-87

# WILLIAM (BILL) WIGDAHL

R.R. #2, Box 308E, Lake Park, MN 56554 Phone 218-532-2854

2-12-27 to whom it may concern: From day one there has been no Communication other Hour what the shippers have had to find out on Their own between Ottestail Valley Railroad and theppen slong This live. Fred Perbull

Mg. Aulky Farmers Coop & lew

SENATE JUDICIARY

EXHIBIT NO. // DATE 4-7-87

BILL NO. 4. B. 861



EXHIBIT NO. 13

DATE CLASSIC 7, 1987

BILL NO. HB 861

Union Pacific Railroad Missouri Pacific Railroad

April 7, 1987

Toseph H. Bateman, Jr. Director Government Affairs

> The Honorable Joe Mazurek Chairman Senate Judiciary Committee State Capitol Helena, Montana 59620

Dear Senator Mazurek:

We have reviewed the amended version of House Bill 861 regarding railroad short line sales. Although the legislation raises fewer concerns than the prior version, we continue to oppose the bill. Before detailing the reasons for our opposition, we would like to make it clear that Union Pacific, were it to carry out a sale in Montana, would work closely with the State of Montana, sharing with the State information that would be of assistance to the State in evaluating the policy implications of any such sale. This is the approach we have taken in those states where we have either made short line sales or have announced such plans.

With that understanding, we have several concerns about the bill. Presently incorporated in the bill in Section 3 (2) is the term, "LABOR AGREEMENTS" when referring to copies of the documents required by the various state agencies. This may lead one to assume that the new owners are to negotiate labor agreements with the current employees on the line or with new employees. These situations may not occur in a short line sale, therefore this requirement is unnecessary and confusing.

Also, Section 3 (2) requires that "any market and feasibility studies" be provided to the named state agencies. This material (produced for the internal consumption of company decision-makers), is not necessary for the state in determining the public interest that may be involved. These studies contain data and projections about traffic provided by shippers and evaluate the future business potential of such shippers.

EXHIBIT NO	12	
DATE	4-7-87	
BILL NO	H.B.861	

They also contain information about a railroad's marketing strategy that should be kept confidential from other railroads and truck and barge firms. A company's internal marketing and feasibility studies should not be subject to involuntary disclosure to state agencies as part of a line sale. We have similar concerns about mandating the disclosure of the specific terms of a contract between the buyer or seller of a rail line. However, we would, of course, be prepared to discuss the general terms of any arrangement to sell our trackage in Montana to interested state officials.

We find the requirement that information contained in the notice of intent and required attached material be kept confidential insufficient to guarantee the absolute confidentiality of this material given the wide distribution of the information as described in Section 2 (1). Also, it is unclear to us how the requirement for confidentiality can be met if meetings are held as contemplated in Section 2 (2). Given the number of public officials involved it is unlikely the public and/or the media could be barred.

Although we continue to oppose HB 861 as amended, we reiterate that it would be our intent to closely work with state officials to identify and discuss the various public policy issues that would arise if we initiated a short line sale.

Thank you for your consideration of our position.

Sincerely,

### BURLINGTON NORTHERN INC.

JOHN N. ETCHART Vice President

April 6, 1987

The Honorable Joe Mazurek, Chairman Senate Judiciary Committee Montana State Senate Capitol Station Helena, MT 59620

Dear Mr. Chairman:

This letter is written to inform you of Burlington Northern Railroad's position on HB 861, a bill to be considered by your committee. Attached is a copy of a letter from W. W. Francis, Regional VP for BNRR's Seattle Region, dated March 16th to Representative Les Kitselman, chairman of the House Business and Labor Committee on this proposed legislation.

As you can see from reading Mr. Francis' letter to Representative Kitselman, Burlington Northern vigorously objected to HB 861. Although the bill has been substantially amended since that letter, many of those comments are still relevant. In its present form, the legislation continues to pose significant problems.

Shortline railroad operations will play a vital role in Montana's transportation system in the future. A shortline can provide improved service at highly competitive rates on track segments where the traffic volume is so light that a Class I railroad would have trouble continuing to operate. Many Montana rail segments fit this description.

The notice and disclosure requirements of HB 861 in its present form would impede any prospective purchase of a shortline in Montana. The notice provisions are burdensome for their uncertainty, while the disclosure provisions require a buyer to reveal sensitive and valuable business information.

Further, those provisions are in conflict with federal law so that even if the Montana legislature were to enact them, it is unlikely they could withstand a Constitutional challenge. HB 861, if enacted, will again give Montana notoriety in its treatment of railroads as no other state has such a law.

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Senator Joe Mazurek Page 2 April 6, 1987

For these reasons, I hope that your committee will recommend that the bill do not pass. If such is not the case, the bill should be amended so that it doesn't have the effect of discouraging shortline operations in this state.

Yours very truly,

John N. Etchart

John N. Etchart Vice President

SENATE JUDICIARY

EXHIBIT NO.\_ /2

DATE 4-7-87

BILL NO.\_ H.B. 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

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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

SENATE JUDICIARY			
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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,

Mike Walsh

cc: Members of the House

Business and Labor Committee

SENATE JUDI	CIARY
EXHIBIT NO	12
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### Scollie Collection

LARRY E. LONG, Assistant Vice President Government Affairs

(612) 347-827

March 13, 1987

#### VIA FEDERAL EXPRESS

The Honorable Dennis Nathe Montana Representative Capitol Station Helena, Montana 59620

Dear Representative Nathe:

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,

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SENATE JUDICIARY

EXHIBIT NO. 12

DATE 4-7-87

BILL NO. H.B. 861



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

March 16, 1987

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.

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The Honorable Les Kitselman March 17, 1987 Page 2

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



SENATE JUDICIARY EXHIBIT NO. 12 BILL NO. H.

April 6, 1987

The Honorable Joe Mazurek Chairman, Senate Judiciary Committee Montana State Senate Capitol Station Helena, MT 59820

Dear Senator Mazurek:

My name is John Greene. I am president of Montana Western Railway, a short line operating between Butte, Montana and Garrison, Montana,

I wish to express my opposition to HB 861. I believe that passing this legislation is both poor policy and poor law.

First, I don't believe reporting to four or five state agencies by the individual purchasing a new short line can be considered reasonable, and with Montana's open meeting law, will certainly not be confidential.

In our own case, we purchased the Montana Western in September of 1986 and before the final agreement was signed, we voluntarily advised the Governor, the Department of Commerce and the PSC of our intentions. For any short line to do otherwise would certainly be short-sighted on the railroad's part because any new short line needs the support of both state and local governments to succeed.

The reporting requirements of this legislation are unreasonable. In purchasing a short line the prospective buyer spends thousands of dollars in developing a purchase contract, operating plan, business plan and financing to purchase and operate the new railroad.

In our case nearly \$70,000 was expended on this, and that does not include the hundreds of hours the staff expended in developing both the business plan and the operating plan. For the state to require a new owner to provide this information to numerous state agencies and risk this all becoming public knowledge through leaks or Montana's open meeting law is totally unreasonable.

Therefore, Montana Western strongly opposes this legislation.

J. W. Greene, President Montana Western Railway Co.

JWG/jdr

SENATE JUDICIARY		
EXHIBIT NO	12	
DATE 4	-7-87	
BILL NO.	H.B.861	

#### WEINER, McCaffrey, Brodsky & Kaplan, P.C.

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April 7, 1987

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PETER A. GILBERTSON MARK H. SIDMAN

MITCHEL H. KIDER KIMBERLY A. MADIGAN

RANDAL D. SHIELDS\*

L. MARK WINSTON

RUGENIA SILVER

R LAWRENCE MCCAFEREY, JR.

Senator Joe Mazurek Chairman Senate Judiciary Committee Montana State Senate 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 rail property from large railroads. I have represented each of the purchasers of four properties of the Burlington Northern Railroad in transactions that were concluded within the last year: the Montana Western, the Arkansas & Missouri, the Washington Central and the Otter Tail Valley Railroads.

The purpose of this letter is to comment on H.B. 861 as recently passed by the Montana House of Representatives, 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 various State agencies and officials, and that representatives of the purchasing railroad attend meetings with such agencies and officials in order to respond to questions. In my judgment, this bill is flawed procedurally, legally and as a matter of public policy.

Procedurally, the bill leaves a purchaser completely confused as to when materials must be filed. In particular, there is great uncertainty as to when a contract is "proposed."

SENATE JUDICIARY

EXHIBIT NO. 12

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

Senator Mazurek

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April 7, 1987

We also doubt whether a "proposed" contract is of any value. Would a buyer's proposal to Burlington Northern to acquire its mainline for one half its value be a serious "proposal" which is likely to be consummated and thus warrant the State's concern.

In addition, we have grave concern over whether, in fact, the information supplied to State officials will be kept confidential and, if revealed, what compensation would be awarded to the aggrieved party for the breach of confidentiality. Our experience is that such information is not kept confidential and that its release severely damages the party supplying the information. Furthermore, the requirement for the provision of information is premature: labor agreements are not negotiated until well after an agreement is signed and serious feasibility studies cannot be done until rate and operating agreements are finalized. Thus, submitting information at the proposal stage will not result in any meaningful analysis.

Legally, Congress has granted to the Interstate Commorce 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 or 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 seeking to acquire properties of existing carriers from the review requirements of the Interstate Commerce Act upon a filing of a notice with the Commission. Ex Parte 392 (Sub No.-1), 41 F.R. 2504. A copy of the Commission's order is enclosed for your consideration. 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

#### SENATE JUDICIARY

EXHIBIT	NO. 12	
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WEINER, MCCAFFREY, BRODSKY & KAPLAN, P.C.

Senator Mazurek

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April 7, 1987

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 sum, in my view H.B. 861 would not survive legal challenge. However, I also believe that its unreasonably burdensome requirements are in any event bad public policy in that they will prevent Montana from continuing to benefit from these regional railroad transactions. 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, the beneficial provisions of the law do not require legislation. Both buyer and seller voluntarily go to representatives of the state or states affected by the transaction to inform them of the transaction and its expected benefits well in advance of closing. 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, legislation is unnecessary to achieve if the objective of this bill is to require that State officials be given reasonable advance notice of rail sales.

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/7985

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

SERVICE DATE

JAN 1 5 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 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. 316, 518 (1982) (Application Proc.), and 49 C.F.R. 1250.1. 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 nonextrier acquisitions and operations, where the nonextrier 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 nonextrier 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.Z.R. 118013(c).

The NPR proposed to amend the regulations at 49 C.f.R. 1150 by adding Subpart D. Exempt Trinsactions. The proposed regulations required the riling of a notice of exemption that

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

EXHIBIT NO. 13

DATE (1941 7, 1987)

PULL NO. 1886

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

 $<sup>^{2}/</sup>$  This proposal does not include railroad construction, which is also governed by section 10901.

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 CONSLUSIONS

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, 5/ to correct any abuses of market power. The fundamental purpose of the exemption process was to allow the Commission to grant exemptions from those

<sup>4/</sup> 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 Ki-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:

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

<sup>6&#</sup>x27; H.R. Rep. Vo. 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. 30563, Chicago Cen. P.R.R. Co. -- Purchase (Portion), Trackage Rights, and Securities Exemption (Chicago), set for modified procedure in secision (not printed) served September 17, 1985; and Pinance Docket No. 30439, Gulf 4 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 <u>substantially all</u> of these transactions is not necessary to carry out the national rail cransportation 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

7/ <u>Id</u>.

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involved purchases of lines that were being abandoned. 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 seems 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 propestants. 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:

<sup>8/</sup> Prairie Trunk Railway-Acquisition and Operation, 348 f.C.C. 832 (1977); Sipance Docket No. 30033 Prairie Com.

We have consistently rejected those 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. 1.P. Ry. Co.-Ft. Worth-Dallas, TX (not printed), served June 3, 1982. It is our escapished 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 Slack v. ICC, 762 F.2d 106, 111 (D.C. Cir. 1985), citing Railway Labor Executives' Ass'n v. United States, 697 F.2d 285, 286 (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., 558 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 Traccic Conf. v. ICC, 725 F.2d 1442, 1447-48 (D.C. Cir. 1964).

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 Tertain new operators with labor protection costs. 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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<sup>9/</sup> The legislative history of the Staggers Act reflects a Geliberate congressional option for "discretionary" ranner than "mandatory" lapor 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.  $10903.\frac{10}{2}$ 

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 amployee 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

<sup>10/</sup> 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 amployee 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 formal 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 harm. 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 advocaced; settled principles of administrative law preclude that. The Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. 2342, et sec., confers "exclusive jurisdiction" on a single court of

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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.

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., p.c. Cir., No. 85-1443, does not make our action premature (RLEA has now moved for voluntary dismisseal). 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. 5 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 It has been our experience that affected not be interrupted. 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 axemption 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 IIIS 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.

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- 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 Fart 1150 of the Code of Federal Regulations as set forth in the Appendix to this decision.
  - 2. This decision is effective February 17, 1985.

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.

James H. Bayne Secretary

(SEAL)

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.

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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 customerily included proposals for acquisition or substitution, operation, and control combined with incidental trackage rights agreements, as well as necessary financing arrangements. Recognizing the have to facilitate continued, even competitive, rail service, we have in the past customerily granted exemption from relevant scattures 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 ancompass those more expansive mituations 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 incarested in avaluating the impact and viability of the proposed transactions.

<sup>1/</sup> See e.g., 70 No. 30439 Gulf & Miss. R.R. Corp. - Purchase Exemption I.C.G. R.R.; (not printed) served January 2, 1985 and 70 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 pocential market abuse. Indeed, had those

Pinally, 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."

frecedent 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 proceedion 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.

<sup>2/</sup> See e.g., Durango 5 Silverton M.C.R. Co. - Acquisition 6
Operations 363 ICC 292 (1979), affaird RLEA v. U.S. 697 F2d 285
(10th Cir. 1983); Frairie Truck Railway - Acquisition and
Operation, 348 ICC 832 (1977) affaird 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).

<sup>1/</sup> See e.g., FD No. 30682, Henmermill Paper Co. - Exemption (not printed) served August 21, 1985 and FD No. 30657, Green Hills Rural Development, Inc. & Chillicothe Southern Extiroad 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. (A) 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 vithout substantial evidentiary support for its conclusions. 5/ The class exemption need not include a blanker 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 ravocation proceedings or problems similar to those experienced in the handling of the Maryland Midland case, supra, n. 5.

See m.g., FD No. 10657 Green Hills Rural Development, Inc. & Chillicothe So. Ry Co. - Exemption (not printed) served January 10, 1986, FD No. 10457 San Dieco & Imperial Valley R.R. Co., (not printed) served October 7, 1985; FD No. 30709 Canonic Atlantic Co. and Canonic. Inc. - Exemption (not printed) served September 11, 1985.

<sup>5/</sup> 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.

<sup>6/</sup> See e.g., No. 10237 Maryland Midland Group. Inc. - Exemption (not printed) served September 19, 1983, reopening decise (not printed) served March 14, 1985, review filed May 17, 1985 UTU v 100 Case No. 85-1304 (D.C. Cir.), voluntarily reopened by Commission (not printed) served October 3, 1985.

<sup>7/</sup> Cf Motor Carrier Exemption at 49 CFR 1186.1 et seg.; codifying Ex Parte No. 55 (Sub-No. 57), Exemption of Gertain Transactions Under 49 U.S.C. 11243. ICC 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

- 1150.31 Scope of exemption.
- 1150.32 Procedures and relevant dates.
- 1150.33 Information to be contained in notice.
- 1150.34 Format for caption summary.

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, SUDTA). 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. I175.

#### 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 <u>Federal Register</u>.
- (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;

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- (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. 1150.21. 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(a) may be filed at any time. The filling of a pecition 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
- (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

SERVICE DATE

JAN 15 1986

INTERSTATE COMMERCE COMMISSION

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

CLASS EXEMPTION FOR THE ACCUISITION 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, 1995, we published a Notice of Proposed Rules (NPR) (SO Fed. Reg. 34880) to exempt from regulation acquisitions and operations / 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 filling of a notice of exemption that

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

 $<sup>^2/</sup>$  This proposal does not include railroad construction, which is also governed by section 10901.

<sup>3/</sup> Acquisition of an active rati line where both buyer and seller SENATE JUDICIARY

### For Publication

#### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioner.

٧.

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 Railteant Company, (Imperial). The Methopolitan Transle 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.

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#### **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.

Rackpround Annthan eniland, Com Misgo and America 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).

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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.

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

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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

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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.

