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PASSENGER TRAIN DISCONTINUANCE—30-DAY NOTICE

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HEARING
BEFORE THE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

ON

S. 2711

AN ACT TO AMEND SECTION 13a(1) OF THE INTERSTATE
COMMERCE ACT, AS AMENDED, AND FOR
OTHER PURPOSES

FEBRUARY 20, 1968

Serial No. 90-23

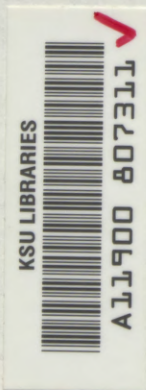
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PASSENGER TRAIN DISCONTINUANCE—30-DAY NOTICE

TUESDAY, FEBRUARY 20, 1968

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Harley O. Staggers (chairman) presiding.

The CHAIRMAN. The committee will come to order.

The Committee on Interstate and Foreign Commerce this morning is conducting hearings on S. 2711, a bill amending the Interstate Commerce Act, for the purpose of changing what the Interstate Commerce Commission holds is a jurisdictional loophole in section 13a(1), that was disclosed by its recent decision relating to the discontinuance of certain passenger trains by The Atchison, Topeka & Santa Fe Railway Co.

It seems to me that the plain language of section 13a, enacted in 1958, guarantees to the public 30 days' notice before a railroad filing under the terms of this section can take off a passenger train. Nevertheless, the Santa Fe took off four passenger trains 9 days after filing such notice.

However, the determinations as to whether the Santa Fe acted legally in taking off these trains on the ninth day, whether Division 3 of the Commission acted properly on the ninth day in notifying the railroad that it would not require that the trains run an additional 4 months, or whether the full Commission on the 30th day acted responsibly in rejecting an appeal from the Division 3 order, are all not matters before the committee this morning.

Our Subcommittee on Transportation and Aeronautics has been conducting hearings on H.R. 7004 and other bills amending section 13a for other purposes. Those issues also are not before us this morning. We are here today solely on the pending legislation and I trust the testimony will be directed to that end so that we may conclude the hearings in this one session.

(The bill, S. 2711, and departmental reports thereon, follow:)

[S. 2711, 90th Cong., first sess.]

AN ACT To amend section 13(a)(1) of the Interstate Commerce Act, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)), is amended as follows:

(1) The second sentence is amended by inserting after the word "may" the word "not" and by striking out the word "otherwise".

(2) The third sentence is amended by striking the word "authority" and inserting in lieu thereof the word "jurisdiction" and by changing the period to

a comma and inserting, immediately after, the phrase "or to permit the proposed discontinuance or change at the expiration of said thirty-day period."

(3) The fourth sentence is amended by striking the word "otherwise" both times it appears by inserting in lieu of the word "otherwise" the first time it appears the word "have".

(4) The fifth sentence is amended by striking the word "has" and inserting in lieu thereof the words "would have" and by inserting after the fourth comma the phrase "or if the carrier or carriers discontinue or change such operation or service in contravention of the provisions of this paragraph,".

Passed the Senate December 1, 1967.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., February 19, 1968.

Hon. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Bureau of the Budget on S. 2711, "To amend section 13a(1) of the Interstate Commerce Act, as amended, and for other purposes."

This bill would amend the procedures under which the Interstate Commerce Commission may permit discontinuance of unprofitable passenger train services.

In its report to your Committee on S. 2711, the Department of Transportation discusses the problem that the bill aims at correcting and the apparently unintended effect it would actually have on the achievement of the objectives of section 13a. It recommends amendment of the bill to correct this effect.

Section 13a has been useful in permitting the elimination of unprofitable service for which there has been little demand and thereby strengthening the carriers that had been required to provide this service. Accordingly, while we have no objection to amendments clarifying the jurisdiction of the Commission, as intended by this bill, we would recommend against favorable action on S. 2711 in its present form.

Sincerely yours,

WILFRED H. ROMMEL,
Assistant Director for Legislative Reference.

DEPARTMENT OF TRANSPORTATION,
OFFICE OF THE SECRETARY,
Washington, D.C., February 19, 1968.

Hon. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Your Committee has requested the views and recommendations of this Department on S. 2711, a bill "To amend Section 13a(1) of the Interstate Commerce Act, as amended, and for other purposes." Section 13a(1) of the Interstate Commerce Act established the procedures by which a rail carrier can seek to discontinue or change interstate passenger train or ferry service. Under its provisions a carrier can bypass state regulatory commissions by filing with the Interstate Commerce Commission notice to discontinue 30 days in advance of any proposed discontinuance or change in service. A carrier filing such notice with the Commission may discontinue or change the service pursuant to the original notice unless the Commission institutes an investigation within 20 days and orders continuance of the service for four months. Among provisions of this section are 1.) discontinuance or change can be effected regardless of state laws; 2.) discontinuance of obviously poorly patronized trains can be expedited; and 3.) public is given 30-day notice of change.

S. 2711, was introduced to close a "loophole" that developed in a recent application of the 30-day notice period.

After filing two notices for discontinuance of trains, Nos. 3, 4, 7, and 8, on October 9, the Santa Fe Railroad, on October 18, wired the Interstate Commerce Commission that it proposed to annul the trains for the remainder of the 30-day period. The trains were discontinued October 19 and 20, the same dates that the Interstate Commerce Commission's Division 3 decided not to conduct an investigation.

The Railway Labor Executives' Association, an affiliation of railway labor unions, protested to the Commission, and asked that the trains be ordered restored until November 10, the end of the 30-day period. Division 3 ruled that the Santa Fe's action was a breach of its own notice and "therefore vitiates our jurisdiction." Division 3 then dismissed the notice. The full Commission later upheld Division 3 and rejected the Railway Labor Executives' Association appeal. The Commission predicated its decision on the view that Section 13a(1) "shelters" the carrier from state action, and that if violated by the carrier the "shelter" is withdrawn and the carrier is exposed to the laws and constitutions of the States involved.

The intent of Section 13a(1) is to provide a minimum of 30 days notice to the public affected by train discontinuances filed under this section. The time period does not appear to be an undue burden on the carrier and we can recall no protest about this waiting period during the legislative history of Section 13a, as part of the Transportation Act of 1958. Also, the record since 1958 reveals only one incident, the instant one, in which trains were discontinued prior to the 30-day statutory period.

The Commission's interpretation that a carrier could enter or leave Section 13a(1) proceedings at will prompted the Senate Commerce Committee to report to the Senate S. 2711, which was passed December 1, 1967. Chairman Warren C. Magnuson argued that the Commission's ruling in the Santa Fe case would enable other carriers to file notice of discontinuance with the Commission and then take off the trains before expiration of the 30-day notice period, if the Interstate Commerce Commission did not initiate an investigation. We are inclined to agree with Senator Magnuson that Section 13a(1) gives the public the right to a 30-day notice, and that this right has been set aside, under certain circumstances, by the Interstate Commerce Commission's Santa Fe decision.

In its report to the Senate, the Commerce Committee outlined the provisions of the bill as follows:

"(1) Provide that a railroad may not, after the filing of a notice, discontinue or change passenger train service, except upon order by the Commission;

"(2) Confirm jurisdiction, of the Commission upon the filing of a notice, by substituting the word "jurisdiction" for the word "authority";

"(3) That within 20 days after the filing by a carrier of a notice to discontinue, the Commission must either enter an order instituting an investigation or permitting the proposed discontinuance or change at the expiration of the statutory 30 days' notice period;

"(4) That if a carrier discontinues or changes its passenger train service in violation of the provisions of Section 13a(1), the Commission may require the continuance or restoration of such service; and

"(5) Delete the word "otherwise" and substitute the words "would have" to confirm that after the filing of a notice a carrier may not change or discontinue passenger train service except upon order by the Commission."

As is sometimes the case, to attempt to clarify a law in order to solve one problem can create another problem. We fear such is the case in S. 2711. The significant language change in the proposed bill occurs when the second sentence is amended by inserting after the word "may" the word "not" and by striking out the word "otherwise." It then reads, "The carrier or carriers . . . may not discontinue or change any such operation or service . . . except as ordered by the Commission."

The practical effort of the change is that the Commission would have to take affirmative action on all notices, whether it intended to investigate a notice or allow discontinuance after the 30-day period. If the Commission decided to investigate there would be no departure from present procedures. The new problem arises if the Commission decided not to investigate. Under S. 2711 it would have to issue an order authorizing the discontinuance. This order would become subject to judicial review and the attendant delays. We believe that opening all train discontinuance cases to judicial review would erode the original intent of Section 13a(1), which was to expedite removal of those few trains that were clearly unprofitable and unpatronized. Under Section 13a(1) the Commission, as of June 30, 1967, decided not to investigate 25 interstate proceedings involving 64 trains. In that same period 201 interstate proceedings involving 1,102 trains were before the Commission. Thus, only a small percentage of train discontinuance requests were permitted to become effective without investigation.

Significantly, there was no discussion of exposing all the Commission's actions under 13a(1) to judicial review in the Senate Commerce Committee's report to the Senate on S. 2711. The Committee was concerned with protecting the public's right to sufficient and proper notice. The proposed bill provides that protection,

but unfortunately creates a situation that invites unnecessary legal challenges of minor cases. Therefore, while the Department fully supports and endorses the intent of S. 2711, we suggest that further language be incorporated to allow a notice of discontinuance, when not investigated, to become final without judicial challenge. It should be understood that the Department does not oppose judicial review of those proceedings which are subjected to investigation and hearings and in which a record is established.

The Bureau of the Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report for consideration of the Committee.

Sincerely yours,

JOHN L. SWEENEY,
Assistant Secretary for Public Affairs.

The CHAIRMAN. We have as our first witness this morning the Honorable Paul J. Tierney, Chairman of the Interstate Commerce Commission.

We are happy to have you with us, Mr. Tierney. You may proceed

STATEMENT OF HON. PAUL J. TIERNEY, CHAIRMAN, INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY COMMISSIONER DALE W. HARDIN; BERTRAM E. STILLWELL, DIRECTOR, BUREAU OF PROCEEDINGS; THADDEUS W. FORBES, DEPUTY DIRECTOR, BUREAU OF PROCEEDINGS; AND FRITZ KAHN, DEPUTY GENERAL COUNSEL

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. Chairman, my name is Paul J. Tierney. I am the Chairman of the Interstate Commerce Commission and have served in that capacity since January 1, 1968.

With me is Commissioner Dale Hardin. I also have with me, Mr. Chairman, Mr. Bertram Stillwell, who is Director of our Bureau of Proceedings.

The CHAIRMAN. Would you each identify yourselves?

Mr. STILLWELL. I am Mr. Stillwell.

Mr. TIERNEY. Mr. Thaddeus Forbes is Deputy Director of the Bureau of Proceedings, and Mr. Fritz Kahn is Deputy General Counsel.

I have a prepared statement, Mr. Chairman, that I would like to present.

The CHAIRMAN. If you can summarize your statement, it would be appreciated.

Mr. TIERNEY. I will, Mr. Chairman.

Generally, I might say, Mr. Chairman, that the Commission is in agreement with the objectives of the bill. In my statement, I have gone to some length to explain the procedures we follow at the Commission in implementing section 13a(1), which we thought would be helpful.

The CHAIRMAN. Do you think those proceedings were followed correctly in this case?

Mr. TIERNEY. I think we followed the procedures; yes, sir.

The CHAIRMAN. That answers my question.

Mr. TIERNEY. If I may, I would like to turn to a portion of my statement. As I say, we do agree wholeheartedly, Mr. Chairman, with the objectives of the bill. But the Commission would like a different

approach in that area, and I think that is the important part of my testimony.

If I may, I will read that portion of the statement. It is the latter portion of the statement. I think we can save some time.

The CHAIRMAN. On what page of your statement does that start?

Mr. TIERNEY. On page 14, Mr. Chairman.

Under S. 2711, the Commission would be required to issue an order in all cases and not just those cases where it proposes to hold an investigation and hearing. In those instances where the Commission actually institutes an investigation and requires the retention of the trains in service for the 4-month period, S. 2711 would require no changes in our present procedures.

However, in those cases where the Commission decides that the rail petitioner's evidence constitutes a prima facie showing that the involved trains are operating at a loss sufficient to constitute a burden on interstate commerce and that their services receive little patronage, S. 2711 would require the issuance of an order, rather than the notice-procedure which the Commission has adopted as a means of notifying the public that an investigation will not be instituted.

Our opposition to this phase of the bill is based on the additional time, effort, and experienced personnel which would be required to draft the requisite orders, make service of such orders on the parties of record, and then defend them when they are judicially challenged.

Since the Commission suspends proposed rail passenger discontinuances in all instances where there is any doubt as to the showing by the carrier, we feel that our available resources can better be utilized in those cases where the discontinuance has been suspended and a hearing ordered.

Since it is our understanding that the stated purpose of S. 2711 is simply to prevent a carrier from taking unilateral action to discontinue passenger service which has been the subject of a notice presented to the Commission, and thus defeat the Commission's jurisdiction, it would seem to us that a simple amendment to section 13a, which indicates that a carrier may not do this in the absence of appropriate authority from the Commission or absent the carrier withdrawing its notice entirely, would accomplish the purposes of this bill.

While it is possible to offer a number of perfecting amendments to S. 2711 to accomplish the same objective, we believe that it would be simpler to amend section 13a in its present form. Accordingly, for the aforementioned reasons, we suggest the committee consider inserting the following amendment to the present section 13a in lieu of the proposed amendments in S. 2711:

1. The second sentence is amended by inserting after "may" a comma and the phrase "upon the expiration of, but not during, the notice period,".

2. Between the fourth and fifth sentences, insert the following new sentence: "However, if, during the notice period, the carrier or carriers discontinue or change, in whole or in part, the operation or service of any train or ferry, the Commission shall retain jurisdiction to enter upon an investigation of the change or discontinuance and may require the immediate restoration or continuance of operation or service of such train or ferry until the expiration of the notice period."

For convenience, I have attached at the end of my prepared testimony a copy of section 13a which gives effect to these amendments. Our proposed amendments are italicized.

The modifications preclude the carrier from changing or discontinuing any passenger operation or service before the expiration of the notice period of at least 30 days and retain jurisdiction in the Commission should the carrier change or discontinue the operation or service before the expiration of the notice period.

I would like to now turn to some additional matters that we believe should be considered apart from S. 2711. As I mentioned earlier, the Commission has previously testified on its legislative recommendation to amend section 13a which is embraced in H.R. 7004. The amendments contained therein include the following:

1. To give the Commission more time, up to a maximum of 9 months, to dispose of a section 13a proceeding.
2. To cure certain jurisdictional problems over intrastate versus interstate train service.
3. To permit us to attach conditions to the discontinuance and continuance of rail passenger service.
4. To clarify and put beyond doubt the right of judicial review from final decisions of the Commission.

While H.R. 7004 is not the subject of these hearings, we urge that the provisions of that bill be considered at this time. But if the committee decides that only the amendments proposed in S. 2711 should be made at this time, we strongly commend to your attention the changes that we have proposed.

