Government Protection of Transportation Employees: Sound Policy or Costly Precedent

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GOVERNMENT PROTECTION
OF TRANSPORTATION EMPLOYEES:
SOUND POLICY OR COSTLY PRECEDENT?

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INTRODUCTION

THE BENEFITS and job security enjoyed by most American workers are tied directly to the degree of success enjoyed by the firms for which they work. Thus, when employers suffer economic losses or disruptions, their employees generally do so as well.

Each year thousands of people lose their jobs for reasons totally beyond their control—firms go out of business, companies merge, environmental laws force factories to shut down, or government programs are cancelled. Workers that are laid-off are often suddenly on their own in finding new jobs and trying to make ends meet with whatever unemployment and general welfare benefits are available—that is, unless the employee happens to work for a railroad or an airline.

For years, railroad and airline industry employees have enjoyed special benefits and unique job security as a result of the beneficent intervention by the federal government in their behalf. The long history of federal intervention extends back over ninety years in the rail industry, and since the infancy of the commercial air transportation industry in the mid-1930's.

For much of that time, most government efforts were directed toward protecting employees affected by mergers and consolidations. Recently, however, the role of the federal government has increased significantly. Under the government-sponsored reorgan-
zation of the railroads in the Midwest and Northeast, the employees of the railroads affected have received job guarantees and unemployment compensation of far greater magnitude than those enjoyed in virtually any other industry in the nation. Now the Congress has decided to provide similar benefits for air transportation workers as it radically alters the regulatory environment of the airline industry. The Airline Deregulation Act of 1978, passed by Congress in the final hours of the 1978 session, offers substantial protections to workers harmed during the transition to complete deregulation.

It is, therefore, a fitting time to ask whether the special government protection enjoyed by these employees is based upon sound economics or whether, instead, the policy of protection is a result of political expediency without regard to the economic or policy impact. The most critical question in this inquiry is whether there is something distinctly unique about railroad and airline employees which justifies special government protection, because if there is not, the implications are quite significant. If the recently enacted protections are regarded as precedent for future government action affecting other industries, the ultimate cost to the taxpayers could be very high.

The analysis must begin with a review of the government's involvement with transportation employees, beginning in the railroad industry almost a century ago. It is only in light of this historical background that recent legislation can be fully understood. This review will demonstrate the common roots of railroad and airline employee protection.

I. FEDERAL INTERVENTION WITH RAILROAD LABOR

Early History of Federal Intervention

The history of federal involvement with railway labor legislation is a long one. The first railway labor law passed by the Congress was the arbitration Act, enacted in 1888, just one year after the

3 See generally, Ingle, Railway Labor Legislation, 18 Tenn. L. Rev. 359 (1944).
creation of the Interstate Commerce Commission (ICC). This was a weak bill which attempted to encourage voluntary adjustment of labor disputes in the industry. Ten years later the Erdman Act was passed, which promoted a policy of government involvement in mediation and conciliation of railway labor disputes. In 1913 the Newlands Act was passed, creating a permanent Board of Mediation and Conciliation. Three years later Congress passed the Adamson Act, emergency legislation which set an eight-hour work day for the industry.

This gradual government intervention into railroad labor regulation escalated significantly with the outset of World War I. The wartime demands for transportation of goods and people strained the railroad system to capacity. In its Annual Report for 1916, the ICC commented that “[s]ince the outbreak of the European war the purchases made in this country by the belligerents have contributed to an almost unprecedented demand upon our railroads for transportation. The inadequacy of existing facilities to meet such a demand has been amply demonstrated.” The condition of the rail services at the time had deteriorated so badly that the federal government assumed emergency control over all the railroads on January 1, 1918. This lasted only twenty-seven months, but it marked dramatic gains for railway labor and established a pattern of governmental intervention in the process of determining the basic structure of the railway system.

During the emergency control period, the government emerged as a far more beneficent employer than private enterprise had been. One of the first government acts was to establish a Railroad Wage Commission to investigate labor demands for higher wages. The results of the Commission’s studies were findings that wages in the industry were unduly low. Consequently, the government raised

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10 Newlands Act, ch. 6, 38 Stat. 103 (1913).
8 Interstate Commerce Commission Annual Report at 72 (1916).
9 Proclamation by President Woodrow Wilson, issued December 26, 1917, as an exercise of emergency war powers.
10 I. Sharfman, The Interstate Commerce Commission: A Study in Administrative Law and Procedure 158-60 (1931) [hereinafter cited as I. Sharfman with appropriate volume].
11 Id. at 158 n.36.
wages and shortened hours.\textsuperscript{12} To those opposed to organized labor the government's actions were scandalous:

The chief indictment against the labor policy of the Railroad Administration is directed against its outright and complete acceptance of collective bargaining, its strengthening of labor organization, its standardization of wages and conditions of employment, its undermining of workers' discipline. "It is no exaggeration to say that the gains made by railroad labor during the twenty-six months of federal operation in the power of collective bargaining, in the development of union organization, in the standardization and nationalization of practices and policies, were greater than in the entire previous period of their existence."\textsuperscript{13}

\textit{Federal Efforts to Promote Unification of the Railroads}

At the conclusion of the war, the government was faced with difficult decisions concerning the future of the railroads. The rail system just prior to the war had been characterized as one where "unnecessary waste and duplication were not uncommon."\textsuperscript{14} As a result, there were many who believed that the government should nationalize the railroads and continue to operate them.\textsuperscript{15} Others sought complete restoration to private ownership.\textsuperscript{16} The compromise between these divergent positions was embodied in the Transportation Act of 1920.\textsuperscript{17}

Basically, the Act called for a return to private ownership of the railroads, but under a good deal more government control. The Act represented the "establishment of a new federal railway policy."\textsuperscript{18} As the U.S. Supreme Court expressed it:

\begin{footnotes}
\item[12] Id.
\item[13] Id. at 160 n.36, quoting F. H. Dixon. See also, P. Russ, \textit{The Government as a Source of Union Power} 20 (1965), who comments that the consequences of government control "were dramatically improved working conditions for many employees."
\item[15] For example, the railroad brotherhoods proposed that the government purchase all the nation's railroad properties and lease them back to a private corporation whose stock would be held in trust for the employees. See \textit{Hearings on Extension of Tenure of Government Control of Railroads}, 65th Cong., 3d Sess., vol. I, at 985-1027 (1918).
\item[16] The carriers themselves were especially eager to resume private management. I I. Sharfman, \textit{supra} note 10, at 167.
\end{footnotes}
Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created.19

From the standpoint of this discussion, the most important element of the 1920 Act was the Congressional mandate to the ICC to create a plan for consolidation of the nation's railroads into a limited number of systems.20 It became the policy of the United States government to guide the nation's many railroads toward unification into a smaller number of larger railroads in order to maximize economies of scale and eliminate wasteful duplication of services. Soon thereafter the ICC observed that "great importance was attached by the Congress that complete control over the situation be in our hands."21

In complying with the Congressional instruction to create a consolidation plan, the ICC utilized Professor William Ripley of Harvard to prepare a proposal.22 With some changes, Professor Ripley's proposal became the ICC's "tentative" plan in August 1921.23 In so doing the ICC sought public comment in order to "elicit a full record upon which the plan to ultimately be adopted can rest. . . ."24 It was, however, eight years before a final plan was adopted,25 and even then it was evident that many of the ICC Commissioners strongly disagreed with the consolidation policy created nine years earlier in the aftermath of World War I.26 After all, it was 1929,

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22 Consolidation of Railroads, 63 I.C.C. 455 (1921). The tentative plan called for consolidation into 19 lines.
23 Id.
24 Id.
25 Consolidation of Railroads, 159 I.C.C. 522 (1929). In failing to make the tentative plan final, although intended and required by law, "the Commission chose to disregard both the statutory mandate and its own pronouncement . . . suggest[ing] a deliberate disregard of the legislative will." III I. SHARFMAN, supra note 10, at 482.
the railroads had never been in better shape, and many opposed various aspects of the plan.\textsuperscript{37}

Labor interests were opposed to the plan on the grounds that "merging roads on a large scale would inevitably involve sharp reductions in railroad employment . . ."\textsuperscript{38} With the onset of the Depression, however, the opposition to government intervention died down quickly.

