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ASK AND YE SHALL RECEIVE: THE LEGISLATIVE RESPONSE TO THE NORTHEAST RAIL CRISIS

HENRY H. PERRITT, JR.†

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I. INTRODUCTION

ONE of the largest corporate mergers in American history occurred on February 1, 1968 when the Pennsylvania Railroad joined with the New York Central to create the Penn Central, an entity whose 20,000 miles of track spanned sixteen states and Canada. Barely more than two years later, the Penn Central filed for bankruptcy.¹ This bankruptcy was the culmination of problems that had been sapping the viability of the railroad system in the northeastern United States for at least twenty years: 1) an ungainly industry structure that was unable to adjust to steadily declining freight traffic; 2) an excessive regulation of rates and services; 3) passenger service losses; and 4) a fragmented collective bargaining system that resisted change and led to high labor costs. In addition to the Penn Central, seven smaller northeastern railroads also succumbed to these problems in the years between 1967 and 1973.² Because the Penn Central and the other smaller northeastern bankrupt carriers could not be reorganized under existing bankruptcy law, Congress enacted four comprehensive statutes in an effort to permit continuing rail

1. Regional Rail Reorganization Act Cases, 419 U.S. 102, 117 n.12 (1974); PENN CENTRAL TRANSP. CO., STATEMENT OF THE PENN CENTRAL TRUSTEES ON THE UNITED STATES RAILWAY ASSOCIATION'S FINAL SYSTEM PLAN 4 (Sept. 16, 1975), reprinted in *Hearings before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 569 (1975); R. SOBEL, *THE FALLEN COLOSSUS* ix, 256-57 (1977).

2. The other northeastern railroads that went bankrupt between 1967 and 1973 were 1) the Central of New Jersey; 2) the Boston & Maine; 3) the Lehigh Valley; 4) the Reading; 5) the Lehigh & Hudson; 6) the Erie Lackawanna; and 7) the Ann Arbor. Regional Rail Reorganization Act Cases, 419 U.S. 102, 108-09 n.3 (1974).

service without nationalization or other forms of continued federal financing. The first legislative attempt to solve the northeast rail crisis was the Regional Rail Reorganization Act of 1973 (1973 Act).³ The next legislative effort to solve this problem was the Railroad Revitalization and Regulatory Reform Act of 1976 (1976 Act),⁴ which was followed by the significant reforms in rate regulations of the Staggers Rail Act of 1980.⁵ The Northeast Rail Service Act of 1981 (NERSA)⁶ is the most recent of these federal efforts to reorganize the northeastern railroad system.

This article reviews the historical background of the northeast rail problem, starting with an analysis of the four underlying problems that led to the Penn Central bankruptcy. It then explores in detail the congressional debates surrounding the enactment of each statute and evaluates the impact of these statutes on each of the four problems. Finally, the article reviews the competing policy proposals before the ninety-seventh Congress when it enacted NERSA, and offers an evaluation of this legislation's potential for achieving its goal of making the northeast rail system financially viable through the sale of Conrail, the transfer of its commuter operations to other authorities, and the initiation of far-reaching labor law changes.

It concludes that Congress initially was reluctant to deal with the real causes of the regional rail problem. Only in its 1980 enactment of the Staggers Act and 1981 enactment of NERSA did Congress address real problems. Major difficulties still lie ahead in realizing the fruits of the statutory reforms relating to rate regulation, industry structure, and labor costs. The article concludes that progress can continue to be made, but only if Congress does not retreat from its new found willingness to address tough problems on their merits, rather than pretending that they will disappear with the infusion of renewed financial support.

3. Pub. L. No. 93-236, 87 Stat. 985 (1974) (codified as amended at 45 U.S.C. §§ 701-794 (1976 & Supp. IV 1980)).

4. Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. §§ 801-854) (1976 & Supp. IV 1980)).

5. Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 11, 45, 49 U.S.C. (Supp. IV 1980)).

6. The Omnibus Budget Reconciliation Act of 1981, Subtitle E, The Northeast Rail Service Act of 1981 [hereinafter cited as NERSA], Pub. L. No. 97-35, 95 Stat. 357, 643 (to be codified in scattered sections of 45 U.S.C.). For a discussion of the novel approach Congress took in enacting NERSA as part of the Budget Reconciliation Act, see note 426 *infra*.

II. HISTORICAL BACKGROUND

A. *The Underlying Problems*

1. *Industry Structure*

A critical element in any analysis of the northeast rail crisis is the industry structure problem.⁷ Essentially, industry structure can be defined as the constellation of railroads that serve a particular market. The Interstate Commerce Commission (ICC) has played a direct role in determining the rail industry structure by exercising its authority over mergers and abandonments, and, more indirectly, by exercising its rate regulatory powers.

Fostering an appropriate industry structure requires consideration of two opposing factors: preserving competition and preserving the cross subsidies necessary to sustain rate regulation. On its face, mergers may seem always to lead to a reduction in competition. Yet mergers may be necessary to preserve competition, especially when a weak competitor would otherwise cease operations without the possibility of a cross subsidy from a merger partner.⁸ Moreover, the savings available from a parallel or end-to-end merger may be necessary to preserve the financial viability of the merger partners.⁹

Historically, problems developed with the northeast rail industry structure when a capital and labor cost infrastructure was maintained through regulation despite changing technology and patterns of demand for rail transportation. For a time, these problems were masked by railroad mergers that increased the opportunities for private subsidy of unprofitable activities. Eventually, however, this source of sustenance was exhausted. Since the roots of this industry structure problem extend back to the nineteenth century, a brief historical analysis of the industry structure problem is warranted.

The frenetic, early days of the American railroad industry were characterized by a governmental policy of laissez-faire that left railroad entrepreneurs free to engage in vigorous competition. One consequence of this policy was over-construction. By the 1880's, for instance, there were five large railroad lines, including the Penn-

7. The industry structure problem is discussed first because the Penn Central and Conrail problems were addressed explicitly in terms of changes in corporate identity and structure. It should be recognized, however, that industry structure problems are merely symptomatic of more fundamental problems of demand, prices, and costs. For a discussion of the interrelationship between industry structure and rate regulation, see note 40 and accompanying text *infra*.

8. R. SAUNDERS, *THE RAILROAD MERGERS AND THE COMING OF CONRAIL* 200 (1978) (suggesting the advantage of the Penn Central merger for the New Haven).

9. 2 A. KAHN, *THE ECONOMICS OF REGULATION* 281-90 (1971).

sylvania Railroad and the New York Central, linking New York to Chicago, even though one observer noted with irony that there was only traffic enough for two lines.¹⁰

Another, somewhat inconsistent, manifestation of the nineteenth century attitude toward railroad regulation was a national policy disinclined toward rail consolidations. Up until 1920, national policy adhered to a presumption that competition would lead to lower rates and better service.¹¹ In 1920, however, Congress rejected this policy by enacting the Transportation Act¹² which encouraged the consolidation of railroads into a limited number of systems.¹³ Under this Act, the ICC was given the authority to formulate a national plan of consolidation.¹⁴ Eventually, this scheme proved unworkable because of resistance by the railroads.¹⁵ Congress nonetheless adhered to the general policy of consolidation when it enacted the Transportation Act of 1940.¹⁶ This Act differed from the earlier transportation act, however, because it gave the carriers, rather than the ICC, the responsibility for initiating mergers and consolidations.¹⁷ With these acts, therefore, a general policy emerged in which competition was sacrificed in an effort to improve carrier profitability through consolidations, which, it was hoped would in turn lead to modernization and better service for the public.¹⁸

10. G. HILTON, *THE NORTHEAST RAILROAD PROBLEM* 5 (1975) (citing William H. Vanderbilt). See also G. KOLKO, *RAILROADS AND REGULATION* 7-11 (1965) (noting that by 1880 there were twenty competitive lines between Atlanta and St. Louis). A consequence of this over-construction was cutthroat competition. For a discussion of this problem, see note 277 *infra*.

11. See *Pennsylvania R.R.—Merger—N.Y. Cent. R.R.*, 327 I.C.C. 475, 503 (1966). Before 1920, the railroads dominated the American economy as no industry has since. The tone of national policy towards railroads was set by the Interstate Commerce Commission (ICC), the first national economic regulatory body. Originally intended to protect shippers, the ICC was authorized to set maximum rates. See Hepburn Act of 1906, Pub. L. No. 59-1906, 34 Stat. 534 (codified as amended in scattered sections of 49 U.S.C. (1976)); Mann-Elkins Act of 1910, Pub. L. No. 61-312, 36 Stat. 539 (codified as amended in scattered sections of 49 U.S.C. (1976)). Each of these acts added to the ICC's power to prevent discriminatory pricing and foster competition among the railroads. See A. MARTIN, *ENTERPRISE DENIED* 1-50 (1971); G. KOLKO, *supra* note 10.

12. Transportation Act of 1920, Pub. L. No. 66-456, 41 Stat. 456, 481 (codified as amended in scattered sections of 49 U.S.C. (1976)).

13. See *Penn-Central Merger & N.W. Inclusion Cases*, 389 U.S. 486, 492 (1968).

14. *Id.* at 492-93.

15. *Id.*

16. Pub. L. No. 76-785, 54 Stat. 898 (codified as amended in scattered sections of 49 U.S.C. (1976)).

17. *Penn-Central Merger & N.W. Inclusion Cases*, 389 U.S. 486, 492-93 (1968).

18. *Id.* at 500-01 (citing *Pennsylvania R.R.—Merger—N.Y. Cent. R.R.*, 327 I.C.C. 475, 504-05 (1966)). An integral part of the consolidation concept was the development of "balanced systems." Under the prevailing economic regulations, all

But despite these legislative efforts to rationalize the railroad industry through consolidations, railroads nonetheless became increasingly vulnerable to a variety of economic, social, and technological developments. For instance, the shift of manufacturing and heavy industry from the Northeast to areas in the South and West weakened the northeastern railroads by depriving them of a traditional source of revenue. The construction of interstate highways made trucks a formidable competitor.¹⁹ These factors, as well as the general shift of the American economy away from heavy industry—the traditional customer of rail carriers—led to a general decline in freight traffic in the Northeast.²⁰ In addition, the eastern railroads were disproportionately burdened by commuter service responsibilities, which were generally unprofitable.²¹

As a result of these trends, by the 1960's there was an oversupply of rail facilities in the Northeast. Consequently, virtually all railroads in the region had poor rates of return.²² Railroad managers responded to these problems in two ways: during the 1950's, they encouraged mergers; and in the 1960's they reorganized railroad companies into conglomerates or holding companies.²³ The rationale

carriers in a competitive area had to charge the same rates. Rates which would produce an adequate return for the weak railroads would result in creating "excessive" rates of return for the stronger carriers. *See* R. CAVES, *AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE* 72 (1964). To obviate this dilemma, consolidation was adopted to unite strong and weak carriers into "balanced" systems, each receiving an adequate rate of return on any given set of rates. SENATE COMM. ON COMMERCE, REPORT OF THE SPECIAL STUDY GROUP ON TRANSP. POLICIES IN THE U.S., S. REP. NO. 445, 87th Cong., 1st Sess. 237 (1961) [hereinafter cited as DOYLE REPORT]. During the 1920's and 1930's, several comprehensive proposals for consolidation of the entire rail system were considered. Some proposed maintenance of competition in every region, through national consolidation, while others proposed regional monopolies through consolidation within regions. Still others proposed nationalization. *Id.* at 262-63.

Railroad competition can destroy carrier profitability without resulting in benefits to the shipper. Because of the large proportion of fixed costs, competition can result in freight rates dropping to half of their original levels. The railroad's first reaction is to reduce variable costs, such as track maintenance, and to defer replacing antiquated equipment. Thus, a "weak" carrier can offer inefficient service and still compete with a "strong" carrier. The result of such "cutthroat" competition is to weaken both. *See* Martin, *Railroads and the Equity Receivership*, 27 J. OF THE WEST 62 (1978). By allowing carriers to merge, a return to profitability and better service is encouraged.

19. G. HILTON, *supra* note 10, at 5-6.

20. Pennsylvania R.R.—Merger—N.Y. Cent. R.R., 327 I.C.C. 475, 510-12 (1966).

21. G. HILTON, *supra* note 10, at 5-6.

22. Pennsylvania R.R.—Merger—N.Y. Cent. R.R., 327 I.C.C. 475, 512 (1966).

23. R. SAUNDERS, *supra* note 8, at 283-91. The railroad industry moves naturally from competition to consolidation, like other "natural monopolies." There are high fixed costs to create a system of track with sufficient motive power and equip-

for these maneuvers was to cross-subsidize the unprofitable services which the railroads were required to provide (e.g., passenger service) with more profitable freight service. Since the railroads were hemmed in by rigid regulations that hindered abandonment of unprofitable lines and by pressure from rail labor unions not to cut costs by eliminating jobs, mergers seemed the only viable way to increase profit margins.²⁴

In 1957, therefore, James Symes, chief executive of the Pennsylvania Railroad, approached his railroad's historic rival, the New York Central, with the idea of merger.²⁵ This plan seemed sensible since both railroads had overlapping traffic routes, each of which was underutilized. Merger, it was hoped, would rationalize the system.²⁶ In 1961 an application was filed with the ICC for approval to merge these lines into a new entity—the Penn Central. Five years later, the ICC approved the merger plan.²⁷ In so doing, it concluded that because of earlier mergers in the region, the Pennsylvania Railroad and the New York Central would have to be permitted to merge if they were to remain competitive with their “ever-growing intermodal competitors.”²⁸ The ICC was aware, however, that the Penn Central merger would endanger smaller carriers in the region by diverting traffic from them. In fact, these endangered carriers—the New Haven, the Erie Lackawanna, the Delaware & Hudson, and the Boston & Maine²⁹—sought to be included in the merged systems.³⁰

ment to produce a variety of “transportation goods.” Joint production of many goods at once results in inseparable costs and falling marginal costs. An equilibrium volume is not obtained until a railroad has achieved regional domination, or brushed against a budgetary constraint, such as limited motive power. *See generally* R. CAVES, *supra* note 18.

24. G. HILTON, *supra* note 10, at 13-15.

25. R. SAUNDERS, *supra* note 8, at 185-86.

26. *Baltimore & O.R.R. v. United States*, 386 U.S. 372, 380 (1966).

27. *Pennsylvania R.R.—Merger—N.Y. Cent. R.R.*, 327 I.C.C. 475, 510-12 (1966).

28. *Id.* at 519. The earlier mergers were those between the Chesapeake & Ohio and the Baltimore & Ohio Railway and between the Norfolk and Western Railway Company and the Nickel Plate. *Id.* The ICC concluded that the Penn Central merger would permit the railroads to deal more effectively with external pressures. Furthermore, the mergers might facilitate the economies of scale necessary to yield a rate of return sufficient to attract investment capital. *Id.*

29. *Id.* at 529, 531-32. *See Baltimore & O.R.R. v. United States*, 386 U.S. 372, 388 (1967). Another smaller railroad, the Reading, took the position that it would not be affected adversely. *Penn-Central Merger & N.W. Inclusion Cases*, 389 U.S. 486, 520 (1968).

30. *Pennsylvania R.R.—Merger—N.Y. Cent. R.R.*, 327 I.C.C. 475, 528 (1966). A necessary element for achieving “balanced systems” was the power of the ICC to compel the inclusion of a third carrier as a condition of approving a merger between two other carriers. *See New Haven Inclusion Cases*, 399 U.S. 392, 423 (1970).

The decisions relating to the regional industry structure were made on a record

The Supreme Court eventually became entangled in these merger plans. In *Baltimore & Ohio Railroad v. United States*,³¹ it held that the ICC could not allow the Penn Central to proceed without deciding the future of the other railroads in the region.³² On remand, the ICC ordered the Norfolk & Western to accept several smaller lines into its system.³³ The Supreme Court affirmed, and the Penn Central merger was consummated in 1968.³⁴

Yet the terms of the merger, in part, spelled the ultimate financial undoing of the Penn Central barely two years later. To prevent labor opposition to the plan, the railroad entered into agreements with twenty-three unions to protect all workers on the merged line. In addition, the inclusion of the New Haven in the merger posed a serious economic drain on the Penn Central. At the time of the merger, the New Haven was in receivership largely because it bore an unusually large passenger service commitment and its freight service suffered from intense truck competition.³⁵

The bankruptcy of the Penn Central in 1970 suggested that the industry structure created by the merger was not viable.³⁶ Ironically, an intensive study directed by the Senate Commerce Committee cited the same economic factors which had been raised in support of the industry structure produced by the merger as a reason for its failure.³⁷ Unfortunately, many of the rail mergers which occurred between

that showed a profound change in the type of economic activity in the region since the railroads were built. *See generally id.*

31. 386 U.S. 372 (1967).

32. *Id.* at 390.

33. Penn-Central Merger & N.W. Inclusion Cases, 389 U.S. 486, 521 (1968).

34. *Id.* at 523, 527.

35. G. HILTON, *supra* note 10, at 14.

36. The size of the Penn Central was so great that its bankruptcy made impracticable the existing statutory mechanism for achieving a balanced industry structure. The usual remedy for weak railroads was to compel their inclusion in a larger system that had the resources to deal with their problems. This had happened to the New Haven. *See New Haven Inclusion Cases*, 399 U.S. 392 (1970). The Penn Central was too big and its losses too great to be merged as an entity with another railroad without undermining the viability of the other railroad.

37. *See* S. REP. NO. 601, 93d Cong., 1st Sess. 6, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 3242, 3247. This study, carried out at the direction of the Senate Commerce Committee, concluded that

the Penn Central's collapse stemmed from the complex interaction of a number of practices, including questionable management policy, the misdeeds of individuals, Federal regulatory policies and practices, an inadequately developed national transportation policy, the national economy, deteriorating business conditions in the Northeast, the inability of the private sector to respond to these changes, and competition from other modes of transportation.

Id.

1959 and 1970 were not always economically sound. The Task Force on Railroad Productivity, for instance, has suggested that end-to-end mergers of railroads spanning different regions produce greater rationalization of the overall structure of the rail industry than parallel or regional mergers.³⁸ Many of the mergers during this era, however, were parallel. Both the ICC and rail managers favored parallel mergers in the belief that they would abolish duplication of lines. Yet several commentators have suggested that this belief was mistaken for several reasons: the elimination of duplicative lines was expensive and difficult to achieve due to ICC regulations; the delays in finally closing a merger can be costly; and labor costs may actually increase as a result of a merger because labor unions demand job protection assurances in exchange for their cooperation.³⁹

2. *Regulation of Rates and Services*

Regulation of rates and services by the ICC was one of the reasons why a viable rail industry structure was not formed in the Northeast. The problem of rate and service regulation, therefore, is not analytically distinct from the problem of rail industry structure.⁴⁰ Since regulation helped shape this structure, it must be analyzed in tandem.

Railroad rates have been regulated by the federal government since the enactment of the Interstate Commerce Act of 1887.⁴¹ Under this Act, railroads were to charge only "just and reasonable" rates and their services were to be available to all on fair terms.⁴² The ICC was created to enforce the terms of the Act and it used its ratemaking authority to distribute traffic among the various carriers.⁴³ In so doing, it established a rate structure dependant upon a

38. Task Force on Railroad Productivity, *Introduction to the Problem*, in RAILROAD REVITALIZATION AND REGULATORY REFORMS (P. MacAvoy & J. Snow eds. 1977).

39. G. HILTON, *supra* note 10, at 13-14; United States Dep't of Transp., *The Northeast Problem*, in RAILROAD REVITALIZATION AND REGULATORY REFORM 9, 21-24 (P. MacAvoy & J. Snow eds. 1977).

40. Restrictions on rates and abandonments caused railroad profitability to decline because too much plant was retained in relation to available revenues. Nonetheless, for a time, viable rail operations could be maintained if the industry structure changed periodically through mergers and other consolidations to provide new sources of subsidy for unprofitable activities. Thus, maintenance of the ICC regulatory doctrine was inextricably bound up in ICC control of industry structure.

41. Ch. 104, 24 Stat. 379 (1887) (codified in scattered sections of 49 U.S.C.).

42. H.R. REP. NO. 1035, 96th Cong., 2d Sess. 87, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 4031 [hereinafter cited as STAGGERS ACT HOUSE REPORT].

43. G. HILTON, *supra* note 10, at 8.

calculation of the value of a commodity relative to its weight.⁴⁴

Under this scheme, rates and profit margins for low-value bulk and agricultural commodities were kept low while rates and profit margins for highly valued manufacturing commodities were high.⁴⁵ Low rates for bulk and agricultural commodities were possible because of cross-subsidization from profits earned on the higher rates charged for transporting manufactured goods. But changes in geographic patterns of economic activity, combined with development of a competitive trucking industry, made it increasingly difficult for railroads to generate sufficient revenues on manufactured goods to subsidize the bulk and agricultural commodities.⁴⁶ Because political forces successfully resisted changing the rate structure to the detriment of agricultural and bulk commodity interests, many carriers became plagued by serious financial weakness.⁴⁷

A more obvious way in which ICC regulation affected the rail industry structure was through its control over abandonments of unprofitable lines or services. The Transportation Act of 1920 gave the ICC the authority to control "entry and exit" from the railroad business.⁴⁸ The justification for vesting the ICC with this power was that railroads, by virtue of their public character, were required to serve the public interest. The practical consequence of this provision was that railroads experienced difficulty in abandoning unprofitable lines because gaining ICC approval for abandonments was often time-consuming and costly.⁴⁹

The underlying economic rationale for this rigid abandonment

44. *Id.*; Friedlaender, *Equity, Efficiency and Regulation in the Rail and Trucking Industries*, in CASE STUDIES IN REGULATION—REVOLUTION AND REFORM 102, 106 (L. Weiss & M. Klass eds. 1981).

From its earliest days, the ICC adopted a rate regulation policy reflected in the economic theory developed by Professor Taussig at Harvard University, and later by a politically influential professor at the Harvard Business School, Professor Ripley. This theory was that the demand for each product, rather than the cost of transporting it, finally determines the chargeable rate. This is because most cost is "joint" and cannot be attributable to any particular source. See W.Z. RIPLEY, RAILROADS: RATES AND REGULATION 68 (1912); Taussig, *A Contribution to the Theory of Railway Rates*, 5 Q.J. OF ECON. 438 (1891).

Implementation of the rate regulation policy ultimately required a policy toward consolidations and mergers. See J. HILLMAN, COMPETITION AND RAILROAD PRICE DISCRIMINATION 119 (1968). For a review of the policy rationale for mergers, see 2 A. KAHN, *supra* note 9, at 79-81, 283 n.86.

45. Friedlaender, *supra* note 44, at 106.

46. *Id.* at 107; G. HILTON, *supra* note 10, at 8.

47. Friedlaender, *supra* note 44, at 108.

48. Transportation Act of 1920, Pub. L. No. 66-456, § 402(18), 41 Stat. 456, 477.

49. STAGGERS ACT HOUSE REPORT, *supra* note 42, at 38, 43, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3978, 3983, 3988.

policy was cross-subsidization. Railroads were to subsidize such unprofitable endeavors as light density freight lines and passenger service with revenues from their more profitable services.⁵⁰ By the 1960's, however, passenger and light density freight service became so unprofitable that they had to be increasingly heavily subsidized by other freight service.⁵¹ The requirement that unprofitable services be maintained not only undermined the economic viability of the railroads but directly shaped the structure of its industry. Faced with decreasing revenues and fixed costs, small weak lines sought cross-subsidization through mergers with larger lines, a practice which has been described as the "weak-carrier/strong-carrier" phenomenon.⁵²

Ten years before the northeastern railroad bankruptcies, the effect of ICC regulation on railroads was analyzed in a study published by the Department of Economics of Harvard University.⁵³ This Harvard study concluded that regulation had created unintended adverse consequences because technological developments had radically changed the competitive relationships among different modes of transportation. Moreover, the study noted that regulation had stifled managerial incentives and imagination.⁵⁴

Seventeen years later, a Senate report addressed the basic problems outlined in the Harvard study by identifying two specific regulatory policies as major causes of the northeast rail problem. First, the report suggested that divisions of interregional traffic reve-

50. Friedlaender, *supra* note 44, at 120-21.

51. *Id.* (light density freight lines). See also H.R. REP. NO. 1580, 91st Cong., 1st Sess., reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4735, 4736-37 [hereinafter cited as HOUSE AMTRAK REPORT] (passenger deficits).

52. See G. HILTON, *supra* note 10, at 14 (one purpose of merger is to make possible subsidization of weak railroad by strong one).

53. J. MEYER, M. PECK, J. STENASON, & C. ZWICK, THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES (1959) [hereinafter cited as J. MEYER].

54. *Id.* at 13. Quantitatively, the study discovered that rail passenger, low-density spur line, and small-lot traffic that once could pay its way in a market characterized by rail monopolies would now have to be subsidized by revenues from other rail service or be abandoned. *Id.* For a more extensive discussion of the passenger problem, see text accompanying notes 58-69 *infra*. This decline in passenger service revenue was particularly troublesome because abandonment of this service was restricted by regulatory constraints. Cross-subsidization did not pose a viable solution to this problem because cross-subsidization requires rate increases on low-value or bulk commodities where intermodal competition is weakest. However, because total consumption of such commodities is sensitive to transportation rate increases, strong political pressure is often exerted by producers of these commodities to keep rates down. These realities prevented revenues from being increased enough to cover growing losses in other areas, raising the strong possibility that government subsidization or ownership would be the only way to continue rail service. J. MEYER, *supra* note 53, at 13-14.

nue between northeastern carriers and carriers in other regions were inequitable.⁵⁵ This inequity, the report concluded, could not be corrected under existing regulatory mechanisms.⁵⁶ Second, the report stressed that a relaxation of rate regulation was necessary to permit an increase in rail revenue.⁵⁷

3. *Passenger Service Deficits*

Deficits from passenger operations were another cause of the northeast rail problem. Prior to their merger, the Pennsylvania Railroad and the New York Central were the two largest passenger carrying railroads in the United States.⁵⁸ Unfortunately, passenger service represented an economic drain rather than a benefit. For instance, in 1959 the ICC issued a report on rail passenger service⁵⁹ which found that passenger deficits, first appearing in 1930, had grown to \$723 million in 1957 and \$610 million in 1958.⁶⁰ Nevertheless, the ICC and state commerce agencies were reluctant to permit services to be cut,⁶¹ so that the northeastern railroads continued to be burdened by a common carrier obligation to continue to provide both intercity and commuter passenger service.

To deal with the problem of passenger service deficits, the ICC in its 1959 study recommended local subsidization of commuter service.⁶² Two years later, a study commissioned by the Senate Commerce Committee concluded that states and localities should take

55. S. REP. NO. 499, 94th Cong., 2d Sess. 8 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 14, 21. Industry-wide agreements control rates for traffic that originates at one carrier's facilities and ends at the facilities of another. Traffic is divided between railroads, and revenues are prorated for each mile of road travelled. This formula hurts the northeast roads because the high cost of terminal work is spread over a low mileage proration. Independent action allows a railroad to claim a higher proportion of traffic revenues to cover higher costs.

56. *Id.* at 9-10, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 22-24.

57. *Id.* at 10-15, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 24-26.

58. *See* Penn-Central Merger & N.W. Inclusion Cases, 389 U.S. 486, 493 (1968).

59. *See* Railroad Passenger Train Deficit Case, 306 I.C.C. 417 (1959).

60. *Id.* at 419.

61. Passenger service had proven difficult to discontinue even when losses were substantial. *See* Pennsylvania R.R. v. Sharfsin, 369 F.2d 276 (3d Cir. 1966), *cert. denied*, 386 U.S. 982 (1967) (state public utility commission challenged rail service discontinuance); New York v. United States, 299 F. Supp. 989 (N.D.N.Y. 1969), *aff'd*, 396 U.S. 281 (1970) (suit by state to enjoin abandonment of passenger service approved by ICC); Sludden v. United States, 211 F. Supp. 150 (M.D. Pa. 1962) (action by rail labor to overturn ICC order permitting passenger train discontinuance); Penn Central—Discontinuance of Trains, 334 I.C.C. 638, 672 (1969) (discontinuance permitted five years after petition was filed); New York, N.H. & H.R.R. Trustees—Discontinuance, 327 I.C.C. 151 (1966) (commuter service ordered continued despite losses).

62. Railroad Passenger Train Deficit Case, 306 I.C.C. 417, 483 (1959).

over commuter service and that a corporation virtually identical to what later was called Amtrak should be created to handle intercity passenger service.⁶³

The possibility of actually implementing this Senate Committee proposal was facilitated by several subsequent events. First, the Interstate Commerce Act was amended in 1958 to make it easier for railroads to discontinue passenger service.⁶⁴ Meanwhile, state and local governments began to organize themselves to remedy the commuter problem.⁶⁵ For instance, in 1966, the state of New York purchased from the Pennsylvania Railroad its commuter subsidiary—the Long Island Rail Road. Moreover, in the early 1970's, mass transportation authorities in the New York and Philadelphia areas agreed both to provide the bankrupt Penn Central with commuter operating subsidies and to purchase capital equipment.⁶⁶

63. See DOYLE REPORT, *supra* note 18. For a discussion of Amtrak, see notes 67-68 and accompanying text *infra*.

64. In 1958, Congress amended the Interstate Commerce Act by adding section 13(a). See Pub. L. No. 85-625, § 5, 72 Stat. 568, 571 (1958) (current version at 49 U.S.C. §§ 10908, 10909 (1980)). This section authorized the ICC to give permission for the discontinuance of passenger service, despite state requirements that such service be continued. In amending this Act, Congress was reacting to the large losses on passenger service that drained income from freight service. See H.R. REP. NO. 1922, 85th Cong., 2d Sess. 11, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3456, 3465. For a general discussion of the purpose and history of section 13(a) of the Interstate Commerce Act, see *New Jersey v. New York, S. & W. R.R.*, 372 U.S. 1 (1973).

65. DOYLE REPORT, *supra* note 18, at 570. In 1959, Nelson Rockefeller, pledging to aid railroads, was elected governor of New York. See *Railroad Passenger Train Deficit Case*, 306 I.C.C. 417, 460 (1959). He met with the governor of New Jersey and the mayor of New York City and encouraged a state Public Service Commission inquiry. Fifteen million dollars in annual state tax benefits were granted to the railroads, and twenty million dollars were loaned for the purchase of new passenger equipment. The Port of New York Authority was authorized to float a \$100 million bond issue for various forms of railroad assistance. R. Purcell, Special Report to the Governor on Problems of the Railroad and Bus Lines in New York State (Mar. 12, 1959).

66. In 1965, the Metropolitan Transportation Authority bought the Long Island Rail Road from the Pennsylvania Railroad for \$65 million. See *Pennsylvania R.R.—Merger—N.Y. Cent. R.R.*, 327 I.C.C. 475, 488 (1966); See R. SOBEL, *supra* note 1, at 237, 248. By 1969, New York and Connecticut had agreed to spend \$104 million to buy 144 new cars and to rehabilitate fixed facilities. 327 I.C.C. at 518.

After the Penn Central bankruptcy, further progress was made in Connecticut, Massachusetts, New York, and Pennsylvania to shift the financial burden of commuter service to state and local authorities. On January 1, 1971, New York and Connecticut agreed to operate the service between New York City and New Haven that had formerly been provided by the New Haven Railroad. [1972] 1011 CORP. REORG. REP. (CCH) 2467, 2491. A similar agreement was reached for the Hudson and Harlem branch service, but the reorganization court disapproved it. *Id.*

In Pennsylvania, the Southeastern Pennsylvania Transportation Authority (SEPTA) agreed to assume full financial responsibility for Philadelphia-area commuter service after July 1, 1972. *Id.* Moreover, the Reading negotiated with SEPTA for a take-over of commuter service. *In re Reading*, 361 F. Supp. 1351 (E.D. Pa.

On a broader, federal scale, Congress created Amtrak in 1970.⁶⁷ Amtrak, a private corporation owned by the participating railroads, was to receive substantial financial assistance from the federal government. It was created to relieve railroads of the burden of providing intercity passenger service.⁶⁸ Nonetheless, commuter service losses remained. Therefore, by the time the Penn Central declared bank-

1973). In Massachusetts, the Massachusetts Bay Transportation Authority entered into negotiations over its assumption of Boston-area commuter services, some of which already had been assumed by the authority. *New York, N.H. & H.R.R. Trustees—Discontinuance of Passenger Service*, 327 I.C.C. 77 (1967).

67. Amtrak was created by the Rail Passenger Service Act of 1970. *See* Pub. L. No. 91-518, 84 Stat. 1327 (codified as amended at 45 U.S.C. §§ 501-645 (1976)). The Act was designed "to prevent the complete abandonment of intercity rail passenger service . . ." in response to the precipitous decline in rail passenger service that had occurred for at least fifty years prior to the Penn Central bankruptcy. HOUSE AMTRAK REPORT, *supra* note 51, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4735. In 1929, for instance, there were about 20,000 passenger trains in the United States. Nine thousand of these had disappeared by 1946. By 1970, fewer than 500 passenger trains remained, and of these, 100 were involved in discontinuance proceedings before the I.C.C. *Id.* at 2, 3, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 4736. According to the Secretary of Transportation, by 1969 the deficit for passenger service had reached \$200 million. *Id.* at 3, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 4737. During the same year, total net railroad income was only \$500 million. In his 1969 testimony before Congress, the Secretary of Transportation noted that as consequence of these continuing passenger service deficits, Congress was confronted with the choice of either subsidizing or reorganizing the rail passenger system. He advised reorganization that would pare away unprofitable lines. *Id.*

By enacting the Rail Passenger Service Act in 1970, Congress recognized that "a rational reduction of present service will be required in order to save *any* passenger service. The remaining service must be organized into a cohesive system requiring a management which takes into consideration the needs and abilities of the entire system. . . ." HOUSE AMTRAK REPORT, *supra*, at 3, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 4737. To help achieve this goal, the Secretary of Transportation was required to make a recommendation for a "basic national rail passenger system" that outlined the route which would be served. *Id.* at 4-5, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 4739-40. After labor unions, the ICC, and public utility commissions were given an opportunity to comment on this plan, a private, for profit corporation was to be established to provide intercity rail passenger service to the points designated in the Secretary's plan. *Id.* at 5-6, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 4739-40.

68. Beginning on May 1, 1971, the new corporation was authorized to enter into contracts with railroads that would relieve them of the intercity passenger service. Once a railroad entered into a valid contract, it was relieved of all of its obligations as a common carrier of passengers. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 401, 84 Stat. 1334 (codified at 45 U.S.C. § 561 (1976)).

Amtrak's common stock was to be owned by the participating railroads. Each railroad joining the Amtrak system would be relieved of its obligation to operate intercity passenger service in exchange for payment under a formula related to the 1969 passenger losses of that railroad. HOUSE AMTRAK REPORT, *supra* note 51, at 6-10, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 4736-44. Payment could be made in cash, rail passenger equipment, or promises to provide future service under contract with Amtrak. *Id.* For a discussion of the federal financial assistance for Amtrak, *see id.*

Commuter service was expressly excluded from the Act, thereby leaving the railroads responsible for that category of passenger service. *See* Rail Passenger Service

ruptcy and its trustees issued their reorganization report on February 15, 1972, it was clear that one requirement for a successful reorganization of the northeast rail system was to relieve freight operations of the burden of commuter losses.⁶⁹

4. *Labor Costs*

Another underlying problem that contributed to the Penn Central bankruptcy was high labor costs.⁷⁰ The labor cost problem was a dilemma with three facets: labor protection, crew size, and bargaining structure.

To reduce labor opposition to the Penn Central merger, the management of the Pennsylvania and New York Central negotiated a labor protection agreement that provided lifetime earnings protection for all of their employees.⁷¹ In addition, the agreement required that

Act of 1970, Pub. L. No. 91-518, § 102(5), 84 Stat. 1328 (codified at 45 U.S.C. § 502(5) (1976)).

69. [1972] 1011 CORP. REORG. REP. (CCH) 2479.

70. *Id.* at 2483. The Penn Central trustees, for instance, noted that high labor costs had to be diminished before successful reorganization could take place. *Id.* Besides the expenses involved in maintenance of plant and equipment, and car utilization, labor costs are the only other significant variable cost in railroad economics. Thus, any attempt to reduce the costs of rail operation without a simultaneous reduction in common carrier services to shippers must look first to labor.