In any event, specific consideration should be given to granting the Commission additional time to process these cases. We cannot emphasize too strongly the need for more time to adequately handle these cases. Due in large part to the discontinuance of mail contracts by the Post Office with passenger-carrying railroads, the Commission has received over 40 notices from carriers under section 13a since September 1, 1967.

On the basis of our present caseload docket, I am told that the Commission will have to render on an expedited basis a decision in these section 13a proceedings on the average of once every 4 days between now and mid-July 1968; and the intervals will become smaller if the volume of these cases continues at its present rate.

When considered in the context of the Commission's regular caseload, this presents a formidable administrative problem not only to the Commission itself, and specifically Division 3 of the Commission which handles the majority of our cases under section 13a; but to our hearings examiners who must conduct these hearings throughout the various States involved.

Although the Commission's jurisdiction over section 13a cases is limited, we are deeply concerned about the decline in rail passenger service and the discontinuance of particular trains. We strongly believe that we have a positive obligation—to both the carriers and the public—to give these cases thorough consideration and to deal with them in a fair and orderly manner.

It is for this reason that we earnestly request that this committee not only consider the amendments we have proposed previously to section 13a, but that at a minimum we be given additional time to perform our functions properly.

This concludes my prepared testimony, Mr. Chairman. I would be happy to answer any questions that you or any other member of the committee might have.

The CHAIRMAN. Thank you, Mr. Chairman.

As I understand, this is your first appearance before this committee. I don't know whether you have appeared on the Senate side or not.

Mr. TIERNEY. I have appeared on the Senate side. This is my first appearance here, Mr. Chairman.

The CHAIRMAN. We want to welcome you and we hope your appearance here will not be too bad and that you will want to come back.

Mr. TIERNEY. Thank you, Mr. Chairman. I am sure I will.

The CHAIRMAN. I have two short comments I would like to make first before asking questions.

In your prepared statement, you have given us a long analysis of what the Interstate Commission does in handling filings under section 13a. I would like to make two comments.

On the bottom of page 3 and the top of page 4, you indicate that the form and style of the notice must conform with the Commission's rules and regulations, and that one of these is advice to the public as to its rights to object to such discontinuance.

Mr. TIERNEY. That is correct, sir.

The CHAIRMAN. I think it appropriate here to state that your form under title 49, chapter 1, section 434d, requires that the railroad give advice to the public that persons desiring to object should notify the Interstate Commerce Commission at least 15 days before the effective date of the proposed discontinuance or change.

Mr. TIERNEY. Yes, sir.

The CHAIRMAN. Mr. Tierney, on page 8 of your statement you discuss what was done by the Commission in the handling of the two filings by the Santa Fe of October 1967, and state that the Commission issued a notice on October 19 stating that it would not investigate the proposed discontinuance of these four trains, and you say "Up to this point the case was not unusual."

I simply do not want to get into a discussion this morning, but it is clear to me that the handling of this case up to this point, even before the Santa Fe took off its trains, was most unusual.

Now I have a question. In light of the revised second sentence which would read that a carrier filing the notice may not discontinue a train except as ordered by the Commission pursuant to this paragraph, do you read the new third sentence to mean that as the discontinuance of a train at the end of a 30-day period, the infinitive "to permit" is implicitly modified by the phrase "by order" in every instance?

Mr. TIERNEY. I am not sure that I understand your question.

The CHAIRMAN. I will give it again. At the end of the 30-day period, the infinitive "to permit"—

Mr. TIERNEY. Are you referring to the Senate version of 2711?

The CHAIRMAN. Yes. I want to say is it implicitly modified by the phrase "by order" in every instance? I think it is as you have given it here, because you have said that this is the part that you wanted to change.

Mr. TIERNEY. That is right; yes, sir.

The CHAIRMAN. And it is your interpretation that as it is written now, it is modified by the phrase "by order" in every instance?

Mr. TIERNEY. Yes, sir.

The CHAIRMAN. If the Commission orders an investigation as provided by the fourth sentence, and finds after hearing that the public convenience does not require the continued operation of a train, how can the train be taken off?

Mr. TIERNEY. In the Senate version of the bill?

The CHAIRMAN. Yes.

Mr. TIERNEY. If we issue an order not to investigate?

The CHAIRMAN. Yes.

Mr. TIERNEY. Under this version of the bill, it cannot be taken off except upon order of the Commission.

The CHAIRMAN. Just a minute. If the Commission orders an investigation as provided by the fourth sentence, and finds that after hearing the public convenience does not require the continued operation of the train, how can the train be taken off?

Mr. TIERNEY. After investigation?

The CHAIRMAN. If the Commission orders an investigation as provided by the sentence and finds after hearings that the public convenience does not require the continued operation of the train, then what do you do? How can the train be taken off then?

Mr. TIERNEY. We would issue an order to that effect, Mr. Chairman, that it would be taken off at the expiration of 4 months, a 4-month period.

The CHAIRMAN. My counsel says there is something the matter here. My counsel tells me that there is nothing that says you can take it off, and my question is whether it is implied.

Mr. TIERNEY. I think we have interpreted it that way, that after investigation we find that the public convenience and necessity does not require it, under those circumstances——

The CHAIRMAN. You issue an order?

Mr. TIERNEY. That is my understanding. We issue an order terminating the investigation. That order, in effect, would permit the discontinuance of the train at the expiration of a 4-month period.

The CHAIRMAN. At the expiration of a 4-month period?

Mr. TIERNEY. Yes.

The CHAIRMAN. Does the new fifth sentence, as amended, mean that any violation of the provision of this paragraph is to be met by a penalty requiring that the railroad operate the specific train for a period of a year?

Mr. TIERNEY. The way we interpret S. 2711 is that they could be required by the Commission to operate the train for a period of a year.

The CHAIRMAN. If there was any violation.

Mr. TIERNEY. That is right, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. Friedel?

Mr. FRIEDEL. Mr. Chairman, I want to reserve my right to question later, but I want to compliment Mr. Tierney for a very fine statement.

I notice on the first page that you say:

Initially I should state we are in favor of legislation that would improve section 13a and, therefore, we are in agreement with the basic purposes of this bill.

Mr. TIERNEY. Yes, sir.

Mr. FRIEDEL. As the Senate passed the bill?

Mr. TIERNEY. We agree with the purposes of the bill as passed by the Senate. But we have suggested different language, Mr. Friedel, which we feel would accomplish the same objective.

Mr. FRIEDEL. Thank you.

The CHAIRMAN. Mr. Cunningham?

Mr. CUNNINGHAM. Mr. Chairman, I certainly want to join in welcoming Mr. Tierney to our committee. I have one observation that doesn't go directly to this issue that I wonder if he would comment upon.

There has been excessive numbers of trains which have been discontinued. What is your opinion as to why there is such a rash of applications for discontinuance of these passenger trains particularly?

Mr. TIERNEY. We feel now that much of it has been attributable to the Post Office Department canceling their contracts with the railroads.

Mr. CUNNINGHAM. I can see that you are going to be a brilliant chairman, because that is exactly what I believe. The Post Office Department takes the position that that isn't the cause, but that trains have initiated applications for discontinuance regardless of whether they carry mail or not.

I happen to be a member of the Post Office Committee also. My research shows that a great majority of applications for discontinuance have come after they have taken the RPO cars off because so many of these lines were just barely breaking even or making a very slight profit, if any. Once they take the RPO cars off, they lose that advantage of a slight profit or a break-even operation.

They have, really, no other course than to ask for the discontinuance. I am not only delighted but very enlightened that you have the same position and viewpoint that I do in my running battle with the Post Office Department.

Mr. TIERNEY. If I may, sir, I would perhaps qualify the statement to this extent: that there are many of the trains which have been losers irrespective of the mail contracts involved. I am referring to this recent influx of cases which we have.

Many of the proposals for discontinuance have been the result of the discontinuance of the mail contracts, which turns a deficit operation into a heavy loser.

Mr. CUNNINGHAM. I am pleased with what you said at the beginning, when you came right out and said the loss of the mail contracts, the RPO in particular, has had a major impact upon applications for discontinuance. You still feel that way?

Mr. TIERNEY. Yes, sir.

Mr. CUNNINGHAM. Thank you very much, sir.

The CHAIRMAN. Mr. Kornegay?

Mr. KORNEGAY. Thank you very much, Mr. Chairman.

Mr. Chairman, I would like to join my colleagues in welcoming you to the committee and wish you every success in your tenure as Chairman of the ICC.

Mr. TIERNEY. Thank you, sir.

Mr. KORNEGAY. The same thought has occurred to me which occurred to my colleague from Nebraska. That is, why has the Post Office Department taken so many of the RPO's off the railroads? Is it a question of the railroads requesting it or the Post Office Department?

I don't know that you have that information. Maybe we ought to get somebody from the Post Office Department up here to testify about it. I thought I would ask you what you happen to know about it.

Mr. TIERNEY. First of all, Mr. Kornegay, I don't think I am in a position really to give an answer to that question. In some areas, as I understand it, the Post Office Department has changed their method of operation. This has contributed to the removal of many of the RPO cars. That is a business decision, and the Commission isn't disputing a decision on that basis.

I don't want to create the impression that we are being critical of the Post Office in these instances. We don't have full information as to which came first; namely, whether the train discontinuances have forced the Post Office Department to other areas for transportation, or whether the removal of the mail contracts has caused the discontinuances. I think it is just a combination of both.

Mr. KORNEGAY. In some instances trains were discontinued as a result of the discontinuance of the mail service on the trains, and then the reverse situation has also taken place.

Mr. TIERNEY. Yes, sir. I think so.

Mr. KORNEGAY. I am no expert, either. We have Members who serve on that committee who can talk about this far more intelligently than I can. But judging by the mail from my constituents, there seems to be a feeling that the mail service has deteriorated since they discontinued the use of a lot of the RPO's.

In other words, there is much slower delivery now than there was when mail was worked on the train and transported by the train. That is a question I should address to another witness, and not you. But I did want the opportunity to get by without mentioning it.

What do you see in the future, and you are an expert in this area, for rail passenger transportation in this country? Is it a thing that is past now?

Mr. TIERNEY. As far as the long-distance transcontinental trains are concerned, I think the future is quite bleak. We will probably move to an era of the shorter, intercity trains.

There has not been the public support or use of those longer transcontinental trains which would justify them economically. Major inroads have been made by the automobile and the airplane. There are some people who may differ with me, but that is my opinion.

Mr. KORNEGAY. But you do have some degree of confidence that there is some future for short-haul trains?

Mr. TIERNEY. Absolutely, and I think we should have them. In future years, we will have to have this type of essential passenger service.

Mr. KORNEGAY. I quite agree with you. I have been preaching that for some time now; that we are missing the boat by not updating and upgrading rail service in the country. I think on shorter hauls the people would support it if they would get the service that they feel they are entitled to.

Thank you very much.

Mr. CUNNINGHAM. Will the gentleman yield?

Mr. KORNEGAY. Yes, I will be happy to yield.

Mr. CUNNINGHAM. Having been a member of the Post Office Committee now for 12 years, I have been fighting this battle to keep the RPO's on, because there is absolutely, in my opinion and in the opinion of many experts, no substitute for en route distribution of

the mail. When they began taking these off about 10 years ago, and now in wholesale lots, we find that we don't get the prompt mail service that we used to get because of the absence of the en route distribution.

In the case of the California Zephyr, Mr. Chairman, this is the finest train in the world, and certainly the finest in the United States. It runs from Chicago to the west coast. It is booked to capacity almost all of the time.

I understand, as you well know, it is a Burlington train originating in Chicago, going over the Burlington tracks to Denver, then from Denver on the Rio Grande, and then on the Western Pacific.

I understand that the Burlington goes after passenger business and they provided this fine train. I understand they want to keep it running, except the Western Pacific are the ones who are wanting to discontinue it over their segment of the route.

It would be a tragedy, in my opinion, if this train would ever be discontinued. I hope the Commission will look into that very, very carefully.

Mr. KORNEGAY. That is a long-haul train.

Mr. CUNNINGHAM. That is a long-haul train from Chicago to the west coast.

Mr. KORNEGAY. That is 1,500 to 1,800 miles. And you say it is booked to capacity most of the time?

Mr. CUNNINGHAM. Yes, it is.

Mr. SKUBITZ. Will the gentleman yield?

Mr. KORNEGAY. Yes. I yield.

Mr. SKUBITZ. Mr. Chairman, I am sorry to hear you take the position that the days of long-haul passenger days are passe. I think in the next 20 years we are going to be forced back to the railroads. Cluttered-up highways and clogged airways will not handle the passenger service.

Eventually, we will be forced back to the railroads. If we don't do something to protect the lines that we have today, whether it be by Government subsidy, whether it be by forcing the Post Office Department to reconsider the position it has taken, I don't know. But if you do away with the railroads, we will be forced someday in the not too distant future to develop a mass transportation system clear across the country.

I have attended several discontinuance hearings recently, and I was rather surprised at some of the statistics that have been presented.

The CHAIRMAN. I said in my first statement that we are coming back at another time to 13a. This hearing has to do with a special bill that came over from the Senate.

I was hoping to finish today, if we could, on this little bill. I don't want to cut off any questions. But, as I say, we are trying to confine it to this one issue at this time, in this bill.

Mr. SKUBITZ. Mr. Chairman, if we are coming back to 13a(1) before all the passenger trains are discontinued, I am willing to hold off my questions today.

The CHAIRMAN. As I say, we are trying to hold this hearing to the confines of this bill, if we can.

Mr. Harvey?

Mr. HARVEY. Mr. Chairman, in line with what Mr. Kornegay asked you with regard to the future of passenger trains in this country, has

the decision been made somewhere in the industry to concentrate chiefly on freight rather than passenger trains?

At least, I gather that, that the whole emphasis has been trying to get the freight business and trying to give the airlines and the buses the passenger business, if they can.

Mr. TIERNEY. The railroads have found, I am sure, that generally speaking the passenger business has been unprofitable.

Whether they have done enough to assure it being profitable is another question. But overall, I think, the public has gone to other forms of transportation, Mr. Harvey.

Mr. HARVEY. I think that is true. In the State of Michigan, where I come from, we discontinued most rail passenger service years ago, other than one or two lines. I can think of nothing north of Detroit as dependable rail transportation.

Just out of curiosity, what does the railroad have to show after they publish this notice in order to satisfy the Commission that they should be able to discontinue this particular service?

Mr. TIERNEY. There are two general areas provided for by the statute. One, that the public convenience and necessity does not require the operation, and, two, that if we required continuance, it would be a burden on interstate commerce, in effect a burden on the railroad, Mr. Harvey.

Mr. HARVEY. These are the two legal terms within the statute. But as a practical matter, what is necessary to satisfy the Commission? How long, for example, must a railroad have been losing money in order to discontinue?

Mr. TIERNEY. I don't think we have any specific length of time. We look at the record and determine how much of a loser it is. We take into consideration the carrier itself, and its ability to withstand losses. On the other side of the coin, we look at how much service it is necessary for the public, and whether there are other forms of transportation available to them.