The question remained as to what form government intervention should take. On the one hand, with production of goods and services substantially reduced and the railroads suddenly facing problems of excess capacity and duplicative services, consolidation no longer seemed so undesirable. On the other hand, the Depression also served to intensify fears that massive unemployment would occur as a result of any major railroad consolidation. Thus, in the early 1930's, there emerged two apparently irreconcilable concerns: (a) the creation of a more efficient transportation network called for some consolidation, but (b) consolidation would exacerbate an already severe unemployment situation by forcing out thousands of employees.

\textit{Early I.C.C. Efforts to Protect Labor in Railroad Consolidations}

As a result of these conflicting concerns, in 1934 for the first time the ICC considered imposing conditions to protect employees affected by railroad consolidations. The first case in which the ICC imposed such conditions, \textit{St. Paul Bridge \& Terminal Railway Co.}

\textsuperscript{37} For example, Commissioner Eastman observed that "the status of the railroads has been improving rapidly and steadily during the past few years and now appears to be better than ever before . . . Such sentiment as appears to exist in favor of the consolidation of the railroads into a very few great systems is, I believe, largely artificial." Consolidation of Railroads, 159 I.C.C. 522, 554-55 (1929). Eastman went on to say that "]a[according to my observation, there is very little sentiment of this kind among either shippers or railroad officers. For the most part I think that it emanates from financial circles which are likely to reap large profits from the mere process of putting the roads together." Commissioner Porter carefully explained that "irrespective of what I may think as to the wisdom of this policy and the method of its execution, I conceive it to be my duty, to execute in letter and in spirit, the mandate as promulgated." \textit{Id.} at 574. However Commissioner McManamy was more blunt: "The railroads came through the readjustment period following the war in better shape than any other major industry and today they are in far better shape financially and physically than at any period in their history . . . I doubt if anyone will contend that under present conditions the consolidation provisions would have become a part of the law. Transportation conditions would not have justified it." \textit{Id.} at 568.

\textsuperscript{38} I I. \textsc{Sharfman}, \textit{supra} note 10, at 483.
Control," was a relatively innocuous one. The case involved an application by the Chicago Great Western Railroad for permission to control, by lease, the railroads and properties of the St. Paul Bridge & Terminal Company and the St. Paul Union Stockyards, which involved a total of forty-one and a half miles of tracks.  

Section 5(4) of the Interstate Commerce Act had been amended by the Transportation Act of 1920 to declare that consolidations, mergers, purchases, leases, or acquisitions of control which were in harmony with the government plan for consolidation of the railroads and would promote the public interest could be approved by the ICC "upon such terms and conditions as it may provide . . . ." In St. Paul Bridge & Terminal Railway Co. Control, the Commission, observing that there was no definition in the Act of "public interest," held that the statute was "broad enough to comprehend every public interest and the interest of every group or element of the public." It went on to make the following determination:

Since employees of railway companies are important elements of the railway transportation industry and of the communities in which railways operate, their interest in changes in management, ownership, or operation of the companies by which they are employed is manifest. It is likewise manifest that their's is a public as well as a private interest. It is our view that in appropriate cases . . . we may make our findings approving applications under 5(4) of the act subject to just and reasonable requirements in the interests of employees of the railways concerned. Accordingly the Commission ordered that the approval of the lease in this case would be conditioned upon the assurance that no employees would be put in any worse position as a result of the transaction.

St. Paul Bridge & Terminal Railway Co. Control thus became the first of many cases in which the ICC imposed labor protective
provisions. The rationale for the decision rests on an assumption that the welfare of the employees is a public as well as a private interest. It is significant that there was no mention in the case of possible work disruptions which might result if the Commission failed to act. Thus, the stated policy was one of concern about the adverse effect of this government-encouraged transaction upon the employees involved, not the public.

Soon after this first case interest in protection of railway labor in consolidations increased substantially. In 1935 the ICC recommended that specific statutory provisions be enacted "to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected."35

In response to the problem, an extraordinary conference of railroad management and labor was held in 1936. The conference involved representatives of approximately eighty-five percent of the railroads and twenty of twenty-one railroad labor unions. The result of the conference was a collective bargaining agreement which became known as the Washington Job Protective Agreement.36 The most important elements of the Agreement were (a) a provision prescribing rates of compensation for dismissed employees, (b) allowances for those displaced from former positions, and (c) assistance to compensate for moving expenses as a result of the transaction.37 These three factors remain the basic elements in modern labor protective provisions in both the railroad and airline industries.38

The Washington Agreement was widely hailed as a great achievement.39 In 1938 the President appointed a Committee of Six to consider the problems of railroad transportation.40 The Committee, composed equally of management and labor, unanimously en-

36 The agreement appears at 80 Cong. Rec. 7661 (1936).
37 Id.
39 80 Cong. Rec. 7766 (1936).
dorsed the Washington Agreement and recommended that the Interstate Commerce Act be amended to require similar protections as a prerequisite to approval of consolidations.\textsuperscript{41}

**Judicial Approval of Labor Protective Provisions**

In the meantime, the ICC had set the stage for an important court test of the labor protection concept by applying the elements of the Washington Agreement to a 1938 consolidation case.\textsuperscript{42} In so doing, the Commission declared its position that a "provision should be made for the protection of employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or will be required to change the place of their employment as a result of the lease herein considered."\textsuperscript{43}

Judicial challenge to the imposition of these labor protective conditions resulted in the landmark Supreme Court case of *United States v. Lowden*.\textsuperscript{44} The Civil Aeronautics Board would later rely heavily on this case to justify the exercise of similar authority.\textsuperscript{45} The case involved the possible dismissal of forty-nine employees and the transfer of twenty-three others as a result of a lease approved by the ICC. Writing for a unanimous court, Justice Stone upheld the ICC conditions on three basic grounds: (1) that the conditions would promote the statutory goal of a national policy of railroad consolidation; (2) that the conditions would tend to prevent interruptions of interstate commerce which might otherwise result from labor grievances concerning the layoffs; and (3) that in the absence of such conditions efficiency might suffer from loss of employee morale when the demands of justice are ignored.\textsuperscript{46}

Only one of the grounds recited, the relationship of the conditions to the general national policy of railroad consolidation, had

\textsuperscript{42} Chicago, Rock Island & Pacific Ry. Trustees Lease, 230 I.C.C. 181 (1938).
\textsuperscript{43} Id. at 187. Commissioner Mahaffie dissented, stating that the ICC did not have the statutory authority to regulate conditions of employment. Moreover, he called it "a bad and dangerous policy for a commission such as this to undertake to regulate matters of social welfare without clear statutory authority." Id. at 190-191.
\textsuperscript{44} United States v. Lowden, 308 U.S. 225 (1936).
\textsuperscript{45} United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701, 708 (1950).
\textsuperscript{46} 308 U.S. 225 (1936).
a solid basis in the record." There had been no indication in the
ICC decision of possible labor unrest as a result of the lease, and
no discussion of employee morale problems. The only indication
that labor unrest or morale were legitimate concerns was given in
a footnote. The court indicated that on several occasions strikes
had been threatened when facilities were being consolidated; only
one specific threat was cited, which had occurred ten years earlier.\(^4\)
The Court failed to note any such threats in the case before it.