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sive." Missouri Pacific R. Co. v. Stroud, 267 U. S. 404, 408. Consequently, state efforts to regulate commerce must fall when they conflict and . . . the acts of Congress on that subject are supreme and excluwith or interfere with federal authority over the same activity. Pp. (a) "[T]here can be no divided authority over interstate commerce

late railroad line abandonments is exclusive and plenary. This authorper should seek relief in the first instance from the ICC. Pp. 319-323 structure makes it clear that Congress intended that an aggrieved shipity is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce. The Act's (b) The ICC's authority under the Interstate Commerce Act to regu-

nance was negligent or reasonable and whether petitioner abandoned its b-cause they, too, are essentially attempts to litigate the issues underlying respondent seeks to raise in the state court-whether roadbed maintepetitioner's abandonment of the branch line in issue. The questions ing applies to respondent's asserted common-law causes of action, bejudgments of fact and of reasonableness necessary to the decision have merce Act also pre-empts Iowa's common-law causes of action when the quests. Consequently, on the facts of this case, the Interstate Comline with some tortious motive-are precisely the sorts of concerns that Congress intended the ICC to address in weighing abandonment rean interstate rail carrier on the facts of this case. The same reasontory cause of action for failure to furnish cars cannot be asserted against has expressly found them to be reasonable. Accordingly, Iowa's statuing the lawfulness of the carrier's actions to go forward when the ICC be contrary to the language of the statute to permit litigation challeng did not come here until after respondent filed its civil suit, it would Interstate Commerce Act. Even though the abandonment approva at odds with the uniformity contemplated by Congress in enacting the its own version of reasonable service requirements could hardly be more which each State could, through its courts, impose on railroad carriers has the power to declare unlawful or unreasonable. A system under sanctions upon a regulated carrier for doing that which only the ICC That court's decision amounts to a holding that a State can impose inconsistent with Iowa law as construed by the Iowa Court of Appeals (c) Both the letter and spirit of the Interstate Commerce Act are

295 N. W. 2d 467, reversed and remanded

already been made by the ICC. Pp. 324-331.

Mansitall, J., delivered the opinion for a unanimous Court,

CHICACO & N. W. TR. CO. v. KALO BRICK & TILE CO. 313

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Opinion of the Court

Stuart F. Gassner, and Frank W. Davis, Jr. him on the briefs were Louis T. Duerinck, James P. Dalcy, Bruce E. Johnson argued the cause for petitioner. With

him on the brief was Ned Alan Stockdale. M. Gene Blackburn argued the cause for respondent. With

Edwin S. Kneedler, Richard A. Allen, and Charles A. Stark. Solicitor General McCree, Deputy Solicitor General Geller, as amici curiae urging reversal. With him on the brief were Henri F. Rush argued the cause for the United States et al

JUSTICE MARSHALL delivered the opinion of the Court.

rail who is injured as the result of a common carrier's failure decision to abandon the line in question. a regulated carrier when the Commission has approved its cide whether these state-law actions may be asserted against of action for damages. In this case we are called upon to deto provide adequate rail service has available several causes on their branch lines. Under Iowa state law, a shipper by state rail carriers, including their decisions to cease service Commission authority to regulate various activities of interments, Congress has granted to the Interstate Commerce Through the Interstate Commerce Act and its amend-1 State

outward in interstate commerce. and branch line to transport its products to Fort Dodge and Fort Dodge in Iowa. Respondent operated a brick manumile railroad branch line between the towns of Kalo and For some time prior to April 1973, petitioner operated a 5.6to the jurisdiction of the Interstate Commerce Commission. facturing plant near Kalo, and used petitioner's railroad cars Petitioner, an interstate common carrier by rail, is subject

bricks that were traveling in interstate commerce. All of the bricks that respondent shipped intrastate traveled by truck. 1 Respondent used petitioner's branch line only for the shipment of

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BILL NO. H. 13.861

Rennquist, J., dissenting

procedural rules to govern the administration of crimina justice in the various States is properly a matter of local

tice Harlan, concurring in the Court's opinion in Griffin: with which to conclude this dissent than those stated by Jusjury in the case being tried. I can find no more apt words vague one that the Court's decision allows a criminal deknow. The concept of "burdens" and "penalties" is such a case, to the present case, and where it will stop no one can carried from the constitutional provision itself, to the Griffin fendant in a state proceeding virtually to take from the trial privilege not to testify." Such Thomistic reasoning is now no court-imposed price for the exercise of his constitutional case stands for the proposition that a defendant must pay judge any control over the instructions to be given to the The Court's opinion states, ante, at 301, that "[t]he Griffin

return to constitutional paths which, until recently, it has followed throughout its history." free to express the hope that the Court will eventually "Although compelled to concur in this decision, I am 380 U.S., at 617

## Syllabus

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# CHICAGO & NORTH WESTERN TRANSPORTATION CO. v. KALO BRICK & TILE CO.

CERTIORARI TO THE COURT OF APPEALS OF IOWA

No. 79-1336. Argued December 9, 1980-Decided March 9, 1981

The Interstate Commerce Act authorizes the Interstate Commerce Comof Appeals reversed, ruling that the state abandonment law was not missed the action on the ground that the Interstate Commerce Act refusing to provide cars on the branch line, by negligently failing to pre-empted and that the state and federal schemes complemented one pre-empted state law as to the matters in contention. The Iowa Court contractual relations with its customers. The state trial court dismaintain the readbed, and by tortiously interfering with respondent's that petitioner had violated an Iowa statute and state common law by court while the abundenment application was still pending. It alleged ICC's decision, but, instead, brought a damages action in an Iowa state was not "willful," that respondent had no right to insist that the line been sufficient to insure continuous operation, that the abandonment due to conditions beyond its control, that further repairs would not have granted the application, finding that petitioner had abandoned the line to the ICC for a certificate permitting it to abandon the line. The ICC manufacturer, which had shipped its products over the line, and applied not to repair, and to stop using, the line, so notified respondent brick may abandon a line unless it first obtains a certificate from the ICC feeted its filing before the ICC and did not seek judicial review of the be an unnecessary burden on petitioner and on interstate commerce be maintained solely for its use, and that continued operation would in Iowa had been damaged by mud slides, it ultimately decided an abandonment. After petitioner interstate rail carrier's branch line that the present or future public convenience and necessity permit such railroad lines, including branch lines. Under the Act, no such carrier mission (ICC) to regulate interstate rail carriers' abandonment of Respondent had appeared to oppose the application but never per-

Held: The Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated rail carrier when, as here, the ICC, in approving the carrier's application for abandenment, reaches the merits of the matters the shipper seeks to raise in state

complete existing contracts and then go out of business. nomically feasible, and notified its customers that it would Respondent determined that shipment by truck was not ecoalthough it would continue to make cars available at Fort would no longer provide service on the Kalo-Fort Dodge line, not to repair it. Petitioner then notified respondent that it inspecting the damage to the leased line, petitioner decided Dodge if respondent would ship its goods there by truck was the only shipper using the Kalo-Fort Dodge line. After was also damaged by a mud slide. By that time, respondent neet Kalo with Fort Dodge. In April 1973, the leased line slide in 1967, when portions of the embankment wholly vandecided to stop using the branch line. Petitioner instead ished under the waters of the Des Moines River, petitioner made repairs after the first two slides, but following the last leased part of another railroad's parallel branch line to conbranch line were damaged by three mud slides. Petitioner During the 1960's, the tracks on the Kalo-Fort Dodge

but failed to perfect its filing before the Commission. In a was the sole party appearing in opposition to the request, tervened in support of petitioner's application. Respondent Fort Dodge branch line. The United States Government invenience and necessity permitted it to abandon the Kaloan application for a certificate declaring that the public con-In November 1973, petitioner filed with the Commission

# Opinion of the Court

LAGO W. T. . . . . BRIC TILE 115

contractual relations with its customers. The state trial cars on the branch line, by negligently failing to maintain 4 6mm 479.122 (1971) and state common law by refusing to provide of state alleged that petitioner had violated Iowa Code \$\$ 479.3, Violated attempt to comply with the provisions of the Interstate Com-& N. IV. Transp. Co. Abandonment, AB1, Sub. No. 24 (Jan. ages action against petitioner in state court. The complaint cision.4 Instead, while the abandonment request was still merce Act regarding judicial review of the Commission's de-11, 1976), App. to Pet. for Cert. 34a. Respondent made no its control and granted the request for a certificate. Chicago decision issued in April 1976, the Commission found that the roadbed, and by tortiously interfering with respondent's pending before the Commission, respondent filed this dampetitioner had abandoned the line due to conditions beyond lun

34a-35a. The reason for this default, according to respondent, was that it petitioner to continue its service on the branch line had gone out of business and therefore had no continuing interest in forcing Abundonment, ABI, Sub. No. 24 (Jan. 11, 1976), App. to Pet. for Cert. titled to no further formal proceedings." Chicago & N. W. Transp. Co

Chicago & N. W. Transp. Co., 533 F. 2d 1025, 1028 (CAS 1976). See ICC v. Chicago, R. I. & P. R. Co., 501 F. 2d 908, 911 (CAS 1974), the Commission. ICC v. Chicago & N. W. Iransp. Co., supra, at 1027, porary emergency suspension of service initiated by filing of a notice with cert. denied, 420 U. S. 972 (1975). An embargo, by contrast, is a temor indefinitely all transportation service on the relevant line." ICC v. "is characterized by an intention of the carrier to cease permanently whether to abandon the Kalo-Fort Dodge branch line. An abandonment 2 It is undisputed that at this time, petitioner had not made a decision

tion as required," and was therefore "deemed to be in default and en-3 In particular, respondent "did not file a verified statement in opposi-

<sup>\*</sup>See 28 U. S. C. §§ 2321 (n), 2342 (5), 2343, 2344

Iown Code § 479.3 (1971) provides in relevant part:

apply therefor, for the transportation of any and all kinds of freight, reasonable time, furnish suitable cars to any and all persons who may Iowa Code § 479.122 (1971) provides: and receive and transport such freight with all reasonable dispatch . . . . "Every railway corporation shall upon reasonable notice, and within a

wrongs, whether of commission or omission, of such agents, engineers, or engineers, or other employees thereof, and in consequence of the willful sequence of the neglect of the agents, or by any mismanagement of the sustained by any person, including employees of such corporation, in conuse and operation of any railway on or about which they shall be emother employees, when such wrongs are in any manner connected with the ployed, and no contract which restricts such liability shall be legal or "Every corporation operating a railway shall be liable for all damage

failure to provide proper service is not a new one under Iowa law. See, The conclusion that these statutes create a state-court damages action for

alternative means of relief for injured parties." • 295 N. W state and federal schemes represented "complimentary [sic], state abandonment law was not pre-empted and that the empted state law as to the matters in contention, dismissed the action. The Iowa Court of Appeals reversed, ruling that court, holding that the Interstate Commerce Act wholly pre-

c. g., Baird Bros. v. Minneapolis & St. L. R., 181 Iowa 1104, 165 N. W.

935 (CA9 1965); Alaska v. K & L Distributors, Inc., 318 F. 2d 498, courts from exercising their jurisdiction. 295 N. W. 2d 467, 468-469 (1979). See Brancadora v. Federal Nat. Mortgage Assn., 344 F. 2d 933, vance to its inquiry into whether the pre-emption doctrine barred the state citizenship was lacking, remanded the case to state court. The Iowa Court of Appeals correctly held that this federal-court ruling had no relethe case to federal court, but the federal court, finding that diversity of After respondent filed its state-court action, petitioner sought to remove

mary-jurisdiction doctrine when the Commission has not yet ruled complied with in spirit, even if not through any intent of respondent, We save for a later case a decision on the proper application of the pritaken place. Consequently, the requirements of the doctrine have been actually ruled, and the state trial on liability and damages has not yet tions raised in the civil damages action. But here, the Commission has 89 (1962). Even if the primary-jurisdiction doctrine were applicable the Commission had an opportunity to address the administrative queshere, it would at best require the state courts to postpone any action until htion." Hewitt-Robins Inc. v. Eastern Freight-lVays, Inc., 371 U.S. 84, the effect of the exercise of the remedy upon the statutory scheme of reguon the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on merce Act: "[T]he survival of a judicial remedy . . . cannot be determined As we have stated in interpreting another provision of the Interstate Comsense of initial deferral to the expertise of the Commission, had no application to this litigation. 295 N. W. 2d, at 471-472. Petitioner, as well at 326-327, and n. 14, we do not rely on the primary-jurisdiction doctrine. pertise in the matters respondent wishes to raise in state court, see in/ra, we agree with petitioner and amici that the Commission has special exof this case, but we have no occasion to address that question. Although the primary-jurisdiction doctrine precludes respondent's suit on the facts as the United States and the Commission as amici curiac, argues that The Iowa court also held the doctrine of primary jurisdiction, in the

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2d 467, 469 (1979). After the Supreme Court of Iowa denied? petitioner's application for review, we granted certiorari, 446 CU. S. 951 (1980). We reverse.

Pre-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no state." ordained." Florida Lime & Avocado Growers, Inc. v. Paul other conclusion, or that the Congress has unmistakably so not and could not in our federal system withdraw from the bons v. Ogden, 9 Wheat. 1, 211 (1824). The doctrine does emption doctrine, as stated more than a century and a half ago, 351, 356 (1976). The underlying rationale of the pre-373 U. S. 132, 142 (1963). See De Canas v. Bica, 424 U. S. that the nature of the regulated subject matter permits no at 644. And in deciding whether any conflict is present, a tion whether they are in conflict." Perez v. Campbell, supra two-step process of first ascertaining the construction of the supra, at 67. Making this determination "is essentially a bell, 402 U. S. 637, 649 (1971), quoting Hines v. Davidowitz. full purposes and objectives of Congress." Perez v. Campas an obstacle to the accomplishment and execution of the eral regulation whenever the "challenged state statute 'stands powers, then a court must find local law pre-empted by fedgress has chosen to legislate pursuant to its constitutional Davidowitz, 312 U. S. 52, 68, n. 22 (1941). But when Conliarly adapted to local regulation, . . . but did not," Hines v. have regulated "a distinctive part of a subject which is pecu-Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 lated [is] a merely peripheral concern" of federal law, San States either the "power to regulate where the activity regufere with or are contrary to, the laws of congress...." is that the Supremacy Clause invalidates state laws that "intercourt's concern is necessarily with "the nature of the activities two statutes and then determining the constitutional ques-(1959), or the authority to legislate when Congress could Serve

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which the States have sought to regulate, rather than on the

Council v. Garmon, supra, at 243. method of regulation adopted." San Diego Building Trades

supreme and exclusive." commerce, and . . . the acts of Congress on that subject are stated: "[T]here can be no divided authority over interstate subject to regulation under the Interstate Commerce Act, act in the same area. More recently, in Chicago v. Atchison, T. & S. F. R. Co., 357 U. S. 77 (1958), we held that a city was within the exclusive jurisdiction of the Commission, and sonable a rail common carrier's rates because rate regulation State's common-law cause of action to challenge as unrea-Id., at 87. The common rationale of these cases is easily the carriers could do what the Act authorized them to do "if local authorities retained the power to decide" whether would be inconsistent with [federal] policy," we observed was facially invalid as applied to an interstate carrier. "[I]t before a railroad could transfer passengers, an activity also ordinance requiring a license from a municipal authority therefore stripped a similar state commission of all power to thority to regulate extensions of service was exclusive and that the Interstate Commerce Commission's statutory au-Comm'n v. United States, 289 U. S. 121, 129 (1933), we held the provisions of the act." Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 446. Similarly, in Transit a state-court action "would be absolutely inconsistent with For example, as early as 1907, the Court struck down a in the Act. These state regulations have taken many forms. merce Commission or with congressional policy as reflected consistent with the plenary authority of the Interstate Comimpose on common carriers obligations that are plainly inwe have frequently invalidated attempts by the States to the time of its enactment. Since the turn of the century, consequently presented recurring pre-emption questions from and comprehensive of federal regulatory schemes and has The Interstate Commerce Act is among the most pervasive Missouri Pacific R. Co. v. Stroud,

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regulate commerce must fall when they conflict with or inter-267 U. S. 404, 408 (1925). Consequently, state efforts to fere with federal authority over the same activity:

### III

about a carrier's ability to abandon a line, what Iowa state is pre-empted, we must determine what Congress has said inconsistent. To these tasks we now turn. law provides on the same subject, and whether the two are In deciding whether respondent's state-law damages action

nent or temporary cessation of service over lines used for by Congress with broad power to regulate a carrier's permaand 11121 (a) (1976 ed., Supp. III),7 the Commission is cmterstate Commerce Act, recodified at 49 U.S.C. §§ 11101 (a) temporary suspension of its service and, if necessary, to order interstate commerce. Under §§ 1 (4) and 1 (11) of the Inmost relevant here, the Act endows the Commission with Co., 505 F. 2d 590, 593-594 (CA2 1974). In addition, and F. 2d 1025, 1027, n. 2 (CAS 1976); ICC v. Maine Central R. it resumed. See ICC v. Chicago & N. W. Transp. Co., 533 powered both to pass on the reasonableness of a carrier's broad authority over abandonments, or permanent cessations The Interstate Commerce Commission has been endowed

carriers stems from the Transportation Act of 1920, ch. 91 of service. The Commission's power to regulate abandonments by rail

and its various amendments have been completely recodified as Subedents. Where appropriate, we also give parallel cites to the Act as original Act for ease in referring to the decision below and to our precfication is without substantive change. In this opinion, we cite to the title IV of Tivle 49 of the United States Code. In the main, this recodi-Under Pub. L. 95-473, 92 Stat. 1337, the Interstate Commerce Act

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41 Stat. 477-478, which added to the Interstate Commerce Act a new § 1 (18), recodified at 49 U.S.C. § 10903 (a) (1976 ed., Supp. III). That section stated in pertinent part:

"[N]o carrier by railroad subject to this chapter shall abundon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Dy States, 271 U. S. 153, 164-166 (1926). The Commission's of Colorado to the power of the Commission to grant a certificate permitting an abandonment of a wholly intrastate supra. There, the Court rejected a challenge by the State sion's authority under § 1 (18) has been clear since the Court 308 U. S. 79, 85 (1939). The broad scope of the Commisauthority over abandonments is also plenary. So broad is first interpreted that provision in Colorado v. United States, terstate commerce requir[e] it." Palmer v. Massachusetts, of purely local lines operated by regulated carriers when, in this power that it extends even to approval of abandonment the Commission's judgment, "the over-riding interests of in-Co., 341 U. S. 341, 346, n. 7 (1951). See Colorado v. United clusive. Alabama Public Service Comm'n v. Southern R. thority of the Commission to regulate abandonments is ex-Consequently, we have in the past concluded that the auproved "detrimental to the public interest." 289 U. S., at tion," because such control, in the judgment of Congress, has respect of matters affecting [interstate railroad] transporta-127. See Chicago v. Atchison, T. &S. F. R. Co., supra, at 87. supra, at 128. Among those evils is "[m]ultiple control in gress intended to abate." Transit Comm'n v. United States, exerted and with a view of climinating the evils that Coneral authority effective to the full extent that it has been This section, we have said, must be "construed to make fed-

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branch line operated by an interstate carrier. Justice Brandeis wrote for the Court:

"Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." 271 U. S., at 165–166.