If it doesn't appear that there would be a great inconvenience to the public by discontinuing the train, then we would probably permit discontinuance in the event there are carrier losses which are substantial.

Mr. HARVEY. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Van Deerlin?

Mr. VAN DEERLIN. Mr. Tierney, do you look at all into the potential of passenger development which might be realized on some of these short-haul lines if we were to adopt some of the technological changes that have marked the railroad business in, say, Japan? There, as we know, it is possible to provide faster train service over a 300-mile run from Tokyo to Osaka than it is to serve that same corridor by air, with trains that have achieved 150 to 175 miles an hour.

Mr. TIERNEY. There is no doubt in my mind, Mr. Van Deerlin, that this would make passenger travel more attractive. But I think we must remember first of all that requires a huge capital investment.

In the northeastern corridor we are investing a minimum amount of money. The Government is contributing some \$10 million or \$11 million and the Pennsylvania Railroad about \$45 million. This represents a limited investment to determine whether or not better passenger service would be attractive and be economically viable.

It is a pilot program. We are trying to determine in the most densely populated area of the United States whether or not that type of service would attract enough people to make it economical.

Hopefully, it will. Hopefully, they will adopt that type of railroad service for that particular corridor. But then when you look to other corridors which don't have the population density of the Northeastern, it may be a question of some years before it will be economically able to support such service.

We have to make economic projections.

Mr. VAN DEERLIN. In California, the Southern Pacific has had a long fight to discontinue the Lark, the once-a-day train going each way between Los Angeles and San Francisco. It was finally shown that an airplane leaves Los Angeles every 13 minutes carrying as many people as are carried on the Lark each way, each night. So obviously the distance of 400 to 500 miles can't provide anything other than an attractive tourist trip.

But for the hard-core business of providing passenger service day in and day out as needed, and you come to a run like Los Angeles to San Diego, 125 miles, it seems to me that if the railroads maintain fast service, you can do far better between those two points than you can do by air, when you count the time of going to the airport and coming in from the airport at the opposite end.

I was wondering if the ICC has given any attention, in these applications for discontinuance, to the potential for restoring service if and when such technological changes can be effected.

Mr. TIERNEY. We can't look so far into the future. In other words, we can't know that in a particular case, Mr. Van Deerlin, 10 years from now, conceivably, this loser might then be economically viable.

I don't think we have that power under the act. We look at it from the present-day situation. How much money is being lost? How necessary is this passenger service to the public today?

In weighing all these factors, we come up with our decision.

Mr. VAN DEERLIN. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Watkins.

Mr. WATKINS. Thank you, Mr. Chairman.

I have no questions. I would just like to wish Mr. Tierney well, and that his trials and troubles be few. I am sure they won't be, however.

I think your judgment that we will have to abolish railroad passenger service in certain sections is possible.

I would suggest that you do as you have in the past, that you have hearings in the locations where the existence of railroads is no longer desirable, with the people being heard.

Mr. TIERNEY. Thank you very much.

The CHAIRMAN. Mr. Moss.

Mr. MOSS. Mr. Chairman, I will support this legislation as an absolute minimal effort.

Mr. Chairman, I would like to ask you for an opinion as to the wisdom of the piecemeal approach that we are making in this Nation to the dismantling of a very important transportation system, or a part of an important transportation system.

I have long felt that we need to stop and take a very careful, critical, analytical look at the type of transportation system, overall, we have in the United States.

There is no question but what we have excellent air transportation across the Nation. There is no question that we have some good air transportation between intermediate points.

There is bus transportation.

But no effort has ever been made to determine the type of balanced transportation requirements existing in this Nation.

Shouldn't we make such an effort before permitting the further dismantling of an important segment of transportation?

Mr. TIERNEY. I might say, Mr. Moss, the Commission has recommended in the past, as we have indicated, a study to look at the overall passenger situation, with the objective of determining what essential passenger service is needed in the United States for the next 10, 15, or 20 years.

This is something that has been recommended and I think it would be necessary for Congress to establish a policy to that effect, and the study would be an extensive one and take some funding.

You may find areas where 10 or 15 years from now we could conceivably project that they would support rail service. But in the interim, you have the problem of how is it going to be supported.

On the other side of the coin, I am sure there are passenger trains which probably are not essential. I think an opportunity should be given in those cases for permitting discontinuances if they are not essential; that is, if they are big losers and are not required by the public.

Mr. Moss. Of course, big losers raises a very interesting question. I have watched the dismantling of the transportation of the Southern Pacific Lines in my State of California. It has followed a very interesting pattern. Schedules become far less convenient to travelers between points than they were previously.

I recall when it was quite a pleasant experience to board the train and go from Sacramento to San Francisco. You arrived there in time to do some shopping and then return in the evening.

Then the schedules were rearranged and no rational person would leave at the hour the train was scheduled to depart, and the hopes of getting back at a reasonable hour vanished.

So you were confined either to a Greyhound bus or an airplane, or your private automobile.

But I think it is quite clear now, almost at the end of the highway construction program, which was authorized back in 1958, with probably \$70 billion to \$100 billion being spent on highways, that we have not kept pace with the demands for highway construction, and that the needs of transportation in this Nation cannot be met solely by constructing ever more highways or freeways.

We are starting already, we have authorized projects, pilot projects, in this committee, between highly populated areas of the Nation, in an effort to reestablish railroad surface transportation.

I wager it will not be too many years we will have requests of the Congress to spend public moneys to reestablish train service to cover greater areas of the Nation.

I think the study should be made before we have completely dismantled. We are a long way down the road. I was a member of this committee when I opposed the adoption of 13a. There weren't very many who did.

But I think we moved too far, too fast, with very little information, and very, very little regard for the public interest, the public need, for an adequate system of transportation.

The CHAIRMAN. Mr. Kuykendall?

Mr. KUYKENDALL. I want to welcome you, Mr. Chairman, to the committee.

I would like to take up just a little bit of the trend of thought of Mr. Kornegay, Mr. Moss, Mr. Harvey, and Mr. Cunningham.

We on the Aviation Transportation Subcommittee particularly have made several trips across the country looking at high-speed ground transportation systems. We have looked at the system in the bay area in Mr. Moss' State in California, and the one in the eastern corridor.

I don't know in the eastern corridor whether we are trying to prove we can or can't. Somebody says this is research. Well, there is always a direction in research. I don't know whether they are trying to prove they can or can't up there.

In the bay area, I think they are definitely trying to prove they can and I think they will prove they can.

The only thing I want to say—and I think I may be directing this more at some of my friends in the railroad in the audience than I am at you—and that is this: 15 years from now when somebody sitting at your desk, Mr. Tierney, is asking for public appropriations to help reestablish passenger service for this Nation on the ground, what will be the position of the railroads? The railroads may have lost their capability entirely, and by that time it might be just about as hard to recruit passenger service people as it would be to recruit stagecoach drivers. I just wonder if, when this time comes, the railroads are going to be willing to just turn this whole thing over to the Government and have a publicly owned, a Government-owned, passenger transportation system, if the railroads would be happy to have seizure? (That is not a good word, is it?)

I just wonder when the time comes if they are going to be ready, since they have voluntarily given up their capability.

I know they are losing money, and I am going to support this bill. But it worries me that a large part of the study that our committee is doing, that the Transportation Subcommittee is doing, is in the area of trying to develop something, that we can turn around in the same committee room and discontinue.

This is a little bit of an admonition of what are we going to do 10 years from now when this thing comes up and the railroads have voluntarily given up their capability.

Really, it is not in the form of a question, but if you have a remark you would like to make concerning it, I would appreciate it. It is just my own idea on this serious subject.

Mr. TIERNEY. As I indicated to Mr. Moss, we have recommended a study and we have exchanged correspondence with the Department of Transportation on this subject. The very purpose of establishing the Department was to assure that we have a balanced system, which you referred to, Mr. Moss.

The CHAIRMAN. Mr. Murphy?

Mr. MURPHY. I would like to offer my personal congratulations to the new chairman of the Interstate Commerce Commission and congratulate him on his statement. I think his position on the amendments is well taken.

Mr. TIERNEY. Thank you, Mr. Murphy.

Mr. MURPHY. Mr. Chairman, have you been to Japan and ridden their high-speed rails?

Mr. TIERNEY. I am sorry, I have not been.

Mr. MURPHY. I visited Japan a year ago and rode those rails, rode with the engineer and with the executives of the railroad company. There were several interesting things that I might point out.

No. 1 was that an entire new railbed had to be laid. They couldn't use the existing roadbed between Osaka and Tokyo. Second, the train proved so comfortable to commuters that they took about 40 percent of the air transportation between Osaka and Tokyo.

But also, I think of significant note is that there was no adequate highway between Osaka and Japan. Therefore, a competing mode of highway transportation was not in existence with that of rail and of air.

I think we have to consider these things here when we take your statement, that the long-range rail transportation may not be a thing of the future. I am looking forward to a high-speed rail in this Northeast corridor, but I am afraid it will take a great capital expenditure before the capabilities of cars and power units can be fully utilized.

I don't think the existing roadbed, trestles, and tunnels will permit the utilization of a high-speed capability. It will take, as you said earlier in your testimony, a tremendous capital investment. Whether the Government should get into this or whether it should be left to free enterprise to adjust to the public need and the public demand is something we will have to consider at a later date with this legislation.

The CHAIRMAN. Mr. Brown?

Did you want to make a comment, Mr. Chairman?

Mr. TIERNEY. No, I don't; thank you.

The CHAIRMAN. Mr. Brown?

Mr. BROWN. I will pass, Mr. Chairman.

The CHAIRMAN. Mr. Kyros?

Mr. KYROS. I, too, want to welcome the new chairman here.

I want to say that last month the chairman of this committee sent me with my colleague, Mr. Stuckey of Georgia, to Japan, and we also rode those trains. We rode them during the period of the holidays, when all the people were moving from Tokyo to the countryside. I was amazed at the trains, their high speed, and their comfort.

You can board the trains very easily from loading platforms. They had trains running in both directions, and it was the height of the holiday traffic, yet it was almost incredible that when we left Tokyo, in 2 hours precisely on schedule you would be in Kyoto on the way to Osaka.

Sure enough, the train pulled into the station in exactly 2 hours. I would think it would be an excellent scheme for you to study and perhaps to travel to Japan and see their operation. It is an operation, I think, that lends itself peculiarly to all kinds of passengers.

The trip was one of the most comfortable trips I have made. The trains are well outfitted, and they are designed for passenger convenience. I think the Northeast corridor in particular, not only from here to New York but ultimately to Maine, my own State, would be an ideal study in order to provide high-speed, safe, and comfortable railroad service.

Mr. TIERNEY. I might say, Commissioner Walrath, while he was Chairman, made an official visit to Japan and rode the train. I think this was before it was officially in operation.

The CHAIRMAN. The committee might make an official act that the whole Commission go over and see how they do things over there.

Mr. TIERNEY. That would be wonderful, Mr. Chairman.

The CHAIRMAN. Mr. Skubitz?

Mr. SKUBITZ. Thank you, Mr. Chairman.

First, Mr. Chairman, I disagree with the statement made by Mr. Moss concerning 13a(1). I think 13a(1) was made a part of the act of

1958 because it was necessary. The railroads at that particular time were flat on their backs and had to get rid of some of their passenger trains.

The States wouldn't permit them to do it for political and/or economic reasons. But it was necessary to do something about getting these trains off the roads. I refer to the trains that were really a burden on commerce and a financial drain on railroads that were fighting for their very existence.

But I think the pendulum has swung the other way. I think now the railroads, not all of them, are taking advantage of 13a(1) and using it as a means of getting rid of passenger service. They find that they can make more profit out of freight than they can out of passenger service, and they don't have to bother about complaints from customers.

There are still passenger trains that ought to be taken over. But I think the Commission has the responsibility in this matter to determine whether or not it is in the public interest to take these trains off and whether the burden is sufficient to take them off.

I thought the guidelines laid down by the Commission in a case a year ago, the *Santa Fe* case, dealing with trains 47 and 48, was an excellent group of guidelines. At that time they did say there were about five things that should be taken into consideration: population of the community served; the use of the service of the train; the financial condition of the carrier; whether it was a burden.

I was impressed with one statement the Commission made then, that a need for service may be so strong as to warrant the continuation even at some loss to the carrier.

I thought those were pretty good guidelines that they laid down at that particular time.

The question that comes to my mind is since we passed 13a(1), upon whom does the burden rest in establishing whether this is a convenience for the public or necessary for the public? Upon whom does the burden rest in proving whether or not this is a burden upon interstate commerce?

Mr. TIERNEY. There is some question about that. As a matter of fact, I think last year as part of H.R. 7004, one of the recommendations we made was that it clearly state that the burden was on the railroads, although we pointed out at that time that that is the situation as we actually handle the cases anyway.

It was a case of not being clear in the statute. That was changed. Some question was raised, I think, during the course of the hearings as to whether that was necessary.

Mr. SKUBITZ. The thing that bothers me is the statement you make on page 14 where you say, in the case of protests, they are most often in the nature of requests that the Commission refuse to permit the discontinuance and they contain little evidence of the need of the public for the continuance of the service.

That indicates that the burden, apparently, in the eyes of the Commission, is on these poor people along the line who might lose the train, that they have to prove that this is a burden upon interstate service.

Mr. TIERNEY. At that point in my prepared statement I am talking about those cases where we have no doubt at all that the train is not required by the public convenience and necessity, and that it is a substantial burden. In these cases we do not conduct an investigation.

In the next phase, when we decide to conduct the investigation,

then we operate under a full record. Although our time is limited, we think we could do a better job in these important, complex cases if we have 9 rather than 4 months.

Mr. SKUBITZ. When you speak of burdens, do you usually think of just the out-of-pocket loss to the company in determining whether or not a train ought to be discontinued?

Mr. TIERNEY. The burden is essentially the area of above-the-track costs. In other words, how much money would be saved in the event the passenger train were discontinued?

Mr. SKUBITZ. I have an article here in the Train magazine that deals with the Kansas City Southern. I take the Kansas City Southern because it goes through my hometown.

I happened to be at a hearing the other day dealing with this railroad. Here is an article in November 1967 dealing with this particular railroad with this statement by the Kansas City Southern:

The Kansas City Southern Passenger Department, although reluctant to disclaim any passenger deficit, is convinced that the ICC accounting procedures are not adequate pictures of what really happens when a passenger dollar crosses the Kansas City Union Station ticket counter.

In other words, isn't there something just a little bit strange about the accounting system that you fellows have?

Mr. TIERNEY. They are talking about our figures for passenger deficits. I want to distinguish that accounting procedure from the approach used in a discontinuance, a 13a(1) case, where we look at losses.

Our accounting people, in attempting to come up with a full passenger deficit figure, include common costs therein. In other words, a station or tracks might be used jointly for passenger service and freight service. The full costs of passenger service as represented by the deficit figures include reasonable apportionment of these joint costs. This is where there is a dispute.