The most striking aspect of the opinion is its emphasis on the
need to protect all parties affected by the national policy of rail-
road consolidation:

In the preparation and execution of the plan it became apparent
that the great savings which would result from the consolidation
could not be effected without profoundly affecting the private in-
terests of those immediately concerned in the maintenance of the
existing nationwide railway system, the railway security holders
and employees. . . . But the Commission has estimated in its re-
port on unification of the railroads that 75% of the savings will be
at the expense of railroad labor.\(^9\)

Clearly Justice Stone was concerned with the fact that the govern-
ment policy encouraging railroad consolidation was at least par-
tially responsible for the damage suffered by the displaced and dis-
missed employees.\(^6\) Moreover, he was impressed that the appellee
railroad had been a party to the Washington Agreement, which in
turn was a response to the government-encouraged policy of mas-
sive railroad consolidation.\(^5\) Accordingly, the extent of govern-
mental intervention in promoting railroad unification was a major
factor considered by the Court in Lowden. Arguably, it was an in-
dispensable factor.

Statutory Authority for Labor Protective Conditions

At the same time the labor protective concept was being tested
in the courts, a powerful movement was underway to make pro-

\(^4\) Id. at 232.
\(^5\) Id. at 233 n.2.
\(^6\) Id. at 232-33. The Court further noted that in several cases the ICC had
disapproved proposals for consolidations because of a failure to deal fairly with
minority stockholders. Id. at 233 n.1.
\(^7\) 308 U.S. 225, 233 (1936).
\(^8\) 308 U.S. 225, 234 n.3 (1936).
tection of railroad employees mandatory. Following the recommendation of the Committee of Six, endorsing the Washington Agreement, Senators Wheeler and Truman introduced an amendment to Section 5(4) of the Interstate Commerce Act requiring that every consolidation approval be conditioned upon "a fair and equitable arrangement to protect the interests of the employees affected." In the House, however, the bill was strengthened by the addition of a clause that no transaction could be approved by the ICC if it would result in any unemployment or displacement of employees. In conference the House proposal was modified and the ultimate result was the requirement of a "fair and equitable arrangement to protect the interests of the railroad employees affected," and the Commission was directed to insure that during a transition period of four years from the date of a transaction no employee would be put in a worse position as a result of the transaction.

Thus, railroad employees had achieved a unique status. By 1938 general welfare legislation had been enacted providing social security and other benefits for the unemployed. However, the benefits railroad employees received were far superior to those enjoyed by labor in unregulated industries.

Any discussion of the legislative history behind the 1940 Act cannot overemphasize the importance of the Depression in formulating Congressional policies. The worst economic crisis in the nation's history was superimposed upon a government policy promoting unification of railroads. In order for the unification policy to be economically successful substantial reductions in employment were required. According to Senator Crosser of Ohio, at stake was "the loss of . . . possibly 200,000 [jobs], a very serious matter, indeed, at this time." Some transportation experts believed that consolidation of the railroads into four or five trunks would put up to

54 84 Cong. Rec. 9882 (1939).
56 80 Cong. Rec. 7766 (1936).
400,000 employees out of work. The railway employees warned that because of the operation of the railroad seniority rules, those likely to have been laid off were older men between forty-five and sixty whose chances for re-employment were almost non-existent. These turned out to be persuasive arguments.

Thus since 1940 the ICC has had a statutory obligation to provide labor protective provisions. By 1960 it had done so in over eighty cases. Only two other statutes require government agencies to impose labor protective provisions in consolidations—one pertaining to the telegraph industry, and the other to freight forwarders.

Renewed Federal Intervention to Protect Railroad Employees

For the next three decades the involvement of the federal government with railroad labor remained unchanged, the principal role being played by the ICC in merger and consolidation cases. Recently, however, government involvement has again increased.

This renewed Congressional involvement began in 1970 with the Rail Passenger Service Act which ultimately resulted in the Amtrak system. In formulating a plan whereby unprofitable passenger rail services were to be transferred to the National Railroad Passenger Corporation, Congress provided for a four year moratorium on discontinuation of passenger service by the nation's railroads. After that time, each railroad was directed to provide "fair

58 Id.
60 47 U.S.C. § 222(f) (1976), and Interstate Commerce Act § 410(g), 49 U.S.C. § 1010 (1976), respectively. Yet, there appear to have been no cases in which the provisions of either of these statutes have been invoked. See Brown Extension, 265 I.C.C. 41, 46 (1951); and ABC Freight Forwarding, 285 I.C.C. 91, 98 (1951), denying labor protection in freight forwarder consolidation cases.
61 The employees themselves have used other means to assure job stability: "Confronted with the problem of excess physical capacity, organized labor has attempted to diminish the impact of contraction by employing four techniques: full crew laws, train lengths, work hours, and employee protection plans as conditions precedents for ICC approval of merger and consolidation dockets." Davis, Sherwood & Jones, supra note 29, at 57.
and equitable arrangements to protect the interests of employees affected by discontinuances of intercity rail passenger service.\textsuperscript{64} Additional substantive provisions of the Act provided for the preservation of collective bargaining rights and benefits, protection against deteriorating employment conditions, priority for reemployment of workers laid-off, and paid training or retraining programs.\textsuperscript{65}

In addition, Congress directed that in no case were the employee benefits to be any less than those provided for in Section 5(2)(f) of the Interstate Commerce Act\textsuperscript{66} which, as previously discussed, guaranteed compensation for a period of four years.\textsuperscript{67} These protective benefits were to be financed by the railroads to be absorbed by the National Railroad Passenger Corporation. As the debt of the National Passenger Rail Corporation was ultimately to be absorbed by the government, the taxpayers were in effect guaranteeing the payment of employee protections.\textsuperscript{68}

The second stage of renewed Congressional involvement occurred three years later. This time there was no pretense that anyone other than the taxpayers would be picking up the tab for employee protection.

With the insolvency of seven railroads in the Midwest and Northwest threatening to result in the cessation of all railway services in 1973, the government stepped in and established a non-profit government association to plan and finance the acquisition, rehabilitation, and modernization of a new railway system.\textsuperscript{69} In doing so, one of the concerns expressed by the Senate was that the legislation, "while beneficial to the Nation and the consuming public, could have an extremely painful effect on thousands of employees whose jobs could disappear in the process of reorganization and restructuring."\textsuperscript{70} As a result, a number of provisions were

\textsuperscript{64} 45 U.S.C. § 565 (1976).
\textsuperscript{65} Id.
\textsuperscript{68} The various forms of federal financial assistance to the Corporation are found at 45 U.S.C. §§ 601-22 (1976).
incorporated in the legislation to protect affected employees. Some of the provisions were unprecedented in scope.

The most important provision guarantees that employees affected by the reorganization will not, with minor limitation, "be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges . . . ." If furloughed, each employee is to receive a monthly displacement allowance equal to the full compensation which the employee would earn at the highest rate of pay to which he or she would be entitled, based upon seniority and qualifications. If forced to work part-time or at lower wages, the monthly allowance will make up the difference. There is a ceiling of $2,500 per month imposed on such payments, but this may be raised from time to time to reflect subsequent general wage increases. Most important, monthly payments for employees with five or more years of service will continue until the employee reaches age 65.