71. Although more generous than prior arrangements, the Penn Central Merger Protection Agreement was merely one in a series of collective bargaining agreements or ICC orders that provided protection for employees of railroads that engaged in mergers or abandonments. *See* SPECIAL STAFF OF THE SENATE COMMERCE COMM., THE PENN CENTRAL AND OTHER RAILROADS, A REPORT TO THE SENATE COMM. ON COMMERCE, 92d Cong., 2d Sess. 331-32 (1972) [hereinafter cited as 1972 SENATE COMMERCE COMM. REPORT]. *See also* Pennsylvania R.R.—Merger—N.Y. Cent. R.R., 327 I.C.C. 304, 313 (1966).

The labor protection movement began with efforts by rail unions during the Depression to promote federal legislation that would protect railroad employment during mergers. *See* L. LECHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION 103 (1955). The Roosevelt Administration proposed legislation to facilitate railroad mergers, and the resulting statute prohibited dismissals or pay reductions resulting from mergers accomplished under the law. Emergency Railroad Transportation Act, Pub. L. No. 91-68, § 7(b), 48 Stat. 211 (1933). Railroad managers opposed the statutory job freeze, and they were even more concerned about labor-sponsored legislation that would make employment protection a permanent requirement of ICC approvals for consolidations. In May 1936, labor and management reached an agreement on employee protective measures that came to be known as the "Washington Agreement." *See* L. LECHT, *supra*, at 109-10.

The ICC began to impose similar requirements for employee protection for its approval of consolidation projects. *See, e.g.*, Chicago, R.I. & G. Ry. — Lease, 230 I.C.C. 181 (1938); Associated Ry.—Acquisition, 288 I.C.C. 277 (1938). This action by the ICC was approved by the Supreme Court. *See, e.g.*, United States v. Lowden, 308 U.S. 225, 238 (1939) ("fair and equitable provision for the compensation of losses thrown upon employees as the result of an authorized consolidation or lease promotes the national transportation policy by developing, coordinating and preserving the railroad transportation system"). In 1940, Congress enacted legislation requiring the

after consummation of the merger several thousand unnecessary employees had to be rehired.⁷² In making these concessions, management was responding to labor's legitimate concern over job security, which, in turn, was prompted by the enormous reduction in railroad employment since the Second World War.⁷³ Assuring job security, however, necessarily imposed an economic burden on the railroads.

Another historic cause of high labor costs was the inflexible requirements for crew size that were required by state full crew laws and collective bargaining agreements. Collectively bargained labor agreements for train crew size (crew consist) varied considerably from one geographic region to the next. Although technological advances made the jobs of many train crew employees—such as second brakemen—largely unnecessary, the railroads were obligated by their crew consist agreements to retain the positions.⁷⁴ In addition, collective bargaining agreements with the unions representing firemen and en-

ICC to impose labor protection, but only in consolidation cases. Pub. L. No. 785, § 7, 54 Stat. 899, 907 (1940) (current version at 49 U.S.C.A. § 11347 (West Supp. 1982)). In 1942, the Supreme Court required that protection also be imposed in abandonments covered by § 1(18) of the Interstate Commerce Act. *ICC v. RLEA*, 315 U.S. 373 (1942) (ICC has the authority to impose terms and conditions for the benefit of employees displaced by abandonments or consolidations).

Although the Washington Agreement provided for five years of protection, the ICC initially imposed protection that lasted only four years. *See, e.g.*, *Chicago, B.&Q.R.—Abandonment*, 257 I.C.C. 700, 704 (1944). In 1950, however, the Supreme Court held that four years was a minimum, not an inflexible formula. *RLEA v. United States*, 339 U.S. 142, 155 (1950). In a series of merger agreements, protection was expanded through collective bargaining to "lifetime protection." Finally, in 1962, the Presidential Railroad Commission recommended the establishment of a comprehensive employee protection arrangement that would allow the public to benefit from the free introduction of new technology, while protecting workers from too sudden changes. The program envisioned giving railroad management the right to introduce technological changes subject to providing employees with notice and an opportunity to negotiate, and if negotiation failed, the right to a binding determination by a special tribunal. Employees deprived of employment as an immediate and proximate consequence of technological change were entitled to certain severance allowances, preferential hiring status, and retraining. PRESIDENTIAL RAILROAD COMMISSION, REPORT 76 (1962) [hereinafter cited as PRC REPORT].

For a good summary of more recent protective conditions, see *New York Dock Ry. v. United States*, 609 F.2d 83, 86-90 (2d Cir. 1979). *See generally* STAGGERS ACT HOUSE REPORT, *supra* note 42, at 139-45, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 4083-89.

72. *See* 1972 SENATE COMMERCE COMM. REPORT, *supra* note 71, at 85.

73. *See* PRC REPORT, *supra* note 71, at 25-26. This report noted that [h]istorically, the railroad industry has been one of the largest employers of manpower in the United States. During World War I, there were over 2 million jobs on the railroads. Except for increases resulting from the unusual transportation demands of World War II, the number of jobs has declined steadily to less than 800,000 in 1960.

Id.

74. *See* PRC REPORT, *supra* note 71, at 54-56. "Crew consist" is a term of art

gineers, required virtually all railroads to employ largely redundant firemen on certain kinds of diesel locomotives.⁷⁵ State laws have had a similar effect on the size of railroad crews and thus on labor costs. For instance, state laws enacted mostly in the 1930's imposed minimum crew requirements for both engine and train crews.⁷⁶

used to refer to a collectively bargained rule that requires a particular number of members for a train crew. *Id.* at 53.

75. Under the National Diesel Agreement of 1937, the railroads agreed to employ firemen on diesel locomotives in passenger trains that either had been streamlined for aesthetic appearance or which operated on a route with heavy traffic between major terminals. The railroads also agreed to employ firemen on diesel locomotives weighing more than 90,000 pounds. Firemen were not required on electric locomotives, a result sought strongly by the Pennsylvania Railroad. *See* NATIONAL RAILWAY LABOR PANEL, EMERGENCY BOARD REPORT 55-56 (1943); PRC REPORT, *supra* note 71, at 36. On May 10, 1941, the Brotherhood of Locomotive Firemen and Enginemen (BLF & E) proposed that firemen be employed on *each unit* of diesel and electric locomotives. 1943 EMERGENCY BOARD REPORT, *supra*, at 4-5. These locomotives were designed so that they could be operated with a number of units coupled together, thereby requiring only one engineer in the forward unit. Four years earlier, the Brotherhood of Locomotive Engineers (BLE) had proposed that an employee represented by it be employed as an "assistant engineer" in the engine room of internal combustion locomotives. *Id.* at 5-6. Both the firemen and the engineer organizations were concerned that the replacement of steam locomotives with diesels would eliminate a substantial number of engine crew positions. *Id.* at 49-50. The 1943 Emergency Board concluded that an additional fireman might be required on locomotives in main-line passenger service to handle engine room matters, but the board rejected proposals for additional employees in freight service diesels. *Id.* at 53-54.

The BLF & E settled with the three carrier conference committees separately on essentially the substantive terms recommended by the Emergency Board. *See* NATIONAL RAILWAY LABOR PANEL, EMERGENCY BOARD NO. 58 REPORT 6-7 (1949). The BLE later settled with the conference committees in a manner that left open a dispute over the employment of additional engineers. *Id.* at 8-10. After the BLE proposed modification of the agreements, to provide expressly for the employment of an additional engineer in the engine room, another Emergency Board was appointed, which recommended against adoption of the proposal. *Id.* at 85. The BLE did not press the matter. L. LECHT, *supra* note 71, at 219. On May 10, 1950, the BLF & E staged a six-day strike on four railroads. The carriers responded by agreeing to employ firemen on yard diesels placed in service after June 1, 1950, and the BLF & E withdrew its demand for an additional employee on road locomotives. *Id.* at 221.

The carriers proposed the elimination of diesel firemen in 1956, but the proposal was withdrawn. *See* PRC REPORT, *supra* note 71, at 36. In 1959, another proposal was served which led to the establishment of the Presidential Railroad Commission. *See* Rehmus, *Collective Bargaining and Technological Change on American Railroads*, COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION 195-209 (1971).

76. States enacted statutes to regulate the size of train crews and the lengths of trains ostensibly on grounds of safety. *See generally* L. LECHT, *supra* note 71. Arkansas enacted the first full-crew law in 1907. Act of 1907, No. 116, §§ 1-3, ARK. STAT. ANN. §§ 73-720 to 73-729 (1947) (repealed 1972). In 1911, and again in 1931, the Arkansas law was upheld as constitutional. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931); *Chicago, R.I. & P. Ry. v. Arkansas*, 219 U.S. 453 (1911). By 1937, twenty states had full-crew laws, and by 1940, four states had train-length laws. L. LECHT, *supra*, at 91. Later, some state laws were amended to protect the jobs of firemen on diesel locomotives. *See, e.g.,* N.Y.R.R. LAW § 54(b) (McKinney 1952) (repealed

In the late 1950's, the railroad industry organized a major public relations campaign to gain the right to determine crew size unilaterally, without restrictions imposed by labor agreement or statute. The campaign forcefully attacked featherbedding on the nation's railroads and called for the establishment of a Presidential Commission.⁷⁷ In response to this concerted effort, in 1960, a Presidential Commission

1977). As a measure of the effectiveness of the laws, one commentator noted that when the California full crew laws were relaxed during World War II manpower needs decreased by almost one-third. L. LECHT, *supra*, at 92. See also *Southern Pac. v. Mashburn*, 18 F. Supp. 393 (D. Nev. 1937) (impact of train-length law on number of crews). In 1945, the Arizona train-length law was declared unconstitutional as imposing an undue burden on interstate commerce. *Southern Pac. v. Arizona*, 325 U.S. 761, 781-82 (1945). Although rail unions pressed for federal full-crew and train-length legislation, none was enacted. One bill was, however, passed by the Senate. See S. REP. NO. 416, 75th Cong., 1st Sess. (1939).

77. The campaign was directed by the Association of American Railroads (AAR) and focused initially on building public support for industry proposals after moratoria for change in the applicable collective agreements expired on October 31, 1959. See Association of Am. Railroads, Press Release (Oct. 20, 1959). Pamphlets for the general public were prepared and material distributed for industry spokesmen to use in making public speeches. See Letter from Vice President and General Counsel of the AAR to General Counsel of Member Roads (Feb. 18, 1960). Substantial press coverage resulted. See, e.g., *Rail Unions Warned*, N.Y. Times, Oct. 21, 1959, at L-30, col. 4; Steinberg, *It's Showdown Time for Featherbedding on the Railroads*, READER'S DIG. (Oct. 29, 1959). The AAR also called for the establishment of a Presidential commission to make "an objective study of the public impact of outmoded work rules" Association of Am. Railroads, Press Release (Aug. 20, 1959). The campaign continued into the mid-1960's, after the Commission was appointed. See Association of Am. Railroads, Press Release (Mar. 27, 1964). Typical of the industry's message was that contained in the following press release:

SOONER OR LATER FEATHERBEDDING WILL END. The public benefits which will come from the elimination of featherbedding on the nation's railroads will be further delayed while the courts dispose of legal technicalities raised by the railroad operating unions. This is a setback for the shipping and traveling public which now pays the railroad unions nearly \$600,000,000 each year for work not needed or not performed. . . .

Plunging this rules dispute into the courts instead of handling it through the orderly processes of the Railway Labor Act is merely an example of the stalling and delaying tactics which the unions have followed ever since the railroads have attempted to negotiate work rules changes. . . .

Another example is the unions' attempt to divert attention from the monstrous public costs of featherbedding by calling for a Congressional investigation of railroad finances. . . .

No one is deceived by such diversionary tactics. Few industries live in such a goldfish bowl as the railroads, who are required to report in meticulous detail to the Interstate Commerce Commission. Every financial fact about the railroads is a matter of public knowledge. But it does not take any Congressional investigation to disclose the effects of the \$600,000,000 burden inflicted by union protected featherbedding. . . .

The railroads will do their best to speed the end of featherbedding.

Association of Am. Railroads, Press Release (Aug. 20, 1962). In response to the advertisement, the operating brotherhoods filed a \$1.5 million libel suit against the AAR. See *Kennedy v. Loomis*, No. 136119-2 (N.Y., filed Aug. 28, 1962).

was appointed to study the fireman and train crew problem.⁷⁸ It recommended the elimination of many firemen, and proposed a procedure for resolving the crew consist problem on a local basis.⁷⁹ After unsuccessful attempts to implement the Presidential Commission's recommendations through collective bargaining, Congress intervened to prevent a nationwide strike⁸⁰ by enacting legislation that provided for compulsory arbitration of both disputes.⁸¹ The result was the virtual elimination of diesel firemen on freight engine crews, and a substantial reduction in the number of freight train crews that required two brakemen.⁸² But railroads in the Northeast and Midwest benefited only modestly from the arbitration award because of obligations imposed by state full crew laws.⁸³ Moreover, the Pennsylvania Railroad, in an effort to reduce labor opposition to the Penn Central merger and to facilitate the repeal or modification of full crew laws, agreed to a standard train crew of one conductor and two brakemen.⁸⁴ Despite contentions by management that many of these employees were unnecessary, this pattern was eventually imposed on the rest of the industry by rail labor.⁸⁵

78. Exec. Order No. 10,891, 25 Fed. Reg. 10,525 (1960). *See also* PRC REPORT, *supra* note 71, at 13.

79. PRC REPORT, *supra* note 71, at 48-50, 59-60.

80. *See* Pub. L. No. 88-108, 77 Stat. 132 (1963) (terminated 180 days after Aug. 28, 1963).

81. *Id.* Although the Presidential Railroad Commission had recommended that the crew consist issue, once settled, should not be reopened for at least five years, Congress provided that the arbitration award should last for only two years. PRC REPORT, *supra* note 71, at 60.

82. For a comprehensive survey of the arbitration award and associated litigation, see *Brotherhood of R.R. Trainmen v. Akron & B.B.R. Co.*, 385 F.2d 581, 588-92 (D.C. Cir. 1967).

83. By the time of the Penn Central bankruptcy, full crew laws were still in effect in Ohio and Indiana, two states where the railroad had significant operations. New York's full crew laws had been repealed in 1966. N.Y.R.R. LAW § 54a (McKinney 1952) (repealed 1966). The Indiana law was modified in 1972. IND. CODE ANN. § 8-9-2-10 (Burns 1973). The Ohio law was repealed in 1974. OHIO REV. CODE ANN. § 4999.07-.08 (1910) (repealed 1974).

The Supreme Court held that the legislation did not preempt state full crew laws. *Brotherhood of Locomotive Eng'rs v. Chicago, R.I. & P.R.R.*, 382 U.S. 423 (1966); *Accord* *Chicago & N.W. Ry. v. La Follette*, 27 Wis. 2d 505, 135 N.W.2d 269 (1965).

84. This was the so-called "Luna-Saunders Agreement" of 1965. *See* F. WILNER, *THE UNITED TRANSPORTATION UNION'S SELECTIVE STRIKE TECHNIQUE* 31 (1977).

85. *See* *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971), *rev'g*, 422 F.2d 979 (7th Cir. 1970), *on remand*, 330 F. Supp. 646 (N.D. Ill. 1971), *rev'd*, 471 F.2d 366 (7th Cir. 1972), *cert. denied*, 410 U.S. 917 (1973). The Supreme Court opinion and district court opinion on remand give helpful histories of the dispute after the "Luna-Saunders Agreement" was entered into in 1965. *See also* *Delaware & H. Ry. v. United Transp. Union*, 450 F.2d 603 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971).

In 1972, the railroads, through their National Railway Labor Conference,⁸⁶ succeeded in negotiating an industry-wide agreement, the Firemen Manning Agreement, that provided for the elimination of most diesel firemen. The crew consist issue, however, was not dealt with at the industry level, because of a court decision that the carriers could not insist upon negotiating that issue on a national level.⁸⁷

Finally, efforts to negotiate necessary labor cost reductions have historically been impeded by the structure of railroad collective bargaining, which, in turn, was shaped both by the custom of union representation of individual crafts and by the practice of separate negotiations of discrete issues under the Railway Labor Act.⁸⁸ "Bargaining structure" is a term used to describe the factors that influence the balance of power between labor and management in collective bargaining. Employers and employees ultimately can resort to lock-outs and strikes to force their bargaining table adversaries to accede to their demands, but the bargaining structure within which they act determines the frequency of the use, timing, and impact of these economic weapons.

In the rail industry, there is a strong disincentive against resort to the ultimate weapon of lock-outs by management. As a practical, economic matter, railroads are highly vulnerable to strikes, in part because the technology of railroad operations is functionally and geographically interdependent. For instance, if employees in one sector such as train operations, decide to stop working, then continued activity by employees in the engineering, mechanical, or clerical sections cannot keep the enterprise running. Similarly, if operations are interrupted by a strike in one geographic area, operations in other areas are also affected because freight cannot flow through the struck area to or from the non-struck areas. Moreover, the limited technological ability that exists to continue railroad operations despite interruptions to a single function or to a single geographic area is diminished by the traditional solidarity of rail unions. It is quite uncommon for

86. The National Railway Labor Conference is the industry bargaining committee established in the early 1960's to coordinate the previously separate activities of the Eastern, Western, and Southeastern Carriers Conference Committees.

87. *See* *Brotherhood of R.R. Trainmen v. Atlantic C.L.R.R.*, 383 F.2d 225 (D.C. Cir. 1967). After the Penn Central went bankrupt, its trustees, and the trustees of at least one other bankrupt line struggled alone with the crew consist problem. The Penn Central trustees considered the labor cost problem primarily in terms of crew size. [1972] 1011 CORP. REORG. REP. (CCH) 2476, 2479. Eventually these trustees forced Congress to deal generally with the northeast rail problem because of the 1972 crew consist dispute. For a discussion of this dispute, see notes 105-14 and accompanying text *infra*.

88. *See* 45 U.S.C. §§ 151-188 (1976).

employees in one craft union to cross the picket lines of another craft union. Therefore, a strike by one labor organization usually causes a cessation of work by all unionized employees.

The problems inherent in a rail strike cannot be mitigated by advance preparation because transportation services cannot be stockpiled. Consequently, a strike that interrupts operations causes an immediate and substantial reduction in revenues. Moreover, for several decades, railroad liquidity has been marginal. Reduced revenues due to a strike can thus have a disastrous effect on the solvency and survival of a railroad. Because of these economic realities, both labor and management know that a strike which continues for any length of time will result in a certain victory for labor.

One factor that increases the number of strike threats is craft organization. Railroad employees historically have been organized into relatively narrow crafts. Approximately twenty "standard" railway labor organizations are recognized, although no more than about fifteen represent significant numbers of employees, largely because of the decline in passenger service⁸⁹ and some of its incidental elements such as dining cars. The large number of labor organizations representing employees of a single carrier has resulted in increased strike frequency, and competitive pressure for more ambitious demands by labor. Although industry-wide bargaining has suppressed the most severe effects of these conflicts, the problems, nevertheless, remain.

The Railway Labor Act, under which railroads and their employees bargain, also has influenced the rail bargaining structure. This Act contemplates issue-by-issue bargaining rather than bargaining over a comprehensive contract for a definite term.⁹⁰ Unless suitable precautions are taken, any issue relating to wages, rules or working conditions can be opened for bargaining, and unless agreement is reached at the bargaining table, a strike over that single issue can occur.⁹¹

89. See Shils, *Union Fragmentation: A Major Cause of the Transportation Labor Crisis*, 25 INDUS. & LAB. REL. REV. 32 (1971).

90. 45 U.S.C. §§ 151-188 (1976).

91. Nonetheless, before a strike can occur under the Act, at least one party to the dispute must declare an impasse, and a period of mediation by the National Mediation Board, undetermined in duration, must ensue. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). For a discussion of the negotiation framework established by the Act, see note 107 *infra*. Moreover, the courts have interpreted the Act so as to preclude a railroad from reacting to a strike over a single issue by making changes in other terms of employment. *Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry. Co.*, 384 U.S. 238, 248 (1966).

The bargaining structure of the rail industry has also been improved somewhat by the practice of railroads and rail labor organizations participating jointly in industry-wide negotiations over major economic issues. See REHMUS, *EVOLUTION OF LEG-*

One way in which management has attempted to avoid these bargaining problems is through multi-employer bargaining. There are a variety of reasons why employers wish to engage in multi-employer bargaining, including the desire to promote comprehensive negotiations over various issues and to force strike threats by different labor organizations to occur simultaneously.⁹² An additional, and perhaps the dominant, reason for rail carriers to engage in multi-employer bargaining is the threat of the economic consequences of a strike against a single carrier, combined with a belief that Congress will intervene rather than permit a national rail strike.⁹³ The belief that the Congress would intervene to prevent a national strike, with results favorable to management, was vindicated in 1963 when Congress enacted a law to resolve the fireman dispute.⁹⁴ Congress also enacted compulsory procedures to settle a shopcraft dispute in 1967.⁹⁵ Indeed, in 1967 the rail industry used the threat of a nationwide strike in a single dispute to support its desire for permanent legislation providing for compulsory arbitration.⁹⁶

Rail labor has sought to preserve a fragmented bargaining structure on occasion. It apparently recognized management's advantage in forcing disputes to the industry-wide level, thereby enhancing the prospect of congressional intervention.⁹⁷ A former president of the United Transportation Union (UTU), Charles Luna, takes credit for conceiving the idea of selective strikes against individual railroads participating in national negotiations. His objective was to exert economic pressure, without the risk of congressional intervention which might be favorable to management.⁹⁸ In 1971, the UTU struck indi-

ISLATION AFFECTING COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRY: THE RAILWAY LABOR ACT AT FIFTY 17-18 (1976); Shils, *supra* note 89, at 37. But not all issues can be dealt with at the national level. See *Brotherhood of R.R. Trainmen v. Atlantic C.L.R.R.*, 383 F.2d 225 (D.C. Cir. 1967) (thousands of crew consist agreements had been negotiated at the local level because of the history and reality of crew consist bargaining in the rail industry which mitigated against a national crew consist rule). This leaves individual carriers vulnerable to strikes over a multiplicity of issues involving many separate labor organizations.

92. See *Bonanno Linen Serv., Inc. v. NLRB*, 102 S. Ct. 720, 723 n.3 (1982).

93. See *Delaware & H. Ry. v. United Transp. Union*, 450 F.2d 603, 612 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971) (vulnerability of individual carriers to strike).

94. See Pub. L. No. 88-108, 77 Stat. 132 (1963) (codified as amended at 45 U.S.C. §§ 151-157 (1976 & Supp. IV 1980)).

95. See Pub. L. No. 90-54, 81 Stat. 122 (1967) (codified as amended at 45 U.S.C. § 151 (1976 & Supp. IV 1980)). See also S. REP. NO. 292, 90th Cong., 1st Sess., reprinted in 1967 U.S. CODE CONG. & AD. NEWS 1397.

96. See *Hearings on the Railroad Labor Dispute before House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 167 (1967) (testimony of J.E. Wolfe).

97. See F. WILNER, *supra* note 84, at 13, 16, 40.

98. *Id.* at 45-46, 48.

vidual carriers engaged in national bargaining. This kind of selective strike was found by the courts to be permissible, as long as its objective was to force an industry-wide settlement.⁹⁹ Thus, the railroad industry's attempt at multi-employer bargaining was less than successful.

B. *The Penn Central Bankruptcy*

The method which the managements of the New York Central and Pennsylvania railroads chose to deal with these complex problems was merger. But on June 21, 1970, only two years after its much heralded merger, the Penn Central Transportation Company filed a petition for bankruptcy in the United States District Court for the Eastern District of Pennsylvania.¹⁰⁰ Within six months, the trust-

99. *Delaware & H. Ry. v. United Transp. Union*, 450 F.2d 603, 619 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971). With the principal purpose of multi-employer bargaining thus threatened, the industry responded with a system of strike insurance. *See Alton & S. Ry. v. Brotherhood of Ry., Airline & S.S. Clerks*, 99 L.R.R.M. (BNA) 2323 (D.D.C. 1978), *aff'd*, No. 78-1607 (D.C. Cir. Sept. 15, 1978). The strike insurance plan was held to permit the union in a single carrier strike to exert pressure on all carriers participating in the insurance plan, involving something of a role reversal from the 1971 selective strike controversy. *See generally* Perritt, *Am I My Brothers Keeper: Secondary Picketing Under the Norris-LaGuardia Act*, 68 GEO. L.J. 1191 (1980).

The difficulties of multi-employer bargaining are illustrated by the attempt of three UTU general committees to withdraw from national negotiations over wage proposals in late 1981. The National Railway Labor Council (NRLC) filed suit, seeking to enjoin the UTU from withdrawing from national negotiations without the consent of all the railroads represented by the NRLC. Complaint at 16, *Atchison, T & S.F. Ry. v. United Transp. Union*, No. 82-0278 (D.D.C. Jan. 28, 1982). The UTU had taken the position that the NRLC was insisting on dealing with "local issues" involving work rules in the national negotiations, and that the UTU was entitled to revert to local negotiations of associated wage issues to preserve its right to bargain locally on issues historically handled at that level. Letter from F.A. Hardin to Rowland K. Quinn (Jan. 12, 1982). The suit did not proceed to a conclusion, but was withdrawn as a part of the 1982 UTU-NLRC collective bargaining agreement.

100. *New Haven Inclusion Cases*, 399 U.S. 392, 399 n.† (1970). Under § 77 of the Bankruptcy Act, federal district courts had broad powers to protect the public interest in continued rail service by restructuring ownership and creditor interests, and even by compelling continued operation in the face of apparently hopeless losses. 11 U.S.C. § 205 (1976). *See* 399 U.S. at 420-21, 431; *Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n*, 383 F. Supp. 510, 536 (E.D. Pa.), *rev'd*, 419 U.S. 102 (1974). Section 77 was enacted to alleviate the problems associated with equity receiverships of railroads. *See generally* 399 U.S. at 426-27. Section 77 had two purposes: the protection of creditors and shareholders of the insolvent carrier, and preservation of rail service. *Id.* at 431.

Prior to the 1960's, railroad insolvency usually was caused by an inability to meet fixed debt service or debt maturities. *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 902 (Regional Rail Reorg. Ct. 1974). Income reorganization was possible in these cases by restructuring debt and equity so that debt service and refinancing could be accomplished with available income. The Penn Central bankruptcy, on the other hand, involved an inability to pay taxes and operating expenses. *Id.* at 903. Therefore, restructuring of debt and equity could not solve the problem. The reorganization court would, of course, have the power to consider a restructuring of oper-

ees of the Penn Central informed Congress that the railroad would cease operating unless it received federal assistance in the form of loan guarantees.¹⁰¹ Congress responded with the Emergency Rail Services Act of 1970, which provided up to \$125 million in loan guarantee authority.¹⁰²

Two years after filing for bankruptcy, the trustees filed a report on the feasibility of reorganizing the Penn Central.¹⁰³ The trustees concluded that the Penn Central could be reorganized, but only if projections of increased freight traffic were accurate and the company was permitted to reduce its labor costs, abandon its unproductive lines, and receive full compensation for the losses it incurred by continuing passenger service.¹⁰⁴

ations so as to bring operating expenses within income. 399 U.S. at 421-22. However, if neither the restructuring of debt and equity nor the restructuring of operations can permit a railroad to cover operating expenses and cost of capital from its income, the railroad is not "reorganizable on an income basis."

In the absence of a prospect for an income-based reorganization based on net operating income, there is no justification for continuing a reorganization proceeding, unless at least one of the following conditions is met: 1) a reasonable prospect that, because of streamlining, consolidations, and other changes in circumstances, earning power and profitability can be restored; or 2) a reasonable prospect that the public need for preserving the debtor's railroad is such that it will be appropriated for public use, and that the values inherent in its assemblage as an operating railroad will be recognized and compensated. 383 F. Supp. at 537 (Fullam, J., concurring). For example, in the New Haven bankruptcy, "[t]here were no earnings and no prospects of any The alternatives were liquidation, nationalization, or merger." 494 F.2d at 280.

It was not entirely clear what the reorganization court was supposed to do when it determined that an income based reorganization was not feasible, and that neither nationalization nor merger would occur. Presumably it was to dismiss the petition, and let liquidation occur under an equity receivership. *In re Tennessee Central Ry.*, 304 F. Supp. 789 (M.D. Tenn. 1969). *But see In re Lehigh Valley R.R.*, 558 F.2d 137, 142-43 (3d Cir. 1977) (district court with jurisdiction of estate of railroad in reorganization was authorized to continue railroad reorganization proceedings even when it was no longer possible to reorganize the debtor as a railroad). *See also* S. REP. NO. 989, 95th Cong., 2d Sess. 136, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5922. The new Bankruptcy Act makes it clear that liquidation can occur under supervision of the reorganization court. *See* 11 U.S.C. § 1174 (1978).

101. H.R. REP. NO. 1770, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5983.

102. Emergency Rail Services Act of 1970, Pub. L. No. 91-663, 84 Stat. 1975 (codified as amended at 45 U.S.C. §§ 661-669 (1976)). Some members of Congress objected to the urgent, stop-gap character of the legislation, preferring that Congress deal with the long-term problems of railroad bankruptcies. H.R. REP. NO. 1770, 91st Cong., 2d Sess. 8, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 5987-88.

103. [1972] 1011 CORP. REORG. REP. (CCH) 2476. The trustees filed their report on February 15, 1972. *Id.* For a general discussion of the trustees' attempt to reorganize the Penn Central, see Langdon, *The Struggle for Viability: First by Penn Central, Then by Conrail*, 49 I.C.C. Prac. J. 374 (1980).

104. [1972] 1011 CORP. REORG. REP. (CCH) 2476. To achieve plant rationalization, the trustees recommended that 9,000 of the 20,000 route miles operated by the Penn Central should be abandoned. *Id.* at 2477, 2482. They suggested that un-

On March 14, 1972, a month after the trustees filed their report, the Penn Central announced that it would implement a crew consist reform proposal by eliminating 6,000 of 18,000 conductor and brakemen positions within two weeks.¹⁰⁵ When the UTU threatened to strike if this plan were implemented, President Nixon appointed an emergency board to investigate the dispute within 30 days as required by the Railway Labor Act.¹⁰⁶ The emergency board recommended further negotiations, which were unsuccessful, and by June 15, 1972 the parties had satisfied their legal obligations under the Railway Labor Act and were free to strike.¹⁰⁷ First, however, they pursued legal action. On December 22, 1972, the Penn Central trustees were given permission by Judge Fullam to reduce crew size after providing four-

necessary labor costs could be reduced by eliminating 9,800 train and engine service personnel that the railroad was required to employ under crew consist agreements and state full crew laws. *Id.* at 2477, 2483. Finally, the trustees contemplated that the Penn Central would continue to provide intercity passenger service in conjunction with Amtrak, and commuter service. *Id.* at 2477, 2483-84. Their report, however, projected an increased reimbursement of \$87.2 million for the losses which Penn Central would incur in providing these services. *Id.* If the necessary charges were made by the end of 1973, the trustees projected that the railroad would begin generating sufficient income to begin to cover fixed charges in 1974. *Id.* at 2476. The trustees further contemplated that by 1976 the company would generate \$220-290 million to cover fixed charges. *Id.*

105. S. REP. NO. 18, 93d Cong., 1st Sess. 4, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 1217, 1220.

106. *Id.* See also 45 U.S.C. § 160 (1976).

107. S. REP. NO. 18, 93d Cong., 1st Sess. 4, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 1220. The Railway Labor Act provides a framework which is intended to facilitate voluntary agreement between carriers and employees' representatives. Various steps are required by both parties before either may lawfully resort to economic self-help over "major disputes," which are those involving establishment of new terms and conditions of employment. "Minor disputes," in contrast, involve interpretation of existing agreements. *Elgin, J. & E.R.R. v. Burley*, 325 U.S. 711, 722-27 (1945). First, if either party wishes to make a change in rates of pay, rules, or working conditions, a 30-day written notice must be given. 45 U.S.C. § 156 (1976). Second, if there is any dispute as to these suggested changes, the parties must confer in an attempt to agree. *Id.* § 152. Third, if the conferences do not result in an agreement on the matter, either party or both may invoke the services of the National Mediation Board, or if the Board determines that a labor emergency exists, it may proffer its services. *Id.* § 155. Fourth, if mediation is requested and fails, the Mediation Board must attempt to induce the parties to submit their controversy voluntarily to arbitration. *Id.* Fifth, if mediation is unsuccessful and arbitration is refused by one or both parties, then the Mediation Board shall give immediate notice that mediatory efforts have failed and for the next 30 days neither party may make changes in rates, pay, rules, or working conditions. *Id.* Sixth, if the conferences terminate without a request for or proffer of the services of the Mediation Board, the carrier or the labor organization may legally alter the status quo after 10 days. *Id.* § 156. Only after the 30 day "cooling off" period or the 10 day waiting period after the conferences have terminated, may either party change the status quo and resort to self-help. *Id.* § 155. Throughout this process each party has a judicially enforceable duty to exert every reasonable effort to make and maintain agreements and to settle all disputes. *Id.* § 152.

teen days notice.¹⁰⁸ Two months later, the Penn Central announced that it would implement its plan to reduce crew size at 12:01 a.m. on February 8, 1973. The UTU promptly struck.¹⁰⁹

On the same day that the strike broke out, both houses of Congress passed a joint resolution aimed at restoring the status quo that existed prior to Penn Central's implementation of its plan to decrease crew size.¹¹⁰ The resolution prohibited implementation of the crew consist change and any lock-outs or strikes over this issue until May 9, 1973.¹¹¹ Just one day later, on February 9, 1973, President Nixon signed this joint resolution into law.¹¹² The committee report accompanying the legislation concluded that the labor dispute could not be resolved without comprehensive proposals that would make it possible to preserve essential rail transportation in the affected areas.¹¹³ Accordingly, the legislation also required the Secretary of Transportation to submit to Congress within 45 days a "full and comprehensive plan for the preservation of essential rail transportation services in the Northeast section of the Nation."¹¹⁴

108. Order No. 1055, [1972] 1011 CORP. REORG. REP. (CCH) 4338; *See* Petition of the Trustees to Promulgate the New Crew Consist Rule, [1972] 1011 CORP. REORG. REP. (CCH) 4277. For a general history of these events, see S. REP. NO. 18, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 1217.

109. S. REP. NO. 18, 93d Cong., 1st Sess. 6, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 1217, 1222.

110. *See id.* at 1, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 1217.

111. *Id.* The quick congressional response to this threatened rail strike is frequently interpreted to mean that Congress will not permit a major railroad strike to occur. The result is a sort of tripartite bargaining among Labor, Management and Congress over labor issues. Another conclusion that can be drawn from this entire incident is that the Penn Central trustees purposefully created a labor crisis in order to stimulate the government to address the overall problem posed by the Penn Central bankruptcy. Regardless of the cause of the crew consist crisis, it certainly had the effect of prompting a general governmental response to the Penn Central bankruptcy.

112. Pub. L. No. 93-5, 87 Stat. 5 (1973).

113. S. REP. NO. 18, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 1218.

114. Pub. L. No. 93-5, § 2, 87 Stat. 5, 6 (1973).

At about the same time Congress concluded that a federal plan was necessary to save the Penn Central. Judge Fullam tentatively concluded that the Penn Central estate would have to be liquidated unless the government acted. On March 6, 1973, the reorganization court entered an order extending the deadline for filing the reorganization plan from April 1 to July 21, 1973. *In re* Penn Central Transp. Co., 355 F. Supp. 1343 (E.D. Pa. 1973). The court noted that little progress had been made in achieving the three changes which the trustees had decided were necessary for a successful reorganization, and that the railroad had continued to operate only because of such short-term measures to conserve cash as deferring maintenance and certain wage increases. *Id.* at 1349. However, the court took note of the ongoing congressional action, and concluded that the government should be given more time to act. *Id.* at 1346.