Mr. SKUBITZ. There ought to be one, don't you think so, Mr. Chairman?

Mr. TIERNEY. I want to emphasize this has nothing to do with the 13a(1) cases. We don't look at the figures from the standpoint of all costs attributed to passenger service. We merely look at the costs which will be eliminated if the passenger service is stopped.

Mr. SKUBITZ. Let's carry that just a little further. Here is a railroad that operates both passenger trains and freight trains over the same track. Then in a discontinuance proceeding, in an effort to point out their losses, they say on maintenance of roadbeds they charge them to their costs—

Mr. TIERNEY. That is not correct.

Mr. SKUBITZ. It is in your files, the procedures that they filed with you. That is where I found it in the *Kansas City Southern* case, \$140,000 chargeable to maintenance.

Mr. TIERNEY. Isn't that concerning overall passenger deficits?

Mr. SKUBITZ. This is right. But in order to show a deficit, they use this maintenance figure.

Mr. TIERNEY. But in discontinuance cases, only those maintenance costs which the carrier demonstrates are, in fact, savable would be considered. These savings would be mostly above-the-track losses.

Mr. SKUBITZ. What do you mean by above-the-track losses?

Mr. TIERNEY. We exclude most of these track expenses, as I understand it.

Mr. SKUBITZ. I am glad to hear you say that. I hope you judge this case on that basis and not on what the figures are that they placed here.

Mr. TIERNEY. I would like to add, sir, that the list of criteria which you read in the *Santa Fe* case are the criteria we use in all the cases.

Mr. SKUBITZ. I heard someone talk about the use of the railroads. I have ridden the Santa Fe Railroad and their service is excellent. In fact, 2 weeks ago I rode their train. It was right on the minute from Wichita to Emporia, and from Kansas City back the other way. I had no problem at all. But I rode the Kansas City Southern. They were talking about people not using the train. I happen to have here a list of their trains. This says Kansas City Southern passenger train passes through North Yard Station, Pittsburg, Kans., December 1, 1967, to January 21, 1968; train 60 was, for 60 days, late over 30 minutes, and 1 hour late on 25 occasions.

Who can use the train on that basis? Do you fellows look into this sort of thing and see whether or not they are actually giving service in determining whether or not passengers are using their trains?

Mr. TIERNEY. We consider that in a train discontinuance case. In fact, there have been cases where we have not permitted discontinuance because we felt the evidence justified the conclusion of a deliberate downgrading in service.

Mr. SKUBITZ. Let me ask you one other question, getting on these mail contracts.

This seems to be the straw that breaks the camel's back in these hearings. Have you ever consulted the Commission or the Department of Transportation, or ever talked with the Post Office Department and visited with them with respect to the effect the cancellation of these contracts would have upon the railroads?

Mr. TIERNEY. I haven't personally, but some of my predecessors have.

Mr. SKUBITZ. Have they ever contacted you as Chairman of this Commission?

Mr. TIERNEY. I have been over there and they have discussed generally what their objectives have been in these areas. That is what I indicated at the outset, of whether it is, in fact, the effect of a business decision of the Post Office Department.

Mr. SKUBITZ. Have you tried to point out to them that, if you take these mail contracts away from the trains, you will wreck a transportation system? Have you ever talked to them about that?

Mr. TIERNEY. Not specifically, sir, no. I think this is an area where, of course, we have no power whatsoever under those circumstances. This is an area, I think, if it is a policy, if Congress determines it their policy, or that this should be changed, that is one thing.

Mr. SKUBITZ. In my State, we are old-fashioned enough to think that we have one Government in Washington, not 25 or 100, and that one department ought to visit with the other about mutual problems. It seems to me that this is an area that either the Interstate Commerce Commission or the Department of Transportation ought to be looking into, the effect these cancellations are having upon our whole transportation system.

I don't want the railroads to go on operating at a loss. I know that some of them had to be taken off. But I think we ought to be lending our efforts in trying to maintain a decent transportation system in this country.

Mr. Moss. Will the gentleman yield?

Mr. SKUBITZ. Yes.

Mr. Moss. First, let me commend the gentleman for his very careful homework and, second, the statements and observations he has made.

I recall when we created the Department of Transportation that it was supposed to coordinate and to recommend policies in the field of transportation. I think this is an area where we could well ask why it has not done more than it has done.

If they have not enough resources, they ought to come to the Congress and seek additional resources. They should certainly undertake with far more vigor and force to define transportation policies than has been evident thus far.

I thank the gentleman.

Mr. SKUBITZ. I agree with the gentleman.

I am hoping, Mr. Chairman, that eventually we do get to this question of dealing with 13a.

I would like to say to Mr. Moss that I put in a resolution just before Christmas time, I believe it was, to investigate the manner in which the Post Office Department, or their policies, deal with this, in relation to the overall transportation system. I think these are closely related as we look at these discontinuances.

Mr. Moss. I would be happy to join the gentleman in his efforts.

The CHAIRMAN. Mr. Pickle?

Mr. PICKLE. No questions.

The CHAIRMAN. Dr. Carter?

Mr. CARTER. No questions.

The CHAIRMAN. Mr. Brown?

Mr. BROWN. As long as we are in the general area of the problems of the railroads, I would like to ask a question that does not involve passenger traffic, but which may relate to the profitability or lack of profitability of the railroads. It concerns the ability of the road to sustain passenger traffic, or the roads in general to sustain passenger traffic, based upon the profit they might receive from their freight handling.

Has the ICC made any progress whatsoever in a study of the general problem of the freight car shortage and the delays when the cars are in the hands of the carriers other than those who own the cars?

Mr. TIERNEY. We are presently in three areas of this, Mr. Brown. No. 1 is *Ex parte* 252, a proceeding involving the per diem bill.

Mr. BROWN. May I stop you there and ask if there is any indication that this has had a significant influence on the problem?

Mr. TIERNEY. Not yet, sir. First of all, we issued a report several months ago which, in effect, was that we did not have sufficient information upon which to implement the act. We are now about to develop this information and we hope to have hearings for it in the year.

The report we have just issued concerns basic per diem—the rental charges for cars received by the owning railroad from the using railroad. We have just issued a report in that area setting forth the basic per diem formula which we feel is a necessary step before devising an incentive per diem.

In the other case involving *Ex parte* 241, which relates to service rules, an examiner has just issued a report in that area.

Mr. BROWN. Is there any conclusion thus far that perhaps the incentive is not high enough or that there might be another incentive put on in a negative way to charge the railroads for mishandling or loss of freight cars? I shouldn't say "loss"; perhaps I should say "mislaying or misdirecting" of freight cars.

Mr. TIERNEY. We felt we did not have sufficient data or information upon which to base a report.

Mr. BROWN. Have you any idea when you might come to a conclusion on this problem and advise the railroads, the Congress, and private industry?

Mr. TIERNEY. The best I can say now is that we hope to begin hearings before the end of this year.

Mr. BROWN. The ICC will have hearings on the problem?

Mr. TIERNEY. That is right, sir.

Mr. BROWN. They will begin before the end of this year?

Mr. TIERNEY. That is correct.

Mr. BROWN. In other words, train shippers face another summer of difficult problems with their freight cars?

Mr. TIERNEY. We hope not, sir.

Mr. BROWN. You said at the end of this year. That means another summer.

Mr. TIERNEY. I am not relating that to the incentive per diem basis. It will still be the end of this year. We don't see how we can get to it before then.

Mr. BROWN. Why is that?

Mr. TIERNEY. It is because of the tremendous problem in developing data.

Mr. BROWN. I think this relates, Mr. Chairman, to this whole problem. We must have more efficient handling of freight cars so that shippers have more confidence in the ability of the railroads to move cars where they are needed when necessary. Until we can escape problems which exist in many grain-producing areas of dumping the grain on the ground because of lack of storage facilities, and the lack of cars to get the grain to these storage facilities, there is a great likelihood that the railroads will lose business to other means of transportation—business which will never return because of the inability of the railroads to provide adequate service at peak needs.

If that happens, certainly our passenger transportation system is going to be derogated in a similar way. The whole thing ties together. I am not sure whose responsibility it is but I gather it is the responsibility of the Interstate Commerce Commission to try to set regulations to take care of the public convenience and necessity. However, it certainly seems to me that this country's railroads have a responsibility to try to maintain their own economic position in a time when they are being oppressed, not only by Federal regulations, but also by other means of competition.

Are you going to undertake this responsibility, then, in your service as Chairman of the Commission?

Mr. TIERNEY. I am going to undertake my responsibilities; yes, sir.

Mr. BROWN. Thank you.

The CHAIRMAN. Thank you, Mr. Chairman, for coming before the committee. We appreciate the time you have given us.

Mr. TIERNEY. Mr. Chairman, we may have one problem on one of your questions with respect to the authority to take the train off

after investigation. I wonder if I might have the privilege of looking into that and writing to you about it.

The CHAIRMAN. Yes, indeed.

Mr. TIERNEY. Thank you.

(The following information was subsequently submitted:)

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., February 21, 1968.

Hon. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.*

DEAR CHAIRMAN STAGGERS: During the course of my testimony on S. 2711, I asked permission to give further study to your question yesterday: "If the Commission orders an investigation as provided by the fourth sentence, and finds after hearing that the public convenience does not require the continued operation of a train, how can the train be taken off?"

It is our understanding that the Senate in S. 2711 intended to give the Commission jurisdiction during the period of time intervening between the filing of the notice and the effective date of the notice of discontinuance, as well as during the statutory four-month period, by not permitting discontinuance until an appropriate order is issued. While there is no question that an order is required after the expiration of the 30-day effective period, we do not construe the bill to require the issuance of an order of the four-month period and the Commission believes that appropriate clarification is necessary. We would be happy to render any assistance to the Committee to effect such clarification.

I might point out that as we interpret the language, the bill would be self-operating after the expiration of the four-month period, that is, if the Commission does not issue an order requiring continuance prior to the expiration of the four-month period, the carrier may discontinue the service.

Sincerely,

PAUL J. TIERNEY, *Chairman.*

(Mr. Tierney's full statement follows:)

STATEMENT OF HON. PAUL J. TIERNEY, CHAIRMAN, INTERSTATE COMMERCE COMMISSION

Mr. Chairman, members of the committee, my name is Paul J. Tierney. I am the Chairman of the Interstate Commerce Commission and have served in that capacity since January 1, 1968.

Mr. Chairman, on behalf of the Commission, I wish to thank you and the other members of the Committee for the opportunity to express our views on S. 2711 which amends, in four respects, section 13a of the Interstate Commerce Act, governing the discontinuance or change of railroad passenger service.

Initially, I should state that we are in favor of legislation that will improve section 13a and, therefore, we are in agreement with the basic purposes of this bill.

It may be helpful at this point to describe the procedure which is presently followed by the Commission in these cases under the present law, in order that the effects of the changes made by S. 2711 can be clearly understood.

The present law, sections 13a(1) and 13a(2) of the Interstate Commerce Act, was enacted as a part of the Transportation Act of 1958, which in turn was a comprehensive program designed in part to alleviate the financial problems of the railroads. Prior to the enactment of this legislation, jurisdiction over passenger train operations and service discontinuances was essentially a matter of state law. Enactment of the present section 13a was prompted in large part by the difficulties encountered by the railroads in discontinuing unneeded and unprofitable trains under state law, difficulties compounded by the fact that, as to a single interstate train, a carrier had to deal with several states and a multiplicity of state regulatory directives which were at times inconsistent and arbitrary.

While the discontinuance or change in service of interstate passenger trains is the subject of section 13a(1) of the Interstate Commerce Act, the mere fact that a train is operated in more than one state does not in itself bestow on the Commission jurisdiction over its discontinuance. There are two elements of fact that must be present before the Commission can assume such jurisdiction: (1) the contemplated discontinuance or change in service must be subject to statutory or constitutional provisions of at least one of the states in which the train is operated or under the regulation or order (including those pending) of a state regulatory agency

or court, and (2) the carrier proposing the discontinuance or change in service must, itself, place the matter within the hands of the Commission. Unless both of these elements are present, the Commission is without authority to institute an investigation or entertain a complaint, regarding a discontinuance under section 13a.

Where these elements are present, a proceeding under section 13a(1) goes through one or both of the following two phases. First, a proceeding under section 13a(1) for the discontinuance of an interstate train is instituted by the carrier filing with the Commission, and posting in every affected depot, station, or other facility for the benefit of the general public, and on each car on each train, a notice of its intention to effect a discontinuance or change in service on a specified date at least 30 days in advance of the proposed discontinuance. The carrier must also mail a copy of the notice to the Governors of the states involved simultaneously with filing the notice with this Commission.

The form and style of the notice must conform with the Commission's rules and regulations issued under this section. It must include such information as the exact corporate name and address of the carrier, the number and name or other description of the train to be discontinued, the date the discontinuance is proposed to become effective, and advice to the public as to its rights to object to such discontinuance. The carrier is also required to furnish additional supplementary information consisting of data regarding the general financial status of the carrier, the financial results of operating the train to be discontinued, the general territory affected, the service performed by the train, alternate service available, the reasons for the carrier's proposal, and a map of the line over which the train to be discontinued operates.

Under the statute, the Commission has authority, if its jurisdiction has been properly evoked and sustained, during the 30 days' notice period, either upon complaint or on its own initiative without complaint, to institute an investigation of the proposed discontinuance. The Commission is also authorized to require continuance of the train in service during the investigation, but not for a period longer than four months beyond the date the carrier's notice announced the discontinuance would be accomplished. However, the Commission's order instituting the investigation and requiring the retention of the train in service for the four-month period must be served on the carrier at least 10 days prior to the time the discontinuance would become effective pursuant to the carrier's notice. If the Commission institutes an investigation in a period less than 10 days prior to the effective date of the notice, it cannot then require the continued operation of the train for the four months pending the investigation. No investigation may be instituted after the effective date provided in the notice.

If it appears clear that the train involved is operating at a loss sufficient to constitute a burden on interstate commerce, that its service receives little patronage and few, if any protests have been received, ordinarily no investigation will be instituted.

If the Commission decides an investigation is not required, it will serve on the carrier and all interested parties a formal notice to that effect. This notice is not required by the statute. The notice procedure has been adopted by the Commission as a means of notifying the public of its decision not to investigate and for providing interested parties with an opportunity to appeal from such decision prior to the date the train is discontinued.

If no appeal is filed to the decision not to investigate, or if an appeal is filed and is denied, the carrier is free to discontinue its train on the date set forth in its notice.

The second phase of one of these proceedings becomes operative in those cases where the Commission decides to investigate the proposed discontinuance. Normally it will, by order served on the carrier and other interested parties, require the train to be kept in operation pending completion of the investigation or up to the four-month period permitted by the statute. Appeals, if any, from this order may be filed within 15 days from the date of its service pursuant to the Commission's Special Rules of Practice.

The investigation is conducted through public hearings held at various points in the territory to be affected by the discontinuance. The carrier is permitted to present its case for discontinuance supported by the necessary financial and operational data. Protestants may cross-examine on the carrier's testimony and evidence and present direct testimony and evidence themselves, subject, of course, to the carrier's cross-examination.