Lump-sum severance allowances of up to $20,000 are available for employees who are offered jobs elsewhere in the system, but choose not to dislocate. For those who are willing to be transferred, however, all moving expenses are reimbursed. Compensation is also available for the costs of selling the employee's residence or to equalize the difference between fair market value of a home and the price at which it is sold.

To implement this program, the Congress appropriated $250,000,000, about forty percent of the entire federal funding of the reorganization. By mid-1978 the labor protective provisions had cost approximately $178,000,000.

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72 S. REP. No. 93-601, supra note 70, at 3246.
74 Id.
75 45 U.S.C. § 775(c) (1976).
78 Id.
II. Federal Intervention with Airline Labor

Beginnings of Intervention

Government involvement in regulation of the airlines began in the 1920's when safety legislation was first enacted. Not until the mid-1930's, however, did a comprehensive scheme of economic regulation evolve.

In 1938 the Congress passed the Civil Aeronautics Act, creating a superstructure for federal economic regulation of the airline industry which has survived for forty years. The Act provided a guarantee of certain basic employment benefits to airline pilots and copilots. For example, it placed a limit on the maximum number of hours which pilots could fly each month and set a minimum wage scale. It also subjected air carriers to the provisions of the Railway Labor Act. While the minimum pay provisions, which were incorporated by reference, remain in the Act today, they are so antiquated as to be of only historical interest.

Far more important than what was included in the legislation is what was not. At no time did the Congress mandate that labor protective provisions be required in airline consolidations. Nor did it provide any special job security provisions for airline labor in the face of government regulation.

The legislation did give the Civil Aeronautics Board (CAB) the power to approve or disapprove consolidations and mergers using procedures similar to those employed by the ICC for rail and motor carriers. It did not, however, either explicitly or implicitly encourage air carriers to consolidate.

While the CAB was given authority to impose "such terms and

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81 See Air Commerce Act of 1926, ch. 344, 44 Stat. 568.
84 It did so by mandating compliance with Decision No. 83 of the National Labor Relations Board of May 10, 1934. 49 U.S.C. § 1371(k) (1976).
85 Id.
86 For example, each pilot is guaranteed a base pay of between $1,600 and $3,000 per year, depending on seniority. Hourly rates are guaranteed to increase incrementally as pilots fly at hourly speeds of less than 125 miles, 125 miles, 140 miles, 155 miles, 175 miles, and 200 or more miles. Pay differentials are allowed for flying over hazardous terrain.
conditions as it shall find to be just and reasonable" in both unification and certificate transfer cases, there were no provisions requiring the CAB to even consider the interests of employees in approving or conditioning a merger. In fact, it has been observed that "relatively little emphasis was placed on the role of protective regulation in ensuring maintenance of satisfactory labor standards." This absence is especially notable in view of the intense Congressional interest at the time in protection of railway employees. "With the importance and consideration given to the question in the railroad industry, it is difficult to comprehend that this matter was simply 'overlooked' when it came to considering aviation. This is particularly true because railroad and aviation legislation were both considered by the same men and the same committee in Congress."

The principal reason why there was no particular interest in guaranteeing labor protection for airline employees is that the employees did not consider the issue a serious problem. In the early 1930's, while the number of commercial airline operators fell from twenty-eight to fifteen, the number of employees in the entire industry nevertheless increased as did their salaries. In 1933 the average captain was earning a very respectable $7.36 per hour, and employment opportunities were increasing; the only burning airline labor issue was whether employees should be paid by the hour or by the mile. In short, the solution didn't exist because the problem didn't exist.

CAB Imposition of Labor Protective Provisions

With this statutory background, it would have been reasonable for the CAB to abstain from imposing labor protective conditions in approving unifications until it received some Congressional direction to do so (as the ICC had received in the Transportation Act of 1940). Indeed, on two early occasions the CAB consid-

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88 Id.
89 Id.
92 Id. at 142, 156-58.
ered, and then rejected the imposition of labor protection in consolidation cases. In these proceedings, however, there was no evidence that employees would be displaced by the consolidations.

When the first case arose in which there was some evidence of actual employee dislocation, the CAB thoroughly embraced the labor protective doctrine, as it had been established in the railroad industry. The CAB has subsequently gone even beyond the railroad standards to expand the scope of protections to include requirements pertaining to integration of seniority lists, the key provision which guarantees jobs to the senior members of the labor force. Since 1950, labor protective conditions have been applied routinely in airline merger cases. Recent debate has not been over the propriety of imposing protection, but the degree to which benefits should be extended.

The original proceeding in which the CAB employed labor protective provisions was the United-Western Case, decided in 1950. In imposing protective provisions, the CAB announced that it found the fact that the ICC had frequently imposed conditions for the benefit of adversely affected rail employees, and that Congress had made the imposition of protective conditions mandatory for mergers of rail and telegraph carriers to be "very persuasive." Apparently the CAB was not concerned that the ICC had refused to impose such conditions on mergers of companies involved in other modes of transportation such as trucking and bus companies, and that the Congress had declined to require protective provisions in the fields of air, ocean and motor transport. The CAB's primary explanation was the following:

A route transfer or a merger or a similar transaction presumably involves benefits to the stockholders of the companies who are parties to it. On balance, it must also benefit the public as a whole;

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94 United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950).
97 United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950).
98 Id. at 708.
otherwise we would disapprove it. Very often, these benefits to the stockholders and to the public will be at the expense of some of the employees of the companies involved. We think it only equitable that in such circumstances the hardships borne by adversely affected employees should be mitigated by provisions for their benefit.\footnote{100}

Then, almost as an afterthought, the Board noted that its conclusions were "reenforced" by the practical consideration which the Supreme Court referred to in \textit{U.S. v. Lowden}—namely, "the national interest in the stability of the labor supply available to the railroads."\footnote{101}

As the CAB continued to impose labor protective conditions in merger cases throughout the years following the \textit{United-Western Case}, the provisions became more sophisticated and the formal justifications for imposing them increasingly terse. Each imposition became, in effect, sufficient justification for the next. Nevertheless, an evolution was taking place in the CAB’s obligatory explanation of why the protections were being ordered. Surprisingly, the labor stability justification—mentioned only as an aside in the first CAB order—has emerged as the dominant modern rationale for the imposition of labor protection.\footnote{102} The two principal rationales of the \textit{United-Western Case}, the ICC precedent and basic equity considerations, have seemed to disappear. The CAB has recently expressed the contemporary theory as follows:

\begin{quote}
The extraordinary exercise of the Board’s discretionary power to invoke conditions for the protection of air carrier employees—protections not enjoyed by the great bulk of the U.S. labor force—does not turn on considerations of general employee welfare. Rather, it must be shown that the extent of employee impact is so great as to jeopardize the continued stability and efficiency of the operations of the affected carrier in terms of the ongoing relationship between a carrier and its labor force.\footnote{103}
\end{quote}

\textbf{Future Prospects for CAB Labor Protective Provisions}

Until very recently, it seemed likely that the history of the development of labor protective provisions by the CAB was at an end.

\footnote{100}{C.A.B. 701, 708 (1950).}
\footnote{101}{Id.}
\footnote{102}{CAB Order No. 75-6-101, June 23, 1975.}
\footnote{103}{Id.}
It appeared doubtful that consolidations and mergers in the airline industry would occur except in extraordinary circumstances. There were three reasons for this.