The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce. In deciding whether to permit an abandonment, the Commission must balance "the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other." Purcell v. United States, 315 U. S. 381, 384 (1942). Once the Commission has struck that balance, its conclusion is entitled to considerable deference. "The weight to be given to cost of a relocated line as against the adverse effects upon those served by the abandoned line is a matter which the experience of the Commission qualifies it to decide. And, under the statute, it is not a matter for judicial redecision." Id. at 385.

The breadth of the Commission's statutory discretion suggests a congressional intent to limit judicial interference with the agency's work. The Act in fact spells out with considerable precision the remedies available to a shipper who is

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injured either by the Commission's approval of an abandon-

civil damages action against a carrier for an abandonment injunction against it. There is no provision in the Act for a addition, at the time that this action was filed in state court, \$1(20) of the Act expressly provided that a shipper beate court of appeals, 28 U.S.C. §§ 2321 (a), 2342 (5). In lieving a carrier's abandonment was unlawful could seek an tion, a shipper may seek review of its action in the appropri-(1980).\* If ultimately dissatisfied with the Commission's acabandonment filed before the Commission. 49 CFR § 1121.36 ed., Supp. III). A shipper may also oppose any request for action. § 13 (1), recodified at 49 U.S.C. § 11701 (b) (1976 ment may ask the Commission to investigate the carrier's ment or by a carrier's abandoning a line without securing Commission approval. A shipper objecting to an abandon-

of the Act." Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S., entirely at the mercy of the carrier, contrary to the overriding purpose exist. "[T]he absence of any judicial remedy [would] plac[e] the shipper because numerous other remedies for improper cessations of service still longer have available the remedy of injunction does not affect our decision, ed., Supp. 111). The fact that shippers in the position of respondent no Commission), 11703 (action by the United States) (1976 ed., Supp. III). State, or the Commission itself may sue to enjoin most illegal abandondonment of a freight-forwarding service. See 49 U.S. C. § 11704 (1976 A private person may seek injunctive relief only to prevent illegal abanas amended and recodified, only the United States, the government of a an injunction was repealed by the Railroad Revitalization and Regulatory not been made to the Commission. The right of a private party to seek enjoin a carrier's abandonment of a line when application for approval has Reform Act of 1976, Pub. L. 94-210, 90 Stat. 127-130. Act of 1920, provided that "any court of competent jurisdiction" could Section 1 (20), which was, like § 1 (18), added by the Transportation Sec 49 U. S. C. §§ 11505 (action by state), 11702 (action by the Under the Act

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the Commission. aggrieved shipper should seek relief in the first instance from of the Act thus makes plain that Congress intended that an that has been approved by the Commission.10 The structure

is exclusive. their lines. And at least as to abandonments, this authority interstate commerce, rail carriers' cessations of service on Commission plenary authority to regulate, in the interest of straightforward and unambiguous. Congress granted to the In sum, the construction of the applicable federal law is

tort for purported interference with contractual relations alleged failure to maintain the roadbed and for common-law of action for common-law negligence based on petitioner's state court also held that respondent could maintain its causes rier" injured it in the amount of \$350,000. App. 78. tioner's failure to carry out these "duties of a common car-According to respondent's complaint in the state court, petimerce Act imposing a similar duty. 295 N. W. 2d. at 469. was not pre-empted by the provisions of the Interstate Comtion to all persons who apply," and that this state-law duty and unconditional duty to furnish car service and transporta-479.122 (1971) "impos[e] on the railroads the unqualified The Iowa Court of Appeals held that Iowa Code §§ 479.3 and common-law obligations that petitioner seeks to challenge Equally clear are the meanings of the state statutory and

F. 2d 662, 668 (CA7 1979). (1976 ed., Supp. III). See In re Chicago, M., St. P. & P. R. Co., 611 have used the line in the past 12 months. 49 U.S. C. § 10904 (a) (3) (D) donment must make reasonable efforts to give notice to all shippers who <sup>8</sup> A carrier who files an application for a certificate permitting aban-

rier's violation of the Act, this Court stated in Powell v. United States, current jurisdiction. Congress might have intended that state and federal courts have confor an illegal abandonment, or if such an action can be brought, whether the language of Powell means that a damages action can never be brought have no application to this case. We therefore need not decide whether there has been no violation of the Act, and this damages remedy could Because the carrier's actions here have been approved by the Commission was "the only method for enforcing" what was then § 1 (18) of the Act 300 U. S. 276, 287 (1937), that the injunctive remedy, see n. 9, supra III), provide a general right to seek damages when injured by a car-<sup>10</sup> Although §§ S and 9, recodified at 49 U. S. C. § 11705 (1976 ed., Supp. We thus reserve those questions for a proper case

with respondent's customers. 295 N. W. 2d, at 471-472. The negligence count as outlined in respondent's complaint claimed \$150,000 in damages based on petitioner's alleged failure "to maintain the track in a proper manner" and "to properly maintain the railroad right-of-way." App. 79-80. The tort count alleged that "at all times material hereto, it was the avowed and publicized purpose of [petitioner] to close all unproductive lines under its control," and that this plan interfered with respondent's contracts and damaged it in the amount of \$100,000. Id., at 81. These, then, are the claims that the Iowa Court of Appeals held properly cognizable in the state courts.

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shipper to gain from the Iowa courts the relief it was denied by the Commission.11 tion represents little more than an attempt by a disappointed intent of Congress cannot be avoided by mere artful pleading It is difficult to escape the conclusion that the instant litigaof the three counts of respondent's state-court complaint T. & S. F. R. Co., 357 U. S., at 87. It is true that not one clare unlawful or unreasonable. Cf. Chicago v. Atchison acting pursuant to the will of Congress, has the power to dea regulated carrier for doing that which only the Commission mentions the word "abandonment," but compliance with the amounts to a holding that a State can impose sanctions upor spirit of the Interstate Commerce Act are inconsistent with mented one another. We disagree. Both the letter and the determine whether they conflict. The Iowa Court of Appeals Iowa law as construed by that court. The decision below held that the two remedies for abandonment merely complefederal regulatory scheme and the state law, we must next Armed with these authoritative constructions of both the

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ICAGO & N. W. TR. CO. v. KALO BRICK

efficient and nationally integrated railroad system," ICC v vitiate the overarching congressional intent of creating "an circumstances." Milmine Grain Co. v. Norfolk & Western only what is reasonable of the railroads under the existing duty to provide cars is not absolute," and the law "'exacts shipped in petitioner's cars, like the lumber in Missouri commerce, "[t]he state law has no application . . . ." Id., at reasonableness belongs exclusively to the Commission. Cf U. S. 482, 434 (1928). The judgment as to what constitutes regulation of car service to the Commission. 408. In the instant case, the bricks that respondent here merce.12 The Court held that because the lumber shipped court damages action would lie for a carrier's failure to Purcell v. United States, 315 U.S., at 384-385. It would Tenn. 1967). See Midland Valley R. Co. v. Barkley, 276 furnish cars in spite of the congressional decision to leave by the carrier moved in interstate, rather than intrastate Louisville & Nashville R. Co., 277 F. Supp. 247, 250 (ED R. Co., 352 1. C. C. 575, 585 (1976), citing Elgin Coal Co. v. Pacific, were moving in interstate commerce.13 Respondent furnish cars to carry a shipper's goods in interstate comthis Court confronted the precise question whether a statefailure to furnish cars on the Kalo-Fort Dodge branch line in essence seeks to use state law to compel petitioner to In Missouri Pacific R. Co. v. Stroud, 267 U.S. 404 (1925). Respondent's main cause of action alleges an improper But "[t]he

<sup>11</sup> The fact that respondent did not perfect its filing before the Commission, see n. 3, supra, does not affect either the validity or the finality of

the Commission's findings with respect to the reasonableness of petitioner's actions. These findings remain valid if supported by substantial evidence, see *Illinois Central R. Co. v. Norfolk & Western R. Co.*, 385 U. S. 57, 66 (1966), and in any case are not ordinarily subject to revision via collateral attack in a civil action.

<sup>&</sup>lt;sup>12</sup> The Commission's authority over furnishing cars was reflected in §§ 1 (4) and 1 (11) of the Act, recodified at 49 U. S. C. §§ 11101 (a) and 11121 (a) (1976 ed., Supp. III).

<sup>13</sup> See n. 1, supra.

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odds with the uniformity contemplated by Congress in enact ing the Interstate Commerce Act. of reasonable service requirements could hardly be more at powered to excuse. A system under which each State could require a carrier to do exactly what the Commission is emto permit the State of Iowa to use the threat of damages to through its courts, impose on railroad carriers its own version Railway Labor Executives Assn., 315 U.S. 373, 376 (1942)

suit, it would be contrary to the language of the statute to perapproval did not come until after respondent filed its civil over which [petitioner] had no control." App. to Pet. for that "the cessation of service occurred because of conditions the Commission has actually approved the abandonment rail carrier on the facts of this case. ure to furnish cars cannot be asserted against an interstate therefore hold that Iowa's statutory cause of action for failfied at 49 U.S. C. § 10501 (c) (1976 ed., Supp. III). them to be reasonable. See 49 U.S.C. §1 (17)(a), recoditions to go forward when the Commission has expressly found mit litigation challenging the lawfulness of the carrier's acther role that the state court could play. Even though the to make such judgments to the Commission, there is no fur-In reaching its decision, the Commission expressly found the purposes of the Act is merely bolstered when, as here The conclusion that a suit under state law conflicts with Because Congress granted the exclusive discretion

address in weighing abandonment requests from the carriers sorts of concerns that Congress intended the Commission to doned its line with some tortious motive—are precisely the was negligent or reasonable and whether petitioner abanto raise in the state court—whether roadbed maintenance to litigate the issues underlying petitioner's abandonment of causes of action, because they, too, are essentially attempts the Kalo-Fort Dodge line. The questions respondent seeks The same reasoning applies to respondent's other asserted

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283 U. S. 35, 42 (1931). That alone might be enough to supra, at 385; Chesapeake & Ohio R. Co. v. United States, subject to its regulation." See Purcell v. them unlawful). for car distribution practices until Commission has ruled U. S. 456, 469 (1915) (no damages action may be brought prohibit respondent from raising them in a state court. Cf. Pennsylvania R. Co. v. Clark Bros. Coal Mining Co., 238 United States,

pound that after the first two landslides, petitioner "made when the Commission is empowered to rule on the underlying cient to insure continuous operations," that the abandonment necessary repairs to enable continuation of service," that fur-Commission's order approving the abandonment application issues, because here the Commission has actually addressed a burdensome line be maintained solely for its own use," and ther repairs after the 1967 slide would not have been "suffithe matters respondent wishes to raise in state court The spondent seeks to raise in state court. Consequently, we hold made pursuant to the authority delegated by Congress, simto Pet. for Cert. 35a-36a. These findings by the Commission, burden on [petitioner] and on interstate commerce." App. that "continued operation of the line would be an unnecessary was not "willful," that respondent has no right to "insist that ply leave no room for further litigation over the matters resion have already been made by the Commission. ages stemming from a carrier's negligence and tort when the also pre-empts Iowa's common-law causes of action for damthat on the facts of this case, the Interstate Commerce Act judgments of fact and of reasonableness necessary to the deci-But we need not decide whether a state-court suit is barred

e. g., Chicago & N. W. Transp. Co. Abandonment, 354 I. C. C. 121, 125factors such as those respondent wishes the state court to decide. See, 678, 700-703 (1576); Missouri Pacific R. Co. Abandonment, 342 I. C. C. 126 (1977); Baltimore & Annapolis R. Co. Abandonment, 348 I. C. C. 14 Most of the Commission's abandonment decisions turn in part on

state common-law remedies for failure to provide cars when state Commerce Act as it related to a carrier's duty to fursurvived the enactment of and the various amendments to of their general and concurrent jurisdiction." Id., at 130 existing at common law or by statute, but the provisions of change in the Act as recodified,15 provided that nothing in nish cars. That section, which survives without substantive the same point in this Court. that the Act "was not intended to deprive the state courts tion of the state courts," so \$ 22 was added to make plair might have been claimed that, Congress having entered the as "there is no administrative question involved." Id., at the carrier had previously agreed to provide them, as long language, this Court held that a shipper could pursue its this act are in addition to such remedies." Relying on this in some detail. In Puritan, this Court was called upon for of Appeals rely heavily on its language, we discuss the case the Interstate Commerce Act. Respondent urges essentially language in concluding that respondent's causes of action The Iowa Court of Appeals relied on this broad-sounding interstate commerce had been withdrawn from the jurisdicfield, the whole subject of liability of carrier to shippers in 131-132. Without this provision, the opinion explained, "It the Act "shall in any way abridge or alter the remedies now the first time to interpret what was then \$22 of the Interresult. But because both respondents and the Iowa Court Coal Mining Co., 237 U.S. 121 (1915), compels a contrary Nothing in our decision in Pennsylvania R. Co. v. Purita

This analysis fails to take into account the fact that the Commission's exclusive jurisdiction over abandonments arises from the Transportation Act of 1920, and its authority over car service from the Esch Car Service Act, ch. 23, 40 Stat. 101. Our decision in *Puritan* preceded these amendments to the Interstate Commerce Act, so it can hardly be viewed as

## Opinion of the Court

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an authoritative construction of the Act as amended.<sup>16</sup> And even assuming for the sake of argument the continuing validity of that opinion's reasoning, it does not control the disposition of the instant case. The Court in Puritan expressly noted that the matters presented to the state courts for decision involved no questions of law or questions calling for an administrative judgment, and, in particular, no issue as to the reasonableness of the carrier's policies. 237 U.S., at 131-132. Instead, the state court was called upon to decide only the factual question whether the railroad had carried out the duties that it had agreed to undertake. The Court's opinion in Puritan recognized the importance of this distinction:

"[I]t must be borne in mind that there are two forms of discrimination,—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission.... Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement....

"But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is

<sup>18</sup> See 49 U. S. C. § 10103 (1970 cd., Supp. III).

<sup>&</sup>lt;sup>16</sup> The Transportation Act of 1920, moreover, also added to the Interstate Commerce Act a new § 1 (17)(a), recodified at 49 U. S. C. § 10501 (c) (1976 ed., Supp. III), which expressly invalidates state remedies when they are "inconsistent with an order of the Commission" or prohibited under any provision of the Act. See supra, at 326. The Puritan Court obviously could not have considered this provision when deciding that a shipper could in some circumstances bring a state-court action for failure to furnish cars.