On July 5, 1973, the trustees filed a reorganization plan with the Interstate Commerce Commission (ICC). This plan proposed cessation of rail service unless properties forming an 11,000 mile "core system" could be sold to other railroads.¹¹⁵ In addition, it concluded that even if a sale could be effected, substantial federal financial assistance would be required, the burden of operating passenger service would have to be removed, and changes would have to be made in labor agreements, particularly those respecting crew consist.¹¹⁶ The plan anticipated a need for federal financial assistance to cover the labor protection payments that were required by existing collective bargaining agreements with employees who would be displaced by plant rationalization.¹¹⁷

The Department of Transportation (DOT) urged the ICC to advise the reorganization court that reorganization of the Penn Central was not feasible.¹¹⁸ Instead, the Nixon Administration believed that Congress should enact legislation to permit the rationalization of all northeast railroads into an efficient system.¹¹⁹ The DOT envisioned a legislative solution providing for a new entity within which route structures could be rationalized and work rules changed, with possible federal funding of labor protection expenses.¹²⁰

The ICC rejected the trustees' reorganization plan as not meeting the requirements of the Bankruptcy Act.¹²¹ It suggested that the federal government assume responsibility for labor protection obligations, but only for those employees who agreed to changes in work rules.¹²² The ICC also concluded that the railroad must be relieved of passenger service losses, and announced the commencement of public hearings aimed at determining the best way to solve this problem.¹²³

III. THE CONRAIL SOLUTION

A. *The Regional Rail Reorganization Act of 1973*

Throughout the three years following the Penn Central bank-

115. [1972] 1002 CORP. REORG. REP. (CCH) 100.

116. *Id.* at 89-90.

117. Judge Friendly later took judicial notice that one of the causes of the Penn Central "debacle" was the cost of labor protection. *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 910 n.20 (Regional Rail Reorg. Ct. 1974).

118. [1972] 1002 CORP. REORG. REP. (CCH) 97.

119. *Id.*

120. *Id.* at 98.

121. *See Penn Central Transp. Co.—Reorganization*, 347 I.C.C. 45 (1973).

122. [1972] 1002 CORP. REORG. REP. (CCH) 100, 106.

123. *Id.* at 112.

ruptcy, both houses of Congress held hearings on the bankruptcy and on legislative proposals to solve the underlying problems confronting the railroad industry, particularly those lines in the Northeast.¹²⁴

Financial problems plagued the northeastern railroads and Congress was confronted not only with the bankruptcy of the Penn Central, but also with the bankruptcy of seven smaller northeastern railroads. In the period between 1967 and 1973, the Central of New Jersey, the Boston & Maine, the Lehigh Valley, the Reading, the Lehigh & Hudson, the Erie Lackawanna, and the Ann Arbor all succumbed to bankruptcy.¹²⁵ Despite the pervasiveness of the industry's economic problems, Congress delayed in formulating a legislative response.

Finally, however, events of 1973, beginning with the threatened strike in February¹²⁶ and culminating in the presentation of the Penn Central trustees' dire reorganization plan in July,¹²⁷ aroused in Congress a new sense of urgency to create a coherent legislative plan for dealing with the northeast rail problem.¹²⁸ On February 27, 1973, for instance, Senator Hartke introduced a bill¹²⁹ that would have established a nonprofit government corporation to own and maintain railroad rights of way over which railroads could operate.¹³⁰ The bill envisioned that this government ownership would begin with the bankrupt carriers of the Northeast but it could later be expanded to

124. 1972 SENATE COMMERCE COMM. REPORT, *supra* note 71 (report analyzing the financial collapse of the Penn Central). This study called for the creation of a Northeast Transportation Authority to propose the best regional industry structure which might take over operations of the bankrupt railroads. It paid little attention to passenger service or labor issues and did not identify them as important issues related to the future of the Penn Central. *Id.* at 205-08. Instead, the 350 page study focused most of its attention on management and financial policies of the Penn Central.

125. Regional Rail Reorganization Act Cases, 419 U.S. 102, 108-09 n.3 (1974).

126. See notes 109-12 and accompanying text *supra*.

127. For a discussion of the trustees' reorganization proposal, see notes 115-17 and accompanying text *supra*.

128. See also J. HARR, THE GREAT RAILWAY CRISIS: AN ADMINISTRATIVE HISTORY OF THE UNITED STATES RAILWAY ASSOCIATION 178 (1978). Harr also credits the judicial process, and particularly Judge Fullam, with prompting legislative action: "[T]he real pressure had been applied by an astute federal judge in Philadelphia with his clear and repeated messages that a resolution could not be postponed indefinitely or he would have to move to liquidate the Penn Central." *Id.* On March 6, 1973, for instance, Judge Fullam issued an order that required the Penn Central trustees either to file a reorganization plan or a proposal to liquidate the railroad. *In re Penn Central Transp. Co.*, 355 F. Supp. 1343 (E.D. Pa. 1973).

129. See S. 1031, 93d Cong., 1st Sess., 119 CONG. REC. 5601 (1973). Similar bills were introduced in the House. See H.R. 4897, 93d Cong., 1st Sess., 119 CONG. REC. 5979 (1973); H.R. 5822, 93d Cong., 1st Sess., 119 CONG. REC. 8673 (1973).

130. *Hearings on S. 1031 Before the Surface Transportation Subcomm. of the Senate Comm. on Commerce*, 93d Cong., 1st Sess., 1-52 (1973) [hereinafter cited as *Hearings on S. 1031*].

include the properties of profitable railroads.¹³¹

On March 26, 1973, the Nixon Administration submitted a restructuring bill for the northeast rail system that would have established a Northeast Railroad Corporation to purchase rail lines from bankrupt carriers and then operate some of these lines within a core system designated by the Secretary of Transportation.¹³² This bill also would have permitted accelerated abandonments of properties that had not been designated by the Secretary.¹³³

Various labor organizations offered different proposals. The UTU, for instance, proposed the establishment of a "North East Transportation Commission," consisting of representatives of shippers, labor, railroads, consumers, and state governments who would be appointed by the chairmen of House and Senate commerce committees.¹³⁴ The Commission would have been empowered to design new transportation systems in the region, to provide for consolidations and funding, and to establish one or more private corporations to operate the new systems.¹³⁵ The Brotherhood of Railway and Airline Clerks (BRAC), on the other hand, proposed the establishment of a Federal Railroad Transportation Authority, that would take over the railroad operations of the bankrupt carriers.¹³⁶ BRAC's proposal also would have prohibited abandonments for one year; at the end of this year, abandonments could be accomplished only under existing ICC procedures.¹³⁷

The ICC also proposed legislation which Representative Dingell introduced on April 4, 1973.¹³⁸ This bill provided for a three-year lease of rail lines by bankrupt carriers to the United States.¹³⁹ The ICC would then develop a "Federal-Aid railroad system," composed of those main lines, yards, and terminals located in the northeast region which were best suited for inclusion in an integrated rail sys-

131. S. 1031, 93d Cong., 1st Sess., 119 CONG. REC. 5601 (1973). One aspect of government ownership that made it attractive was that it would permit rail and truck subsidies to be equalized. The expenditures on interstate highways gave trucks their rights of way at low cost, sharpening their competitive edge against private roads. 119 CONG. REC. at 5606 (referring to § 403 of Senate Bill 1031).

132. *Hearings on S. 1031, supra* note 130, at 261-64.

133. *Id.* at 263.

134. *Id.* at 556-60 (testimony of Al H. Chesser).

135. *Id.* at 559.

136. *Id.* at 590-604 (testimony of C.L. Dennis).

137. *Id.* at 603.

138. H.R. 6591, 93d Cong., 1st Sess., 119 CONG. REC. 70 (1973).

139. *Hearings on H.R. 6591 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess., 8 (1973) (referring to § 201 of H.R. 6591).

tem.¹⁴⁰ The bill also proposed the expenditure of \$800 million for the reimbursement of carriers for specific rehabilitation projects approved by the ICC.¹⁴¹ Still another proposal by Representative Eckhardt called for the creation of a federal agency to take over and directly operate the properties of the Penn Central.¹⁴²

With these proposals before it, Congress finally enacted the Regional Rail Reorganization Act of 1973 (the 1973 Act).¹⁴³ This Act called for the creation of two new entities: the United States Railway Association (USRA) and the Consolidated Rail Corporation (Conrail).¹⁴⁴ The USRA, a nonprofit government association, was established by Congress to prepare and implement a plan for reorganizing rail service in the Northeast and Midwest.¹⁴⁵ One of USRA's major responsibilities, therefore, was preparing a "Final System Plan" which was to serve as the basis for reorganization of railroads in that region.¹⁴⁶ In particular, the USRA was required by the 1973 Act to designate in its plan certain properties which were to be transferred from bankrupt carriers to Conrail. Conrail, as a private, but government supported, corporation, would operate rail service on the transferred properties. It was to issue securities to the estates of the bankrupt railroads in exchange for their properties.¹⁴⁷

To create a more rational, economically-viable industry structure, the Act authorized expedited discontinuance of service and abandonment of those lines which were not included in the Final System Plan. But if states or localities wished to continue service over these lines, they could receive a federal subsidy.¹⁴⁸ As an additional financial boost, the 1973 Act authorized the expenditure of \$250 million for a government-funded employee protection program to guar-

140. *Id.* at 20 (referring to § 301 of H.R. 6591).

141. *Id.* at 28 (referring to § 314 of H.R. 6591).

142. H.J. RES. 50, 93d Cong., 1st Sess., 119 CONG. REC. 70 (1973).

143. Pub. L. No. 93-236, 87 Stat. 985 (1974) (codified amended at 45 U.S.C. § 701-794 (1976)).

144. For a general overview of this Act, see *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 904 (Regional Rail Reorg. Ct. 1974).

145. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, §§ 201-202, 87 Stat. 985 (1974) (codified as amended at 45 U.S.C. §§ 711-712 (1976)).

146. *Id.* § 206 (codified as amended at 45 U.S.C. § 716 (1976)). The plan was subject to congressional veto after comment by the ICC and DOT. *Id.*

147. *Id.* The Act also provided funding for continued operations by the bankrupt railroads until Conrail could take over. See *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 909 (Regional Rail Reorg. Ct. 1974). For a discussion of the transfer of securities, see text accompanying note 152 *infra*.

148. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 304, 87 Stat. 985 (1974) (codified as amended at 45 U.S.C. § 744 (1976)).

antee compensation of employees of the bankrupt railroads.¹⁴⁹ This funding was necessary because Conrail was required to offer employment to all bankrupt railroad employees and to assume the collective bargaining agreements that had been negotiated by the bankrupt railroads.¹⁵⁰

1. *Constitutional Challenges to the Regional Rail Reorganization Act of 1973*

In enacting the Regional Rail Reorganization Act of 1973, Congress was, in effect, attempting to solve the northeast rail problem by supplementing the provisions of section 77 of the Bankruptcy Act with new legislation.¹⁵¹ The basic approach of the 1973 Act was simple. Conrail was to receive those rail properties which the USRA designated to it in the Final System Plan, and, in return, the estates of

149. *Id.* §§ 501-509 (codified as amended at 45 U.S.C. §§ 771-779 (1976)) (repealed 1981).

150. *Id.* § 502 (codified as amended at 45 U.S.C. § 772 (1976)) (repealed 1981).

There was general agreement between Secretary of Transportation Brinegar and members of Congress on the need to assure reasonable protection to employees adversely affected by reorganization of the bankrupt railroads by providing public funding for at least part of the costs of this protection. *See* S. REP. NO. 601, 93d Cong., 1st Sess. 126-29, 139-44, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 3242, 3294-97, 3304-06 (letter from Secretary of Transportation Brinegar to Senators Magnuson and Cotton (Nov. 13, 1973)) (statement of Senators Cotton, Griffin, Cook and Beall). *See also* H. REP. NO. 620, 93d Cong., 1st Sess. 102 (1973) [hereinafter cited as the 1973 ACT HOUSE REPORT] (supplemental views of Representatives Devine, Harvey, Collins and Heinz).

The DOT and congressional Republicans, however, objected to the legislative enactment of the detailed life-time protection formula worked out among the representatives of the labor unions and the Union Pacific and Southern railroads. *See* S. REP. NO. 601, 93d Cong., 1st Sess. 139, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 3304 (statement of Senators Cotton, Griffin, Cook and Beall). Secretary of Transportation Brinegar suggested that the legislation should contain general principles for labor protection that would allow labor and the management of the new railroad to work out necessary details. *See id.* at 127-28, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 3295-96 (letter from Secretary Brinegar to Senators Magnuson and Cotton (Nov. 13, 1973)). More specifically, Secretary Brinegar suggested that the period of employee protection payments would not exceed six years after the conveyance of rail properties to Conrail. In addition, Secretary Brinegar suggested that a procedure should be established that would assure the achievement of only the initial collective bargaining agreements between Conrail and the labor unions. *Id.* at 129, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 3296. Otherwise, Congress might be called upon to settle disputes over "consolidation of the many differing and restrictive working agreements of the six bankrupt railroads." *Id.* A provision in the Senate Bill directing the secretary to study work rules and their possible effect on the consolidation of rail operations was deleted by the Conference Committee. CONF. REP. NO. 744, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 3337.

151. Regional Rail Reorganization Act Cases, 419 U.S. 102, 109 (1974).

the bankrupt railroads were to receive Conrail securities.¹⁵²

The judicial scheme that the 1973 Act created to oversee this conveyance process was slightly more complicated.¹⁵³ Under the 1973 Act, all railroads that were involved in section 77 reorganization proceedings in district courts were to remain under the jurisdiction of the district courts until two determinations were made:¹⁵⁴ 1) whether the railroads were reorganizable on an income basis under section 77 of the Bankruptcy Act;¹⁵⁵ and 2) whether the 1973 Act provided an alternative to the bankruptcy law that was "fair and equitable."¹⁵⁶

If the district courts decided that the railroads should be reorganized under the 1973 Act, then a new Special Court, endowed with broad judicial powers by the Act, was to superintend the process.¹⁵⁷

152. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 206(d)(1), 87 Stat. 985, 996 (1974) (codified as amended at 45 U.S.C. § 716 (1976)).

153. For a general overview of this scheme, see J. HARR, *supra* note 128, at 246-51.

154. Regional Rail Reorganization Act Cases, 419 U.S. 102, 109 (1974).

155. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 207(b), 87 Stat. 985, 998 (1974) (codified as amended at 45 U.S.C. § 717(b) (1976)).

156. *Id.* The district courts were required to make this determination within 180 days of January 2, 1974. *Id.* See also Regional Rail Reorganization Act Cases, 419 U.S. 102, 110 (1974).

The terms "fair" and "equitable" have been applied to the substantive elements of a reorganization plan. See *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 916 n.28 (Regional Rail Reorg. Ct. 1974). They are terms of art whose meaning has developed through judicial interpretation in the field of equity receivership reorganizations. See *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115 (1939). In equity reorganization law, the term "fair and equitable" described a requirement that claims of the insolvent corporation's creditors were to be given priority over claims of its shareholders to the proceeds of liquidation or the interests of the reorganized corporation. *Id.* at 116-17 (citing *Kansas City Terminal Ry. v. Central Union Trust Co.*, 271 U.S. 445, 455 (1926)). Practical arrangements and securities other than income bonds or preferred stock may satisfy the "fair and equitable" test so long as it is recognized that the creditor's rights are superior to those of the shareholders against the full value of the debtor corporation and these creditors are offered a fair opportunity to avail themselves of the right. *Kansas City Terminal Ry. v. Central Union Trust Co.*, 271 U.S. 445, 454-55 (1926).

The 1973 Act required that the terms "fair and equitable" should be applied to a procedure or "process," an approach that differed from early use of these terms. See 384 F. Supp. at 916 n.28. In applying the standards of this Act, courts have interpreted "fairness" to mean that the value of securities and other benefits which were given to the rail estates at the time of conveyance in exchange for their rail properties must be equal to the "constitutional minimum." *Id.* at 928-29.

157. Section 209(b) of the 1973 Act provided for the establishment of a Special Court with exclusive jurisdiction to review the Final System Plan and any suit challenging actions of the USRA or the constitutionality of the Act. See Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 209(b), 87 Stat. 985, 999-1000 (1974) (codified at 45 U.S.C. § 719(b)(e) (1976)). The Special Court was to be a three-judge district court established by the judicial panel on multi-district litigation as authorized by 28 U.S.C. § 1407 (1976). Three eminent judges with experience in reorganization proceedings were appointed to this court: Judge Henry J. Friendly

The USRA, for instance, was required to submit its Final System Plan to the Special Court which then had exclusive jurisdiction over any proceedings arising under this plan.¹⁵⁸ The Special Court also was required to determine whether the conveyance of rail properties to Conrail was in the public interest and whether it would be fair and equitable to the railroad estates.¹⁵⁹ In general, the 1973 Act differed significantly from reorganization under section 77 of the Bankruptcy Act because the 1973 Act provided for a conveyance prior to any judicial determination that the creditors would be adequately compensated.¹⁶⁰

Uncertainty soon developed over the constitutionality of this general scheme. A split developed among district courts over whether the 1973 Act established a process of reorganization that was fair and equitable to the railroad estates. The most significant constitutional challenges focused on the "conveyance taking" and "erosion taking" arguments.¹⁶¹ Specifically, some creditors of the bankrupt railroads

(Second Circuit); Judge Carl McGowan (D.C. Circuit); Judge Roszel Thomsen (Maryland District). See J. HARR, *supra* note 128, at 248.

158. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 209(c), 87 Stat. 985, 999 (1974) (codified as amended at 45 U.S.C. § 719(c)(e) (1976)).

159. *Id.* at § 303(c) (codified as amended at 45 U.S.C. § 743(c) (1976)).

160. Regional Rail Reorganization Act Cases, 419 U.S. 102, 115 (1974).

161. See *id.* In the *Regional Rail Reorganization Act Cases*, the plaintiffs, major creditors and the holding company of the Penn Central, as trustees of Penn Central, contended that the taking of Penn Central's rail properties without just compensation violated their fifth amendment rights in two respects. First, the creditors argued that to compel continued operation of the railroads pending implementation of the Final System Plan violated their due process rights guaranteed under the fifth amendment. *Id.* at 117-18 (citing *Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n*, 383 F. Supp. 510, 525 (E.D. Pa. 1974)). The Supreme Court referred to this as the "erosion taking" issue. Since under § 207(b) of the 1973 Act only those properties which were not reorganizable were to be transferred to Conrail, these were the only properties which were compelled to operate. See Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 207(b), 87 Stat. 985, 994 (1974) (codified at 45 U.S.C. § 716(c)(1) (1976)).

A line of cases has held that a railroad may be ordered to continue service for a reasonable time while the reorganization court or commission explores alternatives even though the railroad will suffer losses and the creditor's security is thereby eroded. See *In re Chicago, M., St. P. & P. R.R.*, 611 F.2d 662, 667 (7th Cir. 1979). Courts have also concluded, however, that the fifth amendment rights of those with a security interest in the enterprise are violated when a railroad is forced to continue operations indefinitely at a loss so that the public may be served. *Id.* at 666-67 (citing *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396 (1970) (fourteenth amendment)). See also *In re Penn Central Transp. Co.*, 494 F.2d 270, 278-81 (3d Cir. 1974) (discussing the continued viability of the *Brooks-Scanlon* principle in the context of the fifth as well as the fourteenth amendment). In such circumstances, operating losses can be financed by new debt or equity with a priority over existing creditors or shareholders, by drawing down liquid assets such as cash, or by failing to maintain assets. Any of these methods reduces the economic value of the interests of the existing claimants. The first method reduces their relative claims to income or to liquidation proceeds. The second and third methods reduce the value of the enterprise. See *In re*

argued that the 1973 Act violated the fifth amendment on at least two grounds: 1) the requirement that rail properties be conveyed to Conrail in exchange for its securities rather than for cash amounted to an unjust taking of property without adequate compensation; and 2) the requirement that rail service be maintained until adoption of the Final System Plan without any provision for compensation for the erosion in value of the rail properties during this time was likewise an unconstitutional taking of property.¹⁶²

Two reorganization courts concluded that the Act provided a fair and equitable procedure and thus ordered reorganization of the railroads under their jurisdiction according to the provisions of the 1973 Act.¹⁶³ Three other reorganization courts, however, concluded that the 1973 Act did not provide a fair and equitable process.¹⁶⁴ These latter decisions were subsequently reversed by the Special Court in September of 1974 when it held that the 1973 Act did not violate the fifth amendment by requiring the surrender of rail properties to Conrail in exchange for Conrail securities.¹⁶⁵ The Special Court conceded that because Conrail's financial prospects seemed doubtful, its securities alone might not be adequate compensation for the rail properties that the 1973 Act required to be surrendered to it.¹⁶⁶ The court concluded, however, that if these securities were buttressed by the possibility of a Tucker Act judgment against the United States for any shortfall in compensation, then constitutional standards would be satisfied.¹⁶⁷

Three months later, most doubts about the constitutionality of

Penn Central Transp. Co., 355 F. Supp. 1343, 1345 (E.D. Pa. 1973). For an additional discussion of the erosion taking issue, see note 169 *infra*.

The creditors also asserted that the 1973 Act was basically an eminent domain statute, and because compensation was in the form of stock in the improved Conrail rather than in the form of cash, such conveyance would necessarily work an unconstitutional taking of property without just compensation. Regional Rail Reorganization Cases, 419 U.S. 102, 137 (1974). The Supreme Court referred to this argument as the "conveyance taking" issue. *Id.* at 118.

162. Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, 383 F. Supp., 510, 513 (E.D. Pa.), *rev'd*, 419 U.S. 102 (1974).

163. Regional Rail Reorganization Act Cases, 419 U.S. 102, 110 n.6 (1974) (citing *In re Reading Co.*, 378 F. Supp. 481 (E.D. Pa. 1974)).

164. *Id.* (citing *In re Penn Central Transp. Co.*, 382 F. Supp. 856 (E.D. Pa. 1974); *In re Lehigh Valley R. Co.*, 382 F. Supp. 854 (E.D. Pa. 1974); *In re Penn Central Transp. Co. (Secondary Debtors)*, 382 F. Supp. 821 (E.D. Pa. 1974); *In re Lehigh & H. R. Co.*, 377 F. Supp. 475 (S.D.N.Y. 1974)).

165. *In re Penn Central Transp. Co.*, 384 F. Supp. 895 (Regional Rail Reorg. Ct. 1974).

166. *Id.* at 938.

167. *Id.* at 932. For the relevant provisions of the Tucker Act, see 28 U.S.C. § 1491 (1976). For general discussion of a Tucker Act remedy, see notes 169-70 *infra*.

the procedures under the 1973 Act were alleviated when the Supreme Court¹⁶⁸ reversed a three-judge district court decision that the 1973 Act was unconstitutional because it required the continued operation of bankrupt railroads pending adoption of the Final System Plan.¹⁶⁹ In reversing this decision, the Supreme Court upheld the constitutionality of the 1973 Act on the theory that a Tucker Act remedy was in fact available to provide compensation for any erosion in value during the interim period prior to the adoption of the Final System Plan.¹⁷⁰

168. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

169. *Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n*, 383 F. Supp. 510, 530 (E.D. Pa.), *rev'd*, 419 U.S. 102 (1974). The action was brought by creditors of the Penn Central and was heard by a three-judge court pursuant to 28 U.S.C. §§ 2282, 2284 (1976). The district court initially decided that the plaintiffs' conveyance taking claim must fail for lack of ripeness. 383 F. Supp. at 517. The court began its analysis of the "erosion taking" issue by noting that Penn Central had been determined not to be reorganizable on an income basis within a reasonable time under § 77 of the Bankruptcy Act. Judge Aldisert reviewed the magnitude of the losses incurred during the reorganization process and impliedly determined that they were substantially greater than the funding authorized or appropriated pursuant to the 1973 Act for interim operations. *Id.* at 521-22. The court's task was made easier by the defendants' acknowledgment that an unconstitutional erosion taking would occur unless an implied remedy were available for just compensation from the United States under the Tucker Act. *See id.* at 525 (citing 28 U.S.C. § 1491 (1976)). But the court declined to "read a Tucker Act remedy into the [1973] act" and held § 304(f), which required mandatory interim operations, and § 207(b), which precluded liquidation under § 77 of the Bankruptcy Act, to be constitutionally defective. *Id.* at 529-30. Accordingly, it enjoined the USRA from certifying a Final System Plan to the Special Court pursuant to § 209(c). *Id.* In a concurring opinion, Judge Fullam voiced his concern "that the constitutional validity of uncompensated interim erosion cannot be properly decided except in the light of the constitutionality of the ultimate result which implementation of the Act would produce." *Id.* at 532 (Fullam, J., concurring). In other words, he found it necessary to address the conveyance taking issue in order to decide the erosion taking issue. Judge Fullam stated:

[T]he fact that the statute does not provide compensation for interim erosion as such would not necessarily render the statute unconstitutional if there is reasonable present assurance that the end result of the statutory process would be the receipt of consideration for the assets and other benefits in amounts equaling at least liquidation value plus interim erosion.

Id. at 532-33 (Fullam, J., concurring).

Judge Fullam determined that the value of the Conrail stock to be received in exchange for the rail properties of Penn Central was too uncertain to permit a conclusion that a deficiency judgment would not be required to satisfy the just compensation standard of the fifth amendment. *Id.* at 540-41 (Fullam, J., concurring). He agreed that a Tucker Act remedy was not assured under the Act, and, moreover, expressed doubts about the adequacy of such a remedy should it be available. *Id.* at 541-42. He therefore concurred in the result reached by the majority.

170. Regional Rail Reorganization Act Cases, 419 U.S. 102, 121 (1974). The Supreme Court concluded that a Tucker Act remedy was available to provide just compensation for any erosion taking effected by the 1973 Act. *Id.* at 136. The Court also decided that the conveyance taking issues were ripe for adjudication. *Id.* at 145. The Court characterized the conveyance taking arguments as resting on assertions that an eminent domain statute which provides for compensation in the form of

2. *The Final System Plan*

The USRA began its work in the midst of these legal controversies. It was incorporated by Congress on February 1, 1974, for the primary purpose of preparing and implementing a "Final System Plan" for the reorganization of the rail service in the Northeast. The USRA was first required to develop a Preliminary System Plan and after recruiting key personnel, began to explore possibilities for that plan.¹⁷¹ By September, the USRA Board concluded that there were at least five options for reforming the structure of the bankrupt railroads. These five basic options were 1) merger of the bankrupt railroads into a single new entity called Conrail; 2) establishment of a new railroad from the "best" pieces of the bankrupt carriers west of the Allegheny Mountains, and the provision of government subsidies to eastern facilities so that they could provide terminal services to all railroads; 3) creation of two or more medium-sized carriers in the region; 4) allocation of the bankrupt carriers' essential services to profitable freight railroads, Amtrak, and local commuter authorities; and 5) establishment of a government entity that would own the rights of way over which Conrail, as a private company, would operate.¹⁷² The USRA Board decided to study the economic possibilities of the Conrail option in detail so that it could be compared to the remain-

"stock of an unproved entity" rather than in cash violates the fifth amendment. *Id.* at 137. First, the Court concluded that a Tucker Act remedy would be available for any deficiency in the consideration paid for rail properties for the same reasons it would be available to cure erosion taking problems. *Id.* at 148. The Court concluded that compensation in the form of stock was permissible under the 1973 Act without deciding whether it was an eminent domain statute or a reorganization statute. *Id.* at 152-54. It did not deny the possibility that the value of the stock received might be less than the minimum constitutional value, but it concluded that recourse to a Tucker Act suit in the Court of Claims for a cash award to cover any constitutional shortfall assured that just compensation would be received. *Id.* at 155.

171. J. HARR, *supra* note 128, at 209-33. Under the 1973 Act, the USRA was required to release its Preliminary System Plan within 300 days after January 2, 1974. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 207, 87 Stat. 985, 998 (1974). Subsequently, Congress extended by 120 days the deadlines for submission of the Final System Plan contained in the 1973 Act because of a 4 month delay in the commencement of USRA operations. Regional Rail Reorganization Act—Extension, Pub. L. No. 93-488, 88 Stat. 1464 (1974) (codified at 45 U.S.C. § 717(a)(1) (1976)).

172. J. HARR, *supra* note 128, at 295-97. *See also In re Penn Central Transp. Co.*, 384 F. Supp. 895, 958-59 (Regional Rail Reorg. Ct. 1974) (describing the 5 structural alternatives as follows: 1) Conrail; 2) Eastern Seaboard Feeder Systems; 3) Moderate-sized carriers (Multi-Conrail); 4) Controlled Liquidation; and 5) Separate Fixed Plant Entity); Hillman, *The Making of Conrail*, 45 I.C.C. PRAC. J., Nov.-Dec. 1977, at 18, 20 (describing the 5 structural alternatives as 1) The Atlantic Coast Firewall Concept; 2) The North/South Split; 3) The MARC-EL/Conrail Plan; 4) Controlled Liquidation; and 5) Outright Government Ownership of all System Rights of Way and Their Release to Conrail Alternative).

ing four options.¹⁷³

In formulating its Preliminary System Plan, the USRA focused little attention on the general passenger service problem.¹⁷⁴ Rather, it analyzed the passenger service problem only within the context of freight service.¹⁷⁵ This was because USRA's main concern was to find a way to allocate costs between freight and passenger operations that would prevent the passenger operations from financially draining the more profitable freight operations.¹⁷⁶

Labor issues received even less USRA scrutiny.¹⁷⁷ The USRA staff prepared a series of papers proposing, among other things, that studies of work rule changes should be undertaken as part of the planning process, and that labor agreements to implement the Final System Plan should be developed, and perhaps negotiated.¹⁷⁸ Although the DOT and the Treasury department hoped for a strong USRA stand on work rules,¹⁷⁹ the USRA Board ultimately rejected this possibility. Apparently the USRA was concerned that if it called for reform of work rules, the relationship between labor and the management of the bankrupts would be disrupted. In addition, it was concerned that an ambitious approach to the labor problem

173. J. HARR, *supra* note 128, at 297. Pursuant to the requirements of the 1973 Act, the USRA staff was directed by the Board to consult with the Attorney General and with the Federal Trade Commission in considering the options. *Id.*

174. *Id.* at 341. The passenger operations of the northeastern railroads were notorious money-losers. *Id.* See notes 21, 58-69 and accompanying text *supra*. The bankrupts supplied the track and ran the trains for the preponderance of intercity and computer passenger service in the 17-state region. J. HARR, *supra* note 128, at 342-43.

175. J. HARR, *supra* note 128, at 345. Harr suggests that three factors led to the subordination of passenger considerations to freight considerations in USRA's analysis: 1) the DOT was already conducting a study on the problem and the USRA did not wish a confrontation by delving into the area; 2) the transfer of the head of the office in charge of passenger studies to another department; and 3) difficulties caused by delay and inadequate work by the USRA's contractor. *Id.*

176. *Id.* The USRA was concerned with achieving better allocation of costs between freight and passenger services of both intercity and commuter operations. *Id.* According to Harr, a second major concern preoccupying USRA was whether there could be some way of effectively segregating freight and passenger traffic in the northeast corridor. *Id.* at 346.

177. See *id.* at 418-23. DOT planners initially hoped that the USRA would scrutinize labor productivity in the industry and possibly provide impetus for changes in work rules as well as in aspects of collective bargaining agreements to cut labor costs. The USRA, however, began on a negative note when it hired a Vice-President for Manpower Planning whose work would be suspect by the unions. Furthermore, the USRA sidestepped the issue of labor productivity in the preparation the Preliminary System Plan. *Id.* at 418-423.

178. See *id.* at 419-21. A third white paper focused on setting manpower planning goals. *Id.* at 419.

179. *Id.* at 419-20. For a brief discussion of DOT's position on work rule charges, see note 177 *supra*.

might result in strikes that would interfere with the establishment of Conrail.¹⁸⁰

In formulating their industry structure proposal, the USRA evaluated each option in terms of three goals: achieving an economically viable Conrail, encouraging railroad competition, and safeguarding the economic viability of other railroads in the region.¹⁸¹ The Big Conrail option, which would create an entity larger than the Penn Central, seemed likely to achieve economic viability but not railroad competition.¹⁸² In particular, USRA staff members and the press expressed concern that Big Conrail might threaten the economic viability of the still solvent Chessie and the Norfolk & Western, as well as the financially weak Erie Lackawanna.¹⁸³ Moreover, political opposition began to develop over the Big Conrail option.¹⁸⁴ Finally, as the deadline for the Preliminary System Plan drew uncomfortably near,¹⁸⁵ a breakthrough came. On January 9, 1975, the trustees of the Erie Lackawanna concluded that their railroad could not be reor-

180. J. HARR, *supra* note 128, at 421. The Board further recognized that the USRA had no statutory authority to enforce its recommendations; rather implementation was left up to Conrail. *Id.*

181. *Id.* at 350.

182. *Id.* at 351. The Conrail option had become known as Big Conrail. *Id.*

183. *Id.* at 351-52. The Erie Lackawanna had gone bankrupt but it was not included in the USRA reorganization plans because a district court had held that it was reorganizable on an income basis under § 77 of the Bankruptcy Act. *Id.* at 352.

184. Since it was both government financed and created, there was concern that Big Conrail would be more vulnerable to political pressures that could interfere with its willingness to take economically necessary, but unpopular, actions. *Id.* at 352-53. From a theoretical standpoint, government-managed liquidation was attractive. *Id.* at 353. But the USRA rejected this option because of the lack of interest by solvent railroads in more than a small fraction of the bankrupt railroads' properties, a growing realization that controlled transfer would result in a larger number of abandonments than the other options, and an understanding that "control" in any controlled transfer would prove illusory. *Id.* at 355-58.

185. *Id.* at 377. As the deadline for the Preliminary System Plan drew near, USRA began to perceive that the amount of federal funding envisioned by the 1973 Act would be inadequate for virtually any option. *Id.* at 300, 396. Pro forma estimates for Big Conrail indicated that \$6 billion in federal funding would be required over ten years. *Id.* at 396. The DOT urged the consideration of options involving greater abandonment, but analysis suggested that the benefit of reducing federal funding requirements would be outweighed by political opposition. *Id.* at 401. For a while, there was renewed interest in the "Confac" option, which involved government ownership of rights of way. This approach had the political appeal of transmuting government funds into grants in a politically acceptable form, but it was feared that the degree of government involvement would be too great to be acceptable to the Administration. *Id.* at 396. By the time the Preliminary System Plan was released, the federal funds required for the favored option had been arbitrarily reduced to \$3.5 billion because of perceptions that the larger figure would not politically be acceptable. *Id.* at 405. *See* UNITED STATES RAIL ASSOCIATION, 1 PRELIMINARY SYSTEM PLAN 200-03 (Feb. 26, 1975) [hereinafter cited as PRELIMINARY SYSTEM PLAN].

ganized on an income basis, thus permitting the properties of that line to be included in the restructuring process.¹⁸⁶ The USRA, therefore, moved quickly to adopt the "Three Systems East" plan as its preferred option for the Preliminary System Plan.¹⁸⁷ This plan envisioned the acquisition of the bankrupt properties by Conrail, the Chessie, and the Norfolk & Western.¹⁸⁸ Specifically, under this plan Conrail would consist of the Penn Central, most of the Reading and Lehigh Valley, the Central Railroad of New Jersey, the Lehigh & Hudson, the Ann Arbor, and the Pennsylvania-Reading Seashore Lines; the Chessie would acquire the Erie Lackawanna; and the Norfolk & Western would extend its operations over the Reading lines between Harrisburg and Philadelphia.¹⁸⁹ The USRA adopted this Three System East concept as its preferred option despite indications that the Norfolk & Western might not be willing to participate in it.¹⁹⁰ The Big Conrail option, which envisioned Conrail acquiring the properties of all bankrupt lines, was retained as an alternative.¹⁹¹

After the Preliminary System Plan was released on February 26, 1975, the Ford Administration, at the urging of the newly appointed Secretary of Transportation, William T. Coleman, organized a cabinet level task force to consider alternatives to the industry structure recommended in the Preliminary System Plan.¹⁹² Coleman advocated controlled liquidation of the properties of the bankrupts,¹⁹³ but despite energetic efforts, he could not produce any buyers for these properties.¹⁹⁴ Meanwhile, serious negotiations with the Chessie and

186. J. HARR, *supra* note 128, at 377 (citing Press Release, Erie Lackawanna Railway Company (Jan. 9, 1975)).

187. *Id.* at 378-79.

188. UNITED STATES RAILWAY ASSOCIATION, 1 FINAL SYSTEM PLAN 15 (1975) [hereinafter cited as FINAL SYSTEM PLAN].

189. *Id.*

190. J. HARR, *supra* note 128, at 400. Although recommending the concept as its first choice, the USRA had not engaged in any discussions with the Chessie on the Three Systems East plan. *Id.*

191. 1 FINAL SYSTEM PLAN, *supra* note 188, at 4.

192. J. HARR, *supra* note 128, at 478-80. William T. Coleman, Jr., a dynamic leader, took control of the Department of Transportation in the spring of 1975. *Id.* at 473. As Secretary of Transportation, Coleman became a member of The Ford Administration Cabinet-level Economic Policy Board (EPB), which decided to create a "Rail Task Force" headed by Coleman. *Id.* at 478. The task force was to study, among other things, the concept of "controlled transfer" (or controlled liquidation) as an alternative to the Preliminary System Plan's recommendation. *Id.* at 479.