First, labor provisions themselves had become so costly to the acquiring carrier that they tended to outweigh the economic benefits of consolidation. As a general rule, the acquiring carrier has been interested only in obtaining new route authority, thus the acquired equipment and personnel were often negative assets. Secondly, it seemed clear that the value of the government license being acquired would diminish rapidly under deregulation legislation and the current liberal route policies of the CAB. In other words, there were increasingly more reasonable and less costly alternatives for obtaining new route authority than mergers or acquisitions. Thirdly, the deregulation legislation has imposed strict antitrust standards for merger approval. It seemed likely that mergers or acquisitions would be largely limited to "failing carrier" type situations in which the negative assets are typically quite high, and hence the incentives for acquisition quite low.

Historically, consolidations have been more attractive during sudden downturns in the economy, fuel crises, or slowdowns in CAB route awards. While at the present time such events seem unlikely, there is nevertheless new interest in mergers and acquisitions. Apparently the carriers are positioning themselves for the more open competitive environment which lies ahead. Moreover, with the recent substantial increase in traffic, there is currently an

104 See generally, CAB SPECIAL STAFF REPORT, supra note 89, at 93-94.
105 Id. at 93.
106 The recent Pan American/TWA Route Exchange, which is not necessarily typical since a route transfer rather than a consolidation was involved, is nevertheless a good example of how costly the protective conditions can be. The cost to TWA alone is estimated at between $12 and 15 million—90% of which would go to just 233 pilots. CAB Order No. 75-4-4, April 1, 1975.
107 As the discussion in the conclusion of this article, infra, states, the value of any government license is directly proportional to the degree of difficulty in obtaining it. As the process of acquiring authority becomes increasingly easy, the value of the license will be diminished.
acute shortage of equipment. For the first time, mergers and acquisitions are being proposed principally in order to acquire planes rather than certificates of authority. In the context of these mergers and acquisition cases, the CAB has a fresh opportunity to re-evaluate or expand upon its existing policy.

Recent Legislation to Protect Airline Employees

In October 1978, after forty years of strict federal controls, the Congress decided to end gradually, but completely, government economic regulation of the nation's domestic airlines.111 This policy is in sharp contrast to the recent railroad legislation which involved significantly increased government intervention.112 The rail legislation and new airline legislation are significantly different in all aspects but one—both contain substantial protections for employees affected by changes in the law.

The initial step towards airline labor protection was passage by the Senate of the proposed Air Transportation Regulatory Reform Act of 1978.113 This bill, which included comprehensive labor provisions, was passed by an overwhelming vote (83-9) on April 19, 1978. The labor protective provisions were the most hotly debated provisions of the bill. As it reached the floor from committee, the labor protective sections had three principal features:114 (1) a trigger mechanism by which the protections would not go into effect unless a bankruptcy or a major contraction of workforce (fifteen percent in any one year) takes place; (2) financial assistance to affected employees to insure they will not be placed in a substantially worse financial position for a period of three years; and (3) a last-fired-first-hired policy requiring that any airline hiring new employees must first offer the jobs to employees of other airlines who have been laid off.

There were four attempts to modify these provisions on the floor of the Senate. Only one succeeded. The first was an attempt by Senator Danforth of Missouri to strengthen the provision by eliminating the trigger mechanism and increasing the duration of finan-

114 Id. at § 22.
cial assistance to a maximum of five years. This was defeated 54-37. The second, a proposal by Senator Hatch of Utah, which would have eliminated labor protection altogether, was defeated 85-7. The third, an amendment by Senator Zorinsky of Nebraska, which would have eliminated both the trigger mechanism and the financial aid, leaving intact only the last-fired-first-hired policy, was defeated by a very narrow margin, 48-43. The only modification which passed was introduced by Senator Cannon of Nevada. This change eliminated the language of the bill which guaranteed payments up to the full salary and fringe benefits enjoyed by employees. In the case of some pilots these payments might have exceeded $100,000 annually.

The Senate debate was both lively and provocative. It proved to be a particularly unorthodox issue. The principal proponent of more extensive federal protection was Republican Danforth, and the most vigorous opponent was Democrat Zorinsky. For some, basic political or economic ideology was the motivating force in deciding how to vote; for others, local politics were more important. The debate reflects a fascinating mix of both public policy and special interest concerns.

Meanwhile, airline regulatory reform legislation was also pending in the House of Representatives. A bill introduced in the first session of the 95th Congress by the chairman of the House Public Works Committee and its Aviation Subcommittee, H.R. 8813, would have required the Secretary of Transportation to promulgate regulations to protect the interests of employees adversely affected by new competition resulting from the legislation. The standards to be used by the Secretary were vague, but the concept was basically the same as the Senate’s.

By the time the legislation reached the floor of the House, the standards were more explicitly defined and the authority to administer the program was transferred to the Secretary of Labor. As

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116 Id. at S5884.
117 Id. at S5885.
118 Id.
the bill emerged from committee, the Secretary of Labor was directed to provide protections at least as beneficial as those established in ICC merger cases, and section 405 of the Rail Passenger Service Act. This was an important refinement because it implicitly built time limits into the payment of benefits and thus represented a policy falling short of that adopted in the Rail Reorganization Act of 1973. The employee protection provision was accepted by the House without debate when the bill reached the floor.

When the representatives of the Senate and House met in a joint conference in late September to reconcile their two different approaches to regulatory reform, one of the principal disagreements was over the employee protection provisions. Among the major differences were the following:

(1) Under the Senate bill, to be eligible for protection an employee must have worked for an air carrier for at least four years. In contrast, under the House bill any dislocated employee could qualify, regardless of length of service.

(2) The Senate bill contained a so-called "trigger mechanism" for providing benefits—namely, bankruptcy or a major contraction of the carrier (fifteen percent of employees laid off) which is found by the CAB to have as its major cause the new regulatory environment. The House bill had no trigger mechanism, but rather simply declared that the protections would be available for employees "who may be affected" by the legislation.

(3) The Senate bill had a hiring priority provision which gave employees laid-off by one airline priority status when other airlines were hiring new employees. The House had no similar provision.

(4) The Senate bill limited payments of compensation to a max-

189 S. 2493, 95th Cong., 2d Sess., § 22(d) (1978).
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imum of three years per employee, and the program terminated after ten years. In contrast, the House bill placed no specific limits on duration of payments and structured the program to run indefinitely.

After a substantial amount of debate and bargaining on this issue, the final agreement by the conferees resulted in a provision far more favorable to airline employees than the Senate's, but not as sweeping as the House's. Among the major elements of the compromise—(a) the Senate's concept of eligible employee was accepted—persons with less than four years service are not eligible for benefits; (b) the trigger mechanism in the Senate bill was completely eliminated for the hiring priority provisions and modified for the direct payment provisions so that a seven and one-half percent contraction would qualify rather than the fifteen percent in the Senate bill; (c) the hiring priority provision of the Senate was accepted; and (d) the direct payments to employees were set at a maximum of six years, but the events causing the disruption must occur within 10 years from the date of enactment.

To summarize, the direct payment provisions fall somewhat short of the railroad protective provisions because of the eligibility requirements and the trigger mechanism. On the other hand, the hiring priority provisions introduce a new element into statutory labor protections. Thus at the same time that Congress made the major step of introducing employee protections into an industry other than the railroads, it also indicated a change in emphasis. The new emphasis appears to be less on making direct payments of money to affected employees, and more on providing new job opportunities for workers who are laid off.