Because of the four-month limitation, no report and recommended order of the hearing examiner is served. Instead, the initial decision is rendered by the Commission itself, usually Division 3.

If, after consideration of the evidence adduced at the hearing, the entire Commission or Division 3 finds that the operation of the train is required by the public convenience and necessity and will not unduly burden interstate or foreign commerce, it may order the train continued in service in whole or in part, for a period not to exceed one year from the date of its order. Continuation or restoration of service may be ordered regardless of the fact that the four-month period may have expired before the decision is rendered and the carrier has removed the train from service.

If the Commission finds the operation of the train is not required by the public convenience and necessity and will constitute a burden on interstate and foreign commerce, it closes its investigation by order and the train can be discontinued at the expiration of the four-month period, thus completing this second stage in the majority of the cases. Petitions for reconsideration of the Commission's report and order may be filed by the carrier or interested parties under section 1.101 of the Commission's General Rules of Practice. Carriers usually await the disposition of protestants' petition before proceeding with the discontinuance of a train which the Commission does not require to be continued in operation. After the expiration of the period during which the carrier was required by the Commission to continue operating the train, the jurisdiction over the train again reverts to the state. However, the carrier may at that time again invoke the jurisdiction of the Commission by instituting a new section 13a(1) proceeding.

Although the Senate Commerce Committee's Report on S. 2711 sets forth in detail the purpose of this bill and the circumstances which gave rise to it, a brief summary of these matters, as well as the provisions of the bill, may be helpful. As indicated in the Committee's report, the stated purpose of the four amendments made by S. 2711 is to close a jurisdictional deficiency in present section 13a(1) resulting from two Commission actions involving the discontinuance of four passenger trains by the Santa Fe Railroad. The proceedings were designated by the Commission as Finance Docket No. 24772 and Finance Docket No. 24774, involving the discontinuance of Santa Fe trains Nos. 3 and 4 between Kansas City, Missouri, and Gallup, New Mexico, and Santa Fe trains 7 and 8 between Chicago, Illinois, and Los Angeles and Bakersfield, California, respectively. The texts of the Commission's orders and notices in these two proceedings are set forth on pages 6 through 10 of the Senate Committee's Report.

In essence, what occurred in these two decisions may be stated as follows: On October 9, 1967, the Santa Fe, pursuant to the Commission's rules and regulations issued under section 13a(1), filed notices with the Commission stating its intent to discontinue the subject trains upon the expiration of the 30-day period following the filing of the notice of discontinuance. Pursuant to the present section 13a which, in effect, allots only 20 days for the Commission to decide whether to investigate, the Commission issued a notice on October 19, 1967, stating that it would not investigate the proposed discontinuance of these four trains. Subsequent to this action, a number of the protesting parties to these proceedings, including representatives of railroad labor and interested members of the general public, filed petitions for reconsideration of the action of the Commission. Up to this point, the case was not unusual. But before the Commission could act upon these petitions, the Santa Fe unilaterally discontinued the trains. On October 30, 1967, Division 3 of the Commission, acting as an Appellate Division, issued an order disposing of the petitions for reconsideration. The operative paragraphs of the Division's order stated:

"It appearing, That section 13a(1) of the statute specifically prescribes that notice of a proposed discontinuance be properly posted and filed 'at least thirty days in advance of any such proposed discontinuance or change' and that the carrier may discontinue or change any such operation or service 'pursuant to such notice * * *';

"It further appearing, That the discontinuance of the said trains by the Atchison, Topeka and Santa Fe Railway Company prior to the expiration of this 30-day period was a breach of its own notice and of this provision of the statute and therefore vitiates our jurisdiction in this matter.

"It is ordered, That the notice and supporting data filed herein, be, and they are hereby, dismissed for failure by the carrier to sustain the jurisdiction of this Commission."

By telegram, the Railway Labor Executives' Association thereafter requested the Commission to find this matter to be one of general transportation importance. This decision of the Division was subsequently affirmed by the entire Commission on its own motion on November 9, 1967. The Commission summarized the effect of the carrier's action in this case in its order of November 9, 1967, which is re-

produced on page 9 of the Senate Committee's Report. As pertinent here, this order stated:

"And it further appearing, That a carrier which files a notice of a proposed discontinuance with the Commission under section 13a(1) of the Interstate Commerce Act is thereby sheltered from prosecution, restriction, or other action by any State by reason of such discontinuance, but that actual discontinuance of operations other wise than pursuant to the notice filed under said section removed that shelter and exposes the carrier to the provisions of the laws and constitution of any State served by the discontinued trains;

"And it further appearing, That on October 30, 1967, the Commission by Division 3, acting as an Appellate Division, issued an order in each of these proceedings dismissing the notices and their supporting data filed by the Atchison, Topeka and Santa Fe Railway Company proposing discontinuance of its trains Nos. 3 and 4 and Nos. 7 and 8, respectively, for failure by the carrier to sustain the jurisdiction of this Commission, in that the carrier, by actually discontinuing operation of said trains other than in accord with its notices filed with the Commission herein vitiated our jurisdiction under section 13a(1);"

Before I turn to my specific comments on the provisions of S. 2711, I would like to reiterate that we support the basic purposes of this bill. However, as I will point out later on, we feel that the provisions of this bill raise many serious problems of interpretation, which may lead to consequences never intended in this legislation, and, further, go beyond what is actually necessary to prevent a repetition of the situation that occurred with respect to the Santa Fe train discontinuance case; and, therefore, we believe this bill in its present form should not be enacted. Rather, we believe that a simple amendment, which I will describe later, to present section 13a making it clear beyond doubt that a carrier cannot by its own action oust the Commission's jurisdiction in cases arising under section 13a(1), will preserve the purposes and intent of S. 2711 without, at the same time, introducing a host of complicating factors.

Turning now to S. 2711, I would first briefly like to summarize the changes made in the present law by this bill. For convenience, I will deal with this bill in the context of the five changes made in the present law which are set forth on page 5 of the Senate Committee's Report. As indicated there, S. 2711 amends section 13a(1) to:

(1) Provide that a railroad may not, after the filing of a notice, discontinue or change passenger train service except upon order by the Commission.

(2) Confirm jurisdiction of the Commission upon the filing of a notice, by substituting the word "jurisdiction" for the word "authority";

(3) Provide that within 20 days after the filing by a carrier of a notice to discontinue, the Commission must either enter an order instituting an investigation or permitting the proposed discontinuance or change at the expiration of the statutory 30 days' notice period;

(4) Provide that if a carrier discontinues or changes its passenger train service in violation of the provisions of section 13a(1), the Commission may require the continuance or restoration of such service; and

(5) Delete the word "otherwise" and substitute the words "would have" to confirm that after the filing of a notice a carrier may not change or discontinue passenger train service except upon order by the Commission.

The complete working of these amendments is set forth in the revised text of section 13a on page 10 of this same report.

Taken as a whole, the intent of these five itemized changes is to foreclose the possibility of any repetition of the Santa Fe situation. Thus, in the future, a railroad upon invoking the Commission's jurisdiction could not lawfully remove or change any service subject to the notice except pursuant to a formal order of the Commission. This is the purpose and effect of item (1). Item (2) makes it clear that even if the carrier should unilaterally take action to remove the trains in question, the Commission's jurisdiction is, nevertheless, not defeated by this act but rather is expressly retained. This is confirmed by the changes described in items 4 and 5, particularly item 4 which, in effect, authorizes the Commission to order the restoration or continuance of service removed by the carriers in violation of the provisions of section 13a(1). It should be added at this point that if such a unilateral act of a carrier would be in violation of an order of the Commission, it also would possibly subject the carrier to the criminal penalties provided in section 10(1) of the act for violation of the requirements of the statute.

Although the Santa Fe cases dealt only with this first or notice phase of the Commission's jurisdiction over rail passenger discontinuances, as the Commission did not enter into an investigation, these five changes also will affect those proceed-

ings in which the Commission undertakes an investigation. Under S. 2711, a carrier could not unilaterally discontinue a train or trains during the course of a Commission-instituted investigation and hearing or unilaterally discontinue a train or trains which the Commission has ordered to be continued for one year or less.

In our judgment, the Commission's jurisdiction cannot be defeated at present by the unilateral action of the carrier during the second, or investigation phase of a section 13a(1) proceeding as may be possible during the notice period, since the investigation is instituted by a Commission order which binds the carrier and subjects it to the penalties which I have just mentioned for violating an order of the Commission. We, however, would have no objection to having any doubt removed over the exercise of our jurisdiction in this second phase should the Committee feel this is required. More important, in our opinion, is that careful consideration be given to any amendments so that the Commission may administer the policy considerations expressed in this legislation in an orderly and practical manner. We believe that S. 2711 will render our administration of section 13a more difficult than under the present law unless certain additional changes are made.

As I have indicated earlier, under the present statute, the Commission's decision whether to institute an investigation is based solely on the notice and the supporting data submitted by the carrier and the representations of protesting parties. In the case of the protests, they are most often in the nature of requests that the Commission refuse to permit the discontinuance, and they contain little evidence of the need of the public for continuance of the service. In effect, the Commission's decision necessarily rests on (1) whether the carrier has made a convincing case for allowing the discontinuance to take effect without a hearing or further investigation, and (2) whether the protests are such as to indicate that a hearing would be useful and productive. In all cases in which there is any doubt as to the showing made by the carrier the Commission suspends the discontinuance of the train and sets the matter for hearing. This enables the development of a complete record with the right of cross-examination accorded to all parties. It provides the Commission with evidence of what public need is being served by the operations of these trains and how much of a financial burden their continued operation will cause the carrier.

Under S. 2711, the Commission would be required to issue an order in all cases and not just those cases where it proposes to hold an investigation and hearing. In those instances where the Commission institutes an investigation and requires the retention of the trains in service for the four-month period, S. 2711 would require no changes in our present procedures.

In those cases where the Commission decides that the rail petitioner's evidence constitutes a *prima facie* showing that the involved trains are operating at a loss sufficient to constitute a burden on interstate commerce and their service receives little patronage, S. 2711 would require the issuance of an order rather than the notice-procedure which the Commission has adopted as a means of notifying the public that an investigation will not be instituted. Our opposition to this phase of the bill is based on the additional time, effort and experienced personnel which would be required to draft the requisite orders, make service of such orders on the parties of record, and then defend them when they are judicially challenged. Since the Commission suspends the proposed discontinuances in all instances where there is any doubt as to the showing by the carrier, we feel that our available resources can better be utilized in those cases where the discontinuance has been suspended and a hearing ordered.

Since it is our understanding that the stated purpose of S. 2711 is simply to prevent a carrier from taking unilateral action to discontinue passenger service which has been the subject of a notice presented to the Commission and thus defeat the Commission's jurisdiction, it would seem to us that a simple amendment to section 13a, which indicates that a carrier may not do this in the absence of appropriate authority from the Commission or absent the carrier withdrawing its notice entirely, would accomplish the purposes of this bill.

While it is possible to offer a number of perfecting amendments to S. 2711 to accomplish the same objective, we believe that it would be simpler to amend section 13a in its present form. Accordingly, for the aforementioned reasons, we suggest the Committee consider inserting the following amendment to the present section 13a in lieu of the proposed amendments in S. 2711:

(1) The second sentence is amended by inserting after "may" a comma and the phrase "upon the expiration of, but not during, the notice period,"

(2) Between the fourth and fifth sentences, insert the following new sentence: "However, if, during the notice period, the carrier or carriers discontinue or change, in whole or in part, the operation or service of any train or ferry, the Commission shall retain jurisdiction to enter upon an investigation of the change or discontinuance and may require the immediate restoration or continuance of operation or service of such train or ferry until the expiration of the notice period."

For convenience, I have attached at the end of my prepared testimony a copy of section 13a which gives effect to these amendments. Our proposed amendments are underscored.

The modifications preclude the carrier from changing or discontinuing any passenger operation or service before the expiration of the notice period of at least 30 days and retain jurisdiction in the Commission should the carrier change or discontinue the operation or service before the expiration of the notice period.

I would like to now turn to some additional matters that we believe should be considered apart from S. 2711. As I mentioned earlier, the Commission has previously testified on its legislative recommendation to amend section 13a which is embraced in H.R. 7004. The amendments contained therein included the following:

1. To give the Commission more time, up to a maximum of nine months to dispose of a section 13a proceeding;
2. To cure certain jurisdictional problems over intra- vs. interstate train service;
3. To permit us to attach conditions to the discontinuance and continuance of rail passenger service; and
4. To clarify and put beyond doubt the right of judicial review from final decisions of the Commission.

While H.R. 7004 is not the subject of these hearings, we urge that the provisions of that bill be considered at this time. But if the Committee decides that only the amendments proposed in S. 2711 should be made at this time, we strongly commend to your attention the changes that we have proposed. In any event, specific consideration should be given to granting the Commission additional time to process these cases. We cannot emphasize too strongly the need for more time to adequately handle these cases. Due in large part to the discontinuance of mail contracts by the Post Office with passenger-carrying railroads, the Commission has received over 40 notices from carriers under section 13a since September 1, 1967. On the basis of our present caseload docket, I am told that the Commission will have to render on an expedited basis a decision in these section 13a proceedings on the average once every four days between now and mid-July 1968; and the intervals will become smaller if the volume of these cases continues at its present rate. When considered in the context of the Commission's regular caseload, this presents a formidable administrative problem not only to the Commission itself, specifically Division 3 of the Commission which handles the majority of our cases under section 13a, but to our hearing examiners who must conduct these hearings throughout the various states involved. Although the Commission's jurisdiction over section 13a cases is limited, we are deeply concerned about the decline in rail passenger service and the discontinuance of particular trains and we strongly believe that we have a positive obligation—to both the carriers and the public—to give these cases thorough consideration and to deal with them in a fair and orderly manner. It is for this reason that we earnestly request that this Committee not only consider the amendments we have proposed previously to section 13a, but that at a minimum we be given additional time to perform our functions properly.

This concludes my prepared testimony, Mr. Chairman. I would be happy to answer any questions that you or any other member of the Committee might have.

APPENDIX

SECTION 13a—DISCONTINUANCE OR CHANGE OF CERTAIN OPERATIONS OR SERVICES (PROPOSED AMENDMENTS ITALICIZED)

SEC. 13a [August 12, 1958.] [49 USC 13a] (1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in

which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may, *upon the expiration of, but not during, the notice period*, discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. *However, if during the notice period, the carrier or carriers discontinue or change, in whole or in part, the operation or service of any train or ferry, the Commission shall retain jurisdiction to enter upon an investigation of the change or discontinuance and may require the immediate restoration or continuance of operation or service of such train or ferry until the expiration of the notice period.* If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

The CHAIRMAN. The next witness will be Mr. William Moloney, general counsel of the Association of American Railroads.

STATEMENT OF WILLIAM M. MOLONEY, GENERAL COUNSEL, ASSOCIATION OF AMERICAN RAILROADS

Mr. MOLONEY. My name is William M. Moloney, and I am general counsel for the Association of American Railroads.