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called upon to decide a mere question of fact." no administrative question involved, the courts being

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court in the instant litigation all involve evaluations of the of the Commission's judgment through the means provided proper.17 Respondent has chosen not to seek judicial review cisely the opposite; it has decided that the abandonment was Commission, in an exercise of its discretion, has done presuit such as respondent's until the Commission "has declared line. These issues call for the type of administrative evaluato the Puritan case. The questions presented to the state by Congress.18 the practice to be . . . unjust." 237 U.S., at 131. And the Co. v. Merchants Elevator Co., 259 U. S. 285, 291 (1922). formed discretion of the Commission. See Midland Valley reasonableness of petitioner's abandonment of the branch Under the Puritan analysis, "no court has jurisdiction" of a R. Co., v. Barkley, 276 U.S., at 484-486; Great Northern R. tions and conclusions that Congress has entrusted to the in-Here, we face the reverse of the situation that gave rise For all of these reasons, to the extent that

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Commission has of course already decided it. intended that the Commission decide, and in the case before us, the (emphasis in original). That is exactly the kind of question Congress circumstances beyond the control of the carrier." Brief for Respondent 6 determination is whether or not the service was terminated by compelling raises only questions of fact that do not call for any expertise. Respondent the state court erred only in concluding that a suit such as respondent's N. W. 2d, at 472. If it is assumed that Puritan remains good law, then and those calling for an exercise of administrative discretion. tional purposes between state-court actions raising strictly factual claims itself concedes that even under its theory of the case, "the sole issue for 17 The court below apparently recognized the distinction for jurisdic-

quest for an abandonment. We express no opinion as to the merits of forward without awaiting the Commission's decision on a pending rewhich is among the express remedies enumerated in the Act, could go F. 2d 1025 (CAS 1976), is also misplaced. That case held only that a federal-court suit seeking injunctive relief on behalf of the Commission, 18 Respondent's reliance on ICC v. Chicago & N. W. Transp. Co., 533

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the Puritan analysis has any application here, it supports Opinion of the Court

courts lack jurisdiction to entertain respondent's suit for

petitioner's and the Commission's arguments that the Iowa

damages arising from petitioner's abandonment of the Kalo-

 $y_{
m contrary}$ , an aggrieved shipper is still free to pursue the avehoposition without a remedy if it is truly harmed. On the could have followed the congressionally prescribed path by evidence to the Commission in support of its allegation, but was filed, but it did not. After petitioner filed its request fusal to provide service before any abandonment application have gone to the Commission and challenged petitioner's renues for relief set forth in the statute. Respondent could Fort Dodge branch line. peals. This, too, respondent failed to do. The Act creates seeking review in the appropriate United States court of apfailed to do so. Having lost its battle there, respondent for a certificate, respondent had the opportunity to present shipper to bring a civil damages action in state court. And carrier's abandonment of a line. In particular, nothing in no other express remedies for a shipper who is damaged by a the Act suggests that Congress contemplated permitting a Our decision today does not leave a shipper in respondent's

of the Act.

sider reasonable policies, is plainly contrary to the purposes

We are thus not free to assume that it has been

such a right to sue, with its implied threat of sanctions for

failure to comply with what the courts of each State con-

sion, in approving the carrier's application for abandonment, a regulated carrier when the Interstate Commerce Commisshipper from pressing a state-court action for damages against reaches the merits of the matters the shipper seeks to raise We hold that the Interstate Commerce Act precludes a

that case, but we do note that its facts bear little relation to those before

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in state court. We reserve for another day the question whether such a cause of action lies when no application is made to the Commission. The judgment of the Iowa Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

### ALBERNAZ v. UNITED STATES

Syllabus

# ALBERNAZ ET AL. v. UNITED STATES

# CERTIORAIU TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1709. Argued January 19, 1981-Decided March 9, 1981

Pelitioners, who were involved in an agreement to import marihuana and then to distribute it domestically, were convicted on separate counts of conspiracy to import marihuana, in violation of 21 U.S. C. § 963, and conspiracy to distribute marihuana, in violation of 11 U.S. C. § S46. These statutes are parts of different subchapters of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Petitioners received consecutive sentences on each count, the length of each of their combined sentences exceeding the maximum which could have been imposed either for a conviction of conspiracy to import or for a conviction of conspiracy to distribute. The Court of Appeals affirmed the convictions and sentences.

### Held:

- Congress intended to permit the imposition of consecutive sentences for violations of §§ 346 and 963 even though such violations arose from a single agreement or conspiracy having dual objectives. Pp. 336-343.
- (a) In determining whether Congress intended to authorize cumulative punishments, the applicable rule, announced in Blockburger v. United States, 284 U.S. 299, 304, is that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The statutory provisions involved here specify different ends as the proscribed object of the conspiracy—"distribution" and "importation"—and clearly satisfy the Blockburger test. Each provision requires proof of a fact that the other does not, and thus §§ \$16 and 963 proscribe separate statutory offenses the violations of which can result in the imposition of consecutive sentences. Braverman v. United States, 317 U. S. 49, distinguished. Pp. 337–340.
- (b) While the *Blockburger* test is not controlling where there is a clear indication of contrary legislative intent, if anything is to be assumed from the legislative history's silence on the question whether consecutive sentences can be imposed for a conspiracy to import and distribute drugs, it is that Congress was aware of the *Blockburger* rule

EXHIBIT NO. 13

BILL NO. H.B. 861

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\*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;
- sale to a short line operator;
- 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 IGC. 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 ICC Ruling 392 specifically addresses the very federal action. items in HB 861.

- additional notice to the state;
- 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.)

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EXHIBIT NO. 13

DATE 4-7-87



### PUBLIC SERVICE COMMISSION

2701 Prospect Avenue • Helena, Montana 59620 Telephone: (406) 444-6165

Tcm 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

SENATE JUDICIARY

EXHIBIT NO. 13

DATE 4-7-81

BILL NO. H.B. 86.

DATE (1011/7, 198)
BILL NO. 1413-861

### AMENDMENTS - HP861 Third Reading Copy

- 1. pl, line 15
  Strike: "ATTORNEY GENERAL"
- 2. pl, line 16 and 17
  Strike: "CONSUMER COUNCIL, AND DEPARTMENT OF COMMERCE"
- 3. pl, line 17
  Strike: "ON"
  Insert: "FROM"
- 4. p1, lines 18 and 19
  Strike: "REQUIRING THE BUYER TO SUCCEED
  TO THE SELLER'S LEGAL AND
  CONTRACTUAL RIGHTS AND DUTIES"
- 5. p2, line 20
  Strike: "Prior to the transfer of"
  Insert: "Thirty days prior to filing with the Interstate Commerce
  Commission of an application to sell any section of"
- 7. p2, lines 24 and 25
  Strike: "the consumer counsel, AND THE DEPARTMENT OF COMMERCE"
- 9. p3, lines 3 and 4
  Strike: THE DEPARTMENT OF COMMERCE, and the consumer counsel"
- 10. p3, line 5, following "transaction"
  Insert: directly related to the requirements of Section 3"
- 11. p3, line 19
  Strike: "copy"
  Insert: "general description of the terms"

EXHIBIT NO. 14

DATE 4-7-87

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- 13. p3, lines 20 and 21
  Strike: "any market and feasibility studies, and a financial disclosure of the buyer"
- 14. p3, line 23
  Strike: All of subsection 3 through p4, line 6
- 15. p4, line 17
  Strike: "each to the Attorney General"
- 16. p4, lines 18 and 19
  Strike: "consumer counsel, and department of COMMERCE

SENATE JUDICIARY

EXHIBIT NO.\_\_\_

DATE april 7

BILL NO. HB 861

PROPOSED AMENDMENTS TO HB 861 BY MONTANA CHAMBER OF COMMERCE

House Bill 861, third reading copy, is hereby amended to read as follows:

1. Page: 1 Line: 21

Following: "ACT;"

Insert: "AMENDING 2-9-111;"

2. Page: 3 Line: 12

Following: "confidentiality"
Insert: "-- penalty"

3. Page: 4

Line: Following line 6

Insert: "(4) except as authorized by a court order, it is unlawful for the attorney general, the commission, the department of commerce,

the consumer counsel or any employees of these agencies or officials to disclose any information submitted under this act to any other person. Failure to comply with the confidentiality provisions of this act shall be punishable by a fine not exceeding \$1,000.00 or by imprisonment in the county

jail not exceeding one year, or both, at

the discretion of the court."

4. Page: 5 Line: 2

Following: "3"
Strike: "are intended to"

Insert: "shall"

5. Page: 5 Line: 2

Following: "codified"

Strike: "as an integral part of"

Insert: "in"

6. Page: 5 Line: 3

Following: "chapter 14"

Strike: ", and the provisions of Title 69, chapter

14, apply to sections 1 through 3"

SENATE JUDICIARY EXHIBIT NO. 15 DATE 4-7-87 BILL NO. 4.8.86/

7. Page: Line: Following:

Insert:

5

"Codification of sections 1 through 3 in Title 69, chapter 14, shall not subject a buyer or seller to any of the investigatory, penalty or enforcement provisions of Title 69, chapter 14 or any other provision of state law."

8. Page: Line: Insert:

4, following Section 6 "Section 2-9-111 is amended to read:

Section 7. Section 2-9-111. Immunity from suit for legislative acts and omissions -- exceptions. (1) As used in this section:

- (a) the term "governmental entity" the includes state, counties, municipalities, and school districts;
- the term "legislative body" includes legislature vested with legislative the power by Article V of The Constitution of the State of Montana and any governmental entity given legislative powers by statute, including school boards.
- Except as provided in (section 3 of house bill 861), a A governmental entity is immune from suit for an act or omission of its legislative body or a member, officer, or agent thereof.
- (3) Except as provided in (section 3 of house bill 861), a A member, officer, or agent of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.
- (4) The immunity provided for in this article does not extend to any tort committed by the use of a motor vehicle, aircraft, or other means of transportation.

Renumber: subsequent sections.

### HOUSE PASSED HB 890 - WHAT IT IS ?

SENATE JUDICIARY

EXHIBIT NO. 16

DATE April 7 1987

REVENUE SOURCE: MADE UP FROM DISTRICT COURT VEHICLE FEES

AMOUNT: FY  $^{88} = $2,873,000$ FY  $^{89} = $2,923,000$ 

STATE PROGRAM WOULD RECEIVE A BIENNIAL GENERAL FUND APPROPRIATION EQUAL TO 15% OF THE DISTRICT COURT VEHICLE FEES COLLECTED IN THE COUNTIES.

AMOUNT: FY  $^{88}$  = \$ 430,950 FY  $^{89}$  = \$ 438,450 BIENNIAL TOTAL = \$ 869,400

ALL COUNTIES WOULD RETAIN 85% OF THE DISTRICT COURT VEHICLE FEES COLLECTED IN THEIR RESPECTIVE COUNTIES, TO BE EARMARKED TO DIST. COURT RESERVE OR OPERATION

AMOUNT: FY 788 = \$2,442,050FY 789 = \$2,484,550BIENNIAL TOTAL = \$4,926,600

ONLY COUNTIES UNDER 30,000 POPULATION, WOULD BE ELIGIBLE TO APPLY FOR STATE PROGRAM REIMBURSEMENT OF CERTAIN CRIMINAL COURT COSTS IN THE GENERAL AREAS OF: CRIMINAL TRIAL TRANSCRIPTS, WITNESS FEES AND NECESSARY EXPENSES, JUROR FEES, INDIGENT DEFENSE, AND PSYCHIATRIC EXAMINATIONS. THESE REIMBURSEMENTS WOULD BE SUBJECT TO: 1.) THE COUNTY CERTIFYING THAT IT HAD SPENT THE EQUIVALENT OF THE DISTRICT COURT VEHICLE FEES RETAINED IN THAT COUNTY FOR THAT FISCAL YEAR 2.) STATE POOL FUNDS AVAILABLE AND 3.) CLAIM ELIGIBILITY EVALUATION.

GENERAL STATISTICAL CALCULATIONS SHOW THE FOLLOWING ABOUT THE STATE PROGRAM MECHANICS:

FY '86 TOTAL COURT COSTS IN 49 ELIGIBLE COUNTIES

MINUS THE 85% RETAINED VEHICLE FEES

REMAINDER

MULTIPLIED BY STATEWIDE FACTOR OF CRIMINAL COURT ACTIVITY

EQUALS PROJECTED ELIGIBLE CLAIMS / YEAR

\$ 6,030,216

- \$ 890,213

\$ 5,140,003

\$ .165

\$ 848,100

STATE POOL FUNDS FOR FY '88 = \$ 430,950

MINUS OPERATIONS - \$ 52,911

REIMBURSEMENT \$ S AVAIL. = \$ 378,524

RELATIONSHIP BETWEEN STATE POOL DOLLARS AVAILABLE AND PROJECTED ELIGIBLE CLAIMS SUGGEST THAT ELIGIBLE COSTS COULD BE AT LEAST 2.2 TIMES HIGHER THAN STATE POOL FUNDS AVAILABLE.

THE ABOVE PROJECTION SUGGESTS THAT THE STATE WOULD START FY '88 WITH A DEFINED PRORATED REIMBURSEMENT OF 30% OF EACH ELIGIBLE CLAIM APPROVED. THIS SYSTEM IS USED TO INSURE THAT EVERY CLAIM IN EVERY COUNTY, THROUGHOUT THE FISCAL YEAR GETS EQUAL REIMBURSEMENT. SHOULD FUNDS BE AVAILABLE AT THE END OF THE YEAR, THOSE FUNDS WOULD BE PRORATED AGAINST THE 70% BALANCES FOR THE YEAR. SHOULD A SURPLUS STILL BE AVAILABLE, IT WOULD BE DISTRIBUTED TO THE ABOVE 30,000 POPULATION COUNTIES.

SENATE JUDICIARY

EXHIBIT NO.\_\_\_\_

### APRIL 7, 1987

STATEMENT BY NEWELL ANDERSON, ADMINISTRATOR LOCAL GOVERNMENT ASSISTANCE DIVISION OF THE MONTANA DEPARTMENT OF COMMERCE

### BEFORE THE SENATE JUDICIARY COMMITTEE

### HOUSE BILL 890

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, FOR THE RECORD MY NAME IS NEWELL ANDERSON, AND I AM THE ADMINISTRATOR OF THE LOCAL GOVERNMENT ASSISTANCE DIVISION OF THE MONTANA DEPARTMENT OF COMMERCE. COMMERCE IS THE AGENCY THAT HAS ADMINISTERED THE DISTRICT COURT CRIMINAL COST REIMBURSEMENT PROGRAM FOR THE PAST 2 YEARS AND BEFORE THAT, ADMINISTERED THE DISTRICT COURT GRANT-IN-AID PROGRAM.

I BELIEVE IT APPROPRIATE TO POINT OUT AT THE BEGINNING - THAT THE DEPARTMENT OF COMMERCE IS NOT A "VESTED INTEREST" PARTY TO THIS ISSUE. AS SUCH, I COME BEFORE YOU TODAY AS NEITHER A PROPONENT NOR AN OPPONENT OF HB 890. WE ARE NOT A PART OF THE JUDICIAL BRANCH AND A SUCH WE DO NOT SET COURT SYSTEM POLICY. WE ARE NOT A PART OF LOCAL GOVERNMENT AND AS SUCH, WE DO NOT SET COURT BUDGETS AND MILL LEVIES. NOR ARE WE A PART OF THE ELECTED LEGISLATURE AND AS SUCH WE DO NOT APPROPRIATE FUNDS AND SET STATE POLICY. THOSE ARE THE "VESTED INTERESTS" IN THIS ISSUE. THE DEPARTMENT IN THIS ISSUE, IS ONLY THE AGENCY THAT ACTS AS THE FISCAL CONDUIT OF STATE APPROPRIATIONS PRESCRIBED BY THE LEGISLATURE. HB 890 ASKS YOU TO MAKE A CHANGE FROM THAT WHICH IS, AND THIS STATEMENT IS FOR THE PURPOSE OF PLACING BEFORE YOU, A SET OF HISTORICAL FACTS IN THE AREA OF DISTRICT COURT COSTS AND FUNDING, SO AS TO HOPEFULLY HELP YOU WITH YOUR DECISION.

FACT # 1. DEDICATED COUNTY DISTRICT COURT MILL LEVIES, AS DEFINED BY STATE STATUTE, WILL FULLY FUND ONLY 19 COUNTIES CURRENT ANNUAL COURT COSTS. THAT MEANS THAT IN 37 COUNTIES, MAXIMUM DISTRICT COURT MILL LEVIES ARE INSUFFICIENT TO FULLY FUND THE LOCAL RESPONSIBILITY OF DISTRICT COURT OPERATIONS.

> { 1st & 2nd Class Counties - 6 mills} { 3rd & 4th Class Counties - 5 mills} { 5th, 6th & 7th Class Counties - 4 mills} (7-6-2511. MCA)

FACT # 2. THE CRIMINAL COST REIMBURSEMENT PROGRAM THAT BEGAN IN FY '86 IS JUST THAT - A REIMBURSEMENT PROGRAM. FUNDS DISTRIBUTION IS DRIVEN BY ELIGIBLE CRIMINAL COSTS IN THE DISTRICT COURTS THAT ARE INCURRED BY COUNTIES AND THEN REIMBURSED BY THE STATE. THE STATE PROGRAM'S DISTRIBUTION IN FY '86 OF \$2.3 MILLION REPRESENTED AN AVERAGE STATE PARTICIPATION IN TOTAL DISTRICT COURT COSTS\* OF 17.3% STATEWIDE. THAT MEANS THAT ON THE AVERAGE, 82.7% OF THE DISTRICT COURT COSTS ARE FUNDED BY LOCAL EFFORT. \* EXCLUDES JUDGES SALARIES AND BENEFITS.