III. Is Government Protection of Transportation Employees Sound Public Policy?

Whether any particular government action is "sound public policy" depends upon the social goals which are being sought. In

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\begin{itemize}
    \item 131 S. 2493, 95th Cong., 2d Sess., §§ 22(e) & (h)(2) (1978).
    \item 133 H.R. REP. No. 95-1779, 95th Cong., 2d Sess., at 105-06 (1978).
    \item 134 Id.
    \item 135 Id.
    \item 136 Id.
\end{itemize}
asking whether labor protective provisions are in the public interest, there are at least five different perspectives from which the question can be posed, and in each case the answer is likely to differ. Consider the following subjective alternatives describing the same proposed government action:

(1) Is it sound public policy to minimize serious disruptions suffered by employees which occur as a direct result of governmental action directed toward their employers?

(2) Is it sound policy to offer advantages to employees impacted by a government action when all other elements involved—shareholders, creditors, and the public—are also receiving substantial advantages?

(3) Is it sound policy to provide benefits for special interest groups in exchange for either support of, or reduced opposition to, legislation which is of substantial public benefit?

(4) Is it sound public policy to establish a precedent whereby thousands of workers from other industries may be able to demand and receive equivalent treatment in the future, potentially resulting in heavy expenditures of tax dollars?

(5) Is it sound public policy to determine that airline and rail employees are somehow inherently more deserving of special treatment than all other workers throughout the country by giving them outright financial aid and job security far in excess of that enjoyed by any other citizens affected by governmental actions?

Few people could answer the same to each different phrasing of this question. The policy-makers, however, have rarely been publicly confronted with the more harsh and cynical phrasings. The historical development of labor protection has been largely characterized by the desire to accomplish short-term goals with minimal opposition. As a result of political and administrative expediency, there has rarely been any focus on the thorny issues of precedent and favoritism raised by labor protection.

Policy Rationale of Labor Protection in Consolidation Cases

(a) Railroad Labor Protection by the ICC

As the previous discussion of the historical development of labor protection indicates, a large number of factors influenced the first decisions by the ICC in the mid-1930's to impose conditions pro-
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Protecting employees in unification transactions. Among them were: (1) the long history of federal involvement in railway labor policy, including a period of almost two years in which the government had seized the railroads; (2) an explicit federal policy encouraging railroad consolidation; (3) an overriding congressional concern about unemployment throughout the country; (4) a national economy highly dependent on rail services; (5) a nationally negotiated agreement between management and labor creating mutually acceptable protective conditions; (6) an industry in which capital barriers to entry by new firms were virtually insurmountable; (7) the existence of large and politically influential railroad labor unions; and (8) a rapidly increasing number of unemployed, middle-aged workers who could not be rehired elsewhere.

Given the existence of all these factors, the pressure for imposition of labor protections in railroad merger cases was apparently overwhelming. The attainment of a more rational rail network was an immediate and highly desirable goal which would be far more easily realized if potential labor opposition was minimized. It is not difficult, therefore, to understand why the ICC, with clear congressional approval, acted to impose employee protections in rail merger situations. The ICC continues to impose such conditions today because it is required to do so by statute.

(b) Airline Labor Protection by the CAB

In contrast, the Civil Aeronautics Board's imposition of similar labor protections in the early 1950's was not nearly as understandable; it is even less clear today. Because of the thoroughly different historical circumstances involved, the main rationale used by the CAB in the United-Western Case¹³⁷ (the ICC precedent in railroad consolidations) was poorly conceived. This is particularly true in light of the fact that a more fitting precedent would have been the ICC's treatment of motor carrier unifications. Relying on this precedent would have led to the opposite result.

Labor protective provisions had never been imposed by the ICC, nor required by the Congress, in motor carrier cases. Structurally, air transportation is far more similar to motor carriage than it is to rail transportation.¹³⁸ In the railroad industry, fixed operating

¹³⁸ CAVES, AIR TRANSPORT AND ITS REGULATORS 81 (1962).
assets and equipment constitute up to seventy-five percent of railroad costs. Due in large part to "unavailability of land, and the prohibitively high initial investment costs, the barriers to entry in the [railroad] industry are insurmountable." In contrast, in air transportation, as in the motor carrier field, capital mobility is of the highest order (airplanes are readily saleable on a world-wide market) and "the capital threshold of entry is sufficiently low that new firms can enter and be fully competitive with existing firms."

Thus when services are abandoned in the motor carrier and air transportation industries, opportunities are created for other firms, and hence new jobs are created which compensate for those lost. This is the explanation for the ICC's unwillingness to impose labor protective provisions in motor carrier unification cases even when it is clear that there will be a reduction in the employment of the labor force of a particular motor carrier. One pair of observers concluded that "since motor carriers, unlike railroads, are expanding transport agencies, and since unified operation promises to facilitate that growth and expansion, employee displacement is, at worst, only a temporary problem." Similarly, at the time when the CAB had just made its decision to impose labor protective provisions, another observer noted that "since air transportation is a new and growing business which may possibly assimilate displaced labor in other sectors, it may be that the circumstances which lead to railroad employee protection by the ICC should not control the regulation of air carriers."

The second reason cited by the CAB for imposing protections, equitable treatment of the employees, potentially has a more firm economic and social policy basis. The difficulty with this justification is that the economic argument was never articulated by the CAB and even the rhetoric of the rationale has disappeared in contemporary CAB decisions.

138 Note: **Railroad Consolidation: A Diseconomic Panacea, 56 Iowa L. Rev. 362, 364 (1970).**
140 Id. at 366.
141 CAB SPECIAL STAFF REPORT, supra note 89, at 107-08.
142 Meck & Bogue, supra note 99, at 1408.
143 Id. at 1408.
144 64 Harv. L. Rev. 664, 665 (1951). In the early 1950's unemployment was not a major problem in the airline industry due to the high degree of expansion. Rosenfield, supra note 85, at 450-51.
If the CAB chooses to re-examine its policy, it should consider a number of points with respect to the equity argument. Of the three principal components of the air transport business—shareholders, creditors, and employees—mergers are primarily designed to benefit the first two. Creditors benefit because debts are either discharged with proceeds from the transaction or a viable entity emerges which will meet previous obligations.

In a regulated industry, shareholders of the acquired company benefit because they receive far more compensation than the value of their capital equipment and general good will—they also receive the value of the government monopoly which has been granted. That is not to say that the owners necessarily make windfall gains in such transactions. In many cases, they are merely recouping the premium which they themselves once paid to obtain their interest in the company. Since the cost of entry into the airline business under a regulatory regime is higher (indeed it has been virtually insurmountable) than entry would be if the industry were unregulated, the shareholders are permitted to recover those original costs which represent the value of the monopoly franchise.

Arguably, protective conditions may permit a similar, but more obscure, phenomenon to occur with airline labor. Airline workers have been remarkably well paid under a regime of federal regulation. Wages are high and work rules are very favorable. There are, however, hidden costs which must be borne by labor in a regulated environment. In the closed-entry regulatory environment, wages and work rules are considerably better than in equivalent fields. Part of the reason for this is that historically the carriers have been able to pass increased expenses on to the travelling public through higher fares without having to worry about competition from lower-cost competitors. The excellent working conditions in the industry, however, result in a demand for employment which is far greater than the number of jobs available. The process for rationing the available positions in the industry is the union seniority system. As employment needs fluctuate, it is the younger flight personnel who are furloughed or not hired in the down-cycles, and the older more experienced people hired or retained as carriers expand.

As a result, there is a great deal of employment instability for

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146 CAB Special Staff Report, supra note 89, at 142-60.
airline employees over a substantial period of time at the beginning of their careers. An accurate measure of the economic benefits of regulation for airline employees (in particular flight deck personnel) must account for those years of intermittent employment and unemployment prior to attaining senior status. When the relatively high wages enjoyed by airline labor are discontinued over the productive lifetime of each individual, the compensation is not as impressive.