The bill your committee is considering, S. 2711, as we understand it, is a bill that was intended to deal with and to correct a particular situation that arose as a result of the action of the Santa Fe Railroad in discontinuing certain passenger trains with respect to which they had filed notices with the Interstate Commerce Commission, but which trains were discontinued prior to the expiration of the 30-day-notice period.

The Commission, in that instance, held that the removal of those trains before the expiration of the 30-day-notice period vitiated the jurisdiction of the Commission.

I should like, Mr. Chairman, first to express one personal view, and by personal I mean purely and simply my own personal legal view as distinguished from the Association of American Railroads.

I think that the Commission's decision was wrong. I think the present law does give the Commission full power during the 30-day-notice period to institute an investigation and to require the continued opera-

tion of the train. They can do that provided they issue an order to the railroad 10 days before the expiration of the 30-day-notice period.

These trains, if you will remember, were taken off while there was still more than 10 days of the notice period remaining. I think they could, under existing law, have directed the Santa Fe—well, they could have instituted an investigation and directed the Santa Fe to continue to operate the trains for 4 months while they held their investigation.

I suppose that might be an interesting question, but possibly an excursion into the past, because right or wrong, that is what the Commission held, and right or wrong, the trains did come off before the expiration of the notice period.

The bill that you have before you being aimed at that particular situation, we think would clarify the present situation if, as I said, it needs clarification at all. At the same time, in listening to the comments and the testimony of the Chairman of the Interstate Commerce Commission, I am very much impressed with the amendments he has suggested to you which should be made in substitution for the provisions of S. 2711. Those amendments are set out on page 16 of Chairman Tierney's testimony.

I think with those amendments substituted, S. 2711 would very clearly deal with the Santa Fe situation, deal with it in a realistic way, and would make clear the power of the Commission under those circumstances.

To the extent that other amendments have been suggested, either by the Chairman of the Interstate Commerce Commission or other amendments that might be suggested by other witnesses that deal with substantive changes in section 13a(1), then the position of the railroad industry is as we have expressed it many times before this committee, and very recently before Mr. Friedel's subcommittee:

We are opposed to any substantive changes in section 13a(1).

Summarizing my statement and the position of the industry, I think that if you took S. 2711 and if you changed it as has been suggested by the Chairman of the Interstate Commerce Commission and reported that bill out, you would have corrected the situation that you are attempting to deal with while at the same time you would not have gone into those very controversial areas that the other proposed amendments would invoke.

The CHAIRMAN. Thank you very much, Mr. Moloney.

Have you any questions?

Mr. FRIEDEL. No questions.

The CHAIRMAN. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

The CHAIRMAN. Mr. Moss?

Mr. MOSS. No questions.

The CHAIRMAN. Dr. Carter?

Mr. CARTER. No questions.

The CHAIRMAN. Mr. Kornegay?

Mr. KORNEGAY. No questions, Mr. Chairman.

The CHAIRMAN. Does anyone on the committee have any questions they would like to ask Mr. Moloney?

Mr. BROWN. I asked the Chairman of the Interstate Commerce Commission the question about the handling of freight cars. I would,

therefore, like to ask you, as a representative of the Association of American Railroads, for a similar comment on this problem of service in general. I ask this in view of the fact that you represent private enterprise, which responsibly must be competitive in order to maintain the viability of the company, the profit for investors, and the service to customers.

Is any effort being made within the Association of American Railroads to resolve this freight handling problem so that railroad customers will not be so tempted to move to other means of transportation for their commodities and, therefore, put the railroads in sort of an increasingly deteriorating condition with reference to passenger service and freight services in general.

Mr. MOLONEY. Mr. Brown, I am delighted that you asked me the question because I think I possibly can shed some light on the subject that you will find interesting.

In an aside, I might say I was chief counsel for the railroad industry in these proceedings, *Ex Parte 241*, to which the Chairman of the Commission referred.

First, let me say that the grain situation and these peak situations that you have referred to are in substance facts of life that we are going to have to live with if we have an economic and efficient railroad transportation system. By that I mean these very shippers that you refer to as being short of cars at certain times when the harvest season is on, they would not enjoy the freight rates that are offered to them today if the railroad industry had to own enough freight cars to meet these peak demands at the instant those demands are made, because the rest of the time that capital investment would be sitting around pretty much idle, yet the costs would be going on and would have to be reflected in the freight rate charges.

Second, the industry itself is taking major strides in correcting and bringing about a better utilization of freight cars. In *Ex Parte 241* we amended certain car service rules providing for the interchange of cars and the handling of empties, as well as loads. We think we have a better set of car service rules.

We also in the industry have started a program—in fact it is very well along—using the sophisticated hardware, the computers that we have today. We have underway an automatic car identification program where every freight car in the United States will bear certain symbol marks that will identify the car by type, by class, and so on. We think that eventually it can even identify it by the nature of the loading in the car.

As those cars move over a railroad, there will be wayside scanners that will pick up and identify that car at speeds as high as 80 to 90 miles an hour and under all weather conditions. This is, at the present moment, a Sylvania machine. This car identification system will be tied into the communications systems so that as the car is identified, that identification will immediately be fed into the communications system and will immediately be fed back to a central computer system here in Washington and almost by the hour and by the minute we would be able to identify and locate every freight car in the United States.

This, of course, would also measure your flows through your gateways. It would give you the opportunity, after a little experience with

it, to anticipate situations such as you have described and to issue car service orders in advance to take care of these anticipated peaks.

But I do not think it is realistic to expect the industry—and as I said I don't think the shippers would stand for it because their costs would be too high—to be staffed, so to speak, so as to take care of the peakloads at all times. It is somewhat like your home. If you are going to have a domestic staff at your home sufficient to take care of your needs when you are entertaining 50 guests, then your household expenses are going up, because the rest of the time you are going to have you and your wife there.

Mr. BROWN. Without discussing an analogy, let me just say that by my own philosophical orientation, I would much prefer to see the railroads themselves resolve this problem. It sounds to me as if you have made some attempts to do this, so that you can move your freight cars around.

I also recognize that it is a question of who has the capacity to handle the material which is in peak supply, the grain shipper or the railroad itself? Or, perhaps, it is even the farmer who has someplace to put it and can deliver it to the grain shipper a little past the peak time so that then the railroads can supply the cars and move it right on.

I am inclined to think that, if ultimately, it is the consumer who pays the price of the grain, the shipper has to add in the prospect of loss of grain he has dumped in the street, or has no place to store. Or, if he has to add in a cost of additional freight car availability affecting the cost of railroad transportation in the handling of that grain. Or if the farmer, in turn, has to add into the price that he hopes to get for his grain the cost of building storage facilities of his own.

I am just wondering where the pressure had best be put to move this grain and store it in the most economical way?

Is any thought being given on the part of the railroads to any other means of handling these peakloads either in other kinds of conveyances, emergency trucking facilities or the like? Is there any practical solution to this problem that you could suggest beyond an effort to eliminate the lost cars or the cars sitting idle on a track someplace when they are badly needed to move grain?

The CHAIRMAN. I would like to say to the gentleman that I did explain very thoroughly at the start of the hearings that we would not go into other subjects. This is another subject completely, which would take many days to get into.

If the gentleman wants to complete his question, I will let the witness answer it. Please make it brief.

Mr. BROWN. The final comment I was going to make is, I have had suggested to me the prospect of legislation which would impose on railroads \$100 a day fine for the lack of utilization of cars equipped to move grain at peak times.

You say you are going to this computer system. Apparently you feel that problem is pretty well under control and that such legislation would not be necessary.

Mr. MOLONEY. We think that such legislation would not be necessary. We feel, for instance, going to the Big John hoppers, and also the rate changes that have been made, that your grain is moving at a different rate pattern than it has moved in the past. We also know that

much of the trouble in the past was due to the Government scheduling its own movements of grain so as to hit you at the time when the harvest is coming in.

The Commodity Credit Corporation is doing a much better job now of spreading their movements out, in timing, and so on.

We do not think that the situation today is nearly as bad as, let's say, it used to be. We think improvement is being made and we will continue to make improvement.

The CHAIRMAN. I would like to ask one question, if I may.

I asked Mr. Tierney this same question. In the light of the revised second sentence, which would read that a carrier filing notice may not discontinue a train except as ordered by the Commission pursuant to this paragraph, do you read the new third sentence to read that as to the discontinuance of a train at the end of a 30-day period, the infinitive "to permit" is implicitly modified by the phrase "by order" in every instance?

Mr. MOLONEY. Insofar as removing the train at the end of the 30-day period, I think it would call for a Commission order. But after the 30-day period, if the Commission institutes an investigation, then I think the statute would continue to operate as it does today.

The CHAIRMAN. Thank you.

Mr. SKUBITZ. Prior to the enactment of 13a(1), a discontinuance action, you would have to go before the State commission; is this correct?

Mr. MOLONEY. That is correct.

Mr. SKUBITZ. At that time, upon whom did the burden of proof fall?

Mr. MOLONEY. Upon the railroads.

Mr. SKUBITZ. In other words, by the passage of 13a(1), what we have done is not only taken the case out of the hands of the State commission, but we have shifted it to the Interstate Commerce Commission and we have also shifted the burden of proof; is this correct, in your opinion?

Mr. MOLONEY. No, sir; not exactly.

Mr. SKUBITZ. Let's not get the burden of proof and the burden of carrying on mixed up.

Mr. MOLONEY. To me it is very difficult to separate the two because as long as the burden of carrying on, the burden of going forward, exists, then for all practical purposes you have a burden of proof.

But from the technical standpoint and from the jurisdictional standpoint, such as obtaining an affirmative order, the placing of the burden of proof then creates serious problems.

Mr. SKUBITZ. I read your testimony before the committee on the railroad abandonment for some time. You have made quite an issue of that. It seemed to me you were trying to point out that the burden really shifted.

Mr. MOLONEY. I think this, fundamentally: That it is much easier for you to prove that you need something than it is for me to prove that you do not need it. But laying that aside, the Chairman of the Interstate Commerce Commission, as you appreciate, in his previous appearances before this committee—not referring to the present Chairman—commented on the fact that the railroads have voluntarily come forward with anything and everything that we have that will tend to show that these trains are not needed, and that the burden of

proof has really been more of a theoretical problem than a practical problem.

Mr. SKUBITZ. Is this available to the general public prior to the hearing?

Mr. MOLONEY. Yes.

The CHAIRMAN. Thank you very much, Mr. Moloney.

The next witness will be Mr. William G. Mahoney, counsel, Railway Labor Executives' Association.

**STATEMENT OF WILLIAM G. MAHONEY, COUNSEL,
RAILWAY LABOR EXECUTIVES' ASSOCIATION**

Mr. MAHONEY. I would like to submit my statement for the record, Mr. Chairman.

The CHAIRMAN. You may put it in and summarize it.

Mr. MAHONEY. I am the partner in the law firm of Mulholland, Hickey & Lyman, the general counsel of the Railway Labor Executives' Association.

The Association asked me to testify on its behalf because of my personal experience with the circumstances which led up to the passage of S. 2711 and also because I have been engaged in some aspect of every case which has ever been before the Commission under section 13a(1) and 13a(2).

In my prepared statement, I have traced briefly the history of 13a as an emergency statute which, in my opinion at least, should have expired by its own terms after 2 years because after 2 years it had accomplished its purpose; namely, permitting the railroads to discontinue those trains which the railroads had said they couldn't discontinue because of obstinate State commissions. They were all discontinued after that 2-year period, however.

The statute acted as a sort of invitation to the railroads to get rid of a service which could never, even in its best light, return to the railroads the same degree of profit which they could get out of their freight service.

As businessmen, I can understand why many of them decided to take the dollars that they had invested in passenger service and invest them in freight service because of the better return. The last year, 1967, was a record year for train discontinuance notices being filed with the Interstate Commerce Commission. And December 1967 was a record month in that record year. Some 36 trains were noticed to discontinuance in December alone. January continued in the way of December.

I think the reason was that S. 2711 passed the Senate and, therefore, many of the railroads were trying to get rid of their passenger service quickly. I know an opinion has been rendered here, and I think it is in part quite correct, that the Post Office Department is partially to blame for this situation because they have removed the mail from the passenger trains. Well, the Post Office Department has removed the RPO cars from the rails. It has not removed the other mails from passenger trains.

I would like at this point to refer to a letter which was sent by Mr. William J. Hartigan, the Assistant Postmaster General, Bureau of Transportation. He addressed this to the legislative representative of the Brotherhood of Railroad Trainmen, Santa Fe Lodge 285, in

Chillicothe, Ohio, Mr. Temburious. Mr. Temburious had written to Mr. Hartigan and said:

Why are you doing this to us? Why are you taking all of this mail off and costing us all of these jobs? If you take the mail off, it takes the trains off.

He enclosed a statement of Mr. John H. Reed, president of the Santa Fe Railroad Co. Some of you may recall the Santa Fe put out a large publicity release some months ago and said they were taking off 33 trains and—"The reason we are doing it is because we have lost the mail. This is the straw that has broken our backs." He enclosed this statement to the Postmaster General and this was the reply:

DEAR MR. TEMBURIOUS: The Postmaster General asked me to reply to your letter of October 10 transmitting a printed statement by Mr. John S. Reed, President of the Santa Fe. This statement does not present a clear picture of the facts.

The action taken by the Post Office Department involved only the removal of the special railway post office cars which amounted to approximately \$3 million annually in mail revenue. The total mail revenue received by the Santa Fe has been approximately \$35 million.

The company, however, decided to remove all rail storage cars from their passenger trains. If this action had not been taken, we would have continued using the passenger trains for transporting mail in other than railway post office cars. Arrangements were made with the Santa Fe to carry the mail in their special merchandise trains which enables the company to retain the major portion of their mail revenues.

The events which led up to S. 2711 began on October 9, 1967, when the Santa Fe filed two notices to discontinue two pairs of trains, trains 7 and 8 between Chicago and Los Angeles, and trains 3 and 4 between Kansas City and Gallup.

In the statements which they filed in support of their discontinuances, they set forth a number of exhibits. They state why they want to take the trains off. If you read it carefully, they are really taking the trains off because they are losing the RPO cars, which represents only about 11 percent of the money which they received from the mail revenues. The profit on these trains, at least on trains 7 and 8, was about \$5.5 million a year. The RPO cars returned \$1.6 million in revenues. So if you subtract the \$1.6 million from the \$5 million, you still have a very profitable train.

There were 45 cars on trains 7 and 8. One of those cars was a coach and the rest were RPO cars, storage mail cars and express cars. Their evidence does not show how many RPO cars there were, nor how many storage cars there were on the trains. They treated them in a lump-sum fashion.

They admitted in their evidence regarding trains 7 and 8 that those trains carried an average of 37.7 passengers a day. The other two trains carried about 66 people a day, or a total of 39,000 people a year.