193. *Id.* at 511. While USRA maintained the position that controlled transfer should be an option should Conrail falter, Coleman advocated that Conrail should be solely a stepping-stone to achieving controlled transfer. *Id.*

194. *Id.* at 508-09. Harr suggests that Coleman favored a doubling in size of the solvent estates, the Norfolk & Western and the Chessie, while USRA was pursuing a more modest acquisition policy allowing the two railroads selective entrance into new

the Norfolk & Western over the purchase of several of the smaller railroads as required to implement the Three Systems East plan resulted in 1) a rejection of the plan by the Norfolk & Western,¹⁹⁵ and 2) a temporary agreement by the Chessie to purchase several of the bankrupt lines.¹⁹⁶

Despite these troubled negotiations with the Norfolk & Western, the Final System Plan which the USRA submitted to Congress on July 26, 1975¹⁹⁷ still envisioned as its preferred option the Three Systems East plan, albeit in modified form.¹⁹⁸ Specifically, the USRA recommended that the northeastern region should be served by three major railroads: Conrail, the Chessie, and the Norfolk & Western as well as by smaller solvent railroads such as the Delaware & Hudson and the Boston & Maine.¹⁹⁹ Conrail was to provide most of the services of the Penn Central, the Chessie was to acquire some of the Erie Lackawanna and Reading properties, while the Norfolk & Western was to retain its previous configuration. In addition, the Southern Railway was offered Penn Central properties on the Delmarva Peninsula.²⁰⁰

Extremely important elements of the Final System Plan were the related questions of federal funding and Conrail capital structure. The USRA successfully negotiated for federal investment of up to \$2.1 billion in debentures and senior preferred stock of Conrail, with a subordinated class of preferred and common stocks and certificates of value going to the bankrupts.²⁰¹

markets. *Id.* at 508. As part of Coleman's marketing efforts, he attempted to persuade the presidents of two solvent railroads to divide the desired lines of the bankrupts between them by offering a fifty percent split between them of the \$1 billion loan funding for rehabilitation under the 1973 Act. *Id.*

195. USRA offered the Reading properties to the Norfolk & Western. *Id.* at 514. The president of the Norfolk & Western made a counter-offer to the USRA offer which was significantly below the asking price. *Id.* When the counter-offer was rejected by the USRA, the Norfolk & Western dropped out of the negotiations, leaving a "Two Systems East" concept. *Id.*

196. *Id.* at 514-20. The Chessie responded to the USRA's offer by agreeing to the asking price of \$114.1 million, without federal assistance, for the Reading, the Erie Lackawanna, and two smaller portions of the estates including an important Penn Central line into the West Virginia coal fields. Although the Board approved the initial deal, when the Chessie attempted to lower the price, the Board rejected their offer. Upon reconsideration the following day, the Board approved the Chessie proposal by a 6 to 4 vote. *Id.* at 514-19.

197. *See id.* at 554-55; 1 FINAL SYSTEM PLAN, *supra* note 188.

198. J. HARR, *supra* note 128, at xviii.

199. 1 FINAL SYSTEM PLAN, *supra* note 188, at 4-5.

200. *Id.* at 15-19.

201. *See id.* at 91-96. Interest due on the government's obligations was to be paid in securities and the government's securities were to be redeemed after Conrail had accumulated \$500 million in retained earnings. The USRA Board also adopted

The Final System Plan also focused on the problem of light density lines, which had prompted considerable public attention because of the substantial abandonments of those lines proposed in the Preliminary System Plan.²⁰² After evaluating public comments, the USRA decided to include in the Final System Plan an additional 1400 miles of light density lines which had been excluded by the Preliminary System Plan.²⁰³

Under the provisions of the 1973 Act, the Final System Plan was to have the force of law if it was not disapproved by either house of Congress within sixty legislative days after its release.²⁰⁴ On November 9, 1975, the Final System Plan was allowed to go into effect.²⁰⁵

After the USRA presented its Final System Plan, the bankrupt railroads, through their creditors and trustees, mounted major criti-

the idea of "certificates of value" to ensure the estates of receipt of a value for their rail properties, without waiting for Tucker Act judgment. *Id.* at 95-96.

The Final System Plan recommended a capital structure that would finance Conrail's projected public sector-funding needs through purchase by USRA of Conrail debentures and series A preferred stock. *Id.* at 92-93. Under the plan, the estates of the bankrupts were to receive Conrail series B preferred stock, Conrail common stock, and certificates of value. *Id.* at 91.

The certificates of value, as full faith and credit obligations of the United States, were designed to ensure that the value of the total package of securities issued to the estates would equal the minimum constitutionally required. *See id.* at 91. Debentures and preferred A were to have a 7.5% return, payable through issuance of Conrail Series A preferred stock, and in cash only if cash was available for such purpose and retained earnings exceeded \$500 million. *See id.* at 93. Earnings within the percentage limit greater than the amount necessary to service the debentures and series A preferred stock would be utilized, in turn, to redeem the debentures and the preferred A and Conrail had the option of calling the preferred B. *Id.* at 93.

Debentures, preferred A, and preferred B, in that order, were to have preference in liquidation. *See id.* at 110-11, App. A. Common stock represented the residual claim to income and liquidation proceeds. *See id.* at 110.

This capital structure was eventually approved by both Congress and the President. *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 605, 90 Stat. 31, 89-92 (1976) (codified at 45 U.S.C. § 726(a)-(f) (1976)). For a definition of the characteristics of the certificates of value, see 45 U.S.C. § 746 (1976). The remaining securities are defined in Conrail's articles of incorporation.

202. *See* 2 PRELIMINARY SYSTEM PLAN, *supra* note 185, at 345 (public officials, shippers, and the general public have expressed concern about the ultimate disposition of light-density lines); J. HARR, *supra* note 128, at 546. *See also* 2 FINAL SYSTEM PLAN, *supra* note 188, at 11 (the proposed line abandonments contained in the Preliminary System Plan resulted in considerable public reaction).

203. J. HARR, *supra* note 128, at 546. Of the total 10,692 miles of active light-density line studied by the USRA, 46% (4,935 miles) was to be included in Conrail and 54% (5,757 miles) was recommended for exclusion. *Id.*

204. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 208, 87 Stat. 985, 999 (1974) (codified at 45 U.S.C. § 718 (1980)).

205. *See* J. HARR, *supra* note 128, at 571. Despite criticisms, the plan was allowed to become effective. *Id.* at 574-75. Congress knew that it would have an opportunity to affect the details of the plan as it considered legislation that everyone acknowledged would be necessary to implement the plan. *Id.*

cisms against the financial aspects of the plan. The creditors and trustees of the bankrupts criticized the value which USRA had placed on the bankrupts' assets and, further, feared that the securities they received would be worthless.²⁰⁶ The Penn Central trustees also criticized the plan for failing to address six basic problems hindering the attainment of a viable rail system in the Northeast: 1) passenger service losses; 2) historically inefficient use of labor; 3) losses arising from the operation of thousands of miles of unprofitable branch lines and duplicative main and secondary lines; 4) costly and inefficient terminal operations; 5) the need to increase traffic volume and revenues; and 6) the need for government financial assistance in rehabilitating the rail plants.²⁰⁷

The ICC criticized the USRA's financial projections as overly optimistic. It recommended that interest on government loans should be forgiven until Conrail could begin to pay so that the plan would not be so burdensome as to be "tantamount to nationalization."²⁰⁸ Studies commissioned by the House and Senate Commerce Committees generally echoed the concern that projected federal funding would be insufficient to meet the program's needs.²⁰⁹ These criticisms and concerns made it apparent that further legislative changes were necessary in order to deal effectively with the problems of northeast rail industry.

B. *The Railroad Revitalization and Regulatory Reform Act of 1976*

The most direct way to make legislative changes to implement the Final System Plan was to amend the 1973 Act. In fact, after the Final System Plan was published, the USRA and the DOT began drafting proposed amendments, hoping for enactment by November 9, 1975, when the Plan was to become law.²¹⁰ Congressional leaders, however, concluded that it would be preferable to implement the Plan as part of a new omnibus legislation, which could additionally incorporate regulatory reform and a program of aid for railroads outside the northeast region.²¹¹ This legislative strategy reflected certain political realities. Regulatory reform was a priority of the Ford

206. J. HARR, *supra* note 128, at 554.

207. See Statement of the Penn Central Trustees, *supra* note 1, at 16-17, reprinted in *Hearings* at 581-82.

208. J. HARR, *supra* note 128, at 568-69.

209. *Id.* at 569-71.

210. See *id.* at 575.

211. *Id.* Harr observed that "[i]nstead of merely amending the 1973 Act, the leadership of each committee came to the conclusion that it would be better to cast the [Final System Plan] within the framework of brand-new omnibus legislation." *Id.* The amendments were to concern 1) the financial provisions; 2) the liberalization

Administration.²¹² Moreover, a priority of the railroad industry, whose support was needed for the Final System Plan, was the creation of a general aid program for railroads outside the northeast region.²¹³

After complicated maneuvering by members of Congress and the Ford Administration, on February 5, 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976²¹⁴ which amended the 1973 Act to provide for the implementation of the Final System Plan. The 1976 Act also overhauled rate regulation, simplified railroad mergers, modified ICC processes, and established a fund to assist railroads with capital and maintenance requirements.²¹⁵ The 1976 Act established a finance committee of the USRA to review

of Title IV; and 3) the provision of deficiency judgment protection for the Chessie.
Id.

212. *Id.* The Ford Administration made regulatory reform a precondition of governmental financing. *Id.* See also G. Ford, *Foreword*, in RAILROAD REVITALIZATION AND REGULATORY REFORM (P. MacAvoy & J. Snow eds. 1977).

213. J. HARR, *supra* note 128, at 575.

214. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified at 45 U.S.C. §§ 801-854 (1976)). The legislative history of this statute was complex. On August 1, 1975 Senator Hartke introduced a bill that was intended to serve as a "working paper to provide a basis for comment and development of more mature legislative proposals." See S. 2265, 94th Cong., 1st Sess., 121 CONG. REC. 26,776 (1975); J. HARR, *supra* note 128, at 581. Under Senator Hartke's proposed legislation, the USRA would have been given the nationwide rail planning role while the ICC would have authority over mergers and restructuring. *Id.* On September 12, 1975, the USRA was ready with its legislative recommendations. These recommendations included the establishment of a government investment committee to supervise investment in Conrail, the implementation of its capital structure recommendations, authorization of "certificates of value" to protect the bankrupt estates, and provisions for further restructuring of the northeast rail system. *Id.* at 586. On September 26, 1975, Congressman Rooney introduced a bill which not only incorporated the substance of some of the USRA recommendations but also made important changes regarding the Administration's control of Conrail. *Id.* at 606-07 (citing H.R. 9802, 94th Cong., 1st Sess., 121 CONG. REC. 29,898 (1975)). Major battles ensued between the Administration and Congress over the level of funding for all programs that were to be included in the new legislation and the manner in which the government would exercise control over its investment in Conrail. See *id.* at 607-11. The DOT was strongly opposed to increasing the funding levels for Conrail despite perceptions that the Final System Plan had underestimated the need. *Id.* at 617.

Secretary Coleman considered these various bills unacceptable and began to prepare for a Presidential veto despite the risks of a delay to northeast rail service. Senator Hartke decided not to send the bill to the President and Conveyance Day was postponed from February 27, 1976 to April 1, 1976, so that Congress would have time for additional action. A second informal conference occurred; the Senate and House rescinded their approval of the conference report, and recommitted it to the conference committee, where the revised conference report could be adopted officially. *Id.* at 644-56. Ultimately, the Senate Bill, rather than the House Bill, was passed. See S. 2718, 94TH CONG., 1ST SESS. (1975), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 14.

215. S. REP. NO. 595, 94th Cong., 2d Sess. 134-41, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 148-59 [hereinafter cited as 1976 ACT CONFERENCE REPORT].

Conrail's use of federal funds.²¹⁶ It authorized the capital structure essentially as recommended by the Final System Plan, deferring debt service on the government's investment.²¹⁷ It also authorized certificates of value for the bankrupt estates.²¹⁸ Under this Act, Conrail was given federal assistance to assure the continuation of commuter service as determined by state and local agencies.²¹⁹ The 1976 Act, however, made no major changes in the labor provisions of the 1973 Act.

After the 1976 Act was approved, labor negotiations were initiated to permit the conveyance of properties to the Chessie and to the Southern Railway, as contemplated by the modified Three System's East concept of the Final System Plan.²²⁰ The Chessie and the Southern insisted that employees transferred with the bankrupt properties should be covered by the existing labor agreements with the Chessie and Southern, rather than by the agreements of the bankrupt carriers.²²¹ Labor opposed placing employees under the less favorable terms of employment of those agreements and insisted that the transferred employees take with them their existing wages and work rules.²²² Despite the personal involvement of Secretary Coleman and of Secretary of Labor Usery, the negotiations were unsuccessful and the transfers to the Chessie and the Southern became unworkable. This resulted in a reversion to the Big Conrail option which the Final System Plan had recommended as an alternative to the preferred Three Systems East plan.²²³ Faced with no other immediately viable alternative, on April 1, 1976, the bankrupts' rail properties were conveyed to Big Conrail.²²⁴

C. *Conrail's First Five Years*

As early as 1978, it was clear that Conrail's actual performance had fallen far behind the expectations originally embodied in the Final System Plan. In large part, this disappointing performance occurred because projected revenue from increased traffic never

216. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 603, 90 Stat. 88 (codified at 45 U.S.C. § 711(i) (1976)) (repealed 1981).

217. *Id.* § 605 (codified at 45 U.S.C. § 726 (1976)).

218. *Id.* § 610(b) (codified at 45 U.S.C. § 746 (1976)).

219. *Id.* §§ 801-810.

220. See J. HARR, *supra* note 128, at 662.

221. *Id.* at 665.

222. *Id.*

223. *Id.* at 666-74. For a discussion of the Big Conrail option, see notes 182-84 and accompanying text *supra*.

224. J. HARR, *supra* note 128, at 697.

materialized.²²⁵ Consequently, by mid-1978, Conrail projected that an additional \$1.3 billion in federal funding over the amount authorized in the 1973 and 1976 Acts would be needed to meet congressional goals and to achieve self-sufficiency by 1982.²²⁶ Congress rejected suggestions that it should provide only interim additional funding pending further evaluation of Conrail's future; instead, it authorized \$1.2 billion for the Conrail.²²⁷ Despite this allocation of additional funds for Conrail, Congress still intended that Conrail should gain economic independence. Yet, as one Senate report noted, Conrail could not become independent of federal financial assistance unless a number of key assumptions were realized.²²⁸ Specifically, the Senate report noted the need to increase revenue by improving service,²²⁹ reducing labor cost intensity to a level near that of other railroads,²³⁰ and achieving more efficient car utilization.²³¹

By the end of 1979, Conrail had concluded that it could not "continue to operate all of its present service, over all of its present track, under all of the existing regulatory constraints, without Federal funding beyond the \$3.3 billion already authorized."²³² In order "to minimize the need for additional federal funding" and to function within the confines of the authorized funding, Conrail emphasized

225. CONSOLIDATED RAIL CORPORATION, 1978 ANNUAL REPORT 8 (1979). Losses from operations amounted to \$246 million in 1976, \$412 million in 1977, \$430 million in 1978, \$220 million in 1979, and \$244 million in 1980. CONSOLIDATED RAIL CORPORATION, 1980 ANNUAL REPORT 7, 26 (1981). By comparison, the Final System Plan projected that Big Conrail would lose \$359 million in 1976, \$238 million in 1977, \$71 million in 1978, and would have positive income of \$151 million in 1979 and \$440 million in 1980. UNITED STATES RAILWAY ASSOCIATION, FINAL SYSTEM PLAN 118 (Supp. Sept. 1975).

226. S. REP. NO. 885, 95th Cong., 2d Sess. 7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5293, 5298. In addition, for that same period Conrail projected an equipment financing requirement of \$1 billion which it hoped to satisfy through the private sector. *Id.*

227. USRA Amendments Act of 1978, Pub. L. No. 95-565, §§ 2-3, 92 Stat. 2397 (amending 45 U.S.C. § 726 (Supp. IV 1980)).

228. S. REP. NO. 885, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5293, 5300.

229. *Id.* at 9, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 5300.

230. *Id.* at 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 5301. Labor cost intensity measures the amount of labor units required on average to produce a unit of output. Frequently, it is expressed as a ratio of total labor cost to total revenues. When traffic remains the same, the number of employees must be reduced or they must be paid less if labor cost intensity is to be reduced.

231. *Id.* at 11, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 5302. A more efficient use of existing equipment is part of plant rationalization. Besides deferred maintenance and lower labor costs, it is a third significant area of cost reduction in rail operations. *See* 1 FINAL SYSTEM PLAN, *supra* note 188, at 72.

232. CONSOLIDATED RAIL CORPORATION, 1979 ANNUAL REPORT 14 (1980).

that "fundamental regulatory reform" was required.²³³ Specifically, Conrail stated that it should "be able to shape [its] fixed plant and operations to the demonstrated needs of its customers" and to set rates freely.²³⁴ Conrail also noted that commuter operations were proving to be a financial burden, notwithstanding the requirements of the 1973 Act, which had required subsidization of commuter losses.²³⁵ In addition, Conrail suggested that its future might be jeopardized by possible liability for labor protection costs beyond available federal reimbursement, increased car hire charges, and potential increases in rail retirement taxes.²³⁶

Finally, the Carter Administration concluded that at least for the time being the best public policy was to enact regulatory reform rather than increase federal funding of Conrail capital and operating deficit needs.²³⁷ The Administration nonetheless recommended increased federal funding for Conrail labor protection payments in addition to reforms of the statutory formula for the protective payments.²³⁸ The Congress did both in the Staggers Act.²³⁹

D. *The Staggers Rail Act of 1980*

In enacting the Staggers Rail Act of 1980 (Staggers Act),²⁴⁰ Congress acknowledged that its previous legislative attempts to increase railroad profitability had not been particularly successful.²⁴¹ With the Staggers Act, therefore, Congress decided to remedy the financial plight of railroads through broad reform of economic regulation.²⁴²

Historically, the general process of introducing substantial changes in the regulation of railroad rates and service conditions began with the 1976 Act.²⁴³ This Act modified railroad rate regulation

233. *Id.*

234. *Id.* at 16.

235. *Id.* at 12.

236. *Id.* at 3.

237. *Staggers Rail Act of 1980, Hearings on S. 1946*, 96th Cong., 2d Sess. 17 (1980).

238. *Id.*

239. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 11, 45, 49 U.S.C.).

240. *Id.*

241. See STAGGERS ACT HOUSE REPORT, *supra* note 42, at 35-38, reprinted in 1980 U.S. CODE & AD. NEWS 3978, 3980-83. This House Report emphasized in particular that "[t]he Railroad Revitalization and Regulatory Reform Act of 1976 has not provided the flexibility in rates that the industry needs to earn revenues sufficient to maintain and improve the rail system." *Id.* at 38, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 3983.

242. *Id.* at 33-34, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 3978-79.

243. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. §§ 801-854 (1976 & Supp. IV

by changing the standard by which the ICC determined whether a rate was "reasonable."²⁴⁴ A proposed rate that contributed to going concern value,²⁴⁵ which is roughly equivalent to marginal cost,²⁴⁶ could not be found to be unjustly or unreasonably low.²⁴⁷ Although the ICC was required under this Act to promulgate standards for establishing seasonal, regional, or peak period rates,²⁴⁸ it was divested of jurisdiction to find a rate unreasonably high except where it found "market dominance" to exist.²⁴⁹

By 1980, Congress determined that the 1976 Act had been largely ineffective in reforming rate regulation.²⁵⁰ Accordingly, Congress made dramatic changes under the Staggers Act which were designed to give carriers the freedom to set competitive rates that were determined mainly by market forces.²⁵¹ In fact, the changes in economic regulation initiated by the Staggers Act are the most extensive since the 1930's.²⁵² The most significant changes involve maximum rate regulation, contract authority, and independent carrier action on rates and routes. By relaxing maximum rate regulation, the Staggers Act is intended to permit railroads to increase their total revenues by allowing them to raise rates to market levels and thereby improve their rates of return to the point that private sector financing can be obtained more readily.²⁵³ The grant of contract authority

1980)). For a general discussion of basic concepts of railroad rate regulation, see text accompanying notes 41-47 & 50-54 *supra*. For a brief history of legislation on rate regulation, see S. REP. NO. 499, 94th Cong., 2d Sess. 10-14, *reprinted in*, 1976 U.S. CODE CONG. & AD. NEWS 14, 24-27.

244. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202, 90 Stat. 31, 34 (codified at 45 U.S.C. § 802 (1976)). Section 202 of the 1976 Act amended § 1(5) of the Interstate Commerce Act. See S. REP. NO. 499, 94th Cong., 2d Sess. 46, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 14, 60.

245. S. REP. NO. 499, 94th Cong., 2d Sess. 46, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 14, 60.

246. Friedlaender, *supra* note 44, at 134.

247. See S. REP. NO. 499, 94th Cong., 2d Sess. 46, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 14, 60.

248. See *id.* at 49, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 63.

249. See *id.* at 46, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 60-61. The 1976 Act also set new procedures and standards to facilitate mergers and abandonments. See *id.* at 106-08, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 121-23.

250. H.R. REP. NO. 1035, 96th Cong. 2d Sess. 38, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 3983.

251. *Id.* at 53-54, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 3998-99.

252. For a chronological overview of railroad regulatory legislation, see *id.* at 81-92, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 4025-29.

253. *Id.* at 57, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 3999. Removing maximum rate restrictions allows railroads to respond to the elasticity of demand in each segment of the market. Where demand is inelastic, high revenues can be produced, allowing rates to be dropped elsewhere to meet a more elastic, competitive price structure. The provision recognizes that, with high fixed costs, the carrier may

weakens the common carrier obligation, thus enabling investments in rolling stock to be linked more directly with profitable traffic.²⁵⁴ Finally, by giving rail carriers freedom to engage in independent action respecting rates and routes, the Staggers Act permits cross subsidies among carriers to be changed in order to benefit carriers with weaker financial performance.²⁵⁵

E. *Impact of the 1973 Act, the 1976 Act and the Staggers Act*

The reforms in rate regulation introduced by the Staggers Act will necessarily have an impact on Conrail. In addition, the Act more specifically addressed Conrail's problems by requiring the USRA and Conrail to submit to Congress, by April 1, 1980, reports on the future

price high or low for any single customer; but to meet revenue goals for the system, the carrier must charge "what the market will bear." For the relevant statutory provisions, see Staggers Rail Act of 1980, Pub. L. No. 96-448, § 201(a), 94 Stat. 1895, 1898-1900 (codified at 49 U.S.C. § 10701a (Supp. IV 1980)).

254. STAGGERS ACT HOUSE REPORT, *supra* note 42, at 57, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 4002. *See also* Staggers Rail Act of 1980, Pub. L. No. 96-448, § 204, 94 Stat. 1895, 1905 (codified at 49 U.S.C. 10731 (Supp. IV 1980)). Section 204 of the Staggers Act authorizes rail carriers and the purchasers of rail services to enter into contracts for specific services at specified rates and conditions. *Id.* Before November 1978, any contracts between railroads and shippers were held unlawful because the Interstate Commerce Act imposed an obligation on common carriers to provide transportation to all shippers upon reasonable requests at reasonable rates. STAGGERS ACT HOUSE REPORT, *supra*, at 57, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 4002. For instance, in 1961 the ICC invalidated reduced rates that were available only to shippers who executed a contract to ship 80% of their traffic with the New York Central. The rationale for their order was that such contracts threatened the integrity of the existing rate structure and more particularly, threatened to divert traffic from other modes to rail. *See* Contract Rates on Rugs and Carpeting From Amsterdam, N.Y. to Chicago, 313 I.C.C. 247, *aff'd sub nom.* New York Central R.R. v. ICC, 194 F. Supp. 947 (2d Cir. 1961). The ICC had begun to relax this policy in 1979. *See* Ex Parte 358-f, Change of Policy, Railroad Contract Rates, 361 I.C.C. 205 (1979).

255. STAGGERS ACT HOUSE REPORT, *supra* note 42, at 41 *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 3986. Seventy percent of the property transported by rail moves over routes involving more than one carrier. *Id.* Before the enactment of the Staggers Act, these movements were covered by joint rates, and the resulting revenue divided among the participating carriers according to divisions generally prescribed by the ICC. *Id.* The existing joint rates and divisions did not allow some rail carriers, including Conrail, to recover even the variable costs of providing transportation services on certain through routes. *Id.*

Section 301 of the Staggers Act, which added a new § 10705(a) to Title 49, provides that rail carriers that do not earn adequate revenues under existing joint rates and divisions can surcharge such rates or cancel their application to particular routes without the concurrence of other carriers. *Id.* at 10-11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 4008. This provision is intended to resolve a century-old battle between northeastern and southern railroads. For a discussion of the legislative and regulatory history of this battle, *see id.* at 91-94, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 4035-38.

prospects of Conrail.²⁵⁶ This required a reevaluation of Conrail in the context of three main problems: industry structure, passenger service and labor costs.²⁵⁷ These problems, however, cannot be analyzed in a legislative vacuum. Instead, the impact of federal legislation since 1973 on these three problems must also be analyzed. Only through this analysis is it possible to assess the prospects for success of the most recent legislative attempt to deal with the northeast rail crisis—NERSA.

1. *Industry Structure and Profitability*

The preferred recommendation of the Final System Plan for industry structure, the Three Systems East plan, was not achieved because of unsuccessful negotiations with the Chessie and Norfolk & Western.²⁵⁸ Clearly, the second choice, Big Conrail, had not met the profitability projections of the Final System Plan.²⁵⁹ The "supplemental transaction" authority in the 1973 Act,²⁶⁰ insisted upon by DOT to facilitate further changes in industry structure, had been used to effect but one rather modest transfer of properties in New England. In the meantime, major mergers between the Southern Railway and the Norfolk & Western, and between the Chessie and the Seaboard Coast Line, threatened Conrail with much stronger competition.²⁶¹ Route abandonments during Conrail's first five years were few. Moreover, it became increasingly doubtful whether large scale abandonments would contribute to Conrail's self-sufficiency.²⁶²

In enacting the 1973 Act, Congress created a statutory mechanism under which industry structure problems could be addressed more freely than under the Interstate Commerce Act or section 77 of the Bankruptcy Act. Unfortunately, the USRA did not take advantage of this opportunity. Its Final System Plan did little more than perpetuate the Penn Central and add to its estate properties of the other bankrupt carriers. Thus, the intellectual foundations laid by the national restructuring plans of the 1920's and 1930's and by the

256. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 703(b), 94 Stat. 1895, 1963 (45 U.S.C.A. § 747 note (West Supp. 1982)).

257. *Id.*

258. For a discussion of these negotiations, see notes 195-96 and accompanying text *supra*.

259. For a discussion of Conrail's disappointing economic performance, see notes 225-26 and accompanying text *supra*.

260. 45 U.S.C. § 745(a) (1976).

261. See Norfolk & Western—S. Ry. Merger, 366 I.C.C. 171 (1982); Seaboard Coast Line—C. & O. Merger, 363 I.C.C. 518 (1980).

262. See CONSOLIDATED RAIL CORPORATION, OPTIONS FOR CONRAIL 4-1 to 4-3 (Apr. 1, 1981) [hereinafter cited as OPTIONS FOR CONRAIL].

debate over the Penn Central merger were not built upon.²⁶³

Additionally, since the USRA did not adequately address questions of economic regulation, it fell to the Nixon, Ford, and Carter Administrations to press for regulatory reform. Unfortunately, the regulatory reform provisions that were finally incorporated in the 1976 Act produced disappointing results.²⁶⁴ Not until the Final System Plan solution was questioned did Conrail finally seek the much needed rate flexibility, which to a large extent was achieved by the enactment of the Staggers Act.²⁶⁵ Because the Staggers Act regulatory reforms are so new, there is little evidence available as to their effect on profitability. It is particularly difficult to assess the effects on profitability of both the broadened contract authority and independent rate and route action. However, two significant questions can be identified regarding the effect the maximum rate changes will have on the economic viability of the northeast rail system. The first question is whether the Staggers Act will be interpreted by the ICC and courts in a manner that furthers the relaxation of regulation contemplated by Congress. The second question is whether the freedom to increase rates will have the beneficial effect of increased profits rather than exacerbating financial problems by accelerating traffic declines or encouraging "cutthroat competition." More simply, the impact of the Staggers Act will depend on whether the legal constraints on maximum rates actually will be relaxed and whether market forces will permit new rates which substantially increase revenues.

The reason why it is so difficult to predict the ultimate effects of the Staggers Act reforms is illustrated by the ICC's changing position and the posture of the courts on the question of market dominance. The 1976 Act eliminated maximum rate regulation, except in cases in which the carrier proposing the rate increase had "market dominance" over the movement or traffic involved.²⁶⁶ The ICC initially interpreted the phrase "market dominance" in a manner that limited

263. See STAGGERS ACT HOUSE REPORT, *supra* note 42, at 38, reprinted in 1980 U.S. CODE CONG. & AD. NEWS, 3978, 3983.

264. *Id.* The Reform Act of 1976 did not provide the requisite flexibility in rates that the industry needed to maintain and improve the rail system.

265. Eckhardt, *Market Dominance in the Staggers Act*, 48 I.C.C. PRAC. J. 662, 672, 682 (1981). For a discussion of whether deregulation will prove to be more of a solution to Conrail's problems than the changes projected in the Final System Plan, see notes 266-88 and accompanying text *infra*.

266. See 49 U.S.C. § 10705 (1976). Basically, market dominance is the relationship between railroad and shipper in which the railroad has a monopoly on shipments into and out of the plant. Shippers subject to market dominance are a small segment of the transportation market. Many shippers may ship economically by truck or water, without increasing transportation costs to the extent that they would price their own products out of existing markets. The hard question in market domi-

the effect of the 1976 Act, thereby largely preserving its jurisdiction over rate increases.²⁶⁷ Four years later, the ICC shifted its position and defined market dominance to preclude maximum rate regulation where shippers had other markets available for their products ("geographic competition") or consignees had other sources for their supplies ("product competition").²⁶⁸ This first move toward consideration of geographic and product competition as a means of relaxing regulation was rejected by the United States Court of Appeals for the Fifth Circuit, in an opinion that suggests how the implementation of deregulation may be frustrated in litigation.²⁶⁹ Although the ICC has sought to remedy the deficiencies found by the Fifth Circuit, while at the same time preserving its substantive position, vigorous criticism of the relaxed definition has been expressed.²⁷⁰ Considering the stakes involved for shippers, this criticism is likely to be pressed.²⁷¹ Although the Staggers Act does not change the definition of market dominance, it does establish a revenue/cost threshold below which rates are deregulated without regard to market dominance.²⁷² Thus, the Staggers Act has to some extent reduced the uncertainty respecting administrative and judicial interpretations of the deregulation of maximum rates. Nevertheless, because the revenue/cost threshold is lower than was sought by the railroad indus-

nance is whether existing or potential truck or water service to the plant should be used to measure a railroad's market dominance.

267. See Ex parte No. 320, Special Procedures for Making Findings of Market Dominance, Final Report, 355 I.C.C. 12 (1977); Ex parte No. 320, Special Procedures for Making Findings of Market Dominance As Required by the Railroad Revitalization Reform Act of 1976, Interim Report, 353 I.C.C. 874 (1976). This interpretation was upheld against a challenge brought by the railroads. See *Atchison, T & S.F. Ry. v. ICC*, 580 F.2d 623 (D.C. Cir. 1978).

268. Ex parte No. 320 (Sub. No. 2), Market Dominance Determinations and Consideration of Product Competition, 365 I.C.C. 118 (1981). These measures determine the extent of a shipper's reliance on cheap rail transportation to maintain its own competitiveness. The new rules follow the ICC's historic function of protecting shippers from unfair advantages gained by discriminatory transportation rates.

269. See *Central Power & Light Co. v. United States*, 634 F.2d 137 (5th Cir. 1980).

270. See Eckhardt, *supra* note 265, at 662.

271. Deregulation could increase shippers' rates as much as 70%. See Levin, *Railroad Rates, Profitability, and Welfare Under Deregulation*, 12 BELL. J. ECON. 1, 22 (1981).

272. See 49 U.S.C. §§ 10701a, 10709 (Supp. IV 1980). Revenues above variable costs defray the high proportion of fixed costs attributable to the cost of haulage. By deregulating all rates below a revenue/cost threshold, the Staggers Act recognizes that no monopolistic profits are earned by rates that contribute proportionally to the system-wide expense. For a discussion of fixed costs, see note 23 *supra*. Regulatory authority is maintained over rates that may potentially take advantage of a monopolistic market and inelastic demand. See notes 253 & 266 *supra*.

try,²⁷³ the interpretation of the market dominance factor is of continued importance in determining the extent to which maximum rates will be held below their market levels by regulation.

Assuming that deregulation succeeds in allowing rates to reach market levels, questions remain as to whether the market will permit rates that produce adequate revenues for carriers in the Northeast.²⁷⁴ A number of econometric studies have been conducted in recent years which attempt to refine estimates of demand and cost behavior in the railroad industry.²⁷⁵ In particular, a study conducted by Professor Richard C. Levin of Yale University specifically addressed the probable course of events which would occur under the deregulation scheme of the Staggers Act.²⁷⁶

An important threshold question is whether intramodel competition (competition among railroad lines) will prevent substantially increased revenues. In the Levin model, the type of cutthroat rate

273. See Eckhardt, *supra* note 265, at 672-77. In its April 1, 1981 Report to Congress, Conrail identified a number of problems which could reduce the benefits derived from the Staggers Act reforms by \$300 million annually. *OPTIONS FOR CONRAIL*, *supra* note 262, at 3-9. Specifically, Conrail expressed concern about the possibility that rates for market-dominant commodities might be limited to fully allocated costs. This approach was approved by a number of circuits. See, e.g., *Union Pac. R.R. v. United States*, 637 F.2d 764 (10th Cir. 1981); *Celanese Chem. Co. v. United States*, 632 F.2d 568 (5th Cir. 1980); *Burlington N., Inc. v. United States*, 555 F.2d 637 (8th Cir. 1977). A higher threshold allows market forces to determine more rates. Charging "what the traffic will bear" seeks to increase rates according to the value of transportation. Thus, more valuable goods are charged higher rates; goods such as pine board exported from only a few areas nationally are charged more for transport to importing regions; and goods that cannot be shipped by alternative modes, such as truck or barge, are charged more.

274. Economic theory would predict that a situation in which revenues do not cover costs, including the cost of capital, would result in disinvestment (abandonment or deferred maintenance), thereby reducing the supply of rail services. As the supply declines, the price would be bid to a higher level by shippers. If competition from other modes of transportation holds prices below the level sufficient to cover costs, rail plant facilities will decrease until an equilibrium point is reached at which the price level produces adequate revenues. Of course, there is no theoretical reason for this equilibrium plant size to be larger than a few rail lines running from coal mines to power plants or ports. This theoretical line of reasoning is supported by the actual experience with rail passenger operations.

275. See, e.g., J. MEYER, *supra* note 53; Harris, *Economies of Traffic Density in the Rail Freight Industry*, 8 BELL. J. ECON. 556 (1977); Keller, *Railroad Costs, Returns to Scale, and Excess Capacity*, 56 REV. ECON. STAT. 201 (1974); Levin, *Allocation in Surface Freight Transportation: Does Rate Regulation Matter?*, 9 BELL. J. ECON. 18 (1978); A. Friedlaender & R. Spady, *Derived Demand Functions for Freight Transportation, Alternative Scenarios for Freight Transportation Policy*, Second Year Report (1978) (MIT Working Paper); R. Spady, *Econometric Estimation of Cost Functions for the Transportation Industries* (1978) (unpublished PhD diss., MIT); C. Winston, *A Disaggregate Model of Demand for Inventory Freight Transportation* (1979) (MIT Working Paper).