Thus, labor protective provisions in merger and acquisition cases can be viewed as a means of compensating the labor element for the hidden costs of working in the regulated industry, much as the selling price of airline stock compensates the seller for the costs of acquiring ownership of a regulated enterprise which exceed the value of the asset being acquired. It is not unreasonable to argue that as a matter of basic fairness labor should be allowed benefits similar to those which shareholders and creditors receive.  

An alternative way to analyze the fairness argument is to consider what would have occurred if labor protective provisions had not been imposed by the CAB in merger situations under pre-reform legislation. As indicated previously, labor protective provisions have been so costly that they have discouraged the filing of merger and acquisition agreements. Thus, one immediate effect of eliminating the conditions would have been to generate new interest in consolidations and, incidentally, to place more jobs in jeopardy as a result. Secondly, it is likely that the reduction in the cost of acquiring an air carrier would not reflect the full savings from eliminating labor protective provisions. In other words, because the monopoly value of the license would not be diminished, the shareholders would receive the compensation which otherwise would have gone to the labor component. It is possible, therefore, by analyzing the economic impact from this perspective, to make a reasonable argument that labor protective provisions should be imposed as a matter of equity so long as the license provides a monopoly value. The difficulty is that the Civil Aeronautics Board has failed to make such an analysis, at least since its early cases.

146 The benefits of labor protection accrue to the younger employees in the form of direct compensation and to the older employees in the form of job security through the required integration of seniority lists.

147 See text accompanying note 104, supra.
Instead, the contemporary explanation of why labor protection is necessary is the illogical ground of labor unrest. As noted earlier, the test most recently announced by the CAB is that "it must be shown that the extent of employee impact is so great as to jeopardize the continued stability and efficiency of the operations of the affected carrier in terms of the ongoing relationship between a carrier and its labor force."\(^{14}\)

The criticisms of this policy are obvious. First, there is no historical basis for the fear of labor unrest. The dangers are purely speculative. Second, it is difficult to imagine a policy more conducive to creating labor unrest than that announced by the CAB. In effect the CAB has said, we aren't going to do anything unless labor threatens disruptions, but if they do we will be sure to act.\(^{14}\)

Third, it is unclear just who the CAB thinks is likely to be engaged in the disruptions. It seems doubtful that the employees who are retained will be motivated to complain, and those who are not still employed have few means provided by law to express dissatisfaction.

In short, the CAB has embraced and developed a policy of labor protection in merger cases which, on a case-by-case basis, could be justified by reasonable economic and policy arguments. Instead, the CAB has chosen to base its original development of the concept on a highly questionable analogy to ICC precedent and has subsequently embraced a thoroughly self-defeating "labor unrest" justification. If faced with merger or acquisition applications in the future, the CAB should stop to evaluate carefully the basis of its labor protection policy.

Statutory Protection of Labor in Regulated Industries

The labor protective conditions imposed by the ICC and CAB in consolidation cases are merely one aspect of the pervasive federal regulation of the rail and air transport industries which serve to protect the vested interests involved. This type of regulation has

\(^{14}\) CAB Order No. 75-6-101, June 23, 1975.

\(^{14}\) It has been quite appropriately observed that "if public interest in avoidance of labor strife justifies protective provisions in merger matters, then it is even more essential that labor strife be avoided in other matters, such as contract negotiation," and other areas where the CAB rarely ventures. Rosenfield, supra note 90, at 455.
often stifled efficiency in the regulated industries. This is particularly true with respect to labor productivity.

Employment conditions in the airline and railroad industries are characterized by high wages, restrictive work rules, short hours, and, in the case of railroads, an excessively large work force.\(^{120}\) The entire regulatory system is itself a type of labor protection.

A recent CAB staff study compared the productivity and compensation levels of employees working for regulated airlines to those working for unregulated airlines and corporations which own and operate their own aircraft.\(^{121}\) The results were dramatic:

—commercial airline captains, working about 11 productive hours per week, earn almost sixty percent more than captains flying for private business enterprises who work forty hours per week.\(^{122}\)

—salaries of test pilots are far below those of the average commercial airline pilots despite the additional danger and needed skills involved.\(^{123}\)

—average earnings of non-flight personnel are nearly fifty percent higher than those of the average U.S. industrial worker.\(^{124}\)

—despite the high costs of equipment and fuel, in the airline industry wages and fringe benefits account for almost one-half of the total expenses incurred by regulated carriers.\(^{125}\)

In the railroad industry, the main inefficiencies result from work rules which have forced the railroads to maintain work forces far exceeding necessary levels.\(^{126}\) As a result, when carriers seek to improve efficiency and reduce excess capacity by merger, the imposition of conditions requiring the protection of employees serves to negate some or all of the potential benefits. In some cases, the


\(^{121}\) *CAB SPECIAL STAFF REPORT, supra* note 89, at 154-58.

\(^{122}\) *Id.* at 154.

\(^{123}\) *Id.* at 155.

\(^{124}\) *Id.*

\(^{125}\) *Id.* at 142. In contrast, for airlines operating outside the federally regulated system, labor costs are less than one third their total expenses. *Id.* at 157-58.

\(^{126}\) Comment, *supra* note 150, at 820; Davis, Sherwood & Jones, *supra* note 30.
carriers that need to consolidate are so weak that "in regions of the country where excess capacity is most prevalent [Northeast and Midwest] . . . they simply cannot bear the burden of labor protection costs."

One transportation economist has suggested that there are three reasons for the superior benefits enjoyed by airline labor (and presumably for railway labor as well):

1. Knowing that entry by new carriers with lower labor costs is unlikely, the unions have been able to demand and obtain, over time, higher wages and more costly work rules.
2. The unions know that their employers are able to transfer a large portion of the above-market wage demands to the consumer through higher fares without fear of price undercutting by other carriers.
3. If their company should fail as a result of the high expense of labor, the employees can be fairly certain that the company will be merged with or acquired by another carrier desiring to obtain the route authority of the failing company and in such circumstances, the acquiring company will be required to provide employment or substantial termination payments to the affected employees.

The relevance of this analysis is that it demonstrates that regulatory environment itself provides incentives for labor to make high demands. The additional costs created by these inefficiencies must be paid for either by the rate payers through higher fares or by the taxpayers through government subsidies, or often both.

In making or proposing to make changes in the regulatory structure of both the railroad and airline industries, Congress has been reminded that extensive protection of labor will defeat the goal of increasing efficiencies and assuring viable, profit-making business enterprises. During committee debate on the rail reorganization plan in 1973, the Department of Transportation (DOT) was particularly adamant in opposing the labor protective provisions ultimately adopted by Congress. DOT described the provisions as "unprecedented provisions which do not assure the new system of labor costs that will permit it to survive, but which do impose

157 Davis, Sherwood & Jones, supra note 30, at 71.
158 Jordan, supra note 150, at 481.
an excessive burden on the taxpayer," and it warned that there would be an "adverse long-term impact" in maintaining the same labor conditions which "helped bring on the demise of the six major bankrupts."

A non-government critic, who didn't have to be so diplomatic, put it this way: "Much of the regional railroads' financial morass can be traced to burdensome labor agreements mandating the maintenance of an oversized work force. Despite reductions in the post-war labor force, this force remains too large for current needs . . . the labor force will continue to be a millstone slung round the neck of the new regional rail system." A group of dissenting senators also pointed out that the provisions in the legislation fail to "deal directly with one of the most critical issues facing the proposed new Midwest/Northeast system—the need for simplification of existing work rules on the various roads which will make up the new system."