The Santa Fe informed the Commission that they were going to take all of the mail off of the trains, and they have an exhibit that would project the loss to the railroad if these trains were run just with the locomotive and the one coach between Los Angeles and Chicago and between Gallup and Kansas City. They said that the total—in their evidence they said—the total loss to them would be \$7,993 per day for the four trains to operate without the mail.

On October 11, the executive secretary of the Railway Labor Executives' Association filed letters in each of these two cases with

the Secretary of the Commission protesting the discontinuances, requesting that the continued operation of the trains be required pending investigation, and asking to be notified of any hearings.

I would like to emphasize that Mr. Beattie sent copies of those letters to Mr. S. R. Brittingham, Jr., general counsel of the Santa Fe; and Mr. R. K. Knowlton, general attorney of the Santa Fe. Copies of those letters are attached to my statement.

At this point, these cases were proceeding like hundreds of others before them. However, on the morning of October 20, 1967, I received a telephone call from Mr. Al H. Chesser, who is the national legislative representative of the Brotherhood of Railway Trainmen, who informed me that trains 3 and 4 and 7 and 8 had been discontinued.

Train No. 3 was discontinued in Amarillo about 7:35 p.m. central standard time on the evening of October 19 on its way to Gallup.

Train 4 had been discontinued on the 19th.

Train 8, which was scheduled to leave Los Angeles at 12:20 a.m. on the 20th, was canceled and the crew reporting for duty on the evening of the 19th were told the train would not leave.

Train 7 was discontinued in the early morning of October 20.

I was surprised at this because in the 9-year history of this law, no railroad to my knowledge had ever discontinued a train prior to the expiration of the 30-day notice.

Mr. VAN DEERLIN. Were there any passengers who had tickets on the trains?

Mr. MAHONEY. I am quite sure that of the 104 people using the trains each day, somebody must have been left standing at the station.

I was given a letter this morning from a Mrs. J. C. Hanks of Bartlesville, Okla., addressed to Mr. Ernest S. Marsh, chairman of the board of the Santa Fe. She refers to the fact that on numerous occasions she had ridden train No. 3 and had always been sold cash fares on this train, although it is not advertised as a passenger train.

Knowing that your company had proposed to discontinue this train, I made a long distance inquiry on or about October 17, 1967, to make certain that the train would be in service for my planned trip on October 20, 1967.

On numerous occasions during the past year we have made a trip by car from our home in Bartlesville, Oklahoma, to Wellington, Kansas, a distance of over 100 miles, to catch your Train No. 3. I was informed by means of an ICC bulletin posted for the public notice that Train No. 3 had proposed discontinuance date effective 12:01, November 10, 1967.

Plans were definitely made for my trip to visit my family in Amarillo, Texas, the above route being the only available one by rail. Approaching the ticket counter, I was informed that Train No. 3 had been discontinued that very day, some three weeks prematurely from the proposed date in November. I was disappointed, flabbergasted and infuriated.

My husband had taken time off from his work to drive our 4-year-old and 6-week-old sons and myself over 100 miles to meet a train which was discontinued by someone who obviously has no regard for the public and no comprehension of the exhausting preparation involved, especially when travelling with small children.

I decided to wait the 14 hours for the only other train to Amarillo. This inconsiderate blunder on the part of the Santa Fe was very costly to us. An itemized statement of my expenses has been sent to President Reed along with a similar letter of explanation. My petition to you, Mr. Marsh, is to use your good offices to see that I am fully reimbursed for my expenses and compensated for this gross injustice on the part of your company.

Very truly yours,

Mrs. J. C. HANKS.

She sent a copy of this letter to Mr. Chesser, who gave it to me this morning. I would guess, on the basis of probabilities, there were other people who ran into the same situation.

When I found out about this by telephone, I called the Commission and asked what in the world had happened. I was told that on October 18 Mr. Marsh had sent a telegram to each member of the Commission, although he hadn't served that telegram on us, Mr. Beattie, or anyone else to my knowledge.

This telegram stated that trains 7 and 8 were losing \$10,000 a day. Their own evidence that they gave to the Commission shows that trains 7 and 8 were losing, at their figures, \$5,400 a day. He called this \$10,000-a-day loss an outright waste in cost of transportation.

I haven't seen the telegram that Mr. Marsh sent concerning trains 3 and 4, but I have been informed it was to the same effect.

Mr. Marsh said that he was aware of the technical question involved. He said,

We proposed to annul Trains 7 and 8 for the remainder of this period—

The next 23 days—

unless we are required by insistence of regulatory authority to continue for no other reason than technical compliance with procedural provisions.

He closed the telegram by saying,

We would appreciate the benefit of Commission direction in this regard as to whether you will insist on this operation pending consideration of application on which we urge prompt handling.

In short, Mr. Marsh was informing the Commission that he knew he was required by law to keep this train on for 30 days, but "unless" you tell us you insist upon our obeying that law, we will violate that law."

This was on the 18th that he sent the telegram. On the 19th, the Commission took a very unusual step. On the afternoon of the 19th, the Commission issued a press release, which it has never done before, to the effect that on the 20th it was going to issue a notice which, in effect, said the Commission was going to do nothing.

Mr. Marsh apparently took that press release as a reply to his telegram that the Commission would not insist that the Santa Fe obey the law because the Santa Fe took off all four of those trains before the Commission actually issued its notice saying it wasn't going to investigate the two cases.

Had we had the opportunity to reply to Mr. Marsh's telegram, we would have pointed out the error in the telegram's claimed loss of \$10,000 on trains 7 and 8 because the Santa Fe's own evidence showed it would lose \$5,400 a day on trains 7 and 8. As a matter of fact, we could have pointed out that, according to his own figures, all four trains, both pairs, would only lose \$7,993 a day.

We could have pointed out also the great profit of trains 7 and 8 and the fact that only \$1.6 million was being lost and they would still be profitable. We could have also pointed out a much more important thing, and that was Mr. Marsh's characterization of his obedience to statutory requirements as technical compliance with procedural provisions and his obvious intention to violate the law.

When I found out about this telegram, I wrote to the Commission immediately. A copy of that letter is attached. I presented our position. The law requires 30 days for the protection of the public, the

traveling and shipping public, and also for the protection of the railroad employees, approximately 100 of whom lost about 21 days' wages as a result of this, and without notice.

My letter got no answer, and after about 3 days I sent the Commission a telegram.

I might point out here that at the top of my statement on page 10, I refer to my letter of October 27 and it should say my letter of October 24. I sent a telegram to the Commission with a copy to the vice president (law) of the Santa Fe.

I sent a copy to each member of the Commission and I urged the full Commission to act on this matter, pointing out the dangers involved in permitting railroads to discontinue service with impunity.

I requested the Commission to restore the service. Four days later, on October 31, division 3 issued an order in which it agreed that the railroad had violated the law and had violated its own notice, but then reached the startling conclusion that in violating the law it had vitiated the Commission's jurisdiction and that the Commission was helpless to do anything about it.

Upon receiving this order on November 1, I sent another telegram to each member of the Commission, again requesting the full Commission to act, and pointing out that the action of division 3 would absolve the Commission of any responsibility to protect the public interest when a carrier violates section 13a.

My telegram also pointed out that the Commission had the 30-day jurisdiction and the purpose for the 30-day jurisdiction, and I stated that during that 30-day period the Commission is the sole agency with responsibility of seeing to it that the railroad obeys the law. A copy of that telegram is attached to my prepared statement.

On November 9, the last day which the Commission in my opinion, at least, could act in this case under the law, the Commission put out an order which it said that when a carrier files a notice under 13a(1) it becomes sheltered from prosecution, restriction, or other action by any State by reason of such discontinuance and actual discontinuance of operation otherwise than pursuant to the notice filed under said section removes that shelter and exposes that carrier to the provisions of the law and constitution of any State served by the train.

The Commission rejected that petition and affirmed the action of division 3. So now the full Commission has held that violations of 13a(1) by railroads vitiate Commission jurisdiction.

I think all reasonable men would agree that it is a very strange law, indeed, which disappears when it is violated. The Commission seemed to think that by issuing this order, the railroad was then thrown open to the not so tender mercies, perhaps, of the States, and the States would act to prosecute or restrict them in some fashion.

While that opinion and belief might have been true 10 years ago, it isn't true today. We tried to get the States to take some action in these cases, and we couldn't. They won't act.

As a practical matter, the States feel that once a carrier files a notice on an interstate train, regardless of what happens after that, they have no jurisdiction to act whatever and they won't act. I disagree with the legal validity of that position, but it is a fact of life with which we live 9 years after the enactment of 13a(1).

Mr. BROWN. Do you draw the conclusion as a matter of political fact or as a matter of legal fact? Have States refused to act, citing legal precedent?

Mr. MAHONEY. As a legal fact. A number of times the States have tried unsuccessfully to get carriers to continue interstate trains, even when the trains haven't been up before the ICC, or if they have been up before the ICC, and the ICC has told them to continue those trains in operation.

They had a situation in California, for example—and I forget the name of the train—which involved a train that went from San Francisco to Portland.

The carrier decided that it would take the trains off. The State commission in California said, "You will continue that train to the border, to the Oregon border." That is where the jurisdiction ends.

The Oregon commission said, "You will continue that train to the Oregon border." That was the way it was done before 13(a) was passed, automatically and routinely.

The railroads appealed that decision and took it to the courts, saying, "You cannot require us to take a train to the border. There is nothing at the border but desolation. The border is as far as we will take the train and this is where it will stop."

The courts agreed and said, "Yes; you can only make them continue that train to the last station stop in California," and conversely in Oregon, "You can only make them continue the train to the last station stop in Oregon."

So you had a hiatus of anywhere from 30 to 150 miles where there would not be any train service. That effectively ended State jurisdiction over interstate trains, or the States felt it did. The States have had many cases which have been thrown out after the Commission has permitted the discontinuance of an interstate train and the States have tried to inject their State authority or State law in some fashion to require the continued operation of these trains and the courts have held uniformly and properly so that once a notice is filed, the State law is superseded. So the States are gun shy of any interstate train where the railroad has filed a notice with the Commission.

In this case, we went to these various States along these lines and asked them, sent telegrams to them, to do something about this because the Santa Fe was clearly in violation of State law as well as Federal law, and the States said, "There is nothing we can do." So as a practical matter, there has been created a no man's land.

The order of the Commission which said that violation of the law vitiated their jurisdiction is what really, I think, caused the passage of S. 2711. In its report accompanying S. 2711, the Senate Committee on Commerce stated that:

If removal of a passenger train service in violation of 13a(1) would vitiate Federal jurisdiction within the statutory 30-day notice, it would appear to be equally true that ICC jurisdiction would also be vitiated by discontinuance of train service in violation of Commission orders within the one-year statutory continuance of service period.

No such results were contemplated in the enactment of 13a(1).

I agree with that statement for the simple reason that if the removal, the violation of a statute, vitiates jurisdiction, the violation of a Commission order which has not the dignity of a statute enacted by this Congress would likewise vitiate Commission jurisdiction.

What could the Commission do about a violation of its order requiring the continued operation of a train? I don't think they could do anything about it. The Chairman of the Commission has indicated that they could do something about it. But I dare say that prior to the Commission's issuance of its orders involving trains 7 and 8 and 3 and 4, there isn't a man in the United States who would have thought that the violation of these notice provisions by a railroad would have vitiated Commission jurisdiction.

This is one of the few points that Mr. Moloney and I are in complete agreement on. I think the Commission misinterpreted the law when it issued those orders. I think virtually everybody else I have talked to thinks the same thing. Nobody would have thought they could have done this.

I don't know what circumstances in the future might arise when the Commission would issue an order saying keep the train on and the train would come off and we would get another order from the Commission saying jurisdiction is vitiated, they can't do anything about it.

So we must have a law which is effective, one which cannot be interpreted out of existence.

There is actually one thing which the S. 2711 does. It is a two-word change as I read S. 2711. It removes the word "otherwise" and inserts the word "not" in the second sentence. This has the effect of requiring a railroad to get a Commission order of permission before it can take a train off.

As I understand it, there are two objections to this, one raised by the Commission at page 15 of Chairman Tierney's prepared statement. He says:

Our opposition to this phase of the bill is based on the additional time, effort and experienced personnel which would be required to draft the requisite orders, make service of such orders on the parties of record, and then defend them when they are judicially challenged.

This, with all due respect, I do not believe to be a great burden, because in the 9-year history of this law, according to the Commission's own statistics, which I got the other day, as of December 31, 1967, 32 cases have involved train discontinuances in which the Commission did not investigate. Nine years and 32 cases. That is not a great many. It involves 78 trains, which I consider to be a great number of trains to just let go without investigation. But from the Commission's point of view, it is only 32 cases in 9 years.

The Commission issues affirmative orders constantly under section 1, paragraph 18, when lines are abandoned. Very often they permit lines to be abandoned without hearings. They issue orders. Such orders are very simple to draft. They are composed of the same type of boilerplate language that they use when they permit trains to come off in these cases.

As a matter of fact, the notices to the effect that the Commission will not hold a hearing in a particular train discontinuance case are no longer than the orders permitting railroads to abandon lines without hearings.

Also, the Commission does this in minor lease cases. It does it in trackage rights cases often. So there is nothing unusual about it.

There is a record, of course in train discontinuance cases in which no hearings are held. The record is the material which the railroad has furnished to the Commission, which supposedly is to convince

the Commission that the train is an undue financial burden on the railroad and that people are not using it. So there is enough there on which to issue a simple order.

Apparently they have to do the same work in reviewing the file before stating their intention not to investigate as they would to write up and issue an order after hearing that would permit the railroad to discontinue its passenger trains.

Insofar as judicial challenge is concerned, I understand there is an objection from the Department of Transportation. The Department doesn't like the appellate aspects of S. 2711 because they might cause delay. Mr. Tierney objects to those aspects of S. 2711 also because the Commission would have to defend its orders when they are judicially challenged.

As I said, there have only been 32 nonhearing cases and if all had been appealed in 9 years there would not be very many hours required to defend them. Nor would there be much of a delay because presumably the Commission would not act irrationally in these cases. They would only do this in those cases in which they were convinced that the railroad had made its case and it couldn't be really seriously challenged.

What would happen? The public, if they wanted to challenge it, would have to go to a three-judge Federal district court and get a temporary restraining order. The court, in looking at the case, would have to decide, if they were to issue a temporary restraining order, that the plaintiffs in the case had a pretty good chance, a relatively good chance, of succeeding, and that the Commission had abused its discretion.

Such a temporary restraining order would be a virtually impossible thing to get. So I would guess out of the 32 cases, maybe one would have gotten a temporary restraining order, or maybe two. But that is about all. There wouldn't have been much of a delay. You wouldn't have many people involved in this thing. It wouldn't be much of an administrative burden on the Commission at all.

In addition, I am still not convinced that it is in the public interest to deprive the public of the right of appeal, particularly in a situation where the railroad has such a right built into the statute and the public doesn't. I think as a lawyer, the public should have that right.