276. Levin, *supra* note 271, at 1.

competition which existed prior to the enactment of the Interstate Commerce Act²⁷⁷ would actually reduce rates of return below the two percent level.²⁷⁸ Therefore, in order to make any reasonable projection as to the effects of deregulation, the extent to which the pricing behavior in the rail industry currently differs from the pricing behavior of 1886 must be determined. Drawing on the results of other studies, Levin concludes that pricing railroad services equal to the marginal cost of providing those services, the condition which would be expected in a market with perfect competition, would not cover total costs.²⁷⁹ However, he concludes that competition under the present rail industry structure will produce prices in excess of marginal costs, thereby avoiding the "cutthroat competition" result. The industry structure has changed sufficiently since the Interstate Commerce Act was enacted to eliminate the need for ICC rate regulation to boost rail profits.²⁸⁰

277. *Id.* at 1-20. For a discussion of cutthroat competition in the rail industry, see J. MEYER, *supra* note 53, at 251.

The possibility of cutthroat competition is rooted in the concept of natural monopoly. A natural monopoly exists when fixed costs are a high proportion of total costs, thus causing marginal costs to be substantially below average costs over the full range of output absorbable by the relevant market. 1 A. KAHN, *THE ECONOMICS OF REGULATION* 124 (1970); 2 A. KAHN, *supra* note 9, at 119 (critical characteristic of natural monopoly is an inherent tendency to decreasing unit costs over the entire extent of the market). The most efficient producer, pricing at marginal costs, eventually drives all his competitors out of business. This is so because the large producer enjoys technological economies of scale. 1 A. KAHN, *supra*, at 65; 2 A. KAHN, *supra*, at 120.

The possibility of destructive competition with deregulation of railroad rates arises if there are continued restrictions on mergers and abandonments, thus artificially preserving excess capacity. See 2 A. KAHN, *supra*, at 172-75. The result of competition in such circumstances is reduced capital expenditures and deteriorations in service. *Id.*

For a discussion of the relationship between rate regulation and control of industry structure by regulation of mergers and abandonments, see notes 7-9 and accompanying text *supra*.

As railroads were built, entrepreneurs resorted to rate wars to coerce competitors in a manner designed to either affect stock prices, force mergers, or both. J. MEYER, *supra*, at 251. Railroad cost structures were such that rates could be cut well below average total cost and still be greater than short run marginal cost. *Id.* In competitive markets, price cutting toward the floor set by marginal costs almost inevitably occurred. However, this meant that any negative difference between price and average costs had to be made up elsewhere if total costs were to be recovered. These pressures led railroads to accept the need for regulation in order to stabilize prices. *Id.* at 6-7. See also G. KOLKO, *supra* note 10, at 7-17 (cutthroat competition led to industry desire for government action).

278. See Levin, *supra* note 271, at 19.

279. See *id.* at 8-9.

280. *Id.* at 2, 19-20. In markets characterized by a small number of competitors, behavior can range from cutthroat competition to joint profit maximization. Levin believes that the weakening of rate bureaus and the complexity of the rate structure will make the monopoly solution of the maximization of joint profits difficult to

The second basic question is whether intermodal competition, primarily between trucks and railroads, will permit substantially increased revenues. The Levin study specifically accounted for the possibility that increased rates would divert traffic to other modes.²⁸¹ Professor Levin concluded that railroad rates of return on total invested capital could increase from about two percent to as high as thirteen percent, but only if competition between railroads was non-existent.²⁸² In his opinion, the more likely pricing behavior would increase rates of return to approximately eight percent, a level at which he thought that it was possible for the railroad industry to obtain the financing necessary to sustain and improve its physical plant.²⁸³ Significantly, Professor Levin also identified a number of qualitative factors characteristic of the Northeast which he considered likely to cause the improved profitability benefits of deregulation to be realized even more strongly by the distressed railroads in the Northeast.²⁸⁴

In another econometric study, Professor Friedlaender concludes that competitive rate making would cause a shift of manufactured goods away from rail and in favor of trucks while bulk commodities would shift toward rail.²⁸⁵ She concludes, however, that the resulting rates of return would be insufficient to allow the railroads to maintain existing levels of capital stock.²⁸⁶ Hence, railroads could be financially self-sustaining only with substantial abandonments or rates substantially in excess of marginal costs.²⁸⁷

Thus, these studies demonstrate that it is reasonable to expect that deregulation, as represented by the Staggers Act, can make a significant contribution to the achievement of profitability in the northeast rail system, but only if administrative and judicial interpretation of the statute permit rates that are governed by market forces rather than by regulation and if the legislation permits substantial

achieve. On the other hand, he asserts that the recognition by the small number of firms of their interdependence will lead them to refrain from cutthroat competition. *Id.* at 21. See also J. MEYER, *supra* note 53, at 251.

281. Levin, *supra* note 271, at 5-6.

282. *Id.* at 19-21.

283. *Id.* at 19-20.

284. *Id.* at 22. Firms with high shares of manufactured traffic will derive greater benefit, as will those with cross-subsidized light density lines. In addition, Levin expects low-profit carriers to benefit from changes resulting from independent action on rates and routes. *Id.*

285. See Friedlaender, *supra* note 44, at 115.

286. *Id.* at 118. She projects rates of return of 3.34% for the eastern region and 5.36% for the Southwest.

287. *Id.*

abandonments.²⁸⁸

2. *Passenger Operations*

The passenger problem received only modest attention in the 1973 Act, the Final System Plan, and the 1976 Act. Conrail was in little better position regarding passenger service at the end of 1980 than its predecessors were when the 1973 Act was enacted. Under the provisions of the 1973 Act, Conrail continued most of the passenger operations of the bankrupts in return for reimbursement of its losses in that area. Five years after its creation, Conrail was operating 1819 daily commuter trains and carrying 231,000 daily round trip passengers at an annual operating cost of more than \$512 million.²⁸⁹ Only about forty percent of this cost was covered by fares.²⁹⁰ The remaining sixty percent of the cost was covered by subsidies from federal, state and local authorities.²⁹¹

Congress addressed the commuter problem in the 1973 Act by investing commuter authorities, rather than Conrail, with the authority to decide what level of service should be provided. Moreover, Congress sought to make it clear that Conrail should provide commuter service only for as long as it was fully reimbursed.²⁹² The statute, however, was interpreted as requiring Conrail to engage in protracted abandonment litigation before service could be terminated, even when full reimbursement was not provided.²⁹³ Thus, by the end of

288. For a discussion of the need to combine an abandonment policy with a relaxation of rate regulation to achieve a viable rail system, see note 277 *supra* and Friedlaender, *supra* note 44, at 118.

289. OPTIONS FOR CONRAIL, *supra* note 262, at 9-2.

290. *Id.* at 9-3.

291. *Id.*

292. Section 304(b)(2) of the 1973 Act originally required Conrail to continue to provide commuter service provided by its predecessors for 180 days after conveyance, regardless of whether the properties on which such service was provided were designated for conveyance in the Final System Plan. The period was subsequently extended by amendment to 240 days. See Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 304(b)(2), 87 Stat. 985, 1008 (1974) (codified as amended at 45 U.S.C. § 744(b)(2) (1976)). If state or local commuter authorities did not pay the difference between revenue and avoidable costs for providing commuter service after the 180 day period, Conrail was permitted to discontinue service. *Id.* § 304(c)(2)(A) (codified as amended at 45 U.S.C. § 744(c)(2)(A) (1976)). Although Conrail was obligated to assume commuter service contracts, and commuter authorities were exempted from ICC regulation by the Reform Act of 1976, it was not clear whether Conrail had been relieved of the common carrier obligation to operate the service. See Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 804, 90 Stat. 133-139 (codified at 45 U.S.C. § 744(a) (1976)).

293. See *Illinois v. Consolidated Rail Corp.*, 589 F.2d 1327, 1334 (7th Cir.), *cert. denied*, 442 U.S. 942 (1979) (holding that 45 U.S.C. § 744 does not authorize Conrail to summarily discontinue rail passenger service over a Final System Plan line without first pursuing protracted abandonment litigation); *Brown v. Consolidated Rail*

1980, Conrail estimated that it had been forced to spend \$230 million to support its passenger operations.²⁹⁴ Losses of this magnitude not only made it more difficult to eliminate the need for federal funding of Conrail, but also diverted management's attention from more pressing tasks.²⁹⁵

3. *Labor Costs*

After five years of Conrail operation, excessive labor costs continued to be a major threat to a viable northeast rail system. This labor cost problem was the result of at least three factors: labor protection obligations, rigid work rules and a fragmented collective bargaining structure.

a. *Labor Protection Obligations*

The labor protection provisions included in Title V of the 1973 Act were substantially the same as the provisions negotiated prior to the Penn Central merger.²⁹⁶ Congress responded to proposals to relieve the reorganized carrier of the economic burden of funding protective payments, but nonetheless wrote the lifetime protection provision into law. The 1973 Act authorized \$250 million to fund the statutory labor protection program.²⁹⁷ There was, however, no clear evidence that this amount would be sufficient.²⁹⁸ By early 1980, the \$250 million in authorized funding was nearly exhausted and Conrail was confronted with the possibility that it would be required to continue making protective payments out of its own funds.²⁹⁹ The Staggers Act significantly changed the benefit formulas to reduce the cost of the program, and, in addition, authorized \$230 million in in-

Corp., 422 F. Supp. 1251 (N.D. Ohio 1976) (Conrail abandonment of rail properties used in freight service enjoined pursuant to 45 U.S.C. § 744(g)); *cf.* Coleman v. Consolidated Rail Corp., 449 F. Supp. 621, 622 (N.D. Ohio 1977) (challenge to discontinuance of passenger service by Conrail denied because plaintiffs failed to prove conditions prohibiting termination pursuant to 45 U.S.C. § 744).

294. OPTIONS FOR CONRAIL, *supra* note 262, at 9-8.

295. *Id.* at 9-9.

296. For a discussion of the labor protection provisions of the Penn Central merger, see notes 71-72 and accompanying text *supra*. See also Railroad Reorganization Act of 1973, Pub. L. No. 93-236, §§ 505-509, 87 Stat. 985, 1015-1020 (1974) (codified as amended at 45 U.S.C. §§ 771-779 (1976)) (repealed 1981).

297. 1 FINAL SYSTEM PLAN, *supra* note 188, at 166; Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 509, 87 Stat. 985, 1020 (1974) (codified as amended at 45 U.S.C. § 779 (1976)) (repealed 1981).

298. 1 FINAL SYSTEM PLAN, *supra* note 188, at 166.

299. Section 509 of the 1973 Act obligated Conrail to make the actual payments and authorized only \$250 million for reimbursement. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 509, 87 Stat. 985, 1020 (1974) (codified as amended at 45 U.S.C. 779 (1976)) (repealed 1981).

creased funding.³⁰⁰ Yet, the Staggers Act explicitly provided that Conrail was responsible for residual funding.³⁰¹ In less than a year, it was clear that the additional funding authorization contained in the Staggers Act would be insufficient to cover program costs.³⁰² This hindered successful reorganization of the regional rail system in two ways: 1) it threatened continued drains on Conrail funds;³⁰³ and 2) it inhibited further restructuring by leaving Conrail with the financial responsibility for continuing to pay employees full salary even when the rail properties on which they worked were abandoned or transferred to other carriers.³⁰⁴ Undeniably, Conrail's burdensome labor protection responsibilities had to be lightened before the overall Conrail problem could be solved.³⁰⁵

b. *Work Rules*

A second cause of the labor cost crisis was the work rule problem. Unfortunately, the 1973 Act, the Final System Plan, and the Reform Act of 1976 accomplished virtually nothing toward resolving this problem, thus leaving it to Conrail to address this aspect of the general labor cost problem within the context of a materially worse bargaining structure.³⁰⁶ In early 1978, Conrail, following in the footsteps

300. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 501, 94 Stat. 1895, 1948 (codified at 45 U.S.C. § 775(b) (Supp. IV 1980)) (repealed 1981). Section 501 of the Staggers Act amended § 505(b) of the 1973 Act by changing the formulas for computing income protection. *See id.* The Staggers Act amendments treated the four generic classes of railroad employees differently. For maintenance-of-way employees, monthly displacement allowances (MDAs) were annualized, and overtime was removed from the base period earnings from which MDAs were derived. For nonoperating employees, overtime earnings were eliminated from the base. For protected operating employees, a limit equal to the average compensation for the craft was imposed on MDAs. For noncontract employees, the original formula was left unchanged. *Id.* § 501(b)(1)-(b)(4) (codified at 45 U.S.C. § 775(b)(1)-(b)(4)) (Supp. IV 1980) (repealed 1981).

In 1981, the Special Court held that the Staggers Act changes did not violate the fifth amendment because there was a rational basis for the distinctions Congress made among employees. *Hinds v. Consolidated Rail Corp.*, 518 F. Supp. 1350, 1361 (Regional Rail Reorg. Ct. 1981), *cert. denied*, 102 S. Ct. 1007 (1982). The Special Court's opinion contains a detailed description of the changes in the benefit formulas made by the Act, and summarizes the economic effect of these changes. *See id.* at 1355-58.

301. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 501, 94 Stat. 1895, 1948 (1980) (codified at 45 U.S.C. § 775(b) (Supp. IV 1980)) (repealed 1981).

302. *See* CONSOLIDATED RAIL CORPORATION, LABOR REPORT TO CONGRESS 9-10 (Mar. 15, 1981) [hereinafter cited as LABOR REPORT].

303. *Id.* at 9.

304. *Id.* at 10.

305. *Id.*

306. Section 504(d) of the 1973 Act required Conrail and labor organizations representing employees of the railroads in reorganization to begin negotiations over new collective-bargaining agreements. There was, however, no assurance that nego-

of the Penn Central six years earlier, identified the solution of the crew consist problem as a major negotiating goal. Its specific financial goal was to save \$500 million in labor costs in the subsequent five years.³⁰⁷ This \$500 million figure reflected Conrail's assumption that resolution of the crew consist problem and the attainment of other bargaining objectives could be achieved promptly.³⁰⁸ There seemed to be grounds for optimism on this score because in 1978 Conrail succeeded in negotiating a crew consist agreement with the United Transportation Union (UTU) providing for the reduction of train crew size through attrition as a precondition for payment of wage increases agreed to by other carriers.³⁰⁹

Unfortunately for Conrail's plan to reduce labor costs, implementation of this new Conrail crew consist agreement and of the 1972

tiations would ever be completed nor was there a vision of what the resulting provisions would contain. *See* Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 504(d), 87 Stat. 985, 1015 (1974) (codified as amended at 45 U.S.C. § 774(d) (1976)).

Before Conrail began operations, the Special Court noted disapprovingly that the 1973 Act provided no relief to Conrail with respect to "burdensome work rules." *In re* Penn Central Transp. Co., 384 F. Supp. 895, 910 n.21 (Regional Rail Reorg. Ct. 1974).

307. CONSOLIDATED RAIL CORPORATION, SUMMARY OF BUSINESS PLAN, Jan. 1, 1978 to Dec. 31, 1982 12 (Feb. 1978).

308. *Id.*

309. CONSOLIDATED RAIL CORPORATION, 1979 ANNUAL REPORT 8-9 (1980). On August 30, 1978, Conrail signed an agreement with a majority of the UTU general chairmen representing its trainmen. *Maloof v. United Transp. Union*, No. 78-3793, slip op. at 14-15 (E.D. Pa. Mar. 27, 1980). The August 30 agreement provided for the payment by Conrail of wage and benefit increases that had been agreed to by the National Railway Labor Conference and the UTU. *Id.* at 37-41. The agreement was applicable to most of the major railroads. In exchange, the general chairmen agreed to a crew size reduction and to binding arbitration of remaining unresolved issues. *Id.* at 37. On September 8, 1978, a detailed crew consist agreement was signed by Conrail and a majority of the UTU general chairmen in order to implement that element of the August 30 agreement. *See id.* at 42.

The September 8 agreement provided for the eventual elimination through attrition of one brakeman from each train crew, leaving one conductor and one brakeman. Trainmen holding seniority on the date of the agreement ("protected trainmen") were entitled to continue to bid for second brakemen positions, so that attrition would result in smaller crews through a gradual decrease in the size of the class eligible to demand second brakemen's jobs. *Id.* at 52-54. Protected trainmen also were to share in the savings resulting from the crew size reduction through payments by Conrail into an employee trust fund. *Id.* at 54. A trust fund agreement was subsequently signed on February 25, 1980, and an arbitration award was entered on June 30, 1981. The combination of the August 30 and September 8 trust fund agreements with the award of Arbitration Board No. 385, resolved all of the issues between Conrail and the UTU represented employees covered by the agreements.

For an explanation of the impact of a court decision partially invalidating the August 30 and September 8 agreements, see note 312 *infra*.

Firemen Manning Agreement³¹⁰ was inhibited by declining traffic.³¹¹ In addition, Conrail became ensnared in unsuccessful litigation over

310. For a discussion of the Firemen Manning Agreement, see notes 86-87 and accompanying text *supra*.

311. Declining traffic causes the number of crews to decrease. Fewer crews means fewer opportunities for protected trainmen to bid for second brakemen positions and for protected engine service personnel to bid for fireman positions. For any particular number of protected trainmen or engine service personnel, the end result is a higher proportion of firemen or second brakemen positions that will be occupied through the exercise of seniority under the crew consist or fireman manning agreements. In more rigorous terms, the process can be expressed mathematically. Suppose, for example, that a railroad operates an average of 3000 crews per day, or 1.09 million crews per year, and that trainmen work an average of 225 days per year. A pool of approximately 15,000 trainmen would be required to fill one conductor and two brakemen positions on all the crews. If the railroad enters into a crew consist agreement similar to Conrail's 1978 agreement with the UTU, the pool of 15,000 trainmen will be "protected", or entitled to exercise seniority to second brakeman positions. However, seniority may not be exercised to a second brakeman's position if the railroad requires the employee to work on a conductor or first brakeman job. This is called a "force assignment" rule, and was included in Conrail's 1978 agreement with UTU.

If attrition among protected trainmen is "a" on an annual basis, the number of protected trainmen in year "t" is:

$$P = P_0 (1-a)^t$$

where $P_0 = 15,000$

If traffic declines at rate "b", the number of crews operated in year "t" will be:

$$C = C_0 (1-b)^t$$

where $C_0 = 1.09 \text{ million}$

The number of conductor and first brakeman jobs in year "t" is twice the number of crews. Because of the force assignment rule, the number of protected trainmen exercising seniority to second brakeman positions in year "t" (based upon 225 working days) will be:

$$Z(t) = 225P_0 (1-a)^t - 2C_0 (1-b)^t$$

The percentage of crews operated with second brakemen will be:

$$\begin{aligned} Y(t) &= \frac{Z(t)}{C_0 (1-b)^t} \\ &= 225 \frac{P_0}{C_0} \left(\frac{1-a}{1-b} \right)^t - 2 \\ &= 3 \left(\frac{1-a}{1-b} \right)^t - 2 \end{aligned}$$

If attrition is 6% ($a=0.06$) and traffic is constant ($b=0.0$), approximately 20% of the crews will be operating with a second brakeman in the fifth year of the agreement. On the other hand, if traffic declines at 3% per year ($b=0.03$) and attrition is 6% ($a=0.06$), 56% of the crews will be operating with a second brakeman in the fifth year.

Attrition can be accelerated by separating protected trainmen in exchange for a lump sum payment. For example, if "d" protected trainmen are separated at the beginning of the hypothetical crew consist agreement, and the crew consist agreement otherwise remains in force, the percentage of crews operating with a second brakeman in year "t" becomes:

the validity of the crew consist agreement.³¹² By the end of 1980, therefore, Conrail's ratio of labor costs to revenue was significantly higher than that of other railroads.³¹³ One reason for this was that the

$$Y(t) = \frac{225(P_o - d)(1-a)^t - 2C_o(1-b)^t}{C_o(1-b)^t}$$

$$= \left[\left(\frac{1-a}{1-b} \right)^t \left(3 \frac{225d}{C_o} \right) \right] - 2$$

If normal attrition is 6% and traffic declines by 3% and 2500 protected trainmen are separated, approximately 12% of the crews will be operating with second brakemen in the fifth year of the agreement.

If, in addition, the railroad is entitled to eliminate completely one second brakeman's job for each trainman separated, the percentage of crews operating with a second brakeman in year "t" would be:

$$Y(t) = \frac{225(P_o - d)(1-a)^t - 2C_o(1-b)^t - 365d}{C_o(1-b)^t}$$

If 2500 trainmen were separated and 2500 second brakeman jobs were eliminated at the beginning of the agreement, no crews would be operating with a second brakeman in the fifth year of the agreement. This assumes, of course, the same 6% and 3% rates of attrition and traffic decline. Equally important, only 15% of the crews will be operating with a second brakeman in the first year, compared with 44% in the first year if 2500 trainmen were separated, but no positions were eliminated.

312. See, e.g., *Maloot v. United Transp. Union*, No. 78-3793 (E.D. Pa. Mar. 27, 1980). In *Maloot*, the court held that Conrail's August 30, and September 8, 1978 wage, crew consist, and arbitration agreements were invalid as to four UTU general committees, whose chairmen had not signed the agreements. *Id.* at 76, 88. The agreements were held valid as to employees within the jurisdictions of seven other signatory general committees. *Id.* at 74-76. By February 1981, Conrail had concluded agreements with all of the nonsignatory general committees, which were substantially identical to the August 30 and September 8, 1978 agreements. These four agreements, negotiated pursuant to the *Maloot* court's order, each provided that

[i]n reaching this agreement, both parties recognize fully their obligations under section 504(d) of the Regional Rail Reorganization Act, as amended, and acknowledge that section requires system wide negotiations in the future, aimed at reaching a simple agreement for the entire craft or class of trainmen, as a single bargaining unit.

Id. at 90-91. In a recent case involving some of the same legal issues but different facts, another district court sustained an agreement between the UTU and the Boston & Maine Railroad to arbitrate the crew consist dispute, and similarly upheld the resulting arbitration award. See *Lenfest v. Boston & M. R.R.*, 537 F. Supp. 324 (D. Mass. 1982). The court held that the union was authorized to execute the agreement to arbitrate, that the union did not breach its duty of fair representation, and that the affected UTU General Committee ratified the agreement to arbitrate after the fact. *Id.* at 334-36. Independently, the court found that acceptance of the pay increases provided for by the arbitration award estopped the plaintiffs from attacking the award. *Id.* at 338.

While the differing facts in the *Lenfest* case make it difficult to distinguish the legal reasoning of *Maloot* on the authority and ratification issues, the outcome on the estoppel theory certainly is different in the two cases. Compare *id.* at 338 with No. 78-3793, slip op. at 89-91 (E.D. Pa. Mar. 27, 1980).

313. *Labor Report*, *supra* note 302, at 1.

average size of its crews had increased rather than decreased.³¹⁴ Consequently, the "solution" to the labor cost problem sought by the Penn Central trustees and pursued by Conrail was far from realization.³¹⁵

c. Bargaining Structure Problem

A third element of the labor cost crisis was Conrail's bargaining structure. The fragmented bargaining structure under which Conrail was forced to negotiate with the rail unions made Conrail's efforts to reduce labor costs even more difficult than that of its predecessors. The 1973 Act had required Conrail to assume the collective bargaining agreements that were in force on the bankrupts.³¹⁶ At the same time, it obligated Conrail and the labor organizations to begin negotiations over new agreements to replace the separate agreements which the bankrupt railroads had negotiated with their employees.³¹⁷ The 1973 Act however, contained no mechanism for forcing resolution of these negotiations.³¹⁸ There were some advantages to this situation which Conrail was able to exploit. For example, by bargaining separately from the rest of the industry, Conrail was able to use the 1978 National Wage Agreement as a lever to force most of its labor organizations to conclude new comprehensive agreements.³¹⁹ It, nonetheless, was still plagued by uncertainty over its legal right to require negotiations on a system-wide basis for each craft or class, primarily because of the litigation over the crew consist agreement.³²⁰ The Staggers Act finally resolved the negotiations problem by providing for systemwide negotiations of any collective bargaining agreement.³²¹ In so doing, it expressly overturned a Pennsylvania Federal

314. DEPARTMENT OF TRANSP., FEDERAL RAILROAD ADMINISTRATION, RECOMMENDATION FOR NORTHEAST RAIL SERVICE C-2 (Mar. 31, 1981).

315. For a discussion of attempt by the Penn Central and its trustees to solve the crew consist problem, see notes 105-09 and accompanying text *supra*.

316. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 504(a), 87 Stat. 985, 1014 (1974) (codified at 45 U.S.C. § 774(a) (1976)) (repealed 1981).

317. *Id.* § 504(d) (codified at 45 U.S.C. § 774(d) (1976)) (repealed 1981).

318. For a discussion of the limitations of § 504(d) of the 1973 Act, see note 306 *supra*.

319. See *Maloof v. United Transp. Union*, No. 78-3793, slip op. at 38. The pace of negotiations under § 504(d), which the author observed, accelerated once a national wage settlement had been reached in the summer of 1978. Conrail steadfastly refused to grant a wage increase to any labor organization until that organization had concluded a § 504(d) agreement.

320. For a discussion of this crew consist litigation, see note 312 *supra*.

321. Staggers Rail Act of 1980, Pub. L. No. 94-448, § 506, 94 Stat. 1956 (amending 45 U.S.C. § 774(d) (1976)) (repealed 1981). Section 504(d) of the 1973 Act was amended to make it clear that a "single collective bargaining agreement" was to be negotiated with each craft or class of Conrail employees and to require that

District Court which had found portions of the crew consist agreement invalid.³²² Nevertheless, by the end of the fifth year of its operations, Conrail was still far from realizing its goal of saving \$500 million in labor costs. It was also far from achieving the substantial reduction in labor intensity that the Penn Central trustees had identified as necessary, but which both the 1976 Act and the Final System Plan had neglected.³²³

IV. THE EVOLUTION OF NERSA

A. *Planning the Future of Conrail*

The Staggers Act required Conrail, USRA, and DOT to submit reports to Congress by April 1, 1981 concerning recommendations on the future of Conrail.³²⁴ The USRA and Conrail reports were specifically to consider three policy options: 1) the discontinuation of federal funding, 2) the continued funding of Conrail as it was then structured, and 3) "future Federal funding [of Conrail] to the extent neces-

"[n]egotiations with respect to such single collective bargaining agreement, and any successor thereto, shall be conducted systemwide." *Id.* This provision was retained by NERSA, which added a new § 708 to the 1973 Act. *See* NERSA, Pub. L. No. 97-35, § 1143(a), 95 Stat. 643, 665-66 (to be codified at 45 U.S.C. § 797g(a)).

322. *See* *Maloo v. United Transp. Union*, No. 78-3793 (E.D. Pa. Mar. 27, 1980). For a discussion of *Maloo*, see note 312 *supra*. The legislative history of § 506 makes it clear that the intent was to overrule the *Maloo* case and to solve one of the most difficult bargaining structure issues facing Conrail. H.R. REP. NO. 1430, 96th Cong., 2d Sess. 134-35, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4166-67. The conference report was critical of the *Maloo* decision:

[R]evocation of the detailed and comprehensive Crew Consist Agreement, on the strength of findings by a Magistrate, not only denies its benefits to a large number of United Transportation Union members but wipes out needed savings for Conrail.

. . . The Conference substitute follows the Senate bill, with a clarifying sentence added to ensure that such a single collective bargaining agreement is negotiated systemwide. This follows the historical policy of the National Mediation Board that crafts or classes are to be certified systemwide, and negotiations conducted on a similar basis.

This section will make it absolutely clear that the intent of Congress was in 1973, has remained, and is today that Conrail is entitled to a single collective bargaining agreement with each craft or class of workers. The Magistrate's opinion was premised on what he described as an ambiguous phrase in the existing statutory language. This section should make it clear that the intent of Congress is that Conrail is entitled to a single agreement for each class and craft.

Id.

323. For a discussion of the Penn Central Trustees' concern about labor cost intensity, see notes 104 & 116 and accompanying text *supra*. For a discussion of the USRA's failure to address the problem when formulating the Final System Plan, see notes 177-80 and accompanying text *supra*.

324. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 703(b), 94 Stat. 1895, 1963-64 (45 U.S.C.A. § 747 note (West Supp. 1982)).

sary to preserve rail service in the region which can be self-supporting, without undue interim disruption of operations which will be maintained.”³²⁵

The USRA submitted its preliminary report on December 17, 1980.³²⁶ The report contained no recommendations; instead, it presented results of a simulation model that indicated that even with an additional \$1.5 to \$2.1 billion in federal funding over the next five years, Conrail would still not be financially self-sustaining.³²⁷ In its concluding chapter, the USRA questioned whether the need for Conrail is “as great now as it was perceived to be in 1974.”³²⁸

The departing Carter Administration, with its budget for Fiscal Year 1982, took the position that further funding for Conrail beyond the amount authorized in the Staggers Act would be forthcoming only if Conrail’s beneficiaries (states, localities, and labor) shared the federal government’s burden of sustaining Conrail commencing January 1981.³²⁹ The Reagan Administration proposed more draconian measures for Conrail. In its proposals for modifications of the Carter Budget,³³⁰ the Reagan Administration proposed elimination of federal subsidies for Conrail.³³¹ Specifically, the proposal stated:

No funding will be provided to aid Conrail beyond 1982. The original intent of the law leading to Conrail’s formation in 1976 was that it become a self-sufficient corporation; this policy change will require Conrail to attain that goal more quickly. Major reform of Conrail, including (a) substantial track abandonment, (b) reduction in Conrail’s workforce and changes in work rules, and (c) State and/or local sup-

325. *Id.* § 703(b)(1)(A)-(C) (45 U.S.C.A. § 747 note (West Supp. 1982)). The same subsection required the Secretary of Transportation to submit recommendations to Congress with respect to the future structure and operations of the Corporation by April 1, 1981. *Id.* § 703(b)(8) (45 U.S.C.A. § 747 note (West Supp. 1982)). The ICC and the Secretary of Transportation were required to comment on the Conrail and USRA reports by May 1, 1981. *Id.* § 703(b)(7)(g) (45 U.S.C.A. § 747 note (West Supp. 1982)). In addition, Conrail was required to submit, by March 15, 1981, an “analysis of the effects upon [Conrail] and its employees of alternative changes in labor agreements and related operational changes.” *Id.* § 703(c) (45 U.S.C.A. § 747 note (West Supp. 1982)).

326. UNITED STATES RAILWAY ASSOCIATION, FEDERAL FUNDING OF CONRAIL: RAIL SERVICE OBJECTIVES AND ECONOMIC REALITIES (Dec. 17, 1980).

327. *Id.* at 18-19.

328. *Id.* at 36.

329. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FOR FISCAL YEAR 1982 188-89 (1981).

330. EXECUTIVE OFFICE OF THE PRESIDENT, AMERICA’S NEW BEGINNING: A PROGRAM FOR ECONOMIC RECOVERY (Feb. 18, 1981).

331. *Id.* at 4-39.

port for losing or marginal rail lines is necessary for self-sustaining operations. Without such reform, dismemberment of Conrail through sale of its lines to other railroads may become a necessity.³³²

In response to this threat, Conrail began to set the political stage for "reform."³³³ In its labor report to Congress on March 15, 1981, Conrail emphasized that it could not be made self-sufficient unless the proportion of its revenues paid out in labor costs was ultimately reduced to a level typical of that of other railroads.³³⁴ Conrail's report noted that its current labor cost ratio was fifty-six percent, compared to an average industry ratio, excluding Conrail, of approximately forty-eight percent. The difference resulted in more than \$300 million in additional annual labor expenses for Conrail.³³⁵ The report concluded that Conrail's labor cost ratio could be reduced only if 1) the 1981 round of collective bargaining negotiations resulted in contributions of at least \$200 million per year, 2) the savings permitted by existing productivity agreements dealing with firemen manning and crew consist were accelerated, and 3) Conrail were shielded from employee protection costs.³³⁶

More specifically, the Conrail report proposed that the federal government assume total responsibility for employee protection payments. In addition, Conrail recommended appropriation of funds authorized by the Staggers Act for separation payments to firemen and brakemen in order to accelerate the benefits of the Firemen Manning and Crew Consist Agreements.³³⁷ Most ambitiously, the Conrail proposed that the 1981 negotiations aim for labor cost savings of \$200 million per year "through wage constraints which would be replaced over time with a negotiated package of work rule changes and other concessions having a comparable value."³³⁸

332. *Id.*

333. *See generally* LABOR REPORT, *supra* note 302.

334. *Id.* at 1.

335. *Id.*

336. *Id.* at 2.

337. *Id.* at 8-10.

338. *Id.* at 6. The report concluded that an explicit legislative or administrative requirement that the contributions be negotiated was needed to ensure that the necessary contributions were made. This would be accomplished by prohibiting wage increases to employees represented by any labor organization until that organization had negotiated the necessary agreement, by permitting a strike of significant duration, or by direct substantive determination of the components of a contribution package for any union unwilling to agree at the bargaining table. *Id.* at 6-7.

The author was the principal draftsman of the March 15 Labor Report. The report's content and tone were intended to establish a clear and relatively inflexible goal for labor cost savings, while suggesting alternative ways of achieving the goal.

In a subsequent report,³³⁹ Conrail emphasized that “even with the most stringent internal cost-saving measures . . . [it is not] possible to operate a conventional railroad with Conrail’s obligations on a self-sustaining basis in Conrail’s service area.”³⁴⁰ Consequently, the Conrail report recommended legislative action to modify some of the obligations imposed on it. This legislative action was necessary to enable Conrail to become a “smaller, leaner railroad,” to counteract declining business volume, and to assist in negotiating agreements designed to bring about labor savings of \$200 million per year. In addition, legislation was needed to require the federal government to assume employee protection obligations imposed by the 1973 Act, relieve Conrail of commuter service operating responsibilities, and relieve Conrail of its debt to the federal government through capital restructuring.³⁴¹

In a major departure from the earlier views of the Penn Central trustees,³⁴² the Conrail report concluded that large-scale line abandonments would not make a major contribution toward Conrail’s self-sufficiency.³⁴³ Conrail’s conclusion was based upon an extensive analysis of its lines which suggested that unprofitable lines and traffic were so broadly dispersed that attempts to solve Conrail’s problems through drastic network rationalization were more likely to impair the railroad’s financial performance than to improve it.³⁴⁴

Finally, Conrail explored the viability of transferring some or all of its properties to other railroads. It concluded that a partial transfer which would allow other railroads to pick the most attractive Conrail properties would result in a residual group of disconnected lines that could not be operated as a system and would generally not be self-sustaining on an individual basis.³⁴⁵ This would leave the federal government with no reasonable option but termination of service on the unacquired lines.³⁴⁶ In addition, the Conrail report observed that

The report particularly sought to avoid making detailed substantive negotiating proposals, which would not be readily understandable by Congress and the public. Simplicity, it was felt, would enhance the acceptability of Conrail’s position.

339. CONSOLIDATED RAIL CORPORATION, *OPTIONS FOR CONRAIL*, EXECUTIVE SUMMARY (Apr. 1, 1981) [hereinafter cited as EXECUTIVE SUMMARY].

340. *Id.* at 3.

341. *Id.* at 3, 4.

342. STATEMENT OF THE PENN CENTRAL TRUSTEES, *supra* note 1, at 16-17, reprinted in *Hearings* at 581-82. For a general discussion of the Penn Central trustee’s views, see text accompanying note 207 *supra*.

343. EXECUTIVE SUMMARY, *supra* note 339, at 20-21.

344. *Id.*

345. *Id.* at 32.

346. *Id.*

the actions that were likely to induce other railroads to acquire large portions of Conrail's system were precisely the major changes that were necessary for Conrail's attainment of self-sufficiency, specifically, reduction of labor costs, freedom from labor protection obligations, elimination of commuter passenger service responsibilities, and amelioration of its debt burden.³⁴⁷

The USRA in its April 1, 1981 report, asserted that Conrail could become viable and forego the need for further federal funding by fiscal year 1983 through better management of its expenses, deregulation, concessions by labor, and exploitation of the marketing flexibility provided by the Staggers Rail Act.³⁴⁸ The USRA recommended a two-year transition period during which Conrail would be required to achieve substantial visible progress in order to prevent the dissolution of the railroad.³⁴⁹ In any event, in the USRA's opinion a detailed alternative plan was needed to guarantee an orderly succession should Conrail fail to meet these objectives.³⁵⁰ As prerequisites for the continuation of Conrail, the USRA recommended several ways to achieve an early reduction in costs: significant concessions by labor; removal of labor protection obligations from Conrail; and transfer of responsibility for passenger operations from Conrail to another entity or to local authorities.³⁵¹

In contrast to the cautiously optimistic USRA report, the DOT, in its March 31, 1981 report, concluded that any independent Conrail organization, no matter how its operations might be economized, would continue to be a marginal, government-owned, northeast operation that consumed hundreds of million of federal dollars.³⁵² If labor concessions and other economies could not be achieved by Conrail and USRA, DOT projected that the continuation of Conrail would cost the Federal Treasury \$4 billion by 1985.³⁵³ Rather than continuing Conrail, DOT proposed legislative action to reform the required labor protection payments and transfer commuter opera-

347. *Id.* at 33.