STATEMENT BY NEWELL ANDERSON HOUSE BILL 890 APRIL 7, 1987

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- FACT # 3. HEINOUS CRIME, ITS TIMING, ITS FREQUENCY, ITS LOCATION AND ITS ULTIMATE FISCAL IMPACT ON THE JUDICIAL SYSTEM ARE ALL UNPREDICTABLE. SIMPLY PUT IF THEY WERE PREDICTABLE THEY WOULD ALSO BE PREVENTABLE. HISTORY SHOWS THAT THESE TYPES OF CRIME GENERALLY CAUSE SIGNIFICANT COURT TRIALS THAT CAN ROUTINELY COST FROM \$40,000 TO \$90,000 EACH. HISTORY ALSO SHOWS THAT THESE TYPES OF CRIMES AND TRIALS HAVE A RECORD OF FREQUENT JUDGEMENT APPEALS.
- FACT # 4. THE EXISTING REIMBURSEMENT PROGRAM HAS DISTRIBUTED THE APPROPRIATED FUNDS PRECISELY AS THE STATUTE PRESCRIBES. THE FY '86 RECORDS SHOW THAT THE PROGRAM PAYMENTS TO COUNTIES WERE WELL WITHIN THE AMOUNTS DETERMINED ELIGIBLE BY THE YEAR END AUDIT.
- FACT # 5. THE EXISTING REIMBURSEMENT PROGRAM IS REFERRED TO AS "THE STATE ASSUMPTION OF CERTAIN CRIMINAL COSTS IN DISTRICT COURT." THE EXCLUSIVE DEFINITION OF "CERTAIN CRIMINAL COSTS" HAS DEFINED THAT THESE COSTS (NOT OTHER COURT COSTS) ARE A STATE RESPONSIBILITY NOT A LOCAL RESPONSIBILITY.
- FACT # 6. THERE ARE NO RELATIVE CONNECTIONS BETWEEN VEHICLE LICENCE FEES AND CRIMINAL COSTS IN DISTRICT COURTS OTHER THAN A REVENUE SOURCE.
- FACT # 7. HOUSE BILL 890, WITH ITS COURT COST TRACKING RESPONSIBILITY AND ELIGIBILITY THRESHOLDS, WILL COST AS MUCH TO ADMINISTER AT THE STATE LEVEL TO DISTRIBUTE \$378,000, AS IT HAS COST TO DISTRIBUTE \$2.5 MILLION PER YEAR DURING THIS BIENNIUM.

IN CONCLUSION MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, THE DEPARTMENT OFFERS NO CONCLUSION. WE ASK THAT YOU SOLICIT THOSE CONCLUSION DEFINITIONS FROM THE "VESTED INTERESTS".

I HOPE THE FACTS AND INFORMATION ATTACHED ARE HELPFUL TO YOU IN CONSIDERING HB 890. I AM AVAILABLE TO ANSWER QUESTIONS. THANK YOU.

County	Max. Allow Mills	Would Raise	1986 Court Costs	85% of Veh.	Amended elig. Threshold
Anaconda/Deer	Lodge 6*	74,760	154,161	25,983	128,178
Beaverhead	5	75,775	159,982	17,332	142,650
Big Horn	6	766,530	219,710	17,388	202,332
Blaine	6	187,506	123,339	13,518	109,821
Broadwater	4	43,708	51,793	9,910	41,883
Butte-Silver		280,722	642,415	84,468	N/A
Carbon	5 5	141,170	111,304	21,822	89,482
Carter	4	27,180	32,888	5,118	27,770
Cascade	6	536,514	1,046,448	177,288	N/A
	5	181,254	70,650	18,091	52,559
Custer Custer	5	91,370	235,476		
	4	32,680	42,359	30,988 7,772	204,488
Daniels	5	146,825	203,797	32,337	34,587
<u>Dawson</u> Fallon	6	694,632	51,650		171,460
	5			11,763 34,511	39,887
Fergus	6	109,370	183,352		148,841
Flathead	6	518,508	847,639	143,686	N/A
Gallatin	4	354,930	763,138	102,570	N/A
Garfield	6	26,756	23,517	4,625	18,892
Glacier		274,776	176,832	17,230	$\frac{159,602}{23,770}$
Golden Valley	4	20,956	25,830	3,058	22,772
Granite	4	21,848	44,249	7,946	36,303
Hill	6	272,208	641,151	44,431	596,720
Jefferson	5	76,930	100,372	18,733	81,639
Judith Basin	4	36,432	45,306	8,588	36,718
Lake	5	132,215	276,645	41,420	235,225
Lewis and Cla		360,606	760,291	123,206	N/A
Liberty	5	100,805	44,284	7,803	36,481
Lincoln	6	199,860	336,391	42,553	293,838
Madison	5	80,900	138,570	8,982	129,588
McCone	4	43,124	59,714	18,659	41,055
Meagher	4	31,892	49,300	5,782	43,518
Mineral	4	17,892	40,017	7,788	32,229
Missoula	6	738,798	1,765,660	190,409	N/A
Musselshell	5	136,385	93,993	11,532	82,461
Park	5	91,800	164,490	37,364	127,126
Petroleum	4	12,732	19,300	2,099	17,201
Phillips	6	236,082	78,829	15,483	63,346
Pondera	5	125,885	127,196	16,345	110,851
Powder River	6	405,078	55,674	9,082	46,592
Powell	4	55,212	77,977	15,678	62,299
Prairie	4	25,988	22,764	4,952	17,812
Ravalli	5	119,480	444,098	64,169	379,929
Richland	6	747,954	185,572	37,708	147,864
Roosevelt	6	461,598	114,838	21,849	92,989
Rosebud	6	1,466,184	156,894	25,262	131,632
Sanders	5	104,665	103,513	19,849	83,664
Sheridan	6	527,196	116,382	19,640	96,742
Stillwater	4	59,908	67,992	19,463	<u>48,529</u> ₹ N
Sweet Grass	4	26,832	52,760	9,767	42,993
Teton	5	93,170	99,066	19,885	42,993 79,181 117,515
Toole	6	288,162	133,039	15,524	117,515
Treasure	4	18,348	28,029	3,296	24,733 <b>巴</b>
Valley	6	262,662	131,660	26,421	105,239 ₹
Wheat land	4	28,356	45,352	6,580	24,733 105,239 38,772
Wibaux	5	140,880	58,159	3,934	54,225
Yellowstone	6	1,211,826	1,447,660	319,881	N/A
(* Consolid	ated Govern	ments have	no max. mill		= \$5,130,213

EXHIBIT NO. 17

16.472 5.082

10.07% 9.27% 16.58%

19.832

0.612

87 DATE B BILL NO.

> Aberage Percentage of Cour Coats Reimbursed FY 185 17.292

#13,293,465.21 \$2,296,815.13

nty Fand

Z OF TOTAL DIST. CT. CUSTS REIMB. TOTAL REIMB. FY '85

2.252 11.592 11.592 10.552 10.782 10.782 7.762 1.312 1.312

19,372

8.572 0.702

21.40g 5.74g 16.00g 26.03g 6.59g

FY 7815 # 00515

PLETRICE COURT

HAM, LEVY MILLS JUD. POPULATION ALLONED LEVIED DIST

804,400

ZELLIOUS FORG

TOTAL

Total FY '85 District

Court Expenditures From Ell. - Peported By County Clerk and

\$59,652.04 \$40,275.17 \$6,207.02 \$7,423.67 \$6,593.31 \$27,272.82 \$24,361.40 \$2,920.45 \$19,021.42 \$1,824.81 \$18,829.40 \$5,301.77 \$15,464.96 \$2,265.58 \$481.54 \$14,328.02 \$21,145.53 \$60,354.53 \$9,536.77 \$92,676.52 \$6,968.55 \$30,558.51 \$5,837.61 \$33,096.36 \$167,632.18 \$62,791.32 \$124,176.04 \$24,475.39 \*433.54 \$88,402.49 5506,595.92 \$3,411.27 (\$23,689.06 \$673,98 11,650.70 151,301.35 \$3.9.36 \$3,690.31 522,721.12 \$5,529.14 535, 323, 27 \$231.72 5147,963,34 523,20 512,654.22 10-106,93 30,747.45 \$42,359,33 \$203,796,73 \$51,649,75 \$22,763,67 \$444,090,41 \$154,161.16 \$159,982.00 \$219,710.00 \$176,831.79 \$51,793.00 \$642,415.06 \$111,304.00 \$1,046,440.30 \$70,649.84 \$235,475,87 \$183,351.92 \$647,638.97 \$763,138.43 544,249.38 545,305.78 \*276,644.73 \$750,290,98 544,284.00 \$336,391,00 559,714.05 \$49,300.00 \$40,016.82 \$164,490.02 \$19,300.47 195,572.00 £115,382.09 81.5P.945.18 \$52,759,83 \$123,339.25 532,807.80 \$100,372.38 \$138,569.97 £33,49**3.**06 1114,037,04 \$156,693.58 \$99,065.92 \$133,038,58 523,516,97 #76,629.11 FIN FIN 10TH 17TH 15TH 15TH HTC 1511 1511 1911 1970 360 1ST HEST HEST STH 16 TH 10 TH 11 TH 5TH 10TH 20TH I 151H 161H 201H 251H 151H 12TH 10 16.13 3.998 5.000 0.000 3.390 1.492 5.853 4.248 4.450 0.000 5.000 0.000 1, 199 2.590 4.1100 9.853 3.367 4.00n 6.000 000.9 3,873 0.000 5.000 4.000 0.00 6.900 2.354 7.000 6.100 5.000 1.000 5.250 0.0.0 0.00 2.480 4.200 0.000 5,000 5.033 3.500 4.000 4.000 3.364 0.00 0.440 8.318 4.000 3.146 6.000 0.000 0.680 2.121 Mill\* Mill\* H:11x ni11# Mi 11s Hi 11 \* M:11\* M; 1.1 \* M11.11# M, 115 Mi 13 ≉ h; 1.1 # 1111 N:11\* ni I1s Hi 11 • 2, 200 12, 200 3, 200 13, 000 52, 300 45, 310 11,000 6,900 3,300 6,100 1,700 1, 100 2,600 18,500 7,300 2,700 2,400 5,000 2,800 13,300 5,400 6,800 6,700 2,500 1,300 12,200 9,000 9,900 1,600 19,400 700 14,900 5,700 14,300 2,300 75,200 23,500 6,000 4,600 HARDNOR-DEER LODGE ante, Silver rou ENIS AND CLARK JULTHERSON JULTH BHSIN LAKE SOLDEN URLIEP POUFILL POUDER RIVER MISSELSHELL UFF F GERSS REHUTEMEND STANDARD ... STILL UNITER PETROLFUN DHEHTI AND PHILLIPS POMPERN MODE SES RUPTEVILL CHUITERU FLAIMEAD MT (U) THE CAPPTELD **HISSOULA** RICH AND HE STERM BULLETIPE ASSTRICE. GLECTER CHRMITE IRERTY PRHIRIE SHELLEHID STEEN S THEORY MOS LON HEHSHER SHRIFES AF1 ER RAUMLLI FRI LON HERE LOPE CHSTER MINERAL VALUEY H. All P. HOUSE HE Ter OME 1 juli . FIGN SHEK

0.962 31.962 115.742 117.732 22.062 110.392 15.062 14.482 33.222 36.322

SENATE JUDICIARY

EXHIBIT NO. 18

DATE CLOSIO 7, 1987

BILL NO. HB 890

DICTOICE	COURT COSTS	DESCRIP	COLLEGED	1000
DISTRICT	COULT COSTS	- DEUTAILE	COLLECTED	- 1986

COUNTY	POPULATION	DISTRICT	COUNTY	FEE REVENUE FY '86	.85% OF FEE REVENUE COLLECTED	.15% OF FEE REVERUE COLLECTED	ELIGIBLE CRIMINAL COSTS REIMBURSED FY '86	DIFFERENCE BETWEEN AMOUNT REIMBURSED AND 85% OF FEES
AVACOURA REED COROR	11 (00	200					*****************	• • • • • • • • • • • • • • • • • • • •
ANACONDA-DEER LODGE BEAVERHEAD	11,600 8,500	3RD	5th	30,568	25,983	4,585		
BIG HORN		STH	4th	20,390	17,332			
BLAINE	11,400 6,900	13TH	lst	20,457 15,904	17.388	3,069	35,324	(17,936)
BROADWATER	3,300	17TH	2nd	15,904	13,518	2,386	33,096 4,448 60,355	(19,578)
BUTTE-SILVER BOW	36,600	1ST	5th	11,659 99,374	13,518 9,910 84,468	1,749	4,448	5,462
CARBON	8,300	2ND 13Th	2nd 3rd				60,355	
CARTER	1,700	16TH	6th	25,673 6,021				
CASCADE	80,100	8TH	lst	208,574	3,118	903	232	4,886
CHOUTEAU	6,100	12TH	2nd	21,284	177,288 18,091 30,988	31,286	151,301 1,589	25,987
CUSTER	13,300	16 <b>T</b> H	4th	36,456	20,091	3,193	1,589 <b>27,</b> 273	16,502
DANIELS	2,800	15TH	6th	9,143	<b>30,</b> 988 <b>7,7</b> 72	1,371		
DAWSON	12,700	7TH	3rd	38.044	30,988 7,772 32,337	5 707	1,592 <b>24</b> ,361	
FALLON	3,800	16TH	lst	38,044 13,839	32,337 11,763	2,076		
FERGUS	13,000	10TH	3rd		34.511	6.090	19,021	
FLATHEAD	52,300	11 <b>T</b> H	lst	40,601 169,042	143,686	25,356	167,632	
GALLATIN	45,300	18TH		120,670	11,763 34,511 143,686 102,570 4,625	18.101	62,791	
GARFIELD	1,700	16TH	6th	5,441	4,625	816	62,791 1,825 18,829 339	2,800
GLACIER	11,000	9TH	2nd	20,271	17,230	3,041	18.829	(1,599)
GOLDEN VALLEY	1,100	14TH	6th	3,598	3,058	540	339	2,719
GRANITE	2,600	3RD	6th	9,348	7,946	1,402	18,829 339 3,690 124,176	4,256
HILL	18,500	12TH	2nd	52,272	44,431	7,841	124,176	(79,745)
JEFFERSON	7,300	5 <b>T</b> H	4th	22,039 10,104	18,733 8,588	3,300	24,4/3	(3./4/)
JUDITH BASIN LAKE	2,700	10TH	6th	10,104	8,588	1,516	434 88,402	8,154
LEWIS AND CLARK	19,400	20TH	3rd	48,729 144,948	41,420 123,206	7,309	88,402	(46,982)
LIBERTY	44,300	1ST	lst	144,948	123,206	21.742	92.677	30.529
LINCOLN	2,400 18,000	12TH	3rd	9,180 <b>50</b> ,062	7,803	1,377 7,509	6,969	834
MADISON	5,800	19TH 5 <b>T</b> H	2nd	50,062	42,553	7,509	59,657	(17 104)
McCONE	2,800	7TH	4th 5th	10,567 21,952	8,982 18,659	1,585		(31,293)
MEAGHER	2,200	14TH	6th	6,802	18,659	3,293 1,020		12,452
MINERAL	3,500	4TH	7th	9,162	5,782 7,788	1,020		
MISSOULA	75,200	4TH	lst	224,011	190,409	1,374	6,593 586,596	1,195
MUSSELSHELL	4,600	14TH	3rd	13,567	11,532	33,602	586,596	(396,187)
PARK	13,300	6TH	4th	43,958	37,364	2,033 6 504	3,411 23,689	8,121
PETROLEUM	700	10TH	7th	2,469	2.099		23,089	13,675
PHILLIPS	5,400	17 <b>T</b> H	2nd	18.215	15 483	2,732		1,981 14,609
PONDERA	6,800	9TH	3rd	19,229	16,345	2,884	5.302	11,043
POWELL	6,700	3RD	5th	18.445	15,678	2,767	15,465	
POWDER RIVER PRAIRIE	2,500	16TH	lst	10,685	9,082	1,603	2,266	
BANALLI	1,900	7TH	6th	5,826	4,952	874 11,324	482	4,470
RICHLAND	23,500	4TH	3rd	75,493	64,169	11,324	147,963	(83,794
ROOSEVELT	14,900 11,300	7TH	lst	44,362	37,708	6,654 3,856	30,559	7,149
ROSEBUD	12,200	15TH 16TH	lst	25,705	21,849			16,011
SANDERS			lst		25,262	4,458		
SHERIDAN	9,000 6,000	20TH 15TH	3rd	23,352	19,849	3,503		
STILLWATER	5,800	13TH	1st 5th	23,106 22,898	19,640	3,466	-	-
SWEET GRASS	3,300	6TH	6th	11,490	19,463 9,767	3,435		
TETON	6,400	9TH	4th	23,394	19,885	1,724		1,020
. TOOLE	5,700	9TH	2nd	18,264	15,524	3,509		14,356
TREASURE	1,000	16TH	7th	3,878	3,296	2,740	•	3,865
: VALLEY	9,900	17TH	2nd	31,083	26,421	582	-	(11,032
WHEATLAND	2,300	14TH	6th	7,741	6,580	4,662		<b>5,2</b> 75
WIBAUX	1,600	7TH	3rd	4,628	3,934	1,161 694		3,840
YELLOWSTONE	113,400	13TH	lst	376,331	319,881	<b>56,4</b> 50		3,809 111,804
TOTAL	804,400			\$2,390,024	\$2,031,520	\$358,504	\$2,296,815	