The principal debate on this issue was not whether employees should receive assistance, but whether the terms of the protection would be so costly as to outweigh the benefits of the legislation. The proponents of labor protection implicitly recognized this danger by requiring the taxpayers, rather than the railroads, to pick up the tab. Nevertheless, by guaranteeing either employment or compensation to all employees until the age of sixty-five, and doing nothing to minimize excessive work rules, the Congress virtually assured that a self-supporting rail system could not evolve. While some may now be expressing outrage as Conrail goes deeper into debt, no one is expressing great surprise. As one economist said, "[t]here is a limit to how far we can go in identifying and compensating losers. We have to be careful that the compensation devices themselves do not become a subsidy to inefficiency."

The opponents of the extensive labor provisions in the 1973 rail bill made two further points in the debate which set the stage for

160 Id.
161 Comment, supra note 150, at 856.
163 See text accompanying note 64 supra.
another debate five years later on the airline bill. First, they raised
the very difficult question of "how can we justify singling out rail-
road employees for such disparate treatment at taxpayers' ex-
 pense?" They pointed out that workers who lost their jobs with
the discontinuance of the Supersonic Transport program, and em-
 ployees of military installations that are suddenly shut down, are
eligible only for regular unemployment insurance.

Why the different treatment for railroad employees? In all the
debate there has not been a satisfactory answer. Even in contrast
to the railroad stockholders, employees seemed to receive superior
treatment. There is no assurance that the shareholders of the con-
solidated carriers will ever be made whole, but the employees have
that guarantee. In the absence of government intervention, all em-
ployees would have lost their jobs. Merely saving the railroads was
itself a substantial benefit to employees. Guaranteeing them full
salary for life was extraordinary.

The second point made by the dissenting senators was the follow-
ing: "We strongly urge every member of the Senate to consider
carefully the precedent that is being established by this legislation.
Haste may be necessary to keep the railroads running in this region
in order to protect the economy and conserve energy, but it is
equally important to assure that in the process of correcting one
problem we are not creating additional problems that will plague
future Congresses."

Less than five years after that prophetic warning was issued, Sen-
ator John Danforth of Missouri stood on the floor of the Senate
urging expansion of the labor protective provisions in the airline
reform legislation and stated: "With respect to precedents, there
is a precedent for what labor protection does in this instance. The
precedent is railroad reorganization . . ."

Despite this reliance on the precedent of railroad legislation,
Senator Danforth nevertheless denied that "the labor protection
 provision in the airline deregulation bill opens up a sort of Pando-
ra's box and provides a precedent which would be widely followed
in many other situations. The basis for labor protection in this par-

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166 Additional Views, supra note 162, at 3305.
167 Id.
168 Id. at 3306.
ticular bill is that the airline industry is not similar to most industries in the United States . . . we have an industry that has been very heavily regulated by the Federal Government.”

Actually, this argument had been predicted and rebutted by Senator Zorinsky earlier in the debate: “Many industries are regulated to varying degrees by the Federal Government. To single out this industry as ‘unique’ is illogical.” After all, is the impact of the Food and Drug Administration on pharmaceutical firms, or the Environmental Protection Agency’s impact on steel plants, or the Occupational Health and Safety Administration’s impact on small business any more extensive than the CAB’s on airlines? Senator Zorinsky is probably correct in doubting that the “unique” quality of the airline industry will preclude the provisions from being used as future precedent, and that “every labor organization working in any type of regulated industry will seize the opportunity to seek this remedy if and when relief is perceived as necessary.”

It should be obvious that in 1978 railroad labor protection is as illogical a precedent for airline labor protection as it was in 1950. The Regional Rail Reorganization Act of 1973 represents a substantial increase in government intervention in a stagnant and dying industry. In stark contrast, the Airline Deregulation Act of 1978 represents a decrease of government regulation of a dynamic, healthy, and expanding industry.

Fortunately, the Congress seemed to recognize this fact and stopped short of the rail precedent. Most importantly, in the airline deregulation legislation, the emphasis is on job opportunities rather than direct payments. This is an important change in emphasis which gives workers the most important benefit—jobs—without creating a substantial burden on the taxpayers. Secondly, the trigger mechanism puts the direct payment provisions into effect only in the case of fairly serious disruptions, and then only for employees who have at least four years of service. This appears to acknowledge that some minor disruptions in moving to a more competitive environment may occur and are an acceptable price to pay.

170 Id. at 5879.
171 Id. at 5877.
172 Id. at 5878.
174 Id.
Finally, by placing limits on the duration of the program,\textsuperscript{172} the Congress has declared that the protections are for the purpose of transitional assistance, a concept not inconsistent with the rest of the bill which provides a transition period for airline management as well.

Despite the fact that these protective provisions are generally more reasonable than the railroad provisions, the nagging questions remain—why favor these employees above all others and how can this not help set a precedent? Satisfactory answers have not been forthcoming. This issue is not one of whether transfers of wealth from one sector of the economy to another are \textit{per se} desirable or undesirable, but rather whether one particular wealth transfer from society to some of its most privileged members is sound social policy.

Balanced against the weighty issues of social and economic policy is a very pragmatic one. While the existence of protective provisions in the legislation did not win a great deal of labor support for the whole package, it certainly minimized any organized opposition by the unions. The provisions permitted pro-labor members of Congress to vote overwhelmingly in favor of legislation to which labor was officially opposed.

Again, it becomes a matter of the perspective from which the public policy question is viewed. Can it be wrong to give employees who have worked in a regulated environment for forty years the same transitional period that management receives? But how can it be right to give a few highly paid workers special benefits and rights far in excess of those enjoyed by all other U.S. citizens? Does it really matter so long as the overall legislation was passed? The difficulty is not in choosing how to answer, but which question to answer and which to ignore.

In contrast to the railroad experience, the airline labor protections are unlikely to be so great as to perpetuate the existing inefficiencies in the industry. While they provide some insulation for labor in the transition to a deregulated environment, virtually every other provision of the legislation will moderate labor's traditional bargaining position. Under the full legislation, carriers will be subject to new, more efficient, low-cost competition. Wage increases

\textsuperscript{172} Id.
probably will not be so readily passed on to the consumer in an area of price competition and more open entry. Mergers will be more difficult since the value of the license held by each carrier will diminish as more competition is allowed, and the antitrust standards will be tougher in the new legislation. In short, the fate of the employer will in large part depend upon its ability to tighten its belt in order to participate in a highly competitive environment. Increased productivity, either in the form of lower wages or better work rules, may become essential for some carriers to remain in business.

On balance, then, the airline labor protections built into the reform legislation are not bad public policy from a narrow perspective—they aided in passing legislation which is a crucial step in the struggle to reduce the regulatory role of the federal government, and which will be of great benefit to consumers. The protections are unlikely to disrupt this goal.

From a broader perspective, however, the provisions may have set an undesirable precedent—especially because they were not needed. The nature of the industry is so dynamic and the opportunities for expansion so great that the likelihood of any disrupted employees being absorbed elsewhere in the industry is excellent, even without government intervention.

Ultimately, the soundness of this public policy will depend upon the success of the total airline deregulation program, compared to how costly the precedent of protecting special interest labor groups proves to be in the future. If labor protective provisions of a temporary nature are the necessary price to pay for elimination of government regulation on a wide-scale basis, it may be a good trade. But the same trade-off may also be acceptable when it comes to shutting down polluting factories or closing unnecessary military installations.

In the past, such government actions have been taken without any special provisions for affected employees. But now employees affected by such actions may have an excellent precedent to point to in asking for transitional benefits. With the airline labor protections now law, it will be difficult to turn back.