348. UNITED STATES RAILWAY ASSOCIATION, CONRAIL AT THE CROSSROADS: THE FUTURE OF RAIL SERVICE IN THE NORTHEAST 79 (Apr. 1981).

349. *Id.* at 77.

350. *Id.* at 77-78.

351. *Id.* at 79. Representatives of DOT and the Department of Treasury dissented from the USRA Report, not because they opposed the changes, but because they would be insufficient. *Id.* at vii-viii.

352. FEDERAL RAILROAD ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, RECOMMENDATIONS FOR NORTHEAST RAIL SERVICE 2 (Mar. 31, 1981) [hereinafter cited as DOT REPORT].

353. *Id.*

tions to state and local authorities.³⁵⁴ Thereafter, DOT proposed that Conrail's physical plant should be integrated into the national railroad system by transferring major portions of Conrail's lines to other railroads.³⁵⁵

The DOT report analyzed Conrail's report as well as USRA's April 1 report.³⁵⁶ DOT concluded that neither report constituted an acceptable basis for further commitment of public funds to Conrail³⁵⁷ because both plans required "achievement of ambitious programs involving unprecedented changes in labor agreements, reversal of long-term traffic trends, and achievement of operating efficiencies that could be beyond the reach of Conrail's management."³⁵⁸ According to the DOT, the probability of Conrail's achieving such goals was not promising.³⁵⁹ The DOT was concerned that even if the Conrail and USRA savings projections could be realized, "the result would be a financially marginal railroad not strong enough to survive subsequent economic downturns and unable to sustain itself without Government assistance over the long term."³⁶⁰

The three reports conflicted on whether Conrail should be given another infusion of federal funds and afforded another opportunity to become viable. All three reports agreed, however, on the need for legislative initiatives that would transfer the responsibility for labor protection to the federal government, divest Conrail of commuter service obligations, and lead to labor savings.³⁶¹ This agreement pro-

354. *Id.* at 1-2.

355. *Id.*

356. *Id.* at III-1.

357. *Id.* at III-1.

358. *Id.* at III-7.

359. *Id.*

360. *Id.* Such a perpetually marginal system, in DOT's opinion, would be unable to be a part of the dynamics of the railroad industry. *Id.* Without sufficient earnings to attract merger partners and insufficient financial strength to purchase other railroads or lines, Conrail could not effectively exploit the single-line, shipper-oriented service packages which would be necessary for long term viability in the rail system. *Id.*

361. *See generally* notes 336-60 and accompanying text *supra*. At about the same time that these reports were submitted, the commuter authorities expressed their positions in congressional testimony. *See Conrail Reauthorization, 1981: Hearings before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce Science and Transportation, 97th Cong., 1st Sess. 106-11 (1981)* [hereinafter cited as *NERSA Senate Hearings*] (testimony of Louis J. Gambaccini, N.J. Comm'r of Transp. and Chairman, N.J. Transit Corp.). They questioned whether relieving Conrail of the obligation to provide commuter service was essential to Conrail's future financial health. *Id.* at 108. In the event responsibility was to be transferred, however, the commuter authorities proposed creation of a new corporation to provide service under contract with the authorities. *Id.* at 109-10. Such a corporation was established in the resulting legislation, though not exactly in the form proposed by the authorities.

vided a foundation for congressional debate.

Even before the April 1 reports were submitted, private groups with an interest in Conrail were expressing similar views. During Senate hearings in late March, shipper representatives, who favored continuation of a restructured Conrail, recommended removing the labor protection burden from Conrail and creating mechanisms for transfer of Conrail lines.³⁶² Rail labor criticized Conrail for asking the government to intervene on the issues of labor protection and collective bargaining³⁶³ over labor costs, but hinted that concessions such as wage deferrals might be considered in the appropriate labor-management forum.³⁶⁴ One local union representative suggested a wage freeze, a change in work rules, and the elimination of the responsibility for commuter service.³⁶⁵ Rail labor made no suggestions regarding labor protection except to note that the Staggers Act changes³⁶⁶ in the benefit formulas had reduced claims significantly.³⁶⁷

On the thorny passenger service issue, some commuter authorities accepted the need for a transfer of commuter operating responsibility from Conrail,³⁶⁸ but others wanted to retain Conrail as the operator of commuter lines through achievement of major changes in the labor agreements.³⁶⁹

B. *Draft Bills*

1. *The Department of Transportation Proposal*

Shortly after April 1, both Conrail and DOT informally submitted draft legislative proposals to each other and to congressional committee staffs. The DOT "Rail Service Transfer" draft bill would have relieved Conrail of the obligation to operate commuter service one

362. *See id.* at 119-25 (testimony of E. Kennedy Bowers, Chairman, Railway Facilities Commission, National Industries Traffic League; Thomas T. Church, Vice President, Transportation, Bethlehem Steel Corp.)

363. *Id.* at 50. (testimony of Fred J. Kroll, Chairman, Railway Labor Executives Association).

364. *Id.* at 56, 79 (testimony of Fred A. Hardin, President, United Transportation Union; Fred J. Kroll, Chairman, Railway Labor Executives Association).

365. *Id.* at 166 (testimony of William Svendlin, Legislative Representative, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees).

366. For a discussion of the Staggers Act changes in benefit formulas, see note 300 and accompanying text *supra*.

367. *NERSA Senate Hearings*, *supra* note 361, at 45 (statement of Fred A. Hardin, President, United Transportation Union).

368. *Id.* at 109 (testimony of Louis J. Gambaccini, New Jersey Commissioner of Transportation and Chairman, New Jersey Transit Corp.).

369. *Id.* at 158 (statement of Southeastern Pennsylvania Transportation Authority).

year after its effective date, by transferring this responsibility to commuter authorities.³⁷⁰ The DOT favored the splitting up of Conrail, and accordingly recommended that Conrail freight rail properties be transferred to "financially responsible" persons by the Secretary of the Treasury.³⁷¹ The bill authorized the Secretary to permit the discontinuation of service on lines, and, in addition, to promote the formation of necessary terminal operations which were to be supported by connecting railroads.³⁷² Those lines on which service was to be discontinued could be transferred to entities designated by the states, in which case the transferee would not have common carrier status.³⁷³ The draft bill provided for transfer of commuter employees to new operators, expressly subjecting the new operators to the collective bargaining agreements that were in effect on the transferee railroads.³⁷⁴ If the transferee railroad had no collective bargaining agreement, then the new operators would be subject to the Railway Labor Act.³⁷⁵ According to this draft bill, the transferee railroads would be able to determine the number of Conrail employees to be transferred with the properties.³⁷⁶ Finally, the bill would have repealed the Title V employee protection provisions of the 1973 Act. It would nonetheless have authorized lump-sum separation payments to employees deprived of employment in connection with the transfer of rail operations from Conrail.³⁷⁷

2. *The Conrail Proposal*

The Conrail draft bill provided for additional federal funds for Conrail, and mandated legal and economic changes to enhance the prospects of Conrail's viability. The bill would have relieved Conrail of the obligation of operating commuter passenger service within 180 days of its enactment, permitting commuter authorities to designate themselves or some other entity as replacement operators.³⁷⁸ The bill also would have required Conrail and the labor organizations to reach collective bargaining agreements that would result in reduced

370. DEPARTMENT OF TRANSPORTATION, RAIL SERVICE TRANSFER ACT OF 1981, § 201-06 (draft bill Apr. 14, 1981).

371. *Id.* § 201(a).

372. *Id.* § 201.

373. *Id.* § 205.

374. *Id.* § 403.

375. *Id.*

376. *Id.* § 402.

377. *Id.* §§ 301, 308.

378. CONSOLIDATED RAIL CORP., THE NORTHEAST RAIL ACT OF 1981, §§ 703, 704 (draft bill Mar. 27, 1981).

labor expenses.³⁷⁹ Until such agreements were negotiated, wages would be frozen.³⁸⁰ In addition, the bill transferred responsibility for labor protection to the federal government,³⁸¹ and required state and local governments to contribute \$50 million in the aggregate per year for five years.³⁸² Finally, it permitted the Secretary of Transportation to determine annually whether Conrail would require federal funding substantially in excess of the total amounts authorized.³⁸³ If the Secretary determined that additional funds would be required, the draft bill authorized him to sell Conrail's properties according to a specified procedure.³⁸⁴

C. *The May 5 Labor Agreement*

Shortly after Conrail filed its March 15, 1981 labor report,³⁸⁵ it began negotiations with a committee of labor organizations representing its employees.³⁸⁶ Conrail proposed a five-year agreement, providing for \$200 million annually in wage concessions. These concessions were to be achieved through a variable delay in Conrail's implementation of wage increases provided for in the industry agreement. Any resulting differentials between Conrail wage levels and industry wages were to be narrowed on a craft-by-craft basis as work rule changes were negotiated. The labor representatives objected, claiming that the five-year term was unprecedented, that the pay differential formula was too complex, and that the craft-by-craft wage/work rule tradeoff was impracticable in view of historical wage relationships among crafts and the substantial disparity in the value of work rule changes sought from different organizations.

On April 24 and 28, 1981, Conrail, union negotiators, and the staff of the House Subcommittee on Tourism and Labor engaged in discussions. The union negotiators made it clear that their overriding objective was to forestall the Reagan Administration's proposed liquidation of Conrail. The House staff warned, however, that the only hope of preserving Conrail was to build political support in the House by negotiating a labor agreement that satisfied the requirements set

379. *Id.* § 202(a)(1)(b).

380. *Id.* § 203.

381. *Id.* § 301(b).

382. *Id.* § 401(a).

383. *Id.* § 501(a).

384. *Id.* §§ 501-505.

385. For a discussion of this report, see notes 333-38 and accompanying text *supra*.

386. The author participated in these negotiations. The following characterizations of the negotiating process are drawn from the author's recollections and contemporaneous notes.

forth in Conrail's March 15 labor report. To achieve the desired effect, such an agreement would have to be negotiated before House action commenced on the Conrail legislation.

After renewed bargaining, Conrail and members of a committee representing twelve of Conrail's fifteen labor organizations signed a three-year agreement on May 5, 1981 which was subject to ratification by their individual organizations.³⁸⁷ The agreement established a twelve-percentage-point differential between Conrail wages and industry wages by withholding wage increases until the differential was established.³⁸⁸ According to a fact sheet prepared by Conrail and distributed to the union committee, the differential would result in average savings of \$200 million per year for its duration.³⁸⁹

Equally important as the agreement's substantive treatment of wage concessions and work rule issues was its resolution of the troublesome bargaining structure issues that had impeded Conrail's labor negotiations during its first five years.³⁹⁰ The agreement contained a procedure, tied to the Railway Labor Act, that would channel all work rule proposals into a single set of negotiations.³⁹¹ Any work rule issues which were not resolved in these negotiations would be the subject of a factfinding report that would be released shortly before the agreement expired.³⁹² Thus, fragmented bargaining over discrete issues was to be prevented.

D. *The Senate Proposal*

On May 4, 1981, Senator Packwood introduced in the Senate a bill that reflected the Reagan Administration's position.³⁹³ The proposed bill would have relieved Conrail of any obligation to operate commuter service beginning one year after the bill's enactment. At that time, responsibility for providing commuter service would be transferred either to Amtrak or to other commuter authorities.³⁹⁴

387. See H.R. REP. NO. 153, 97th Cong., 1st Sess. 109-16 (1981).

388. *Id.* at 109.

389. *Id.* at 132.

390. For a discussion of the history of this problem, see notes 316-23 and accompanying text *supra*.

391. H.R. REP. NO. 153, 97th Cong., 1st Sess. at 109-16 (1981).

392. *Id.*

393. S. 1100, 97th Cong., 1st Sess. §§ 101-606, 127 CONG. REC. 4313 (1981).

394. *Id.* §§ 201, 202. Within eight months after the bill's enactment, commuter authorities or regional transportation authorities for areas outside the northeast corridor were required to complete transfer agreements with Conrail. *Id.* § 202(a). These agreements were to specify the service responsibilities to be transferred and the rail properties to be conveyed. Within ten months after the bill's enactment, Conrail and Amtrak were to formulate an agreement on the terms for transfer of the balance of Conrail's commuter services and related properties in the northeast corridor. *Id.*

Conrail's commuter employees were likewise to be transferred to these other authorities with their collective bargaining agreements intact.³⁹⁵ These collective bargaining agreements, however, could be changed if the new operators followed the procedures outlined in the Railway Labor Act.³⁹⁶

Senator Packwood's bill also would have required the Secretary of Transportation to initiate negotiations for transfer of Conrail's freight service responsibilities.³⁹⁷ The transferees of the freight service were required to determine the number of Conrail employees whose continued employment was necessary for operation of the freight service. After making this determination, they had to offer employment to those employees.³⁹⁸

§ 202(b). These transfers were also to occur within the one year period provided in § 201. *Id.* If Conrail and Amtrak could not reach an agreement within ten months, the Secretary of Transportation was given the authority to determine the rail properties that were to be transferred to Amtrak as well as the terms and conditions of the transfer. *Id.* § 202(c).

Amtrak was required to operate the service for commuter authorities if those authorities so requested and if they reimbursed Amtrak for fully allocated costs. *Id.* § 204(a). If Amtrak and the commuter authority were unable to reach an agreement, either party had the right to petition the ICC to establish the terms and conditions for operating the commuter service. *Id.* The ICC also had authority to establish the just and reasonable terms for operation of the commuter service.

395. *Id.* § 402(a).

396. *Id.* § 404(c). Commuter authorities, but not Amtrak, could determine the number of employees that were to be transferred. *Id.* § 403(a).

397. *Id.* § 251(a). Lines that were not transferred under these agreements could be transferred to an entity designated by an affected state or shipper for continued operation without common carrier obligations. *Id.* § 254(b)(1).

398. *Id.* § 452(a)(1), (b)(1). These employees were to be covered by collective agreements already in effect as to the transferee, or, in the absence of such agreements, under terms prescribed by the transferee, pending negotiations. *Id.* § 453(a). This provision would have avoided the problem that developed in the Chessie and Southern negotiations under the Final System Plan. For a discussion of the negotiations with the Chessie, see notes 195-96 and accompanying text *supra*. Under the Packwood bill the Secretary was required to impose protective conditions for transferred employees and for adversely affected transferee employees unless other protective arrangements were negotiated. S. 1100, § 455, 97th Cong., 1st Sess., 127 CONG. REC. 4313 (1981).

Although this bill would have repealed Title V, it also provided for allowances of up to \$30,000 to Conrail employees deprived of employment because of the transfer of freight or commuter service, except for those commuter employees refusing transfer to the new operators. *Id.* § 301. The bill also provided that employees who were deprived of employment should be given priority for rehiring by other railroads. *Id.* § 302(a). Any employee who incurred moving expenses after rehiring by another railroad within 3 years of the transfer date was also entitled to compensation for these expenses. *Id.* § 304(a). To finance these new employee protection benefits, the bill authorized \$400 million. *Id.* § 310(a).

The bill also broadened the jurisdiction of the Special Court established by the 1973 Act to include all cases involving enforcement, operation or interpretation of the Act. *Id.* § 601(a)(1). Conrail and its successors were given the flexibility to revise divisions and joint rates for a period not to exceed two years. *Id.* § 606. Although the

The Senate Committee on Commerce, Science and Transportation ordered the bill to be reported on May 15, 1981 without significant change.³⁹⁹ Subsequently, the Committee and the Secretary of Transportation agreed to certain changes in the bill, which was later incorporated into an omnibus budget bill and therefore did not receive a separate vote on the Senate floor.⁴⁰⁰

E. *House Proposal*

A bill much more favorable to the continued existence of Conrail as an entity was introduced in the House of Representatives. After extensive informal discussions with committee staff and interested parties, Representative Florio introduced a bill on May 12, 1981.⁴⁰¹ This proposal provided for the initial transfer of commuter services to a new subsidiary of Conrail 210 days after enactment,⁴⁰² and subsequently to a new subsidiary of Amtrak 540 days after enactment.⁴⁰³

bill did not authorize any additional funds for Conrail, it did provide for \$50 million to facilitate the transfer of commuter services. *Id.* § 204(c).

399. S. REP. NO. 101, 97th Cong., 1st Sess. (1981).

400. *Id.* Senator Packwood's bill was incorporated into Senate Bill 1377, with certain changes. S. REP. NO. 139, 97th Cong., 1st Sess. (1981). For a discussion of the novel approach that was taken in enacting NERSA as part of a Budget Reconciliation Act, see note 426 *infra*.

401. H.R. 3559, 97th Cong., 1st Sess., 127 CONG. REC. H2167 (1981).

402. *Id.* § 301. Section 301 proposed to amend the 1973 Act by adding Title IV—Conrail Commuter Corporation. *Id.*

This bill proposed creation of a new subsidiary, known as the Conrail Commuter Corporation (CCC), which would be authorized to issue common stock as well as to borrow any amount up to \$50 million. *Id.* § 301 (proposing to add § 404(b) to the Regional Rail Reorganization Act of 1973). These loans were to be guaranteed by the Secretary of Transportation under the 1976 Act, and were to be used to cover operating expenses prior to reimbursement by the commuter agencies and possible delays in such reimbursement. *Id.*

403. *Id.* § 305. Section 305 sought to amend Title IV of the Rail Passenger Service Act by adding a new Title V. *Id.* (proposing to amend 45 U.S.C. §§ 501-645 (1976)). Section 305(a) of the Florio Bill was combined with portions of Senate Bill 1377 and the original Packwood Bill (S. 1100) to form § 1137 (Establishment of Amtrak Commuter) of NERSA. *See* CONFERENCE REP. OF THE OMNIBUS RECONCILIATION ACT OF 1981, H.R. REP. NO. 208, 97th Cong., 1st Sess., 127 CONG. REC. S9035, S9056-57 (1981).

Commuter authorities desiring to operate service themselves could take over directly from the Conrail subsidiary, but, if they so elected, the Amtrak subsidiary was required to provide service so long as it was reimbursed for the difference between revenues and avoidable costs. Conrail was relieved of all obligations to operate commuter service 540 days after enactment. Employee representatives were to negotiate implementing agreements with the new Conrail subsidiary to provide for the transfer of commuter service employees. The decision of a neutral referee was to conclude such agreements if necessary. New collective agreements to cover commuter employees also were to be negotiated with a wage freeze imposed until such agreements were reached. If a new collective bargaining agreement between the Conrail subsidiary and employee representatives of the transferred commuter employees was not com-

The Florio bill authorized \$500 million for additional investment in Conrail,⁴⁰⁴ but funds could flow only if certain conditions were met, including the negotiation of \$200 million per year in labor savings agreements covering five years and the availability of \$40 million per year in contributions from state and local governments.⁴⁰⁵

The bill sought to repeal Title V and add a new Title VII to the 1973 Act which would have authorized new labor protection funds, as well as a program to separate excess firemen and brakemen.⁴⁰⁶ By

pleted within 240 days from the effective date of the Act, then the agreement in existence at such time would control. *Id.*

A similar negotiating procedure was required with respect to the transfer of employees from the Conrail subsidiary to the Amtrak subsidiary. *Id.* In addition, within 330 days of enactment a factfinding panel was to be established to report on desirable work rule changes for the Amtrak subsidiary. H.R. 3559, §§ 301, 305, 97th Cong., 1st Sess. (proposing to add § 505 to the Rail Passenger Service Act and §§ 406(a), 406(b)(3), 407(c), 410(a), 411(c), 412(a) to the Regional Rail Reorganization Act of 1973).

Section 505 of the bill proposed a special two-emergency board procedure to resolve commuter labor disputes, including those involving commuter authorities, the Conrail subsidiary, or the Amtrak subsidiary. If an irresolvable dispute arose between a publicly funded and publicly operated carrier providing rail commuter service and its employees, any party or the Governor of the state in which the service which was the subject of the dispute was operating could request the President, in his discretion, to establish an Emergency Board to investigate and report on the dispute. If no settlement was reached within 120 days, any party to the dispute, or the Governor of the state whose service was affected, could request the President to establish another emergency board. The second emergency board was to receive the final offers of the parties, and then select the most reasonable offer. If either party rejected this final offer and thus caused a strike, sanctions would be imposed against that party. For instance, if the Board selected the final offer of the carrier, and the employees of the carrier continued to engage in a work stoppage, the employees would not be eligible during this period for benefits under the Railroad Unemployment Insurance Act. On the other hand, if the carrier refused to accept the final offer of the employees selected by the Board, and the employees engaged in a work stoppage, the carrier would be precluded from participating in any benefits arising from any agreements between carriers that were designed to provide benefits to such carrier during any work stoppage. *Id.* § 505 (proposing to add § 9A to the Railway Labor Act).

404. *Id.* § 201 (proposing to add § 217(n) to the Regional Rail Reorganization Act of 1973). Although the crux of this section was not adopted into NERSA, certain of the preconditions for investment became "goals" in NERSA. Among the changes was a reduction of \$500 million authorized for purchase of securities to \$262 million.

405. *Id.* (proposing to add § 217(c) to the Regional Rail Reorganization Act of 1973). Under the Florio proposal, the labor agreement was required to include a fact-finding procedure to address work rule issues. The USRA was authorized to increase or decrease, as necessary, the required contributions from employees and others in order to enhance Conrail's prospects for profitability. Employees were to receive shares of a new class of Conrail preferred stock in exchange for their wage concessions. *Id.* § 201 (proposing to amend the Regional Rail Reorganization Act of 1973 by adding §§ 217(a), 217(c)(6)(B), 217(d)).

406. *Id.* § 205(a). Section 701 of the new title VII would have required rail labor and the Secretary of Transportation to negotiate an agreement providing for the expenditure of \$165 million into new labor protection funds authorized by the bill. The agreement could not require an obligation of more than the amount au-

April 1, 1984, the USRA was required to recapitalize Conrail by converting all debt and equity into common stock if it determined that Conrail could become profitable.⁴⁰⁷ The Secretary of Transportation was to submit to Congress, by April 1, 1982, a plan for disposition of the Conrail assets.⁴⁰⁸

The House Committee on Interstate and Foreign Commerce ordered the Florio bill to be reported on June 18, 1981.⁴⁰⁹ The committee made significant changes in the original bill, in addition to altering its organization. The Conrail commuter subsidiary was to carry over Conrail labor agreements rather than negotiate new agreements.⁴¹⁰ A new section 308(i) was added, prohibiting spillover of freight strikes into commuter operations, and vice versa.⁴¹¹ New authorizations for Conrail funding were reduced from \$500 million to \$375 million. Conrail was exempted from state and local taxation until its stock was sold or its assets were transferred, and the requirement for state and local "contributions" was deleted.⁴¹² Except for the fact that the terms of the new labor protection program were to be negotiated with the Secretary of Labor rather than with the Secretary of Transportation, the original labor protection and firemen and

thorized. The bill also authorized \$115 million for termination allowances in a program to separate excess firemen and second and third brakemen from service and gave Conrail the right to eliminate one position for each such employee terminated. *Id.* § 205(a) (proposing to add §§ 701-704, 712 to the Regional Rail Reorganization Act of 1973). The provisions of § 205(a) of the Florio bill were negotiated between Conrail and representatives of the UTU. The author participated in the negotiations. The UTU did not necessarily agree with the decision to separate the employees involuntarily, but wished to assist in making the statutory language technically workable. Conrail expressly was not liable for worker protection payments. The bill specifically preempted state full crew laws. *Id.* (proposing to add §§ 710, 711 to the Regional Rail Reorganization Act of 1973).

407. *Id.* § 202(c)(1) (proposing to amend § 202 of the Regional Rail Reorganization Act of 1973).

408. *Id.* § 501. The plan was to provide for the purchase of 85% of Conrail's route miles and the retention of 85% of Conrail's employment as of the date of enactment. The plan also was to analyze the feasibility of ownership, by a private corporation, of Conrail's rights of way for use by other railroads. This plan was to be executed only if both houses of Congress approved it by adopting a concurrent resolution. The Secretary also was authorized to submit a plan for the sale of assets after April 1, 1982, without restriction as to route miles purchased or maintenance of employment. Congress was to be notified of the post-April plan, but no Congressional approval was provided for. In addition, if Conrail notified the Secretary before April 1, 1983 that it was unable to continue operations within the constraints of the 1973 Act, the Secretary was authorized to vote the Conrail stock and to sell its assets. Any sale of assets under § 501 was to be covered by the Interstate Commerce Act. *Id.*

409. H.R. REP. NO. 153, 97th Cong., 1st Sess. (1981) [hereinafter cited as NERSA HOUSE REPORT].

410. *Id.* at 67-68.

411. *Id.* at 59.

412. *Id.* at 13.

brakemen separation provisions of the Florio bill were left unchanged by the committee.⁴¹³

The committee did, however, significantly change the original bill's provisions for the sale or transfer of Conrail. The USRA, for instance, was to make a determination as to whether Conrail would become profitable each time federal money was invested.⁴¹⁴ If the USRA determined that Conrail would become profitable, the Secretary of Transportation was required to sell Conrail's common stock between July 1, 1982 and December 31, 1983, first offering the stock to Conrail employees.⁴¹⁵ The Secretary was permitted to transfer Conrail's assets on a piecemeal basis only if it was determined that Conrail would not become profitable.⁴¹⁶ Asset transfer could occur under a plan submitted to the Congress within 180 days after December 31, 1983, unless either house of Congress passed a resolution disapproving the plan.⁴¹⁷

The reported bill provided more detail on the transfer of employees to transferee railroads than did the original bill. Transferees were to negotiate implementing agreements with representatives of rail labor. If agreements were not reached, arbitration of the terms of transfer was possible.⁴¹⁸ The ICC was to determine the extent of employee protection.⁴¹⁹

F. *Conference Report*

The House and Senate bills were considered as part of a comprehensive budget reconciliation bill under a novel procedure.⁴²⁰ With no floor debate on the specific Conrail provisions, the Senate passed its budget reconciliation bill on June 25, 1981⁴²¹ and the House passed its version one day later.⁴²²

Pressures on the conferees with jurisdiction over the Conrail legislation came from two quarters: the Reagan Administration and rail labor.⁴²³ Rail labor was concerned with realizing the benefit of the

413. *Id.* at 84-86.

414. *Id.* at 50.

415. *Id.* at 61.

416. *Id.* at 62.

417. *Id.*

418. *Id.* at 71-81.

419. *Id.* at 65.

420. For a discussion of this procedure, see note 426 *infra*.

421. S. 1377, 97th Cong., 1st Sess., 127 CONG. REC. 6985 (1981).

422. H.R. 3982, 97th Cong., 1st Sess., 127 CONG. REC. 3757 (1981).

423. Rail labor encompassed the following labor organizations: The Brotherhood of Locomotive Engineers; United Transportation Union; Brotherhood of Railway and Airline Clerks; Brotherhood of Railway Car Men; The Brotherhood of

bargain which it believed it had derived from the May 5 Agreement.⁴²⁴ By entering into the May 5 Agreement, rail labor sought to ensure the continuation of Conrail as an entity in exchange for wage concessions. Labor took the position that the Conrail entity should be protected until the wage concession agreement came to an end on April 1, 1984. Accordingly, rail labor viewed with alarm provisions of the Senate bill that would have permitted transfer of Conrail assets prior to April, 1984.

Labor did not have a clear understanding of the differing impacts that a stock sale and an asset transfer would have on employment levels and labor standards, and accordingly labor representatives generally tended to oppose the sale of Conrail stock at any time within the term of the May 5 Agreement.⁴²⁵ Although labor representatives were willing to consider the possibility of stock sales, they expressed concern that the Secretary of Transportation might refuse arbitrarily to consummate a stock sale in order to make possible a piecemeal transfer of assets.

In addition, some labor organizations, primarily the Brotherhood of Locomotive Engineers and the UTU, were concerned about the manner in which the transfer of employees to new commuter operators would be handled. In particular, they sought to ensure that seniority rights would be preserved in any such transfer. Finally, labor was concerned that the procedure for the negotiation of new collective agreements to cover the new operators of commuter service might adversely affect their interests. Consequently, rail labor sought to compel accommodation of its concerns by threatening to withhold ratification of the May 5 Agreement.

Although this point was rarely discussed, the Reagan Administration was presumably astute enough to realize that a transfer of

Maintenance of Way Employees; Brotherhood of Railroad Signalmen; International Brotherhood Electrical Workers; Transport Workers Union; International Association of Machinists; International Brotherhood of Firemen and Oilers; Sheet Metal Workers International Association; Railroad Yardmasters of America; International Brotherhood of Boilermakers and Blacksmiths; American Railway and Airline Supervisors Association; American Train Dispatchers Association; International Brotherhood of Teamsters.

424. Most of the facts in this section are based on discussions between the author and the participants. The author was counsel for Conrail throughout the conference period, with specific responsibility for trying to work out language acceptable to both DOT and rail labor.

425. Basically, a stock sale would leave the Conrail corporate entity intact and would have no direct effect on employment levels or labor agreements. An asset transfer, in contrast, would create considerable uncertainty concerning the number of employees that would be transferred with the assets and the labor agreements that would apply to those employees who were transferred. Thus, a stock sale, in concept, was less threatening to labor interests than an asset transfer.

Conrail during a Presidential election year could prove impolitic. The Administration, therefore, was primarily concerned with preserving its ability to effect an early transfer of Conrail to private ownership. The Secretary of Transportation, Andrew Lewis, did not oppose preserving Conrail as an entity by seeking the sale of Conrail stock. Spokesmen for the DOT, however, expressed concern that a sale of stock to persons without sufficient resources to provide for Conrail's future funding requirements ultimately would result in a repeat of the Penn Central bankruptcy experience. Therefore, DOT sought to have discretion to determine whether the terms of a stock sale were acceptable. If a stock sale on acceptable terms could not be arranged, DOT wanted to preserve the option to transfer Conrail assets without undue delay. The Reagan Administration threatened to force accommodation of its concerns by urging the Senate to remove the Conrail provisions from the Senate Reconciliation Bill, thus precluding the authorization of new funding for Conrail.

Conrail had two overriding objectives: 1) the realization of the benefits of the May 5 agreement; and 2) the elimination of the burden of labor protection obligations. Conrail understood the concerns of the rail unions and the Administration and sought to promote a compromise that would be acceptable to each party. Accordingly, Conrail negotiated a resolution of the commuter employee transfer issues which was acceptable to both labor and Amtrak. In addition, Conrail attorneys served as mediators between rail labor and DOT.

On July 16, 1981, representatives of Conrail, rail labor, and DOT met in an effort to achieve a compromise. Although the parties moved much closer together, they did not reach a formal agreement, possibly because labor representatives believed that their interests might be protected better in a struggle between Senate and House conferees than in a compromise with DOT. Consequently, as the compromise discussions continued, Conrail, DOT and rail labor each provided proposals for language changes to the Senate and House staffs. In some instances, the parties agreed upon the proposed language changes, while in others no consensus was reached.

By the end of July, 1981, the rough substance of a solution acceptable to both DOT and rail labor had emerged. A key concept was a requirement that, if the Secretary of Transportation could not sell the Conrail stock on terms acceptable to him, he must offer the stock to Conrail employees. Through this "last resort" employee purchase option, rail labor would have the power to prevent a piecemeal transfer of assets. Additional constraints on the Secretary's discretion during the stock sale procedure were sought by the House staff

in the form of mandatory involvement by an investment banking firm.

The final language for a conference report was put together by staff late in the evening of July 30 in order to meet the deadlines for floor action set by the Reagan Administration and the congressional leaders who were much more concerned with the general budget policy issues in the comprehensive budget bill than with Conrail. Ultimately, the Senate Republicans abandoned their position on the Conrail legislation so that the overall bill could be enacted. The result of these negotiations, the Northeast Rail Service Act of 1981, (NERSA),⁴²⁶ was passed by both the House and Senate on July 31,

426. NERSA was contained in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981) (to be codified in scattered sections of 5, 7, 8, 10, 12, 16, 20, 26, 29, 31, 40, 42, 45, 49, 50 U.S.C.). Consequently, NERSA did not receive independent consideration on the floor of either the House or Senate. Rather, it was combined in a single bill with provisions as diverse as Agriculture, Forestry and Related Programs, International Affairs, and Medicare. This procedure substantially affected the practical political strength of various groups interested in the Conrail legislation, especially rail labor.

The unusual procedure was authorized by § 310 of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 315 (codified as amended in 31 U.S.C. 1331 (1976)). See S. REP. NO. 139, 97th Cong., 1st Sess., 2-11, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 396, 397-403. Basically, the 1974 Act requires that appropriation bills should not cumulatively exceed a limit established by a series of congressional budget resolutions. If, however, the total appropriations threaten to exceed this ceiling, § 310 provides that congressional committees may submit recommendations to the Budget Committee for reducing spending. The Budget Committee then must assemble these recommendations, without substantive revision, into a single package which will then be considered by the House and Senate respectively. COMMITTEE ON THE BUDGET, HOUSE OF REPRESENTATIVES, THE CONGRESSIONAL BUDGET PROCESS: A GENERAL EXPLANATION 12-13 (Comm. Print 1981).

In Conrail's case, the supplemental appropriation proposals for \$60 million in Title V funding, for \$350 million investment in Conrail for fiscal year 1981 and for additional proposed appropriations for fiscal year 1982, required the enactment of a subsequent concurrent budget resolution pursuant to section 311 of the Budget and Impoundment Control Act of 1974. This subsequent resolution for fiscal year 1981 was combined with the First Budget Resolution for fiscal year 1982. H.R. Cong. Res. 115, 97th Cong., 1st Sess. (1981). It included "reconciliation" directions to the House and Senate Commerce Committees, pursuant to section 310 of the 1974 Budget Act, that Title V of the Regional Rail Reorganization Act of 1973 should be amended to 1) reduce the benefit formulas set forth in section 505 of that Act, and 2) to relieve Conrail of the legal obligation to make Title V payments after federal funds are exhausted.

Achieving the goal of section 310 to conform the total level of spending to the ceilings set in a new budget resolution can require an amendment of substantive authorizing legislation that modifies the terms under which appropriated funds will be obligated. The Senate Report, for instance, observed that under § 310 "[a] broad spectrum of possible action is provided in recognition of the fact that *any and all facets* of the revenue/expenditure/debt posture must be amenable to change in order to achieve a fiscally responsible result." S. REP. NO. 688, 93d Cong., 2d Sess. 52, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3504, 3552 (emphasis added).

Other portions of the legislative history of § 310, however, suggest that reconcili-

1981 and was approved by President Reagan on August 13, 1981.

V. EVALUATION OF NERSA

A. Introduction

NERSA, as finally enacted, addresses most of the major problems that caused the bankruptcies of Conrail's northeast predecessors⁴²⁷ and incorporates the major suggestions for reform offered by Conrail, the USRA and the DOT as part of the review process mandated by the Staggers Act.⁴²⁸ It facilitates substantial changes in industry structure by requiring the sale of Conrail stock and, failing that, the transfer of its assets. In the meanwhile, additional funding is authorized for federal purchase of additional Conrail stock to support operations and capital programs.⁴²⁹

NERSA also focuses on the passenger problem by disassociating passenger service from private enterprise freight service through the transfer of commuter services to state and local commuter authorities.⁴³⁰ Finally, NERSA tackles the labor cost problem essentially as suggested in Conrail's labor report⁴³¹ by eliminating the Title V labor protection program, by forcing negotiation of a collective agreement to reduce annual labor costs by \$200 million, by authorizing the accelerated separation of firemen and brakemen, and by taking steps to reform the collective bargaining structure.⁴³² Because reform of rate regulation was already accomplished by the Staggers Act,⁴³³ NERSA

ation bills may be limited to directions to change "budget authority," a term of art referring to appropriations rather than to substantive authorizing legislation. Under this interpretation, a reconciliation bill was not the appropriate vehicle for substantive legislation such as NERSA, which did far more than adjust budget authority. *See id.* However, even if the Budget Act was improperly stretched to permit substantive legislation in a reconciliation act, the permissibility of this procedure almost certainly is not justiciable in private litigation. *See Field v. Clark*, 143 U.S. 649, 680 (1892) (court may not inquire into procedural regularity of legislative process when Act has been properly presented to the President and signed, even when there is a good chance that the President signed something different from what Congress passed).