YT#100	HAK, LEVY POPULATION PLLÜMED		MILLS JUD. LEVIED DIST.	VALUE OF RILL	ANGUNT RAISED BY TAXATION	TOTAL DISTRICT COURT COSTS FY '85 H	REVENIE COLLECTED FY 1956	BSZ OF REVENUE COLLECTED	152 OF PEVENUE COLLECTED	TOTHL REIMB. FY '36	2 OF TOTAL DIST. CT. COSTS REIMS.
RHACONDA-DEER LODGE	11,600	;	11.528 380	\$12,460.00	\$144,8	\$154,161.16	\$30,568.00	\$25,982.80	4,585	\$32,990.63	21.40%
BEATERFEAD	3,509 5	7.11 <b>*</b>		\$15,155.00	an a	\$159,982.00	520.350.00	417,331.50	600 m	99,257,19	356. B
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BRORDLATER	3,300 4	7.11.8		\$10,927.00	244, 109, 79	00.88%.00%	511,659,00	\$9,910.15	0.7. 1.1.	00 T-177 T-100	7 7 7 W
Burre-SilveR Bou	26,600			\$46,787.00			\$39,374,00	584,467.90	14,506	350,354,53	7 10 CM
CARBON	3,300 5	7111 a		\$28,234.00	\$70,020.32		\$25,573,00	\$21,322.05	3,851	55,536,77	3,572
CARTER		# I I		\$6,735.00		•	\$6,021.00	55,117,85	606	8231.72	0.70%
CHSCHUE		# 1 T T I	9.000 SIN	355,419.00		•	2503.574.00	05.782.778	31,286	4151, 301, 35	14. 45%
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DANTELS	2,300	111		\$8,170.00			39,143,00	\$7.771.55	1.371	21.501.93	11.582
CALISON		Mills	4.260 7TH	\$29,365.00			538,044,00	332,337,40	5,707	524,351,40	11.952
FALLON		Mills		\$115,772.00			\$13,835,00	\$11,763.15	2,076	32,920.46	5.65%
FEREUS	13,000 5	7117 x	88	\$21,874.00			\$40,601.00	\$34,510,35	6,090	\$19,021.42	10.372
COL DITA		# T T T		\$36,418.UU			\$159,042.00	\$143,685.70	4.55 3.55 4.55 4.55	5157,632.16	19.79%
GREFIELD		1114	3.500 16TH	85,589,00			150, 641, 00 1 441, 00	\$4.624 AS	13,101	307,791,32	10 F
GLACIER	11,000 6	7111		345,796,00			520,271.00	\$17,230,35	9,041 0,041	\$18,829,40	10 V
GOLDEN VALLEY	1,100	N111 s		\$5,239.00			33,598,00	\$3,058.30	540	\$339.26	1.912
GRAHITE		1118	4.000 3RB	\$5,462.00			39,348.00	57,945.80	1,402	\$3,690.31	8.34%
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TI CONE		4111	4.000 7TH	\$10,781.00			\$21,952,00	313,559.20	9 60 9 60 9 60 9 60 9 60 9 60 9 60 9 60	(A) (B) (A) (B) (B) (B) (B) (B) (B) (B) (B) (B) (B	CONTROL CONTROL
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nineest.	3,500 t	7,11 g	3.146 4TH	\$4,473.00		•	\$9,162.00	27,787,70	₩.O.4	18.888.81	16.43%
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PONDERA	-	#:11 •	5.000 9TH	567,513.00	\$337,565.00	\$127,195,96	119,229,00	\$15,344,65	2,834	\$5,301.77	₩.
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PRHIE		# 11 F	3.364 2TH	\$23.836.00	\$80.386.14	822,269,67	35,826,00	24.952.10	7000	0	7.05
PRIVALLI	23,500 5	1118	5.000 4TH	\$23,896.00	19, 48	\$444,098.41	175,493.00	364,169.05	11.82	\$147,963,34	
RICHLAND		#11#	•	\$124,659.00	20.00	\$185,572.00	144,362.00	337,707,708	6.534	520,553.51	16.47
ROUSEVELF		4111	1.000 :5TH	376,933.00	575. 33.00	40.7.037.04	225, 705,00	\$21,849.25	3,356	\$5,837.61	5.082
Pallaken Pallaken	9,000	111	0.000 20TH	\$20,933.00	60.05	\$103,512,58	\$23,352,00	419 649 20	กาศ การ การ	422, 121, 12	4.4
SHERIGHN	_	H111s		597,856.00	\$105,351.33	\$116,332,09	523, 106,00	319,640,10		00 TUN 000	
STILLWAFER		A111s	•	\$14,927.00	\$78,629.25	\$57,352,18	\$22,338,00	319,463.30	3,40	\$5.301.01	2 12 P
SUEET GRASS	4,300	# 11 F	4.000 6TH	\$6,708.00	\$26,832.00	352,759,83	511,430.00	\$9,766.50	1.724	50,747.4S	16.58
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TAERSURE		4114	-	24,587.00	\$11,880.33	\$28,029,89	53,878,00	53,296,30	0 00 00 00 00 00 00 00 00 00 00 00 00 0	W11.008.70	26.767
VALLEY		H111#	_	\$43,777.00	\$104,627.03	\$131,660.00	531,083.00	\$26,420.55	4.65.2	521.145.53	18.062
WHERTLAND	2,300	Mills	_	\$7,089.00	\$28,356.00	345,351.54	\$7,741.00	\$6,579.85	1,161	9	6.0.4 %
YELLOUSTONE	113,400 6	nills nills	5.250 13TH	\$201,971.00	\$1,060,347.75	•^•	5376,331.00	\$3,933.80 \$319,881.35	55,450	\$125.28	0.222
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1 2	804,408			00.020.016.026		17.504,553,516	P20,086,56	52,031,520	335 <b>8</b> ,504	\$2,296,816.13	17.28% Av

880 SENATE JUDICIARY BRL NO HB EXHIBIT NO. DATE

17.28% Average Costs A

OFFICE OF THE

### COUNTY ATTORNEY

ROSEBUD COUNTY
FORSYTH, MONTANA

SEN TE SUDICIARY

EXHIBIT NO. 20

DATE April 7, 1987

BRL NO. HB 890

April 6, 1987

Senate Judicial Committee Capitol Building Helena, MT 59620

Dear Committee Members:

I have reviewed House Bill 890 and have concluded that it is a poor piece of legislation. My personal experience as a small county prosecutor (Hysham, Treasure County) may shed more light on the situation.

Less than two months after the current law was effective, M.C.A. 3-5-901 et al, we had our first homicide case in Treasure County in 66 years. The criminal, was one Allen Blythe, who had a long history of crimes, ranging from drug charges, theft charges and aggravated assault. In August, on a Saturday night, in Hysham, Allen Blythe took Marty Junge, who was intoxicated at a .025 level, behind the Town and Country Bar and proceeded to stomp and beat the life from Marty Junge. Under Montana law, the crime committed was deliberate homicide. Because of the circumstances, however, it was the opinion of many experienced prosecutors that I discussed the case with, that it would be a difficult case to get a deliberate homicide conviction. Allen Blythe, as with most dangerous felony offenders, was appointed an attorney, Gary Wilcox from Billings.

The case proceeded to trial, with a conviction of a lesser charge. Allen Blythe received a 20 year sentence, and was designated a dangerous offender. He will be eligible for release in approximately eight years, hopefully he will be there longer.

The general consensus in the community, after the conviction and sentencing, was that the community was very glad to be rid of Allen Blythe for at least eight years. The point I wish to make to the Judiciary Committee, is that if House Bill 890 passes Allen Blythe might be free from prison today. If Treasure County had been faced to assume the entire cost, a plea bargain for financial reasons may have been necessary.

Compared to other homicide trials, the cost of <u>State v. Blythe</u> was within reason. However, a seventh class county like Treasure, at the time had a taxable valuation of approximately 4.8 million, does not have the financial resources to cope with a major felony case. The total cost of <u>State v. Blythe</u> was \$17,000. A significant emergency mill levy would have been required had the district court reimbursement legislation was not in effect. That legislation allowed me to prosecute the case as the law required.

SENATE JUDICIARY

EXHIBIT NO. <u>20</u>

DATE 4-7-87

Senate Judicial Committee Page 2 April 6, 1987

As with any legal action, either public or private, the cost is a concern. But present court system, with the legal requirement of court appointed counsel for indigent criminal defendants, creates a tremendous potential liability for a small county with a limited taxable base. M.C.A. 3-5-901 et al has done a very good job of removing this concern. House Bill 890 reinstitutes this concern.

When I was county attorney in Treasure County, I did not want to be put in the position of making a decision on whether or not to prosecute a case because of the prohibitive cost of court appointed counsel. I was very glad as were the people of my county, that we were not in that position in State v. Blythe.

A criminal defendant does not know county lines. They are as perfectly capable in committing a crime in Yellowstone County, as they are in Treasure County. Should the disposition of the criminal matter be different, because Yellowstone County has a taxable base to prosecute those crimes, and Treasure County does not?

I thank you in advance for your consideration in rejecting House Bill 890.

Sincerely,

Gary A. Ryder

Deputy County Attorney,

Rosebud county

GAR/nls

EXHIBIT NO. 2/
DATE April 7, 1987
BILL NO. HB 890

MISSOULA COUNTY

DISTRICT COURT FUND

CRIMINAL CASE EXPENSE

REIMBURSEMENT PROGRAM REPORT

JANUARY 1987

RICHARD VANDIVER COURT OPERATIONS OFFICER

### EXECUTIVE SUMMARY

The first year of the District Court Criminal Case Reimbursement program in Montana resulted in the distribution of funds to counties on the basis of the costs of processing criminal cases. Missoula County received over 25% of the state's reimbursement funds, the largest share of any of the counties. The reasons for this apparent disproportional disbursement of funds are discussed in this report.

One major point of the report is that, unlike the grant in aid program previously in place, the purpose of the present program is not to provide funds to the counties on the basis of total District Court expenditures but is to reimburse counties for the actual costs of processing criminal cases. Discrepancies between the counties in the amounts of reimbursements received can be explained on the basis of differences in: a) accounting; b) prosecution policies; c) type of indigent defense, and, most importantly, differences in rates of serious and complex crimes. Each of these reasons is discussed in the report in some detail with tabular and graphic comparison between the 10 most populous in Montana. Evidence is presented that relationships between these 10 most populous counties are not new but have existed for several years.

Missoula County went through a major revision of the Indigent Legal budget to allow for detailed accounting for expense of cases in District Court Criminal, District Court Non-Criminal and Justice Court categories. A thorough audit of Missoula County bills by the Department of Commerce Division of Local Government Services revealed that the expenses reimbursed were legitimate.

The County Attorney's office in Missoula County pursues a policy of vigorous prosecution of criminal cases in both Justice Court and the District Court. That policy and the large amount of resources available to the office, compared to other counties in Montana, result in high costs for processing and for defense.

During fiscal year 1986 Missoula County changed from a system of Indigent Defense through contracts with private attorneys to a 4 month period of assignment of attorneys where the attorneys were paid an hourly rate to an in-house Public Defender's office. This transition was an expensive one and resulted in attorneys receiving larger rates of pay for the handling of indigent defense cases. The transition was made due to an inability of the attorneys under contract in fiscal year 1985 and the Board of County Commissioners to come to terms over the amounts to be paid for Indigent Defense. The in-house Public Defenders office was set up to provide more control to the

Commissioners over the constantly rising costs of indigent defense. While the costs during fiscal year 1986 were great they can be seen as the result of a transitory situation.

The major reason for the high costs of District Court Criminal case processing during fiscal year 1986 is the high number of complex, serious criminal cases. One case alone cost over \$94,000 dollars and resulted in a hung jury so will have to be tried again. A list of the major expensive cases is provided in the report.

Finally, a month by month comparison of the bills submitted from Missoula County to the Department of Commerce for fiscal year 1986 and thus far in fiscal year 1987 show the expenses are dropping and are expected to continue to do so. Undoubtedly as they experience the regrettable rise in serious, complex criminal cases, other counties will need to increase their billings to the District Court Criminal Reimbursement program.

The program is a valuable one for any county which has criminal cases, the prosecution and processing of which are very expensive under our current system of justice.

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### INTRODUCTION

The 49th Legislature of Montana passed a bill providing for the state to reimburse counties for legitimate expenses of District Court Criminal cases. This bill (Senate Bill 25) was intended, at least in part, to ease the burden on the counties of the expenses of criminal trials which are frequently costly. The program, as set up and operated through the Department of Commerce, replaced the old grant-in-aid program through which counties received assistance for District Court expenses.

The District Court Criminal Reimbursement program was never intended to be a block grant program whereby all counties got "their share" of the funds based on their population. Instead, the program required counties to carefully document their expenses related to the processing of criminal cases in the District Court and receive reimbursement for those expenses.

Missoula County received a large allocation of the reimbursement funds and this has been the subject of some concern to politicians in other parts of the state. This concern has been expressed in the press as well as in public meetings. This report is an attempt to explain the reasons for the expenses for which Missoula County has been reimbursed.

It should be noted at the outset that the Department of Commerce has carefully audited every billing sent to them by Missoula County to determine the legitimacy of the expenses incurred. Any questions about the legitimacy of those expenses should be directed to Mr. James M. Courtney, Accounting and Management Systems Supervisor in the Department of Commerce or to Mr. Newell Anderson, Administrator of the Department's Local Government Assistance Division.

### REIMBURSEMENTS FOR FY 1986 FOR LARGE COUNTIES

In Table 1 below a comparison of some pertinent data for the 10 most populous counties of Montana is presented. Counties are listed in rank order by population size and the amount of funds received through the Department of Commerce District Court reimbursement program is shown for each. This table shows that Missoula county received a large amount of the funds when compared to the size of its population.

Five of the ten largest counties received larger amounts of the money than they would have been given had the funds been allocated on the basis of population. The other five counties received smaller amounts than they would have if the program had been a block grant. Overall these 10 counties representing 63% of the population of the state received nearly three-fourths of the entire reimbursement fund.

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TABLE 1

COMPARISON OF POPULATION WITH DISTRICT COURT CRIMINAL REIMBURSEMENTS FOR 10 MOST POPULOUS COUNTIES OF MONTANA FISCAL YEAR 1986

spun	Levied	5.25 5.25	9	4	9	5.993	9	0	כו	כוו	9	
Local Funds	Allowed	9	9	9	9	9 .	9	0	כנו	מו	9	
inal nt	Percent Difference	-5.04	-3.37	+16.19	+0.80	-2.90	-1.48	-1.92	+3.52	+1.44	+3.10	
District Court Criminal State Keimbursement	Fercent Of Total	790.6	765.9	25.54%	7.30%	2.73%	4.03%	2.63%	6.44%	3.85%	5.40%	73.57%
District State R	Dollar Amount	\$208,077.31	151,301.35	586,595.92	167,632.18	62,791.32	92,676.52	60,354.53	147,963.34	88,402.49	124,176.04	\$1,696,971.00
ָם ה ה ה	Total State Fogulation	14.10%	9.96%	9.35%	6.50%	5.63%	5.51%	4.55%	2.92%	2.41%	2.30%	63.23%
	Foculation	113,400	80,100	75,200	52,300	45,300	44,300	35,600	23,500	19,400	18,500	208,600
	County	Yellowstone	Cascade	Missoula	Flathead	Gallatin	Lewis & Clark	Butte-Silver Bow	Ƙavalli	Lake	Hill	TOTAL

Montana Deptartment of Commerce - Local Government Service Source:

### POSSIBLE EXPLANATIONS OF DIFFERENTIALS IN REIMBURSEMENTS

Presumably there are many reasons for the discrepancies reimbursements of the counties. between differences could account for some of them, variations in the policies of County Attorneys regarding charging and vigorousness of prosecution could account for some of the differences in costs eligible for reimbursements, and differences between counties in the form of indigent defense could account for some differences since different forms have different costs. The most obvious difference between the counties is likely to be the differences in the numbers of serious crimes which require jury trials, complex prosecution and defense, and related expenses. serious criminal felony case can cost a county a large amount of money to process. Several such cases compound these expenses many times over. It is just for such situations that the reimbursement program was created.

### ACCOUNTING DIFFERENCES

Following the 49th Legislature there was a period of uncertainty about how to change county accounting procedures to keep track of District Court Criminal case expenditures. Past accounting in Missoula county had grouped together civil and criminal expenditures and District Court and Justice court expenditures. This new program, however, required revision of budgets to allow for the categorization of all line items into District Court Criminal expenditures, District Court Non-criminal expenditures, and Justice Court expenditures. The Clerk of Court's budget was changed to allow for distinguishing between Criminal and Civil jury and witness expenses. The Indigent Legal budget was separated into the three parts indicated above as well as separating out requests for transcripts and psychiatric exams made by the County Attorney and those made by public defenders.

On numerous occasions the author has had discussions with Department of Commerce officials about Missoula County accounting in the District Court fund as compared to other counties. It is obvious from those discussions that there are no consistent procedures for accounting for District Court expenses between the counties. Both Mary Wright, Accountant, and Jim Carver, Auditor, who work for the Department of Commerce on this reimbursement project, have indicated that there are significant variations in the way in which counties keep track of District Court expenditures. For further documentation of this point see page 2 of "Preliminary Report on the Fiscal Year 1986 Operation of the Montana District Court Criminal Reimbursement Program," October, printed by the Department of Commerce, (hereinafter referred to as the Preliminary Report).

Table 2 shows the total District Court budgets for FY 1986 of the most populous counties in Montana. It should be noted that these figures in Table 2 represent budgeted amounts and not actual expenditures.