427. For a discussion of these problems, see notes 7-99 and accompanying text *supra*.

428. For a discussion of these varying proposals, see notes 333-61 and accompanying text *supra*.

429. For a general discussion of the sale of Conrail, see notes 437-71 and accompanying text *infra*.

430. For a discussion of NERSA's commuter transfer provisions, see notes 474-501 and accompanying text *infra*.

431. For a discussion of Conrail's labor report, see notes 334-38 and accompanying text *supra*.

432. For a discussion of NERSA's labor provisions, see notes 502-27 and accompanying text *infra*.

433. For a discussion of the Staggers Act rate regulatory reforms, see notes 240-55 and accompanying text *supra*.

did not address this problem.

Enactment of NERSA, however, does not ensure that a solution to the northeast rail problem has been achieved. The statute, for instance, may be implemented in a manner that reduces its intended effect. Political pressures may lead to legislative action that will vitiate the force of important NERSA provisions. It may also develop that the policy objectives embodied in NERSA were misguided or that the statutory language was ineffective to achieve these objectives. This section considers these possibilities by focusing on NERSA's impact on each major issue: industry structure and profitability, commuter problems, and labor issues.

B. *Conrail Funding and Sale*

NERSA does not specifically deal with the industry structure problem; it does, however, establish an environment in which Conrail has a better chance of becoming a profitable railroad and makes its properties potentially more attractive to purchasers or merger partners. It also circumscribes the methods that can be used by the Secretary of Transportation in disposing of the government's ownership of Conrail, or, alternatively, of disposing of Conrail's rail properties.

In enacting NERSA, Congress ultimately allowed the basic approach proposed by the Florio bill to prevail. Consequently, \$262 million was authorized for additional federal investment in Conrail.⁴³⁴ NERSA also exempts any transfers or sales of rail property from federal, state, and local taxes.⁴³⁵ Although NERSA does not require the negotiation of a labor contribution agreement as a precondition of funding, one of its statutory goals is that Conrail employees should help assure Conrail's profitability by agreeing to reductions in wage increases and changes in fringe benefits that might lead to an annual savings of \$200 million a year for Conrail.⁴³⁶

NERSA creates a complicated procedure for the ultimate sale of Conrail. It requires a restructured USRA⁴³⁷ to make two profitability determinations. First, by June 1, 1983, the USRA is required to determine whether Conrail *will* become profitable.⁴³⁸ Then, as soon

434. NERSA, Pub. L. No. 97-35, § 1140, 95 Stat. 643, 652-53 (1981) (adding § 217 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 727). The Florio Bill had initially proposed additional funding of \$500 million. *See* text accompanying note 404 *supra*.

435. *Id.* § 1153 (to be codified at 45 U.S.C. § 1106).

436. *Id.* § 1134 (to be codified at 45 U.S.C. § 1103).

437. *Id.* § 1147 (amending 45 U.S.C. § 711 (1976)).

438. *Id.* § 1142 (adding § 403(a) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 763(a)).

after November 1, 1983 as possible, the USRA must determine whether Conrail *has become* profitable during the period between June 1, 1983 and October 31, 1983.⁴³⁹ The Secretary of Transportation is required, with the assistance of an investment banking firm, to attempt to sell Conrail stock, beginning as soon as practicable and continuing until the USRA concludes that Conrail has failed either one of the two profitability tests.⁴⁴⁰ If the Secretary is unable to sell the stock by April 1, 1984, he is required to notify the USRA.⁴⁴¹ If the USRA board agrees with the Secretary's determination that he cannot sell the stock, or if Conrail fails to meet the profitability tests, Conrail assets may be sold piecemeal.⁴⁴² If the USRA does not concur with the Secretary's determination that the stock cannot be sold, the Secretary has an additional 90 days in which to sell the stock.⁴⁴³ This process will be repeated until either the stock is sold, or the USRA agrees that it cannot be sold.⁴⁴⁴

The NERSA approach to the preservation of Conrail as an entity conflicts with the DOT's original desire to move promptly to integrate Conrail operations into the emerging regional industry structure.⁴⁴⁵ Yet, by preserving the Conrail entity, the Act ensures that there will be a period of time during which problems other than industry structure can be addressed. For instance, the transfer of commuter operations, the phasing out of the 1973 Act's Title V labor protection provisions, and the pursuit of labor cost reductions under the May 5 Labor Agreement and the firemen and brakemen termination program all can be accomplished better in a stable corporate setting rather than simultaneously with the break-up of the Conrail entity. Of equal importance, the opportunities to increase revenues because of deregulation probably can be pursued more aggressively by the established Conrail marketing organization than by other railroads that are pre-occupied with absorbing pieces of Conrail. Once the Staggers Act and NERSA reforms of rate regulation, passenger

439. *Id.* (adding § 403(b) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 763(b)).

440. *Id.* (adding § 403 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 763).

441. *Id.* (adding § 404(a) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 764(a)).

442. *Id.* (adding § 404(b) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 764(b)). Employees have first option to purchase common stock. *Id.*

443. *Id.* (adding § 404(c) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 764(c)).

444. *Id.*

445. For a discussion of DOT's draft proposals, see notes 370-77 and accompanying text *supra*.

service, and labor cost have been given a chance to either succeed or fail, the industry structure problem can be addressed separately.

If the Secretary and his investment banker can develop a sound plan for the future rail industry structure in the Northeast, NERSA contains only a few provisions that might interfere significantly with the implementation of the plan; moreover, it contains some provisions that could encourage successful reforms of the industry structure. Section 1142 of NERSA requires DOT to sell the Conrail stock.⁴⁴⁶ Although this section probably does not materially add to the authority that already exists for such a sale, it clearly indicates that Congress contemplates such a sale. In addition, the proviso in section 1142 of NERSA which exempts a stock sale from ICC review could expedite the sale of the enterprise to one or more railroads; without such a provision, the sale would require ICC approval.⁴⁴⁷ Finally, section 1167(c) of NERSA extinguishes minority stockholder interests that otherwise might be asserted in a stock sale by eliminating the bankrupt estates as shareholders.⁴⁴⁸

If buyers can be found for the stock, they will have the flexibility to merge Conrail into another carrier, or to sell its assets to other railroads. Indeed, if other railroads are interested in major portions of Conrail, they could acquire Conrail properties more freely by first buying the stock, rather than by waiting to participate in an asset transfer under section 1142 of NERSA.⁴⁴⁹ The stock sale approach does not impede any further major restructuring of the rail industry in the region.

Nevertheless, a number of impediments to a stock sale still exist, some of which are serious. Admittedly, the possibility of a two-house veto to a stock sale provided for in section 1142 of NERSA⁴⁵⁰ does not represent a significant obstacle since the amount of political support necessary to forestall a stock sale under this provision would also be adequate to pass new legislation prohibiting a sale even in the ab-

446. NERSA, Pub. L. No. 97-35, § 1142, 94 Stat. 643, 654-55 (1981) (adding § 401 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 761)).

447. *See id.* (adding § 408(c) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 768(c)).

448. *Id.* § 1167(c) (amending 45 U.S.C. § 743 (1976)). This section requires the transfer of all the common and preferred B stock from the clerk of the Special Court to the Secretary of Transportation. This eliminates the bankrupt estates as shareholders and contemplates the estates being compensated through the medium of the certificates of value.

449. *See id.* § 1142 (adding § 405 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 765).

450. *Id.* (adding § 401 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 761(a)(3)).

sence of that provision. The chief impediment to a stock sale is the need for confidence in the buyer's resources and intentions. The DOT probably will not proceed to sell its stock unless it can be assured that the capital structure of Conrail after such a sale will provide adequate financing for the foreseeable future. Absent such assurance, a bankruptcy could ensue which would start the cycle all over again, with the inevitable pressure for a federal rescue. In addition, while the requirement in section 1142 of NERSA that the government forgive its interests in the preferred stock and debentures provides the legal framework for outside financing through the issuance of new senior debt and stock,⁴⁵¹ such financing probably will not be available unless Conrail's prospects for continued profitability are relatively bright. In this respect, the reservation of the government's priority in a bankruptcy proceeding may be a significant deterrent to private sector investment.⁴⁵² Furthermore, the right of employees to be offered stock in exchange for their wage concessions under the May 5 Agreement is unclear.⁴⁵³ Litigation over this right could delay the consummation of a stock sale, or at least guarantee the existence of a group of minority shareholders which might discourage potential purchasers of the stock. However, if employee groups do develop a stock purchase package, the option to purchase some shares in exchange for wage concessions would not be troublesome, and might provide a face-saving way for DOT to dispose of its stock for minimal new consideration.

By the end of 1982, Conrail had developed the financial capacity to maintain its operations without additional federal funding.⁴⁵⁴ This economic viability was achieved during a period when total traffic declined at an annual rate of more than 20%.⁴⁵⁵ While the railroad hardly can be said to be profitable, in the sense that term is applied to

451. *See id.* § 1142 (adding § 402 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 762).

452. *Id.* (adding § 402(b) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 762(b)). Ordinarily, an investor in equity or debt securities is protected against a complete loss of his investment by his claim to the proceeds of a liquidation in bankruptcy. The government's priority under new § 402(b) would reduce the value of such a residual claim substantially.

453. *See id.* (adding § 404(b) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 764(b)). This new § 404(b) does not make it clear whether employees are to receive stock in exchange for consideration already given in the form of wage concessions agreed to in the May 5 Agreement or for new consideration. If they are entitled to stock only for new consideration, there is little guidance in the statutory provisions as to how the stock should be priced to the employees.

454. *See* Consolidated Rail Corporation, Press Release, Special for Year-End Editions (Dec. 22, 1982).

455. *See id.* at 2.

nonrailroad enterprises, it nevertheless appears that the divestiture of the government's ownership and control of Conrail can proceed more or less according to the schedule envisioned by the drafters of NERSA.⁴⁵⁶

The economic trends in the region of the country served by Conrail, however, do not bode well for a reversal in long-term traffic declines.⁴⁵⁷ Accordingly, it is difficult to foresee any strong demand for Conrail securities by investors primarily interested in reasonable financial return in the short run.⁴⁵⁸ This leaves two or three basic possibilities for the sale and restructuring of Conrail—each of which is feasible only if the enterprise does not require a large scale cash inflow.⁴⁵⁹

The first possibility for the sale and restructuring of Conrail is to transfer the government-owned stock to Conrail employees, or to a trustee for their benefit. The terms of the transfer could require the payment of additional, modest, cash for the stock; it could require additional concessions in wages or work rules; or it simply could transfer the stock in consideration of past concessions. The amount of

456. For a discussion of the schedule for the transfer of government ownership in Conrail, see notes 437-44 and accompanying text *supra*.

457. Close to 40% of Conrail's carloadings are related to either the steel or automobile markets. From 1966-81, Conrail's traffic dropped 33%, measured in ton miles, while the traffic for the rail industry as a whole increased by 24%. Submission of Consolidated Rail Corp., Emergency Board No. 200, 2-11 to 2-12 (Feb. 16, 1983) [hereinafter cited as Emergency Board 200 Submission]. For background on the Emergency Board, see note 514 *infra*.

458. In theory, the price for a security is determined by the purchaser's assessment of the capitalized present value of the earnings that will be attributable to the security over time and the value of the assets on which the security holder has a claim in bankruptcy. See G. OVENS & D. BEACH, BUSINESS AND SECURITIES VALUATION 33-35, 45-58 (1972) (comparing valuation of assets and valuation of earnings approaches). In competitive capital markets, the individual investor will bid a price for a security no more than that which will cause his yield to equal the expected interest rate, plus a risk premium. E. SHAPIRO, MACROECONOMIC ANALYSIS 204-07, 371-74 (1970) (securities prices as a function of income stream and interest rates). Accordingly, if earnings per share were \$1, the price bid would be no more than \$10, if prevailing interest rates were 10% and were expected to stay at that level. Projecting a security price attributable to the value of the underlying Conrail assets is problematic; it depends on the investor's assessment of the likelihood that the asset value could be realized in a bankruptcy. It is likely that investors would look to the Penn Central experience as a guide. However, the value realizable in bankruptcy would be reduced by the provisions of NERSA giving the federal government a priority. See note 452 and accompanying text *infra*.

459. A growing firm requires a constant infusion of funds. A declining firm does not necessarily require such access to external funds. If, for example, Conrail could earn revenue sufficient to cover its operating expenses and to maintain a constantly shrinking physical asset base, it is conceivable that it could survive without access to capital markets. This would require a continuation of the 1981-82 policies, under which the physical plant was decreased as traffic declined. It is not clear that this can be continued forever.

cash realizable from employees is not likely to make any difference to Conrail's financial future; even if every one of the approximately 50,000 employees contributed \$1,000, the total sum generated would be only 10% of Conrail's annual revenues.⁴⁶⁰ Transfer of the stock in exchange for additional labor concessions would fit well with the expiration date of Conrail's May 5 Labor Agreement⁴⁶¹ and would remove one major uncertainty with respect to Conrail's future profitability.⁴⁶² Transfer of the stock in consideration of past labor concessions arguably is envisioned by certain portions of NERSA,⁴⁶³ and would present a face-saving way for the government to get rid of the stock, and for the employees to gain control of the enterprise without having to give up anything.

The second basic possibility is to transfer the Conrail stock that is now held by the government to one or more profitable railroads. The problem with this approach is that there is little incentive for other railroads to participate in such ownership. It is clear that connecting roads clearly would have incentive to attempt to forestall the capture of Conrail lines that are important to them by another, hostile, rail-

460. If capital investment on the levels required by other railroads is required by Conrail, such an amount would clearly be insufficient.

461. The May 5 Agreement expires no later than April 1, 1984, after which time changes in wages, rules, and working conditions can be sought in accordance with § 6 of the Railway Labor Act. 45 U.S.C. § 156 (1976).

462. Even if Conrail is profitable within the present levels of labor costs, the prospect that the differential between Conrail wage rates and industry rates might be eliminated in the future would virtually eliminate prospects for profitability. Without the labor concessions of the May 5 Agreement, Conrail's modest profits for 1981 and 1982 would have been losses. *See* Emergency Board 200 Submission, *supra* note 457, at 2-24.

463. *See* NERSA, Pub. L. No. 97-35, § 1142, 95 Stat. 643, 655 (adding section 401(e) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 761(e)). This section provides that any stock sale plan developed by the Secretary of Transportation must include an offer of stock to employees "in amounts equal to the extent of . . . wage reductions." *Id.* Another provision of NERSA affords employees a final opportunity to purchase Conrail stock, if the Secretary has been unable to sell it to other purchasers. This subsection contains no reference to the consideration to be given to past wage concessions. *Id.* (adding section 404(b) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 764(b)). On July 9, 1982, the RLEA issued a statement reporting formation of a task force to study, among other options, acquisition of Conrail stock by employees. The statement implied that consideration should be given to the \$600 million in wage deferrals which the "employees will have 'invested' through 1984 under existing commitments." Statement by Rail Labor Executives Association (July 9, 1982). An October 15, 1982 letter to Conrail employees represented by RLEA organizations reported that financing for Conrail stock might come from an "extension of current contributions" and in any event would not require cash outlays. Letter from Rail Labor Executives Association to Conrail Employees represented by the RLEA organizations (Oct. 15, 1982).

road.⁴⁶⁴ Similarly, they would have an incentive to attempt to forestall government action that would terminate Conrail operations completely or so degrade the quality of these operations that their competitive position in the marketplace would be diminished.⁴⁶⁵ But neither of these threats is present in the first, stock-sale, stage of the NERSA transfer process.⁴⁶⁶ It would seem that interested connecting railroads would be better advised to await the outcome of this stage of the statutory process,⁴⁶⁷ developing contingency plans if the piecemeal transfer of Conrail properties were to proceed under the subsequent stages, if the stock sale fails.

A third possibility for the sale of Conrail is for a nonrailroad investor to purchase the Conrail stock for essentially speculative purposes. It is, however, difficult to guess the circumstances under which such a sale might be consummated.

Section 1142 of NERSA provides the DOT with authority to transfer Conrail freight properties and service responsibilities in the event the stock cannot be sold, or if Conrail fails to meet the required profitability tests.⁴⁶⁸ The DOT is obligated in structuring such transfers to ensure that seventy-five percent of Conrail's total rail service be maintained.⁴⁶⁹ In contrast to the two-house veto required to nul-

464. Conrail's 1981 report to the Congress identified some of the factors that would make other railroads reluctant to purchase major portions of Conrail. Some of these factors were eliminated by NERSA. See EXECUTIVE SUMMARY, *supra* note 339, at 11-12. The report estimated Conrail's market value under these circumstances at \$0.5 to 0.9 billion. *Id.*

465. Conrail's 1981 Report to the Congress summarizes the traffic losses to other major railroads that would result from a shutdown of Conrail operations. *Id.* at 11-20.

466. There is no reason that a change in ownership of Conrail stock would have any effect on Conrail policies or operations. Therefore, the stock sale alternative presents few threats for the connecting railroads.

467. The structure of the statutory process leaves little doubt that potential railroad purchasers could wait out the exploration of stock sale and still submit bids for portions of the Conrail properties.

468. See NERSA, Pub. L. No. 97-35, § 1142, 94 Stat. 643, 654-55 (1981) (adding § 405 to the Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 765). One of the controversies to be resolved in the final version of NERSA related to the manner in which Conrail employees would be transferred to purchasers in a piecemeal transfer. For a discussion of the possibility of a piecemeal transfer, see note 416 and accompanying text *supra*. Section 1146 of NERSA provides the terms under which employment obligations would be assumed by purchasers. See NERSA, Pub. L. No. 97-35, § 1146, 95 Stat. 672-75 (1981) (adding §§ 411 & 412 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. §§ 769b & 769c). These sections supplant the authority of the ICC normally utilized to prescribe labor conditions. See *id.* § 1142 (adding § 408(a) to the Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 768(a)).

469. See *id.* (adding § 406(c) to the Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 766).

lify a stock sale, either house is granted veto power over any proposed asset transfers.⁴⁷⁰

The sale of assets would intrinsically deal with the industry structure issue; the resulting industry structure would be as sound as the plan developed by DOT. However, the requirement that 75% of the rail service performed by Conrail be preserved in an asset sale is difficult to interpret, and the method for its enforcement is not clear. Presumably, the maintenance-of-service requirement would be interpreted by the Congress in determining whether to exercise its one-house veto right as judicial review is precluded under this Act.⁴⁷¹

Taken as a whole, the freight transfer provisions of NERSA do not inhibit the prospects for further improvement in railroad industry structure in the Northeast. In fact, NERSA's freight transfer provisions in some respects actually enhance the possibility of improving the industry structure. Ultimately, however, the soundness of industry structure charges will be determined not by the extent of the authority granted by NERSA, but by the policy judgments of DOT.⁴⁷²

In sum, NERSA improves the prospects for Conrail profitability, but the outlook for a satisfactory industry structure in the Northeast is not appreciably clearer than it has been in the past, unless one assumes that what is now Conrail will gradually fade away.⁴⁷³

470. *Id.* (adding § 407(d) to the Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 767(d)).

471. *Id.* (adding § 408(c) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 768(c)).

472. Conrail's April 1, 1981 Report to the Congress presented the results of network model simulations of several merger possibilities and of liquidation. "Packaging" 75% of Conrail's existing route mileage into two components, it evaluated four pairs of merger partners: 1) NWS and CSX; 2) Santa Fe and Union Pacific-Missouri Pacific-Western Pacific ("UMP"); 3) Santa Fe and Southern Pacific; and 4) Southern Pacific and UMP. It concluded that gross annual benefits would range from \$170 million if Santa Fe and UMP were purchasers to \$280 million if NWS and CSX were purchasers. The route mileage that would be lost in such mergers would approximate 2,000 to 3,000 miles. Employment requirements would be diminished by approximately 20,000 jobs. *OPTIONS FOR CONRAIL*, *supra* note 262, at 11-12 to 11-13. Liquidation, based on interest expressed by other railroads in 1975 in lines now operated by Conrail, would result in abandonment of nearly 9,000 route miles and the loss of 40,000 jobs. *Id.* at 11-17.

473. Apart from the impediments to the integration of Conrail into other regional rail systems through purchase of assets or stock, Conrail standing by itself faces enormous difficulties. Except for a few locations in New Jersey, New England, and Pennsylvania, there are no major markets served by Conrail that are not also served by either the Chessie (now part of the CSX Corporation) or by the N. & W. (now part of NWS). In addition, truck competition will become a more severe threat because of lower truck labor costs resulting from concessions made by the Teamsters Union and because larger trucks may now be used under the Surface Transportation Act of 1982. Thus, Conrail standing alone is assured of almost no markets from which it can get profitable traffic. Its ability to compete for traffic in other markets depends greatly on its future cost structure, which in turn depends substantially on

C. *Transfer of Computer Operations*

NERSA clearly has been successful in disassociating the passenger service problem from the northeast rail freight dilemma. Following the basic approach proposed by the Senate bill, NERSA required the transfer of Conrail's commuter operations to either commuter authorities or to Amtrak Commuter—a new subsidiary of Amtrak.⁴⁷⁴ Under NERSA, however, the deadline for this transfer was extended to January 1, 1983.⁴⁷⁵ This step represents the resolution of the passenger service problem that rail management has desired since the late 1950's. Until the enactment of NERSA, the problem of discontinuing railroad passenger service was handled in a piecemeal fashion. For instance, during the 1960's, significant discontinuances of passenger service were permitted by the ICC under the authority granted by the Transportation Act of 1958.⁴⁷⁶ Twelve years later, Congress made another attempt to solve the passenger service problem through the Rail Passenger Service Act of 1970 which created Amtrak to relieve railroads of the obligation to bear the losses of intercity passenger service.⁴⁷⁷ Nonetheless, disputes still occurred over the amount of reimbursement due to the railroads by Amtrak for costs incurred in providing passenger service, but the amounts involved were small in comparison with the passenger losses borne by railroads before 1970.⁴⁷⁸

Although NERSA took the final step of relieving Conrail of the responsibility for commuter service⁴⁷⁹—a problem which neither the 1973 Act nor the 1976 Act resolved—even under NERSA several problems remain. The potential for cost disputes, for instance, persists. This is because Conrail may not be fully reimbursed for the costs imposed upon it by commuter operations on its property. Moreover, Conrail may be charged too much for operating freight trains

its continued ability to control and reduce labor costs. *See* Emergency Board 200 Submission, *supra* note 457, at 2-12 to 2-15.

474. NERSA, Pub. L. No. 97-35, §§ 1136-1139, 95 Stat. 643, 647-52 (1981) (to be codified in scattered sections of 45 U.S.C.). The commuter authorities involved in the this transfer process are the Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, and the New Jersey Transit Corporation. *Id.* § 1135(a)(3) (to be codified at 45 U.S.C. § 1104(3)).

475. *Id.* § 1136 (to be codified at 45 U.S.C. § 744a).

476. *See* 49 U.S.C. § 15(a) (1976).

477. *See* 45 U.S.C. §§ 501-645 (1976).

478. For a discussion of passenger losses borne by railroads prior to 1970, see notes 59-61 and accompanying text *supra*.

479. *See* NERSA, Pub. L. No. 97-35, § 1136, 95 Stat. 643, 647 (1981) (to be codified at 45 U.S.C. § 744a).

over property owned by the commuter authority.⁴⁸⁰

Two other major difficulties that might have been anticipated with respect to the NERSA commuter provisions did not interfere with the accomplishment of NERSA's basic goal. These problems related to labor issues and to the capacity of commuter authorities to meet their responsibilities under NERSA.

NERSA amended the Rail Passenger Act by adding sections 508, 509, and 510 to assure an orderly transfer of Conrail passenger service employees to the commuter authorities.⁴⁸¹ In accordance with section 508, rail labor organizations, Conrail, Amtrak, and independent commuter authorities were required to negotiate implementing agreements that facilitate this transfer of Conrail employees to the new operators.⁴⁸² NERSA also provided for a fact-finding process, followed by negotiations over substantive collective bargaining agreements, to apply after the transfer was completed.⁴⁸³

Substantial litigation occurred over the claim by the Southeastern Pennsylvania Transportation Authority (SEPTA) that until January 1, 1983, it was not bound by section 508 to engage in negotiations for implementing agreements with Conrail employees. Rather, SEPTA maintained that it retained the option either to contract with third parties for performance of certain commuter support services or to begin to perform these services with its own forces.⁴⁸⁴ The Special Court, in a series of cases, concluded that while SEPTA

480. *Id.* § 1137 (adding § 504(e) to Rail Passenger Service Act) (to be codified at 45 U.S.C. § 584).

481. *New Jersey Transit Rail Operations, Inc. v. International Bhd. of Boilermakers*, 550 F. Supp. 1327, 1328-29 (Regional Rail Reorg. Ct. 1982).

482. *See* NERSA Pub. L. No. 97-35, § 1145, 95 Stat. 357,669 (adding § 508 to the Rail Passenger Service Act) (to be codified at 45 U.S.C. § 588).

This newly added § 508 of the Rail Passenger Service Act requires Amtrak Commuter, Conrail, commuter authorities intended to operate commuter service, and labor organizations representing commuter employees to negotiate "implementing agreements." *Id.* If negotiations are unsuccessful, NERSA provides for binding arbitration. *Id.*

483. *Id.* (adding § 509 to the Rail Passenger Service Act) (to be codified at 45 U.S.C. § 589). By adding this new section to the Rail Passenger Service Act, NERSA provides for a fact-finding report on changes in wages, rules, and working conditions that would reduce labor costs after commuter service is transferred to the new operators. *Id.* Section 1145 of NERSA provides for the negotiation of new collective bargaining agreements that would apply after the transfer. *Id.* (adding § 510 to the Rail Passenger Service Act) (to be codified at 45 U.S.C. § 590).

484. *See, e.g., RLEA v. SEPTA*, 534 F. Supp. 832 (Regional Rail Reorg. Ct.), *cert. denied*, 102 S. Ct. 227 (1982). SEPTA took the position that NERSA should be interpreted to permit it to decide unilaterally what employees to hire and, alternatively, that the newly added §§ 508 & 510 of the Rail Passenger Service Act were unconstitutional. *Id.* at 839-40, 849. The Special Court rejected SEPTA's contentions, although it left open the possibility that SEPTA might be able to avoid the

did have certain flexibility to change the scope of services performed by Conrail employees before the new operators take over, it could not threaten Conrail operations or circumvent NERSA.⁴⁸⁵ Although

labor provisions of NERSA by contracting with a third party other than Amtrak Commuter to provide service. *Id.* at 839-48.

Before NERSA was enacted, commuter authorities strongly urged Congress to recognize the need for major changes in collective bargaining agreements for commuter rail labor that would either permit commuter authorities to operate under state labor laws or provide for compulsory arbitration. *See NERSA Senate Hearings*, *supra* note 361, at 15-16, 25-26, 27-28. (statements of Louis J. Gambaccini, Richard Ravitch, and David F. Girard-deCarlo).

485. *See* RLEA v. SEPTA 534 F. Supp. 832 (Regional Rail Reorg. Ct.), *cert. denied*, 102 S. Ct. 2271 (1982) (SEPTA I); RLEA v. SEPTA, 534 F. Supp. 852 (Regional Rail Reorg. Ct. 1982) (SEPTA II); International Bhd. of Teamsters, Local 732 v. SEPTA, 539 F. Supp. 1222 (Regional Rail Reorg. Ct. 1982) ((SEPTA III); RLEA v. SEPTA, 547 F. Supp. 884 (Regional Rail Reorg. Ct. 1982), *cert. denied*, 103 S. Ct. 571 (1982) (SEPTA IV). These decisions interpreted SEPTA's obligation under section 1145 of NERSA. *See* NERSA, Pub. L. No. 97-35, § 1145, 95 Stat. 643, 669-72 (1981) (adding sections 508, 509 and 510 of the Rail Passenger Act) (to be codified at 45 U.S.C. §§ 588-590). In a contemporaneous case, the Teamsters Union was enjoined from striking Conrail-operated commuter service to protest cancellation of Conrail police work assignments at SEPTA's direction. *SEPTA v. International Bhd. of Teamsters*, Local 732, No. 4446 (C.P. Phila. May, 1982). This case was removed to the United States District Court for the Eastern District of Pennsylvania. *See* No. 82-2389 (E.D. Pa. June 6, 1982).

In *SEPTA I*, the Special Court held that if SEPTA intended to operate commuter service through Conrail on the effective date of NERSA, it had to comply with § 1145 of NERSA. 534 F. Supp. at 848. *See also* NERSA, Pub. L. No. 97-35, § 1145, 95 Stat. 643, 669-72 (1981) (adding §§ 508-510 to the Rail Passenger Service Act) (to be codified at 45 U.S.C. §§ 589-590). The Special Court permitted SEPTA to operate service on a limited segment without complying with the labor provisions of NERSA because that service was not in operation on the effective date of the Act. 534 F. Supp. at 849. Finally, the court held that the Congress could impose these negotiating obligations on SEPTA without violating the Constitution. *Id.* at 851.

In *SEPTA II*, the Railway Labor Executives Association (RLEA) sought to enjoin the contracting out of certain grass cutting and janitorial services previously performed by Conrail. The Special Court framed the question as "whether sections 508 and 510 of NERSA are applicable in a situation where a commuter authority seeks to complete the process of making a small scale adjustment in the manner in which commuter services are provided when substantial steps towards making this adjustment had been taken prior to the effective date of NERSA." 534 F. Supp. at 855. Relying on the fact that "contracting out for janitorial and grass cutting services was merely one of the routine changes in the manner in which commuter service is provided to Philadelphia" and that it did not pose a danger to Conrail that threatened the transfer of the entire commuter service operations, the Special Court held that SEPTA was entitled to make these changes. 534 F. Supp. at 857. In *SEPTA III*, the Special Court permitted SEPTA to begin providing commuter police services with its own forces rather than with Conrail forces represented by the Teamsters. The court found the facts to be very similar to those in *SEPTA II*, particularly since preparations to make the police change were underway before the enactment of NERSA. *See* 539 F. Supp. at 1222-25.

In *SEPTA IV*, the principles developed in *SEPTA I*, *II*, and *III* were applied to permit SEPTA to contract out ticket selling functions rather than employing Conrail clerks. 547 F. Supp. at 891-92.

In the state strike litigation, Teamsters representing Conrail police officers were enjoined from picketing Philadelphia center city rail facilities. No opinion was writ-

SEPTA lost the right to avoid completely the NERSA procedures governing the transfer of commuter employees,⁴⁸⁶ it gained substantial flexibility—and bargaining leverage—through judicial vindication of its right to dispense with the services of substantial numbers of Conrail commuter employees.⁴⁸⁷

More generally, by the end of 1982, difficulties had been encountered in carrying out NERSA's labor transfer provisions and, particularly in negotiating implementing agreements with the three major commuter authorities: the Metropolitan Transportation Authority (MTA), covering the New York area; the New Jersey Transit Rail Operations; and SEPTA.⁴⁸⁸ The drafters of NERSA had anticipated these difficulties, and provisions were included in NERSA for binding arbitration in the event of unsuccessful negotiations.⁴⁸⁹ Accordingly, arbitration awards were entered to resolve these snarled negotiations.⁴⁹⁰ New Jersey Transit challenged the award affecting its operations on two grounds: 1) the arbitrator misapplied section 508 by refusing to order modifications of the transferred employees' craft classifications which New Jersey Transit had requested; and 2) the arbitrator had erred by requiring that each offer of employment by New Jersey Transit should be awarded on the basis of relevant provisions in Conrail's collective bargaining agreements.⁴⁹¹ The Special

ten by the court, but the complaint and supporting memoranda asserted tortious interference with Conrail and SEPTA contractual relationships. In particular, the plaintiffs argued that Teamsters picketing caused Conrail to breach its operating agreement with SEPTA. Plaintiff's Memorandum of Law in Support of Motion for Temporary Restraining Order at 1, *SEPTA v. International Bhd. of Teamsters*, Local 732, No. 4446 (C.P. Phila. May 12, 1982).

486. *See* *RLEA v. SEPTA*, 534 F. Supp. 832 (Regional Rail Reorg. Ct. 1982).

487. *See* note 485 and accompanying text *supra*.

488. The MTA negotiated implementing agreements with organizations representing its nonoperating employees. It was, however, unsuccessful in negotiating agreements for the operating crafts. *See In re* Arbitration pursuant to Section 508 of the Rail Passenger Service Act (Oct. 12, 1982) (F. Blackwell, Arb.).

489. NERSA, Pub. L. No. 97-35, § 1145, 95 Stat. 357, 670 (adding § 508 to the Rail Passenger Service Act) (to be codified at 45 U.S.C. § 588).

490. In a determination and order issued on September 7, 1982, the National Mediation Board decided the structure of § 508 arbitration proceedings. 9 N.M.B. No. 144 (1982). It appointed referees on September 14, 1982 and the arbitrations proceeded thereafter. *See* Section 508 Implementing Agreements, Arbitration involving New Jersey Transit Rail Corporation, Inc. and Labor Organization Representatives (Oct. 14, 1982) (R. Kasher, Neutral Referee); *In re* Arbitration pursuant to Section 508 of the Rail Passenger Service Act (Oct. 12, 1982); (F. Blackwell, Neutral Referee); *In re* Arbitration pursuant to Section 508 (Oct. 10, 1982) (F. Quinn, Neutral Referee); *In re* Arbitration pursuant to Section 508 of the Rail Passenger Service Act (Oct. 12, 1982) (J. Sickles, Neutral Referee) (Delaware Dep't of Transp. and Maryland Dep't of Transp.).

491. *New Jersey Transit Rail Operations, Inc. v. International Bhd. of Boilermakers*, 550 F. Supp. 1327, 1328-29 (Regional Rail Reorg. Ct. 1982).

Court, however, rejected both of these arguments and refused to disturb the arbitrator's award.⁴⁹²

NERSA also provides for the establishment of a special emergency board upon the inability of the commuter authorities to negotiate new collective bargaining agreements.⁴⁹³ These special emergency board procedures had to be invoked with respect to the MTA, New Jersey Transit, and SEPTA.⁴⁹⁴ In both the New Jersey Transit and SEPTA proceedings, the emergency boards lamented the lack of progress in the negotiations and were eventually forced to select the final offer of the commuter authorities over those of the labor organizations.⁴⁹⁵

Two general aspects of this commuter employee transfer process are especially noteworthy. First, rail labor did not encourage Congress to reverse or delay the process of relieving Conrail of its commuter obligations. The only action that Congress took on this issue was enacting legislation that assured the application of the Railway Labor Act and the Railroad Retirement Act to the commuter authorities.⁴⁹⁶ The second significant aspect of this general transfer process was SEPTA's unexpected success in assuring that rail commuter service employees should work under mass transit, rather than railroad compensation levels and work rules.⁴⁹⁷ For instance, on December

492. *Id.* at 1331-32. The court took particular note of Referee Kasher's decision not to bind New Jersey Transit to the substantive Conrail agreements. *Id.* Rail labor also challenged the award of Referee Quinn in the SEPTA 508 dispute. The Special Court dismissed the petition for review, applying the same reasoning it used in reviewing the New Jersey Award. *Railway Supervisors v. SEPTA*, 551 F. Supp. 688 (Regional Rail Reorg. Ct. 1982).

493. NERSA, Pub. L. No. 97-35, § 1145, 95 Stat. 357, 671 (adding § 510 to the Rail Passenger Service Act) (to be codified on 45 U.S.C. § 590).

494. On October 1, 1982, President Reagan appointed Emergency Boards 196, 197 and 198 to deal with uncompleted § 510 negotiations involving SEPTA, New Jersey Transit, and MTA respectively. *See* Exec. Order No. 12,384, 47 Fed. Reg. 43,935 (1982); Exec. Order No. 12,385, 47 Fed. Reg. 43,937 (1982); Exec. Order No. 12,386, 47 Fed. Reg. 43,939 (1982).

495. *See* Report to the President by Emergency Board No. 196 (Dec. 6, 1982); Report to the President by Emergency Board No. 197 (Dec. 1, 1982) (on file with the N.M.B., Washington, D.C.). Negotiations between operating craft organizations and New Jersey Transit and the MTA finally broke down on February 28, 1983 resulting in a strike against both authorities. *N.Y. Times*, Mar. 2, 1983, at 1, col. 4. The New Jersey Transit strike ended on April 1, 1983. *Phila. Inquirer*, Apr. 1, 1983, at 6-B, col. 1.

496. *See* Pipeline Safety Authorization Act of 1981, § 509, 128 CONG. REC., H 10683 (Dec. 21, 1982).

497. The Emergency Board adopted SEPTA's proposal for a basic labor agreement and transition program. The basic agreement incorporated transit employee wage rates and transit employee work rules. The transition program provides supplemental wage payments and benefits so that no current Conrail employee would be significantly disadvantaged in his compensation. Under the transition program, SEPTA would pay the difference between the prevailing transit wage rate and the

20, 1982, rail labor organizations negotiating with SEPTA announced that they would instruct the employees that they represented to report for work with SEPTA on January 1 under SEPTA's proposed wage levels and work rules while negotiations continued.⁴⁹⁸ Rail labor's announcement nonetheless expressly reserved the right to strike if negotiations reached an impasse at a later date.⁴⁹⁹ It is therefore too early to conclude with confidence that SEPTA will achieve ultimate success in attaining its objective.⁵⁰⁰ Even if SEPTA's proposal for an interim arrangement of compensatory payments to close the differential between mass transit pay rates and Conrail pay rates is accepted formally in the first bargaining round, the principle of linking the transferred employees to mass transit labor agreements, rather than to railroad agreements, easily could be eroded in future rounds of negotiation. Yet despite the uncertain future, it is reasonable to conclude that the policy embodied by NERSA⁵⁰¹ of shifting the responsibility for commuter rail operations to state and local authorities has been achieved.

D. *Labor Law Reforms*

NERSA adopts most of the recommendations presented to Congress on the labor issue.⁵⁰² This may represent NERSA's greatest success but also its greatest potential for failure. The NERSA provisions

Conrail wage rate, which would be limited by a "cap" on total annual compensation. *See* Report to the President by Emergency Board No. 196, 7-8 (Dec. 6, 1982) (on file with the N.M.B., Washington, D.C.).

498. Phila. Inquirer, Dec. 21, 1982, at B-1, col. 6. Previously, all parties were preparing for a work stoppage on January 1, 1983. *See id.*, Nov. 18, 1982, at D-7, col. 1.

499. *Id.*, Dec. 21, 1982, at B-1, col. 6. On March 14, 1983, rail labor struck SEPTA over the unresolved § 510 negotiations. The strike was still continuing in early May.

500. At the eleventh hour, the transfer to SEPTA was greatly complicated by two events: a state court proceeding in which SEPTA was ordered not to terminate service for a change-over period; and a brief attempt by the National Mediation Board to intervene and impose the "status quo." *See* Lashner v. SEPTA, No. 4733 (C.P. Phila. Dec. 27, 1982); Telegram from National Mediation Board to David L. Gunn (Dec. 29, 1982) (on file with the author).

Nevertheless, the transfer occurred on January 1 and service has continued while negotiations proceed. At the end of February, 1983, Philadelphia County Common Pleas judge Bernard J. Goodheart, Jr., was mediating between SEPTA and the labor organizations within the framework of the Lashner suit. *See* Transcript of Hearing (Feb. 14, 1983), Lashner v. SEPTA, No. 4733 (C.P. Phila. Dec. 27, 1982).

501. NERSA, Pub. L. No. 97-35, § 1133(2), 95 Stat. 643, 644-45 (to be codified at 45 U.S.C. § 1102). A congressional goal in enacting NERSA was to transfer Conrail commuter service responsibilities to entities "whose principal purpose is the provision of commuter service." *Id.*

502. For a discussion of the recommendations, see text accompanying notes 333-41, 351, 354, 358 & 361 *supra*.

dealing with the transfer of commuter service and the sale of Conrail represent highly significant policy initiatives in the continuing attempt to restructure the railroad system of the Northeast. The most far-reaching steps taken by NERSA, however, relate to labor costs.⁵⁰³ It is therefore likely that most of the controversy concerning the implementation of NERSA will relate to these labor initiatives.

NERSA relieves Conrail of the obligation to make labor protection payments.⁵⁰⁴ In this respect, NERSA removes the significant burden which the Penn Central bore as the result of collective bargaining,⁵⁰⁵ and a constantly threatening contingency which Conrail faced as a result of the 1973 Act.⁵⁰⁶ NERSA also shields Conrail from the legal obligation to negotiate on the subject of labor protection until April 1, 1984.⁵⁰⁷ This places Conrail in an extremely favorable position as compared to other railroads. However, the fact that Conrail may be required to negotiate labor protection after April 1984 adds some urgency to the task of resolving the industry structure issue

503. One of the most helpful provisions of NERSA has been the broadened jurisdiction of the Special Court under § 1152, which extends to all disputes over the interpretation of the statute. *Id.* § 1152 (to be codified at 45 U.S.C. § 1105). While this has increased substantially the caseload of the court and necessitated the establishment of a new panel, it has prevented individual district courts from rendering interpretations of the statute that are inconsistent with congressional purposes as happened in the *Maloolf* case. For a discussion of *Maloolf*, see notes 312, 319-20 and accompanying text *supra*.

504. See NERSA, Pub. L. No. 97-35, § 1143(a), 95 Stat. 643, 661-68 (1981) (adding § 701(a) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797(a)). Section 1144 of NERSA repealed Title V of the 1973 Act in its entirety. Certain Title V provisions, however, were continued in a new Title VII. See NERSA, Pub. L. No. 97-35, § 1143(a), 95 Stat. 643, 661-68 (adding a new Title VII, §§ 701-714, to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. §§ 797-797n). The new § 706 of the 1973 Act, for example, is a reenactment of § 503 of the 1973 Act, except that the assignment of work flexibility which it provides Conrail expires when government funding ceases. The new § 707 is a reenactment of § 506 of the 1973 Act. Section 708 is a reenactment of § 504 of the 1973 Act, with certain changes to clarify the application of the single agreement requirement and to prohibit the negotiation of labor protection obligations. Section 709 is a reenactment of § 505(e) of the 1973 Act and certain other provisions relating to personal injury claims. Section 714 is a substantial reenactment of § 507 of the 1973 Act, relating to arbitration of disputes over the meaning of the statutory labor provisions. However, through a drafting error, the operation of the arbitration mechanism is nullified by the broad jurisdiction of the Special Court. (The author supervised the drafting of the provision as submitted to the congressional committees, but an error was made in the final version).

505. For a discussion of the labor protection agreements negotiated by the Penn Central, see notes 71-72 and accompanying text *supra*.

506. For a discussion of the employee protection program of the 1973 Act, see note 149 and accompanying text *supra*.

507. NERSA, Pub. L. No. 97-35, § 1143(a), 95 Stat. 643, 666 (1981) (adding § 708(a) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797g(a)).

before that time. If this issue is not resolved by April 1984, one of the chief economic burdens removed by NERSA may well return.

The fund for employee protection which section 1143(a) of NERSA establishes⁵⁰⁸ was to be expended as determined in negotiations between rail labor and the Secretary of Labor.⁵⁰⁹ A formula was included which imposed a \$20,000 limitation on the benefits payable to any one employee.⁵¹⁰ To date, this seems to have resolved the employee protection problem. However, a suit is pending in the Special Court which challenges the constitutionality of the repeal of Title V.⁵¹¹ Thus, it cannot be said with complete confidence that Conrail is entirely relieved of the burden of employee protection obligations.

Although NERSA contains no provisions expressly requiring action to reduce labor costs, this is certainly a goal of the legislation.⁵¹² Moreover, it is likely that the May 5 collective agreement will achieve savings of \$600 million over its three-year term, if it is fully implemented.⁵¹³ Since this agreement was negotiated to forestall legislation designed to break up Conrail, to impose a wage freeze or to require work rule changes, it is reasonable to credit the legislative process with producing this labor cost benefit. The significance of the agreement's contribution to Conrail's profitability will depend both upon labor's influences on Conrail's administration, and on the negotiations that will occur at the conclusion of its term. There was a substantial risk that the agreement would be modified or rescinded prior to April 1, 1984 due to the refusal of the Brotherhood of Locomotive Engineers to ratify.⁵¹⁴ There is also a risk that improving

508. *Id.* (adding § 701 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797).

509. *Id.* (adding § 701(a)(1) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797(a)(1)). If negotiations are unsuccessful, the Secretary of Labor is authorized to establish the terms on which the funds will be expended. *See id.* (adding § 701(a)(2) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797(a)(2)). In December, 1981, the Secretary promulgated such terms.

510. *Id.* (adding § 701(d) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797(d)).

511. Complaint, *RLEA v. United States*, No. 82-11 (Regional Rail Reorg. Ct. Apr. 8, 1982). The complaint alleged a violation of the fifth amendment because Congress breached a contract that was created between rail labor and the United States when Title V was enacted in exchange for preexisting labor protection. It also alleged violation of the Railway Labor Act by Conrail for discontinuing Title V payments that had been incorporated in some of its labor agreements. *Id.*

512. *See* NERSA, Pub. L. No. 97-35, § 1134(4), 95 Stat. 643, 645 (1981) (to be codified at 45 U.S.C. § 1103(4)). This subsection of NERSA establishes as a goal that Conrail negotiate collective bargaining agreements to reduce its labor costs by \$200 million annually. *Id.*

513. *See* NERSA HOUSE REPORT, *supra* note 409, at 6-7.

514. The May 5 Agreement is accompanied by a side letter that automatically

Conrail's profitability could lead to rank-and-file pressure to renegotiate the agreement.⁵¹⁵ However, the greatest risk is that Conrail will be only marginally profitable when the agreement expires, and rail labor will insist upon recouping the sacrifices which were made under the agreement. Such action could increase Conrail's labor costs during the period after April, 1984 substantially above the labor costs of its competitors.⁵¹⁶

The effect of NERSA's provisions relating to work rules is difficult to anticipate. For instance, section 1143(a) of NERSA provides

grants to employees covered by the Agreement any more beneficial terms granted to employees not covered by the Agreement. *Id.* at 119. If Conrail negotiates an agreement with a nonratifying organizations which materially differs from the May 5 Agreement, this side letter could cause the basic agreement to self-destruct. *See id.*

All of the organizations that signed the agreement of May 5 had completed the necessary ratification procedures by the end of November, 1981. The Brotherhood of Locomotive Engineers (BLE) declined to execute the May 5 Agreement and pressed Conrail to negotiate. Litigation ensued but was dismissed by a stipulation which obligated the parties to negotiate further.

When negotiations pursuant to the stipulation failed to produce a settlement, the Brotherhood of Locomotive Engineers threatened a strike against Conrail. Consequently, on February 14, 1983, President Reagan appointed Emergency Board No. 200. Exec. Order No. 12,405, 48 Fed. Reg. 6,889 (1983).

The BLE refused to sign the May 5 Agreement unless it received additional compensation for the erosion of the historical differential between engineer and train crew wages. This erosion was the result of productivity bonus payments made to UTU represented employees under Conrail's 1978 crew consist agreement. Transcript of Testimony by the Brotherhood of Locomotive Engineers before Emergency Board No. 200, 78-80, 83, 90-91 (Feb. 16, 1981).

Conrail's response to this demand was that the BLE should not receive extra compensation on account of a productivity agreement negotiated with another organization. Emergency Board 200 Submission, *supra* note 457, at 3-B-23. Conrail also has argued that BLE adherence to the May 5 Agreement is essential for Conrail's survival. *Id.* at 1-5 to 1-6.

A dispute between the BLE and the NRLC over the trainmen-engineer wage differential was the subject of a four-day national strike on September 22, 1982. Congress responded by enacting a Senate Joint Resolution requiring that the dispute be submitted to a study commission and prohibiting a strike until late 1984. *See* S.J. Res. 250, 97th Cong., 2d Sess. (1982), 128 CONG. REC. H7374-87 (daily ed. Sept. 22, 1982). Conrail also has argued that its dispute with the BLE should be resolved in conjunction with the proceedings of the railroad Study Commission. Emergency Board 200 Submission, *supra* note 457, at 1-9.

On April 20, 1983, Conrail reached agreement with the BLE, forestalling a strike. The May 5 agreement was adopted and a special additional payment in exchange for changes in work rules was provided for, thus protecting the concept of productivity bargaining.

515. The Agreement by its terms is not renegotiable until 1984. NERSA HOUSE REPORT, *supra* note 409, at 113. However, it is difficult to predict whether Conrail, or the Congress, will be able to stand its ground in the face of an illegal strike intended to compel premature renegotiation.

516. Without the benefits of the May 5 Agreement, Conrail's modest profit in 1981 and 1982 would have been a loss. Emergency Board 200 Submission, *supra* note 457, at 2-24.

funds for the elimination of excess firemen and brakemen.⁵¹⁷ This program for separating firemen and excess brakemen is likely to accelerate materially the realization of the benefits of the Firemen Manning Agreement and the Crew Consist Agreement.⁵¹⁸ However, if the transfer of commuter employees to the new operators ultimately does not work as intended, the benefits of NERSA section 1143(a) could be substantially negated.⁵¹⁹ The preemption of state full crew laws by NERSA will have some immediate beneficial effect in permitting Conrail to reduce crew size.⁵²⁰ But ultimately, the greatest benefit is

517. NERSA, Pub. L. No. 97-35, § 1143(a), 95 Stat. 643, 662 (adding § 702 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797a(e)). NERSA authorizes funds for the termination of excess firemen as well as second and third brakemen. It also permits Conrail to abolish one fireman or one brakeman position for each employee terminated. In effect, these statutory provisions extinguish the collectively bargained right employees otherwise would have to exercise seniority to such positions. *Id.*

In *United Transp. Union v. Consolidated Rail Corp.*, 535 F. Supp. 697 (Regional Rail Reorg. Ct. 1982), the Special Court held that collective bargaining agreements were not intended to limit the operation of § 702 and that § 702 was not unconstitutional because it negated collectively bargained terms of employment. *Id.* at 703-12.

518. For a discussion of the Firemen Manning Agreement and the Crew Consist Agreement, see notes 86-87 & 308-309 *supra*.

519. For a discussion of NERSA's plan for transferring commuter employees, see notes 474-501 *supra*. If the number of commuter employees ultimately employed by new operators is smaller than the number employed in Conrail commuter service, the authority provided by NERSA will not be sufficient to eliminate all excess firemen and second and third brakemen positions. See NERSA, Pub. L. No. 97-35, § 1143(a), 95 Stat. 643, 662 (1981) (adding § 702 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797a). Many commuter employees have seniority which can be exercised for firemen and second and third brakemen positions. The number of such positions that can be eliminated is limited by the funds authorized for termination allowance. *Id.* For a discussion of this termination fund, see note 517 *supra*.

Conrail is protected from labor disputes arising with the new commuter operators. Section 1158 of NERSA prohibits persons engaging in concerted action over disputes with commuter operators from engaging in any strike against or otherwise inducing any employee of Conrail "where an effect thereof is to interfere with rail freight service provided by Conrail." NERSA, Pub. L. No. 97-35, § 1158(a), 95 Stat. 643, 682 (1981) (to be codified at 45 U.S.C. § 1108(a)). This section contains a similar prohibition against the disruption of rail passenger service because of secondary pressure on commuter employees exerted by those engaged in concerted economic activity over Conrail freight operations. *Id.* § 1158(b) (to be codified at 45 U.S.C. § 1108(b)). Finally, this section of NERSA states that any violation of its provisions "shall be deemed to be a violation of the Railway Labor Act." *Id.* § 1158(c) (to be codified at 45 U.S.C. § 1108(c)).

520. See *id.* § 1143(a) (adding § 711 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797j). This section of NERSA prohibits states from maintaining or establishing any law, regulation, or standard that requires Conrail, Amtrak, or the National Railroad Passenger Corporation "to employ any specified number of persons to perform any particular task, function, or operation." *Id.* A virtually identical provision of NERSA is contained in § 1168(b). See *id.* § 1168(b) (to be codified at 45 U.S.C. § 1116(b)). For a discussion of these state full crew laws,

likely to be prophylactic: gains at the bargaining table can no longer be threatened by political action at the state level. Both the program established under Section 1143 of NERSA and the state law preemption relate to the realization of benefits already negotiated.

Negotiation of new changes in work rules is not required by NERSA. The Act only requires the establishment of a fact-finding procedure similar to that contained in the May 5 collective agreement.⁵²¹ The obvious intent of the fact-finding approach to work rule

see note 76 and accompanying text *supra*. The preemption standard established by NERSA is unambiguous. Only the manner of its enforcement poses any questions. Presumably a United States District Court would have jurisdiction to enjoin on supremacy clause grounds the enforcement of a state law preempted by this section. Alternatively, the Special Court presumably would have jurisdiction to grant injunctive relief to enforce preemption under § 1152 of NERSA. *See* NERSA, Pub. L. No. 97-35, § 1552, 95 Stat. 643, 676 (1981) (to be codified at 45 U.S.C. 1105).

A group of firemen and trainmen have brought suit to challenge the constitutionality of § 1168(b) of NERSA which provides that the minimum size of Conrail crews should not be affected by state or local law. *See* Plaintiff's Complaint, *Keeler v. Consolidated Rail Corp.*, No. 82-3 (Regional Rail Reorg. Ct. Feb. 1, 1982). The plaintiffs argued that the purported objective of NERSA to preempt state full crew laws was designed to enhance Conrail's chances to become profitable, and that this economic objective should not be allowed to supplant the safety considerations underlying Indiana's crew size legislation. *Id.* at 13-15.

521. Conrail's March 15 Labor Report implied that legislation requiring the conversion of wage concessions into work rule changes might be desirable. In addition, Conrail's draft bill contained such a provision. *See* notes 338 & 379 and accompanying text *supra*.

Section 1143 of NERSA adds a new § 712 to the 1973 Act, requiring Conrail to enter into collective bargaining agreements with its employees "which provide for the establishment of one or more advisory factfinding panels, chaired by a neutral expert in industrial relations, for purposes of recommending changes in operating practices and procedures which result in greater productivity to the maximum extent practicable." NERSA, Pub. L. No. 97-35, § 1143, 95 Stat. 643, 668 (adding § 712(a) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797K(a)).

This new section requires the National Mediation Board to appoint neutral parties to the factfinding panels and to perform "such functions contained in the agreements as are consistent with the duties of the Board under the Railway Labor Act." *Id.* It also authorizes the factfinding panels to provide mediation and conciliation services. *Id.*

NERSA's addition of § 712 to the 1973 Act was contained in neither of the bills passed by the Senate or House. *See* notes 421-22 *supra*. The language of this section, however, is virtually identical to a provision contained in the "goal" section of the Senate Bill, and to a provision in section 231 of the House Bill establishing prerequisites for further federal funding of Conrail. The House Committee report contains a determination that the agreement reached between Conrail and its labor organizations on May 5, 1981 meets the requirements of the section. NERSA HOUSE REPORT, *supra* note 409, at 7. The report does not preclude the possibility that some other negotiated factfinding procedure would meet the requirements of § 712, but it clearly contemplates a procedure similar to the one contained in the May 5 agreement. *Id.* at 7.

Paragraph five of the May 5 Agreement provides a procedure for the handling of "proposed rules changes" served by or on Conrail subsequent to the date of the agreement. The parties must negotiate the proposals and counter-proposals for a

reform is to accomplish three objectives: 1) deferring major work rule changes beyond a bargaining round in which substantial wage sacrifices were requested and won; 2) scheduling negotiations over work rule changes so that any impasses can be addressed at the same time wages are again the subject of negotiation; and 3) scheduling negotiations over both wages and work rules to coincide with the next round of policy decisions about Conrail's future. If these objectives are realized, economic and political pressure should be focused in a manner that enhances the collective bargaining process and increases the likelihood that it can produce appropriate work rule changes.⁵²² On the other hand, uncertainties about the viability of the May 5 agreement, along with difficulties with bargaining structure, make the achievement of these objectives a major challenge. It certainly cannot be predicted with confidence that the approach to work rule reform under NERSA and the May 5 Agreement will succeed.

The fragmented bargaining structure characteristic of the railroad industry has always been a major difficulty in collective bargain-

minimum of 90 days. Thereafter, either party may cause the mediation services of the National Mediation Board to be invoked jointly.

After 90 days, at the request of either party, the dispute may be submitted to a seven-person fact-finding panel. Upon submission of the dispute to a fact-finding panel, the Mediation Board is to "recess" mediation. Negotiation and/or mediation shall continue for a period of at least 60 days after the fact-finding panel reports. Thereafter, if the Mediation Board has "terminated its services," or if the moratorium provision contained in paragraph six of the Agreement has expired, either party may serve a 30-day written notice of its intent to engage in self-help. *Id.* at 110-13. Presumably, § 712(b) makes participation in this process, including obedience to the time deadlines, a statutory obligation of the Board. *See* NERSA, Pub. L. No. 97-35, § 1143(a), 95 Stat. 643, 668 (adding § 712(b) to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. § 797K(b)). The final limitation of service of self-help notices by the parties appears to be purely contractual. *See* NERSA HOUSE REPORT, *supra*, at 111-13.

Section 712 raises a number of questions of statutory interpretation, the answers to which will determine whether the fact-finding process must be exhausted before a legal strike can occur. First, several recent United States Court of Appeals decisions, particularly in the Ninth Circuit, hold that strikes by employees covered by the Railway Labor Act may be enjoined only if they violate some procedure of the Act, as opposed to violating contractual no-strike provisions. *See, e.g.,* Trans-International Airlines v. Teamsters, 650 F.2d 949 (9th Cir. 1980); Federal Express Corp. v. Teamsters, 617 F.2d 524 (9th Cir. 1980); *See generally* Perritt, *Ploughshares into Swords at Buffalo Forge?*, 12 TRANS. L.J. 219 (1982). Thus, it must be decided whether § 712 should be read as amending the Railway Labor Act, and, if it does, how much of the language of paragraph 5 of the May 5 Agreement is incorporated by reference. In addition, the question may arise as to how § 712(a) is to be enforced if the May 5 Agreement is not ratified by all the labor organizations representing Conrail employees.

522. For example, insistence by a potential purchaser of Conrail on work rule changes as a precondition for purchase might induce labor organizations to agree to changes.

ing.⁵²³ Except for the requirement established by the Staggers Act that Conrail negotiations with each craft or class take place on a system wide basis,⁵²⁴ Congress has done little to improve this unwieldy bargaining structure. On the other hand, the combination of arbitration awards arising out of the 1978 bargaining round⁵²⁵ and the process established by the May 5 Agreement⁵²⁶ could result in substantial improvement. For instance, if fact-finding panels are established for groups of labor organizations, the negotiating difficulties resulting from craft fragmentation can be minimized. Moreover, if the prohibition against issue-by-issue negotiation contained in the May 5 Agreement can be enforced, and if it is continued beyond the expiration of the Agreement, one of the continuing bargaining structure problems would also be solved.⁵²⁷

In sum, the opportunities for Conrail collective bargaining created by NERSA and the May 5 agreement are profound, but realizing them will require major feats of industrial relations, creativity, and discipline. Success depends more on future action, and forbearance to act, than on past legislative actions.

Success at the bargaining table will depend largely on employee attitudes about the future of Conrail. Just as the employee sacrifices contained in the May 5 Agreement were stimulated by the fear of a piecemeal sale of Conrail assets, employee perception of the alternatives to Conrail in 1984 will influence that bargaining round. If piecemeal sale seems to be a realistic possibility unless work rule changes are agreed upon or wage concessions are extended, the prospects for additional labor concessions are significant. On the other hand, if the political climate is such that additional federal funding for Conrail, even with high labor costs, seems likely, the prospects for collectively-bargained concessions are slight. In the short-run, pres-

523. For a discussion of the railroad collective bargaining structure, see notes 88-99 and accompanying text *supra*.

524. For a discussion of this Staggers Act innovation, see note 321 and accompanying text *supra*.

525. For a discussion of the Crew Consist Agreement, see note 309 *supra*.

526. For a discussion of the procedures of the May 5 Agreement, see note 521 and accompanying text *supra*.

527. On the other hand, the dispute between Conrail and the Brotherhood of Locomotive Engineers (BLE) is troublesome for reasons other than its obvious potential to destroy the May 5 Agreement. For a discussion of the dispute between Conrail and the BLE, see note 514 *supra*. The existence of the railroad Study Commission on the wage differential issue and the possibility that Conrail may end up separating negotiations over this controversial issue from its general bargaining process under the May 5 Agreement presents the possibility of renewed issue fragmentation between the industry level and Conrail. Such fragmentation would begin to unravel the progress Conrail has made toward achieving a comprehensive collective bargaining structure.

sure on labor at the bargaining table might be reduced by a resurrection of the nationalization proposals that were considered before the 1973 Act was passed.⁵²⁸ The effect of the possibility of a stock purchase by employees or by other railroads on negotiations is difficult to assess. If labor perceives a stock purchase as the only alternative to piecemeal asset disposal, and if potential purchasers demand further labor concessions, then labor might be willing to make concessions. On the other hand, railroad purchasers might be willing to have Conrail employees work under standard industry wages and work rules, which would imply a relaxation of the May 5 agreement wage concessions and the erosion of some of the gains flowing from the crew size provisions of section 1143(a) of NERSA. The future of the labor cost problem is not appreciably clearer than in the past, despite the ambitious nature of NERSA's labor provisions.

VI. CONCLUSION

The last ten years in the history of the northeast rail crisis have been marked by the failure of government institutions to move swiftly and boldly to address the underlying problems. The historic design of our government institutions is one in which minority interests can frustrate majority action that might harm those minority interests.⁵²⁹ Because so many of the diverse constituencies enmeshed in the northeast rail crisis have vital interests at stake, it is not surprising that progress in solving this crisis has been slow.

Despite the protracted debate over the nature of the railroad problem, some progress has been made. Specific policy initiatives have been pressed, some of which have now been accomplished. Consolidations were proposed and have been permitted, albeit with some delay.⁵³⁰ Relief from passenger losses has been accomplished, although not until nearly twenty years after the first proposals for remedying this problem were made.⁵³¹ Reform of economic regulation has been achieved, although sufficient evidence is not yet available for an accurate assessment of the effect this will have on the regional rail system's financial health.⁵³²

Progress has also been made in the labor area; nonetheless this

528. See note 142 and accompanying text *supra*.

529. THE FEDERALIST NO. 51 (J. Madison).

530. For a history of rail consolidations, see notes 12-39 and accompanying text *supra*.

531. For a discussion of the rail passenger service problem and NERSA's solution to it, see notes 58-69 & 474-501 and accompanying text *supra*.

532. For a discussion of the Staggers Act and regulatory reform, see notes 240-55 & 266-88 and accompanying text *supra*.

progress has been slow and painful, for both courage and sound policy have been lacking.⁵³³ The legitimate interests of employees with long tenure in railroad service must be recognized. It is natural that senior employees feel threatened by phenomenal job losses and seek to protect themselves with labor protection arrangements. In addition, it is not surprising that these employees would attempt to defend themselves against the dismantling of their work rules. Because collective bargaining is at the heart of American labor policy, it is not desirable to circumvent the bargaining process either through government prescription of terms and conditions of employment, or through unilateral management action. Despite these legitimate countervailing forces against the ability to obtain major reductions in labor costs, a better job could have been done if public and private decisionmakers had followed constructive suggestions. The Presidential Railroad Commission, for example, proposed that employee protection arrangements should be extended to facilitate the achievement of more rational work rules and the introduction of new technology.⁵³⁴ In a similar vein, following the Penn Central bankruptcy, the ICC proposed that the government should assume responsibility for labor protection only in exchange for changes in the work rules.⁵³⁵

Nonetheless, in the early 1970's employee protection was extended only in exchange for labor's cooperation in the Penn Central merger and the 1973 Act, and not for labor cost reductions.⁵³⁶ Serious bargaining structure problems were recognized at about the same time that the Penn Central collapsed, but virtually no legislative action was taken to improve bargaining structure, even though such an initiative need not favor management over labor interests.⁵³⁷

There is, however, promise for a mere adaptive future because of labor and management efforts in 1981. How this promise develops will be one of the most important aspects of NERSA and will have a potentially great impact on the entire northeast rail crisis. However, it is fair to question whether the political process must necessarily react so slowly in dealing with clearly recognized problems. By the late 1950's, it was known that the unrecovered costs for passenger opera-

533. The most serious omissions were the failure of the Congress or the USRA to address the labor cost problem in framing the 1973 Act, the Final System Plan and the 1976 Act.

534. For a description of the Presidential Railroad Commission's Report, see note 71 *supra*.

535. For a discussion of this ICC proposal, see text accompanying note 122 *supra*.

536. See notes 71 & 296-99 and accompanying text *supra*.

537. Reducing fragmentation of authority within a single union need not decrease, and might increase, the union's power.

tions threatened the viability of railroads in the Northeast.⁵³⁸ Yet it was not until the Penn Central bankruptcy that Congress was moved to comprehensive action and created Amtrak.⁵³⁹ The great difficulties posed by high labor costs were also recognized in the 1950's,⁵⁴⁰ but Congress resorted to temporary solutions, rather than attempting to force an accommodation between legitimate employee and management interests. In creating Conrail, Congress merely worsened the problem of labor costs by mandating lifetime income protection for railroad employees while obtaining nothing from labor in return.⁵⁴¹ Deregulation of rates and service levels came only after Conrail began to falter due to the burdens recognized as among those which caused the Penn Central bankruptcy.

It may be that coherent action could not have been taken until a period of debate and experiment had elapsed. This is probably the case with the labor issues, which were the subject of much economic conflict and litigation in the 1960's. But party positions and policy alternatives had substantially crystalized by 1974, and neither Congress nor the USRA made significant progress toward solving the problems when Conrail was created.⁵⁴² In 1972 Senate Commerce Committee Study barely mentioned the passenger and labor issues.⁵⁴³ Perhaps some of the policy conflicts were so strong and fundamental that compromise was not possible. Yet one gets the sense that the USRA leadership and the Congress did not really attempt to reach a compromise. The record is devoid of any evidence of serious attempts to address either the commuter passenger or the labor problems. The Nixon Administration, to be sure, had attacked rail labor's position, but without showing any real appreciation for the realities of collective bargaining or the legitimate interests of rank and file railroad employees.⁵⁴⁴ The USRA, which was Congress' designated agent to frame the public debate, seemed to avoid major controversy and to proceed as if the essential public policy objective was to merge the properties of the bankrupt railroads into a new operating entity, without regard to whether the environment would be such that the new

538. For discussion of the 1959 ICC report on the passenger service problem, see notes 59-63 and accompanying text *supra*.

539. See notes 67-68 and accompanying text *supra*.

540. See note 77 and accompanying text *supra*.

541. See notes 149-50 and accompanying text *supra*.

542. For a description of the varying party positions prior to enactment of the 1973 Act, see notes 129-42 and accompanying text *supra*.

543. For a discussion of this 1972 study, see note 124 *supra*.

544. See note 150 *supra*.

entity could succeed.⁵⁴⁵

The USRA and Congress purported to believe that an infusion of approximately one billion dollars would be sufficient to rectify the situation without requiring important interests to make significant sacrifices. The money for Conrail capital programs and operating deficits was insufficient for implementation of the USRA's own plan, a fact which the USRA seemed to acknowledge.⁵⁴⁶ In addition, \$250 million was not adequate to pay for the lifetime income protection established by Title V of the 1973 Act.⁵⁴⁷ It is not apparent whether USRA knew this fact, but it seems reasonable to assume that USRA should have discouraged this underestimation through a better understanding of how railroad labor agreements work and more accurate actuarial projections.⁵⁴⁸ Absolutely nothing was recommended in USRA's Final System Plan or implemented by Congress to facilitate collective bargaining over clearly identified labor productivity issues that were a source of conflict during the Penn Central bankruptcy.⁵⁴⁹

The point is not that Congress should have disregarded labor's interests, but rather that both the USRA and Congress failed to fulfill their duty 1) to explain the problem in a balanced way, 2) to identify alternative ways for solving the problem, and 3) to make a candid assessment of the costs of each alternative. In the overly sanguine political environment that surrounded Conrail's formation, rail labor was not asked to address fundamental labor cost problems. Indeed, it is surprising that Conrail made more progress than most of the private sector railroads achieved during the same time period at the bargaining table.⁵⁵⁰

With respect to deregulation, Conrail's management ultimately took an aggressive stand by asserting that Conrail could not be successful under existing regulations.⁵⁵¹ Yet it seems fair to ask why it took Conrail's management so long to realize that this problem was substantial enough to threaten the viability of the Conrail "solution."

545. For a general discussion of the USRA's planning process, see notes 171-205 and accompanying text *supra*.

546. See note 185 *supra*.

547. See notes 149 & 297-99 and accompanying text *supra*.

548. The Special Court has referred to the Title V projections as a "monumental miscalculation." *Hinds v. Consolidated Rail Corp.*, 518 F. Supp. 1350, 1354 (Regional Rail Reorg. Ct. 1981).

549. For a description of the labor disputes during this reorganization period, see notes 104-14 and accompanying text *supra*.

550. As of this writing, fewer than half of the nation's railroads have negotiated crew consist agreements.

551. See note 265 and accompanying text *supra*.

Undoubtedly related to this failure to identify quickly the need for legislative action on regulation was Conrail's overly optimistic traffic projections in the face of continued historical declines in traffic.⁵⁵² Conrail made no public explanation concerning the manner in which these declines were to be reversed by Conrail or concerning regional economic changes.

Viewed as a whole, the effort to solve the problems underlying the economic failure of the northeast railroads languished from 1974 to 1980, with too many of the interested parties pretending that the expenditure of large sums of federal money would be an adequate solution. That this complacency was overcome by sounder public policy initiatives in 1980 and 1981 is fortunate.

Criticism of the political system is not appropriate: the same political system which failed to make significant policy changes in earlier efforts moved effectively to enact the Staggers Act and NERSA. Rather, the failure was one of leadership. Because of a combination of timidity and a poor grasp of problems already well-understood and documented, opportunities were lost. It is to be hoped that the policy changes made by NERSA will prove efficacious.

As the evaluation of NERSA's principal features suggest,⁵⁵³ the implementation of NERSA will be painful in many respects. Pressures are already emerging to delay statutory mandates for changes in labor, passenger, and economic regulatory areas. To date, these pressures have not been focused strongly on Congress. However, circumstances can be anticipated in 1983 and 1984 in which arguments to back away from NERSA provisions could be presented forcefully.

Unless none of the problems identified with respect to Conrail's labor relations develop, further congressional action with respect to work rule modification, bargaining structure, or labor protection is likely. It is hoped that in the future Congress will act with a more long-range view of what ultimately must be accomplished, and with a more sophisticated understanding of the essential nature of incentives in the collective bargaining process. It is unrealistic for Congress to grant major benefits to labor through legislation, while leaving management with the challenge of extracting concessions. It is equally unrealistic for Congress or the Executive Branch to expect that financial problems should be solved solely through sacrifice by em-

552. For a comparison of Conrail's projected and actual traffic, see Emergency Board 200 Submission, *supra* note 457, at 2-5.

553. For an evaluation of NERSA's principal features, see notes 427-528 and accompanying text *supra*.

ployees, or that rail labor can agree permanently to substandard wages.

The Conrail profitability test⁵⁵⁴ and the freight transfer process⁵⁵⁵ are especially vulnerable to Congressional tampering if decision-makers lose their will to complete the process of rationalizing the regional rail system. For example, it would be easy to decide to give Conrail "just a little more time," because of an unwillingness to tolerate the dislocations associated with a breakup of the Conrail entity.

These concerns are intensified by a realization that NERSA was enacted in a political environment dominated by the President's call for budgetary austerity.⁵⁵⁶ Consistent with historical trends, the President's support in Congress was diminished by the 1982 elections, and reaction to the Reagan Administration's economic program may be well accompanied by diminished determination to see the NERSA process through to completion.

Of course, a future Congress may decide that the economic and policy judgments embodied in NERSA are wrong, and that another course should be followed. But in that event, it would be preferable forthrightly to adopt nationalization of the regional rail system, or some other alternative yet to be articulated, rather than temporizing, avoiding controversy by glossing over the real problems, and creating another promised solution which goes unperformed. Perhaps the greatest achievement represented by NERSA is a frank congressional recognition that action, however, painful, cannot be delayed forever.

554. For a discussion of the profitability test, see notes 437-44 and accompanying text *supra*.

555. See NERSA, Pub. L. No. 97-35, § 1142, 95 Stat. 643, 654-60 (adding sections 401-410 to the Regional Rail Reorganization Act of 1973) (to be codified at 45 U.S.C. §§ 761-769c).

556. For a discussion of the Reagan Administration's proposal, see notes 330-32 and accompanying text *supra*.