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TABLE 2

DISTRICT COURT AND INDIGENT BUDGETS FOR THE 10 MOST FOFULOUS COUNTIES IN MONTANA FISCAL YEAR 1986

18.9%	N/A	\$134,105	\$16.36	\$778,842	MEAN:
M/M	A/N	\$1,341,05B	A/N	<b>\$7,788,421</b>	TOTAL:
29	5.61	103,809	19.15	354,265	Hi 1 1
40	6.44	125,000	16.21	314,593	Lake
29	6.58	154,732	22.72	534,042	Favalli
7	1.26	45,952	17.18	628,850	Butte-Silver Bow
10	1.65	73,000	16.43	728,032	Lewis & Clark
11	1.29	58,400	11.47	519,393	Gallatin
9	1.12	58,400	17.74	927,916	Flathead
26	4.98	374,571	18.83	1,416,053	Missoula
18	1.81	144,819	10.25	821,215	Cascade
13%	1.78	\$202,375	*13.62	*1,544,062	Yellowstone
			`		
PERCENT OF TOTAL BUDGET	RATE OF FOPULATION	INDIGENT LEGAL BUDGET	COST PER <u>POFULATION</u>	DISTRICT COURT BUDGET	COUNTY

Source: Montana Association of Counties Data

This table indicates there are large differences between counties in budgeted amounts for the District Court. The amounts budgeted per person in the population of the county reveal a range from \$22.72 for Ravalli County to \$10.25 for Cascade County. The Preliminary Report (2nd page 2) shows that Indigent Defense represents 70% of the reimbursements made for the state. Undoubtedly the indigent defense portion of all District Court budgets is a significant portion of the entire budget. Table 2 shows that that proportion varies from 6% in Flathead County to 40% in Lake County. This variation can also be seen in the budgeted amounts per person which ranges from \$6.58 per person in Ravalli County to \$1.12 per person in Flathead County.

One should expect to find different costs for District Courts in the various counties of the state. Obviously the larger population centers would be expected to have larger total budgets and smaller per population costs since there is efficiency of scale in the handling of court cases. courts can handle more cases in less time and at less expense than courts in smaller communities where court personnel have to spend much time in travel. Also in small counties inefficiencies of paying for the costs of maintaining courtrooms which are unused much of the time and paying salaries of court personnel who, because of the small number of cases, aren't able to work at maximum levels of cost-efficiency, make costs per population high in those counties.

Nevertheless, Table 2 indicates support observations of the Department of Commerce staff that there are different ways of keeping track of District Court within the various counties. expenses Lacking consistent accounting procedures across the state it is impossible to actually compare the expenditures for District Court between the various counties. For example, Missoula County includes a variety of items within its budget called Indigent Legal, which do not involve payments to attorneys for work on public defender cases. This budget includes expenditures for transcripts, psychiatric exams, chemical dependency testing, detention of people awaiting hearings or commitment to Warm Springs in the local hospital psychiatric ward, and other related court expenses involved in the processing of both civil and criminal cases for indigents. The extent to which other counties account for expenses of this type within the District Court fund is not known.

The expenses which qualify for reimbursement under the District Court Criminal program must meet the specific criteria required by the Department of Commerce regardless of how the individual county accounts and pays for them. It seems highly likely that there are differences between what counties request reimbursement for based, in part, on differences in accounting.

SENATE JUDICIARY

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### PROSECUTION POLICIES

The decisions of prosecutors always dramatically impact the costs of processing criminal cases. Extensive research throughout the U.S. has documented the savings in expenses of the process popularly known as "plea bargaining." For example, Rosette and Cressey, <u>Justice By Consent</u>, and M. Heumann, <u>Plea Bargaining</u> document the results of attempts to change plea bargaining practices on the courts and the costs of taking many cases to trial.

Courts in which plea bargaining has been eliminated through state law (e.g., Alaska) or through judicial unwillingness to accept them, produce changes in prosecutors' decisions about the number and types of cases to prosecute. Without those changes, jails and prisons fill up and pressures increase for spending large amounts to expand physical facilities.

Table 3 below shows that there are wide fluctuations in crime rates and in numbers of criminal case filings in District Courts in the ten most populous counties. Three counties (Lake, Missoula, and Yellowstone) have higher percentages of criminal case filings than their percentage of the population. The rate of criminal case filings varied from .63 per 160 people in Lake county to .23 per 100 population in Butte-Silver Bow county. These variations show that there are clear differences in prosecution policies in the ten most populous counties. The differences are not necessarily based on the rates of serious crimes in the counties since Lake county has a very low rate of serious crime but the highest rate of criminal case filings and Silver Bow county has an average rate of serious crime but the lowest rate of criminal case filings.

To provide an historical comparison Table 4 is included below. This table shows that the number of cases filed in District Court has remained fairly stable. In general the larger the staff of the County Attorney's office the larger the budget and the larger the number of criminal case filings.

Missoula county has the state's second highest rate, among the 10 most populous counties, of criminal case filings, yet ranks 6th among all counties in serious crime rate and third in total population. Missoula's County Attorney has publicly committed his office to a policy of vigorous prosecution of serious criminal cases. In addition, due to his proximity to the University of Montana Law School, he has at his disposal a cadre of interns who handle the prosecution of minor cases. This allows the Deputies to spend more time on serious cases. Undoubtedly this policy and available resources in part account for high overall costs in the processing of criminal cases.

TABLE 3

COMPARISON OF POPULATION, CRIME RATE, AND CRIMINAL CASE FILINGS
FOR THE 10 MOST POPULOUS COUNTIES IN MONTANA

CALENDAR YEAR 1985

County	Criminal 0 Case Filings	Rate of* Criminal Case Filings	Rate of** Index <u>Crime</u>	Percent Of Total State Case Filings	_	Percent of State Populat.
Yellowstone	454	.40	6.2	14.66%	(+)	14.10%
Cascade	275	.34	6.2	8.88	(-)	9.96%
Missoula	416	.55	5.2	13.43	(+)	9.35%
Flathead	180	.34	5.5	5.81	(-)	6.50%
Gallatin	140	.31	4.8	4.52	(-)	5.63%
Lewis & Clark	158	.36	6.0	5.10	(-)	5.51%
Butte-Silver B	3ow 84	.23	4.3	2.71	(-)	4.55%
Ravalli	67	.29	2.7	2.16	(-)	2.92%
Lake	122	.63	2.4	3.93	(+)	2.41%
Hill	64	.35	5.5	2.07	(-)	2.30%

Average = .38

State Rate = 4.2

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<sup>@</sup> Montana State Judicial Information System

<sup>\*</sup> Number per 100 population

<sup>\*\*</sup> Montana Board of Crime Control Annual Reports - Index crimes are 7 most serious offenses. Rate = Number per 100 population.

<sup>\*\*\*</sup> Rate higher (+) or lower(-) than percent of state population.

1981 CRIMINAL CASE FILINGS,
FY 1982 COUNTY ATTORNEY'S BUDGET, AND
NUMBER OF COUNTY ATTORNEY'S STAFF FOR 10 MOST POPULOUS COUNTIES

TABLE 4

	1981	FW 3000	\$ mmon N	••	CAFF	CAT
COUNTY	CRIMINAL CASE FILINGS	FY 1982 BUDGET	ATTORN FULL	PART	CLERI FULL	PART
Yellowstone	437	382,332	8		6	2
Cascade	202	289,547	5		4	
Missoula	351	462,630*	10		. 5	2
Flathead	147	310,000	4	1	5	
Gallatin	107	203,000	. 4		2	
Lewis & Clark	255	202,510	3	1	<b>2</b> ·	
Butte-Silver B	86 86	204,118	3	•	2	
Ravalli	86	124,118	1		2	
Lake	110	**	**	**	**	**
Hill	66	80,794		3		2

Source: Prosecution Services in Montana, A Report to the Sub-committee on Judiciary. Prepared by the Montana Legislative Counsel, 1982.

<sup>\*1%</sup> of funding from fees and charge backs to special districts.
\*\*No response

# TYPE OF INDIGENT DEFENSE

In a report titled "Indigent Defense in Montana" Legislative Council researcher, Lois Menzies says "Three basic methods were used [in Montana] to provide defense services: (1) assigned counsel, (2) public defender, and (3) contracted services." (p. 1) She found that "...the cost per case generally was less for counties contracting for defense services than for those using assigned counsel or employing public defenders." (p. 6) Menzies' survey also found that 38 counties used assigned counsel, 12 used contracts and 3 counties and 1 judicial district used public defenders.

It should be clearly noted here that figuring costs of indigent defense by dividing the amount paid per year by the number of cases handled can greatly distort the costs of any particular form of indigent defense. One or a few large cases can cost more than many of the usual, routine cases typically handled by a defense attorney. Thus it is impossible to say which form of indigent defense is the least costly without a thorough analysis which compares forms across a variety of cases of different types and complexities.

While this information is somewhat dated now it indicates that there are different approaches to the legally mandated requirement of counties to provide defense services for indigent defendants in criminal and other cases. Table 5 indicates that the overall costs for District Court and Indigent Defense among the 10 most populous counties have risen since 1981-2, yet the relationship of those expenses between those counties has remained pretty much the same. Assuming these data are comparable for 1981-2 and 1986 it appears that only Yellowstone county has experienced a decline in the amount spent for District Court while all the other counties increased their budgets significantly.

It is interesting to note, however, in looking at the budgets for indigent defense services between the counties for 1981 and 1986 (Tables 2 and 5), that three counties (Cascade, Flathead, and Silver Bow) actually decreased their budgets. Silver Bow county, for example, decreased their budget for indigent defense services in 1986 to nearly half what that budget was in 1981. Whether that change reflects a change in form of indigent defense or some other change is not known.

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TABLE 5

DISTRICT COURT BUDGETS FOR FY1982 AND INDIGENT BUDGETS FOR FY1981
FOR THE 10 MOST POPULOUS COUNTIES IN MONTANA

COUNTY	DISTRICT COURT BUDGET	INDIGENT LEGAL BUDGET
	<u>1982*</u>	<u>1981**</u>
Yellowstone	\$1,595,260	\$153,017
Cascade	571,572	145,317
Missoula	945,386	137,290
Flathead	829,645	61,281
Gallatin	377,802	34,500
Lewis & Clark	410,444	69,475
Butte-Silver Bow	479,810	90,180
Ravalli	148,107	8,768
Lake	158,359	14,424
Hill	244,693	37,936

<sup>\*</sup>Menzies L. "Supreme Court and District Court Personnel: A Report for Subcommittee No. 3." January 1984.

Source: Montana Association of Counties Data

<sup>\*\*</sup>Menzies L. "Indigent Defense in Montana" April 1982.

It should be noted that the nature of indigent defense is largely responsive to the quantity and quality of prosecution services in the particular county. Reluctance by prosecutors to enter into plea bargaining negotiations and their inclination to press for maximum possible penalties bring about an increased likelihood of counsel for criminal defendants taking those cases all the way through to a jury trial. This is true regardless of the form of indigent defense unless there are strong economic pressures on defense attorneys to spend their time on convincing clients to plead guilty. Where county commissioners pay defense attorneys a small amount on a per case basis they encourage attorneys assigned to the case to spend very little time on the cases in order to increase their hourly pay.

# CRIME RATES

As noted earlier, clearly the most plausible explanation in the discrepancies between the counties in the amounts of reimbursable expenses under the District Court Criminal Reimbursement program is the number, of complex and serious crimes required to be processed by the counties. Assuming that all County Attorneys would have a policy of prosecuting the most serious crimes and the expenses of that processing would depend significantly on the complexity of the case, it would appear that the reimbursable costs would vary directly with the number of serious crimes in a county.

Tables 6, 7, and 8 show a comparison of the most serious crimes against the person among the 10 most populous counties for 1982 - 1985.

These tables reveal that, as would be predicted, the counties with the highest rates of serious crime consistently have the highest budgets for indigent defense. Tables 9 and 10 show the same thing in another way. Yellowstone and Missoula counties have the highest rates of serious crime for both years compared to their populations and the highest budgets for indigent defense. Conversely, Gallatin and Silver Bow counties have low rates of serious crimes for both years compared to their populations and also have the lowest budgets for indigent defense.

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COMPARISON OF HOMICIDES BY NUMBER AND PERCENT OF STATE TOTAL
FOR THE 10 MOST POPULOUS COUNTIES OF MONTANA
CALENDAR YEARS 1982-1985

TABLE 6

			но	MICIDE				
		1982		1983		1984		1985
State Totals		27		26		36		28
County Totals and Percent of State Totals	#	<u> જ</u>	<u>#</u>	<u>8</u>	#	<u>&amp;</u>	#	<u>%</u>
Yellowstone	1	(3.7)	2	(7.69)	8	(22.22)	4	(14.29)
Cascade	1	(3.7)	3	(11.54)	4	(11)	3	(10.71)
Missoula	3	(11)	4	(15)	4	(11)	5	(18)
Flathead	4	(14.81)	1	(3.85)	1	(2.78)	1	(3.57)
Gallatin	0		0		1	(2.78)	1	(3.57)
Lewis & Clark	ı	(3.7)	1	(3.85)	3	(8.33)	0	
Butte-Silver Bow	2	(7.4)	1	(3.85)	3	(8.33)	0	
Ravalli	1	(3.7)	0		1	(2.78)	4	(14.29)
Lake*	1	(3.7)	3	(11.54)	1	(2.78)	0	
Hill**	0		1	(3.85)	2	(5.56)	1	(3.57)

<sup>\*</sup>Lake - Flathead Tribe did not report in 1982,83,84,85 \*\*Hill - Rocky Boy Tribe did not report in 1982,83,84,85

Source: Montana Board of Crime Control Annual Reports

1986 - Total of 7 Homicides in Missoula County

TABLE 7

COMPARISON OF RAPES BY NUMBER AND PERCENT OF STATE TOTAL
FOR 10 MOST POPULOUS COUNTIES OF MONTANA
CALENDAR YEARS 1982-1985

				R	APE				
		1982			1983		1984	]	<u>1985</u>
State Totals		128			153		156	:	148
County Totals and Percent of State Totals	土	<u>%</u>		井	<u>*</u>	#	<u>%</u>	進	<u> </u>
Yellowstone	25	(19.53)	2	29	(18.95)	35	(22.44)	29	(19.6)
Cascade	9	(7.03)	]	L 6	(10.46)	16	(10.26)	14	(9.46)
Missoula	23	(17.97)	2	22	(14.38)	34	(22)	24	(16)
Flathead	12	(9.38)	]	L7	(11.11)	13	(8.33	18	(12.2)
Gallatin	1	(.78)		8	(5.23)	7	(4.49)	6	(4.05)
Lewis & Clark	13	(10.16)	]	<b>L</b> 3	(8.5)	18	(11.54)	13	(8.78)
Butte-Silver Bo	w 9	(7.03)	-	10	(6.54)	3	(1.92)	3	(2.02)
Ravalli	0		]	LO	(6.54)	1	(.64)	1	(.68)
Lake*	5	(3.91)	\$1 1	5	(3.27)	1	(.64)	4	(2.7)
Hill**	2	(1.56)		6	(3.92)	9	(5.77)	8	(5.4)

\*Lake - Flathead Tribe did not report in 1982,83,84,85 \*\*Hill - Rocky Boy Tribe did not report in 1982,83,84,85

Source: Montana Board of Crime Control Annual Reports

1986 - Rapes Totaled 28 in Missoula County

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TABLE 8

COMPARISON OF AGGRAVATED ASSAULTS BY NUMBER AND PERCENT OF STATE TOTAL FOR THE 10 MOST POPULOUS COUNTIES OF MONTANA CALENDAR YEARS 1982-1985

# AGGRAVATED ASSAULT

		1982	1	.983	]	L984	19	985
State Totals		1335		1448		1392	נ	L381
County Totals and Percent of State Totals	土	<u> 8</u>	土	<u>8</u>	井	<u>%</u>	. #.	<u> </u>
Yellowstone	169	(12.66)	120	(3.29)	. 69	(4.96)	- 94	(6.8)
Cascade	127	(9.5)	199	(13.74)	246	(17.67)	112	(8.11)
Missoula	89	(6.7)	109	(7.5)	112	(8)	. 128	(9.3)
Flathead	111	(8.31)	144	(9.94)	193	(13.86)	197	(14.27)
Gallatin	97	(7.26)	134	(9.25)	167	(12)	151	(10.93)
Lewis & Clark	84	(6.3)	75	(5.18)	52	(3.74)	66	(4.78)
Butte-Silver Bow	181	(13.56)	87	(6)	23	(1.65)	61	(4.42)
Ravalli	52	(3.9)	91	(6.28)	83	(5.7)	35	(2.53)
Lake*	17	(1.27)	8	(.55)	3	(.21)	77	(5.58)
Hill**	11	(.82)	38	(2.62)	39	(2.8)	77	(5.58)

<sup>\*</sup>Lake - Flathead Tribe did not report in 1982,83,84,85 \*\*Hill - Rocky Boy Tribe did not report in 1982,83,84,85

Source: Montana Board of Crime Control Annual Reports

1986 - Total of 80 aggravated assaults in Missoula County

TABLE 9

PROPORTION OF SERIOUS PERSONAL CRIMES FOR 1984 FOR THE 10 MOST FOFULDUS COUNTIES

TABLE 10

PROPORTION OF SERIOUS PERSONAL CRIMES FOR 1985 FOR THE 10 MOST POPULOUS COUNTIES

	ָרְ בְּיִבְּיִבְּיִבְּיִבְּיִבְּיִבְּיִבְּיִ		i L	PERCENT	OF.	STATE TOTAL
COUNTIES	POPULATION	BUDGET 1986*	RANK	HOMICIDE	RAFE	AGG. ASSAULT
Yellowstone	14%	\$202	и	14.3	19.6	8.8
Cascade	10	145	4	10.7	٠. ت	8.1
Missoula	м. 6	375	•••	18	16	n. 0
Flathead	6.5	ខ្លួ		3.6	12	14.3
Gallatin	5.6	ស		3.6	4	10.9
Lewis & Clark	נו נו	73	7	0	8.8	4.8
Butte-Silver Bow	4.	46	10	0	И	4.4
Kavalli	2.9	154	м	14.3	.7	ល់
Lake	и 4.	125	כוו	0	2.7	ις 2
Hi 11	ы. М	104	. 4	3.6	1. 4.	. 6

\*In Thousands

#### THE MISSOULA COUNTY SITUATION

The analysis presented above has demonstrated that Missoula County: 1) has a carefully detailed accounting system for District Court expenditures and the reimbursements received were audited by the Department of Commerce to be legitimate under the provisions of the program; 2) has the second largest District Court budget in the state; 3) has the largest budget for prosecution in the state; 4) has the largest budget for indigent defense in the state; and 5) over the past several years has had consistently higher rates of serious crimes against the person than its share of the population.

#### INCREASING COSTS

Table 11 shows that over the past 6 years the District Court budget in Missoula County has doubled and expenditures have far exceeded the budgets. Reimbursements under two different programs have gradually increased along with the increasing costs of processing major criminal cases.

Table 12 shows the increases in budgets and expenditures for Indigent legal services over the past 6 years in Missoula County. Graph 2 demonstrates the gradually increasing expenditures in the indigent defense area.

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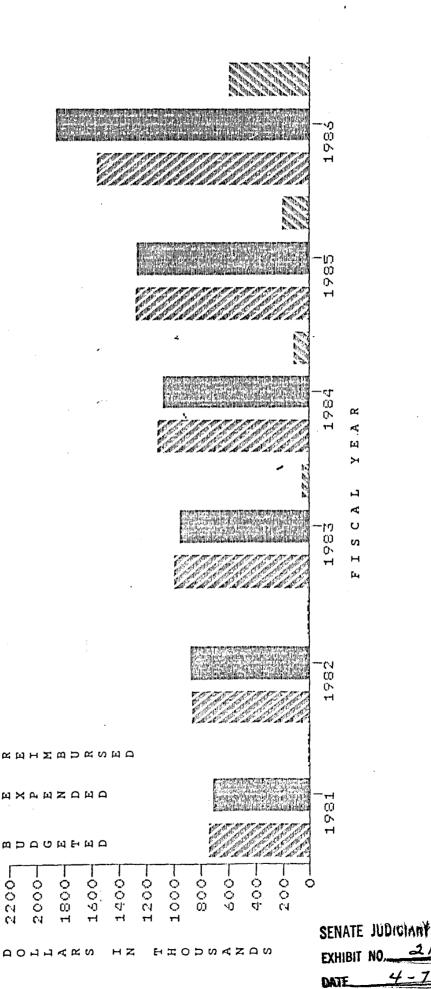
TABLE 11

# MISSOULA COUNTY DISTRICT COURT BUDGET/EXPENDITURES/REIMBURSEMENT FISCAL YEARS 1981 - 1986

YEAR	BUDGET	EXPENDITURES	REIMBURSEMENT
1981	\$ 735,295.00	\$ 706,257.07	
1982	\$ 857,904.04	\$ 868,324.64	
1983	\$ 992,606.50	\$ 951,997.07	\$ 52,319.00 *
1984	\$1,114,804.92	\$1,073,687.23	\$116,801.00 *
1985	\$1,268,962.40	\$1,257,415.90	\$191,586.00 *
1986	\$1,548,039.00	\$1,854,936.77	\$586,595.92 **

<sup>\*</sup> FY '83 - '85 State Grant-in-Aid Program MCA 7-6-2352

<sup>\*\*</sup> FY '86 District Court Criminal Reimbursement Program Senate Bill 25



4.8.890 BILL NO.

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# TABLE 12

# MISSOULA COUNTY INDIGENT LEGAL BUDGET/EXPENDITURES/REIMBURSEMENT FISCAL YEARS 1981 - 1986

YEAR	BUDGET	EXPENDITURES	REIMBURSEMENT*
1981	\$194,650.00	\$198,524.97	
1982	\$205,311.40	\$229,144.18	
1983	\$228,668.00	\$265,847.17	-
1984	\$313,530.20	\$311,643.60	
1985	\$415,574.00	\$436,849.36	
1986	\$475,731.00#	\$848,572.54 <sup>@</sup>	\$444,370.62 **

<sup>\*</sup> Reimbursement under State Grant-in-Aid Program (1983-1985) covered all District Court expenses. The proportion attributable to Indigent legal expenses is not determinable.

<sup>\*\*</sup> District Court Criminal Reimbursement Program .
"Preliminary Report"

<sup>@</sup> Includes \$110,000 one time expense for set up of in-house Public Defender's Office. Not applicable under reimbursement program.

<sup>#</sup> As amended.

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# HIGH COST CASES FISCAL YEAR 1986

# DELIBERATE HOMICIDE

- T. Ballinger trial, co-counsel, psych. exams
- D. Doll trial, re-trial motion, co-counsel, on-going psych. exams, plea bargain just prior to second trial
- C. Rasmussen still in process
- D. Steed co-counsel, psych. exams
- J. Thornton trial, co-counsel
- F. Van Dyken change of venue, trial, hung jury, co-counsel retrial

# SEXUAL INTERCOURSE WITHOUT CONSENT/SEXUAL ASSAULT

- D. Bushilla on-going psych exams
- K. Friedman trial, appeal
- K. Geyman trial, appeal
- H. Gleed trial, appeal
- R. Hummel numerous charges, co-counsel, plea bargain just prior to trial
- R. Neeley co-counsel, plea bargain just prior to trial
- D. Statczar trial, hung jury, retrial, appeal, co-counsel
- E. Tilly trial, psych. exams

# AGGRAVATED ASSAULT/FELONY ASSAULT

- T. Carter numerous charges, trial
- A. Charlo trial, sentence review
- B. Cole numerous charges, trial, appeal, psych. exams
- T. Fah on-going psych. exams, plea bargain just prior to trial
- D. Matson trial, appeal
- J. Munro psych. exams, plea bargain just prior to trial, sentence review
- L. Smith trial, co-counsel, in process of requesting new trial

Van Dyken case is the only case listed above on which we have kept a detailed expense report. To date (1/26/87) Missoula County has paid out over \$95,000 on this case not including salaries of prosecutors and the chief public defender after November 1985, or salaries of law enforcement and jailers.

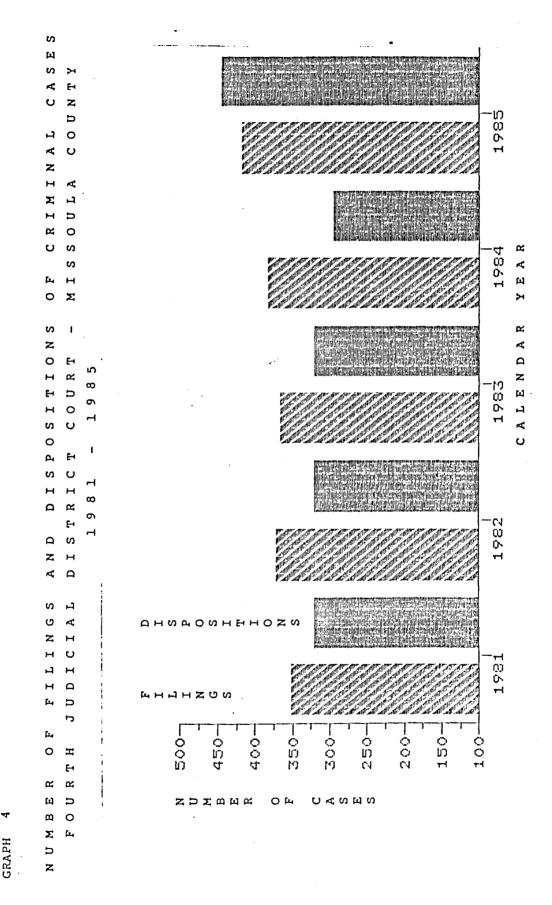
GRAPH 2

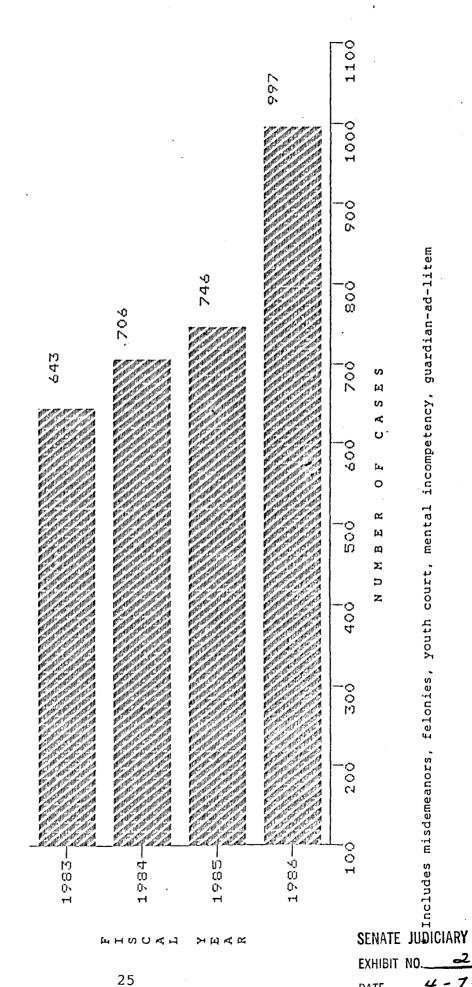
EXHIBIT NO. 21

DATE 4 - 7-87

PH. NO. 4.8.890

Montana State Judicial Information System (SJIS) Annual Reports SOURCE:





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DATE RHI NO 4-7-87 4.B.890

### CRIME RATES

Explanations for this rise in expenditures and the very large expenditures of Fiscal Year 1986 follow from the analysis presented above. Tables 6 through 10 document the disproportionate number of serious and complex criminal cases in Missoula County. Graph 3 shows how the Missoula County rates for the 7 major index crimes compare to the state rate for the past 4 years. Graph 4 shows the steady increase in the number of criminal case filings in District Court in Missoula County over the past 5 years.

Table 13 presents a list of the 21 most complex and undoubtedly most expensive cases processed in Missoula County during the Fiscal Year 1986. In only one of these cases have we actually attempted to keep track of the expenses related to that specific case. In the State of Montana vs. Fred Vandyken the defendant is charged with deliberate homicide of Deputy Sheriff Allen Kimery. This case was moved to Livingston, MT for trial on a change of venue and resulted in a hung jury there. That case alone has cost nearly \$100,000 not including the costs of the prosecutors salaries and support services or the salaries of law enforcement required to assist the prosecution and guard the defendant in Livingston.

In addition to these major and very expensive cases which undoubtedly made up the bulk of the reimbursable indigent defense costs for Missoula County during FY 1986, Graph 5 documents the growing number of cases assigned to the public defenders over a four year period. The dramatic increase (35%) from FY 1985 to FY 1986 is another illustration of the reason for the rising costs.

# CHANGE IN TYPE OF INDIGENT DEFENSE

During Fiscal Year 1986 Missoula County went through a significant transition in the type of indigent defense system it employed. Since 1976 Missoula County had contracted with private attorneys to provide indigent defense in all eligible cases. contract system seemed to work well since the quality attorneys was high and the entire work load was shared among several attorneys and firms. The contract had evolved into one in which the attorneys were paid a monthly retainer to handle a set share of the indigent defense cases on a rotation basis. firm was responsible for administration of the contract and making the assignments on the basis of the amount of the contract In addition to handling all each attorney or firm was awarded. which were routine for the monthly retainer the the cases contract provided that attorneys could, after having reached a negotiated number of hours on a complex case, charge the County on a per hour basis. The Fiscal Year 1985 contract had a major litigation threshold of 65 hours after which an attorney would be paid \$35 per hour outside of court and \$45 inside of court.

Contract negotiations for Fiscal Year 1986 broke down when the group of Public Defenders demanded increased retainers and decreased hours worked on a case before the major litigation hourly pay rate took effect. The Missoula Board of County Commissioners offered what they regarded as a reasonable increase in the retainer and a modest decrease in the hours to major litigation. The result was an impasse and Missoula County was forced to go to a direct assignment basis whereby all attorneys assigned cases were paid the District Court established rate of \$35 outside of court and \$45 inside of court per hour of work. This change in the form of Indigent Defense proved to be very costly since attorneys had to be allowed to retain the cases they had been assigned earlier and indeed were assigned additional cases all of which were subject to the higher assignment rates of pay.

This form of Indigent Defense was operative from August 1, 1985 to December 1, 1985. Following the collapse of negotiations an attempt was made to find another group of attorneys to enter into a contract with the county for providing Indigent Defense. A letter sent to all local attorneys and firms known to be interested in criminal defense work failed to provide sufficient interest to cover the contract. A short but intense feasibility study was carried out by the Court Operations Office which resulted in the recommendation that Missoula County establish an in-house Public Defenders Office. The Missoula County Board of County Commissioners gave their approval for setting up such an office and instructed the Court Operations Officer to proceed with the project.

The Missoula County Public Defender's office was set up in November and in December of 1985 was housed in temporary quarters with a Chief Public Defender, four entry level attorneys, three clerical support staff, and a couple of legal interns on work study. Later in the spring an investigator was hired. The office was modeled after the staff in the criminal division of the Missoula County Attorney's office and from recommendations received from communities of similar size with Public Defenders offices (e.g., Bellingham, WA, Grand Junction, CO, Boise, ID, etc.).

While the initial costs of setting up an in-house Public Defender's office were high, those costs could be amortized over several years. They were not reimbursable under the Department of Commerce program. The Missoula Board of County Commissioners were hopeful that the new office would save money over what the contract attorneys were demanding. They were certain they could better control the increases in costs over the long run by limiting the increases in salaries and other budget

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items.

Since the Public Defender's Office has been established Missoula County has been reimbursed for 70% of the operating costs through the Department of Commerce District Court Criminal Reimbursement Program. The rate was determined by a careful study of the billings of the assignment attorneys during the four months of their work. An automated case management system will soon be implemented which will allow for the careful accounting of exact time and resources spent on District Court Criminal cases.

Fiscal Year 1986 was a year of transition for Missoula County in going from a contract system of Public Defense in July of 1985 to an assignment system from August to December and then to an in-house Public Defenders office from December to the present.

Thus the large number of complex crimes coupled with the dramatic increase in the cost of indigent defense brought about by the necessity of going to an assignment system at an increased hourly rate were major factors in Missoula County receiving such a large share of the District Court Reimbursement funds. From all indications so far this fiscal year Missoula County's billing for District Court Criminal Reimbursement will be considerably lower than for Fiscal Year 1986.

# CONCLUSIONS

Fairly obviously the key to decreased costs in the processing of criminal cases in Montana's District Courts is a decline in the number of serious and complex cases. Even one major case can result in massive expenditures of scarce resources. While not providing a cheap solution to handling ever increasing numbers of criminal cases, Missoula County's in-house Public Defenders office has allowed the county to contain the costs. Other approaches may work in other communities but for the present this approach is working well.

Undoubtedly some other county will get a large proportion of the Reimbursement funds when it experiences a dramatic increase in its serious and complex criminal cases.

One final note should be made of the report by the Department of Commerce on the Reimbursement Program. In the analysis of costs by judicial district the Fourth Judicial District received a dramatically large share of the reimbursement funds. It should be noted, however, that the Fourth Judicial District is the only district in the state that has two of the 10 most populous counties in the state.

Comparison of Missoula County District Court Criminal Reimbursement for fiscal year 1986 and fiscal year 1987 shows that the costs are going down. Table 14 shows the monthly reimbursements received for fy 1986 and through November, 1986. The figure for December, 1986 is the amount billed and the figure for January, 1987 is the amount estimated to be billed. The first half of fy 1987 is currently 82% of the comparable period during fy 1986. If costs continue to decline as projected Missoula County should finish fy 1987 at from one quarter to one third below fy 1986 in reimbursements.

The District Court Criminal Reimbursement program is good for what it was intended, to help counties with major criminal cases bear the cost of processing those cases. Whenever a county has the unfortunate experience of complex and serious litigation of criminal cases the reimbursement program will allow that county to continue to operate without excessive budget deficits in the District Court fund.

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TABLE 14

# SENATE BILL 25 REIMBURSEMENT FY 1986/FY 1987 TO DATE

	FY 1986 Reimbursed		FY 1987 Requested
July	\$ 32,185		\$ 27,607
August	26,057		37,005
September	44,850	4	30,007
October	42,444	•	48,111
November	61,774	•	36,378
December	72,939	٠,	49,384
January	79,774		76,418
February	_31,134		24,088
	391,157		328,998
March	48,152		
April	60,297		
May	49,677		
June	37,313		
TOTAL	\$586,596		

<sup>\*</sup>July - February of FY 86 total \$391,157

July - February of FY 87 total \$328,998 (85% of FY 86)