Insofar as the circumstances surrounding the Santa Fe train discontinuances are concerned, some people have said that this is kind of a tempest in a teapot, that these trains would have come off anyhow. I don't disagree with that. The trains probably would have come off. But that type of argument misses the point because we are here dealing with the interpretation of a statute by an agency charged with administering the statute and the agency has interpreted it so that the agency is removed from the scene. They have nothing to do with it once the law is violated.

If this committee should decide to report out a bill, of course, I don't know whether you will take the same tack that apparently the Senate Commerce Committee has; that is, to report out this S. 2711 which then passed the Senate by consent, and then go back later this year and look at the other bills which have been in the Senate committee and decide maybe to report one of those out.

We have some very vital problems and issues involved before the Senate committee and we hope to bring them up at the proper time

over there. But if the bill that is reported out of this committee is to be the only passenger train legislation to be acted upon as far as this committee is concerned, and if the committee is seriously thinking of perhaps reporting out S. 2711 as the only bill to come out of this committee with regard to 13a(1), I would strenuously recommend that the committee consider a modification of the bill and include within the bill language which would permit the Commission to impose terms and conditions which, in its judgment, the public convenience and necessity requires.

I say that for two reasons. First of all, the Commission feels it cannot do that now. I disagree with that interpretation, but we are faced with it. The Commission feels that under the present law, it is faced with this either/or authority, either it keeps the train on or it permits the train to come off.

It is difficult to restrict, or to properly administer, I should say, a complex interstate transportation matter in such a black and white way. Many times, I am sure that train A should come off if the train B is rescheduled or if train B is furnished with a diner or a sleeper or something else.

The Commission should be authorized, in my opinion, and in the opinion of my clients, to be able to condition a discontinuance.

Next, of course, such authority would permit the Commission to impose conditions for the protection of employees who are adversely affected. They are adversely affected in train discontinuances in exactly the same fashion that they are adversely affected in line abandonments. The language we propose is identical to the language found in the line abandonment provision which the Commission has used to protect employees affected in line abandonment cases for over 20 years.

The railroads have never challenged, no one has ever challenged, the reasonableness or the equity of protecting employees adversely affected in line abandonment cases. The railroads don't want that sort of protection in train-off cases. I can understand why. The railroads would have to pay some money to the employees out of whose pockets the savings are made. That is the same in line abandonments, but it has been in effect so long it is not challenged any more.

I have a letter from the secretary-treasurer of a system federation on the Erie Lackawanna, representing the shopcraft employees, in which he requests us to try to protect 40 people whose jobs will be abolished because the Erie Lackawanna is going to take off certain passenger trains and close its passenger equipment repair shops.

So we feel that this type of language should be in here. It is just, it is equitable, and recently the Department of Transportation has stated that it agrees with and supports language amending 13a which would provide for the protection of employees.

After all, the railroads every time they take off these trains, like 7 and 8, 3 and 4, realize millions of dollars in net profits. They put the mail revenue on other trains, the freight trains; they don't have the expenses of the crews and the other expenses of the passenger train, all of which amounts to millions of dollars in net profits to them, as I point out on pages 19 and 20 of my prepared statement.

I think that unless this bill is passed with the modifications that I respectfully submit for your consideration, and very rapidly, train

service in this country will simply cease. I don't believe it should cease, but that decision is up to this Congress.

Thank you.

(Mr. Mahoney's prepared statement, with attachments, follows:)

STATEMENT OF WILLIAM G. MAHONEY, COUNSEL, RAILWAY LABOR
EXECUTIVES' ASSOCIATION

My name is William G. Mahoney. I am a partner in the law firm of Mulholland, Hickey & Lyman, 620 Tower Building, Washington, D.C. My law firm is General Counsel to the Railway Labor Executives' Association and I was requested by that Association to appear here today to testify in regard to S. 2711 which has passed the Senate and which would amend Section 13a(1) of the Interstate Commerce Act dealing with the discontinuance of interstate passenger trains.

The Railway Labor Executives' Association requested me to testify on this bill because of my personal experience with the circumstances surrounding the train discontinuance case which led to the introduction and passage of S. 2711. My client also requested me to testify because I have participated to some degree in every train discontinuance case which has come before the Interstate Commerce Commission since the enactment of Section 13a.

The Railway Labor Executives' Association is an organization of the chief executives of the national and international railway labor unions which represent virtually all employees in the railroad industry. The chief executives of the following rail unions are affiliated with our Association:

- American Railway Supervisors Association.
- American Train Dispatchers' Association.
- Brotherhood of Locomotive Firemen and Enginemen.
- Brotherhood of Maintenance of Way Employees.
- Brotherhood of Railroad Signalmen.
- Brotherhood of Railroad Trainmen.
- Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees.
- Brotherhood Railway Carmen of America.
- Brotherhood of Sleeping Car Porters.
- Hotel and Restaurant Employees and Bartenders International Union.
- International Association of Machinists and Aerospace Workers.
- International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.
- International Brotherhood of Electrical Workers.
- International Brotherhood of Firemen and Oilers.
- International Organization Masters, Mates and Pilots of America.
- National Marine Engineers' Beneficial Association.
- Order of Railway Conductors and Brakemen.
- Railroad Yardmasters of America.
- Railway Employees' Department, AFL-CIO.
- Sheet Metal Workers' International Association.
- Switchmen's Union of North America.
- Transportation-Communication Employees Union.

The Congress enacted the Transportation Act of 1958 to provide the railroads of this country with emergency assistance. The Act was introduced and passed in a time of severe economic recession. Many of the railroads of this country were operating at large deficits and they needed temporary emergency assistance. Section 5 of the Act, which became Section 13a of the Interstate Commerce Act, was inserted to permit the railroads to circumvent certain state regulatory agencies which, according to the railroads, had blocked the discontinuance of passenger trains which were losing a great deal of money and which were not being used by the public. My client opposed the enactment of Section 13a as it feared that its provisions would be used by the railroads, not merely to rid themselves of unused, uneconomical trains, but to destroy passenger service which have never—and indeed could never—return to the railroads the profits they received from their freight service. The fears of the Railway Labor Executives' Association proved correct.

Section 13a accomplished its primary purpose almost immediately. Within two years following its enactment all of the trains which the railroads had testified they could not discontinue because of allegedly obstinate state agencies, had been discontinued. But unfortunately Section 13a did not expire after it had accomplished its objectives; it remained in effect thereby providing the railroads an

easy means of ridding themselves of service which could never be as profitable as their freight service. In the first two years of its existence, Section 13a accomplished the discontinuance of 157 trains. Beginning in 1961 and continuing through December 31, 1967, the railroads had discontinued an additional 837 trains.

The existence of this law over the past nine years has had an additional but originally unforeseen result. Although the law specifically states that it does not supersede the state laws except when a railroad utilizes the provisions of Section 13a, its existence and continued use by the railroads has resulted in court decisions and state agency decisions which, in effect, wipe out state law in the area of interstate passenger train service.

Recently, an interpretation was placed upon paragraph (1) of Section 13a, the interstate passenger train discontinuance provisions, which was so detrimental in its adverse effect to the public interest that the Senate Committee on Commerce upon hearing of it immediately reported out a bill which then immediately passed the full Senate by consent. The bill was S. 2711. The circumstances which led to its passage are these:

On October 9, 1967, the Atchison, Topeka & Santa Fe Railway Company filed with the Interstate Commerce Commission two notices of intent to discontinue two pairs of trains. The notice in each case was to be effective November 10, 1967. One pair of trains were Nos. 7 and 8 operating between Chicago and Los Angeles and the notice regarding them was designated ICC Finance Docket No. 24774. The other pair of trains were Nos. 3 and 4 operating between Kansas City, Missouri, and Gallup, New Mexico. The notice involving those trains was designated ICC Finance Docket No. 24772. In the statements which the Santa Fe submitted to support the discontinuance of trains 7 and 8, it alleged that the trains were primarily mail and express carriers and contained only one coach in the consist. The revenue from passengers amounted to but \$48,000 annually and they carried an average of 37.7 passengers per day. The Santa Fe said that the Post Office Department was going to remove the rail post office traffic from these trains which would mean a loss of over \$1.6 million a year in revenue to them. The Post Office further informed the Santa Fe that it could retain all other mail but it would have to negotiate lower rates for that mail. According to the Santa Fe figures, the income for all mail including RPO was \$5.2 million for the first six months of 1967, express revenue for the period exceeded \$1.8 million. With regard to trains 7 and 8, therefore, the Santa Fe was faced with the immediate loss of about 11.5% of its revenue. The rates on the remaining mail would be re-negotiated downward and the Santa Fe would switch that mail from trains 7 and 8 to its freight trains.

The situation on trains 3 and 4 operating between Kansas City and Gallup was similar. Mail and express revenues exceeded \$5 million a year. Passenger coach revenues averaged over \$80,000 per year. The trains averaged 66.6 passengers per day. On September 6, 1967, the Post Office Department advised the Santa Fe that it was removing the rail post office traffic and that the rates on the other traffic would be negotiated downward.

The Santa Fe statements supporting the discontinuance of these trains, of course, set the losses on the trains as high as possible. For example, they treated these trains as losing all of the mail and express revenue on or about October 16, 1967. Such a picture is not completely accurate. The Santa Fe would keep most of the rail revenue by switching it from the passenger trains to freight trains. In other words, the loss to the railroad was much less than that which appeared on the material furnished the Commission. The allegations contained in the two Statements were to the effect that once the mail was removed from these two pairs of passenger trains their continued operation would result in a daily loss to the Santa Fe of some \$7,993.00 per day.

On October 11, Mr. Donald S. Beattie, Executive Secretary of the RLEA, sent letters to Mr. H. Neil Garson, the Secretary of the Interstate Commerce Commission, protesting the discontinuance of the two pairs of trains; requesting the Commission to institute an investigation pursuant to Section 13a(1) and "to require the continuance of operation of the trains pending hearing and decisions subsequent to a conclusion of the investigation requested." Mr. Beattie also requested that the Association be given notice of any hearings which might subsequently be held in the proceedings. I would like to emphasize at this point that Mr. Beattie sent copies of these letters to Mr. S. R. Brittingham, Jr., General Counsel of the Santa Fe, and Mr. R. K. Knowlton, General Attorney of the Santa Fe, at 80 East Jackson Boulevard, Chicago, Illinois, 60604. A copy of each of these letters is attached to my statement as Appendices 1 and 2, respectively.

At this point in time, the two discontinuance cases were proceeding in the same manner as hundreds of others before them. However, on the morning of October 20, 1967, I received a telephone call from the National Legislative Representative of the Brotherhood of Railroad Trainmen, Mr. Al H. Chesser, who informed me that trains 3 and 4 and trains 7 and 8 had been discontinued. He stated that train 3 on its way from Kansas City to Gallup had been discontinued in Amarillo, Texas, on October 19, at approximately 7:35 P.M. CST; that train 4 had also been discontinued on October 19; that train 8, scheduled to leave Los Angeles at 12:30 A.M. on October 20, was cancelled and the crew who reported for duty on the evening of October 19 was informed they would not be taking out train No. 8; and, train No. 7 was discontinued in the early morning of October 20.

I was quite surprised at this information since, to my knowledge, it was the first time in the nine-year history of Section 13a that a railroad had discontinued a train prior to the expiration of the 30-day notice required under Section 13a(1). I immediately telephoned the Interstate Commerce Commission and discovered that on October 18, 1967, Mr. E. S. Marsh, Chairman of the Board and Chief Executive Officer of the Santa Fe, had sent telegrams to each member of the Interstate Commerce Commission and to the Secretary of the Commission but had not furnished copies of those telegrams to Mr. Beattie or to anyone else. The telegram concerning trains 7 and 8 stated that the Santa Fe was losing \$10,000 per day operating these trains and characterized that loss as "an outright waste in cost of transportation". Mr. Marsh went on to state that there was no justification for continuing the operation of the trains to November 9 (he undoubtedly meant November 10, the posted discontinuance date) and stated that while he recognized the existence of "a technical question" as to his obligation to continue the operation of the trains until the posted discontinuance date "we propose to [annul trains 7 and 8 for the remainder of this period] unless we are required by insistence of regulatory authority to continue * * * for no other reason than technical compliance with procedural provisions". He closed his telegram by saying "we would appreciate the benefit of Commission direction in this regard as to whether *you will insist* on this operation pending consideration of application on which we urge prompt handling". In short, Mr. Marsh was informing the Commission that he was fully aware of the requirements of the law but that he was going to violate those requirements unless the Commission, in response to his telegram, insisted he obey them. A copy of the telegram regarding trains 7 and 8 is attached as Exhibit 3. The telegram regarding trains 3 and 4 was identical.

As I noted above, the Association was not furnished with copies of these telegrams, therefore, we had no opportunity to reply to them. Had we been afforded such an opportunity we could have pointed out that according to Mr. Marsh's own allegations in his Statement filed with the Commission on trains 7 and 8 in Finance Docket No. 24774, his losses on those trains were not \$10,000 per day—even conceding that the Santa Fe lost all of the revenue from the mail, which they did not—but were only \$5,475 per day or about half the loss claimed in his telegram. Exhibit K to the Santa Fe Statement in Finance Docket No. 24774 indicates that the operation of the passenger trains 7 and 8, without allowing credit for any mail revenue, would cause an out-of-pocket annual deficit of \$2,098,565 annually. If we divide 365 into that figure, we find his daily loss to be \$5,475. Indeed, even if we add to the loss of trains 7 and 8, the alleged loss on trains 3 and 4 we could only add another \$2,518 daily loss, or a total loss of \$7,993 for the four trains. Exhibit K to the Santa Fe Statement in Finance Docket No. 24772 shows a loss of \$919,230. The combined loss of the two trains then, falls far short of what Mr. Marsh informed the Commission was the loss on trains 7 and 8 alone. But because we did not know of the existence of this telegram, we were in no position to reply to it.

There is, however, a much more important point to which we would have replied had we had the opportunity. That point involves Mr. Marsh's characterization of his obedience to statutory requirements as "technical compliance with procedural provisions" and his patent intention to violate those statutory requirements unless the Interstate Commerce Commission insisted that he obey them.

As I mentioned a moment ago, this telegram is dated October 18, 1967. On the afternoon of October 19, 1967, the Commission took the unique and unusual action of issuing a press release to the effect that on the following day it was going to issue a notice in these two cases indicating that it would do nothing in either of them. And, the following day, October 20, 1967, it issued notices that in each of these cases it had "concluded not to enter upon an investigation of the proposed discontinuance". But the Santa Fe had not waited for that notice to be

issued. It apparently relied upon the press release as the Commission's response to Mr. Marsh's telegrams and discontinued all four trains before the notice was issued.

Upon learning of Mr. Marsh's telegram to the members of the Commission and the Commission's apparent response to that telegram, I addressed and had hand delivered to Mr. Richard Block, Jr., Assistant Deputy Director, Section of Opinions, Interstate Commerce Commission, identical letters in each of the two cases challenging the action taken by the Santa Fe as being in violation of the explicit provisions of Section 13a(1) which state:

"A carrier * * * may * * * file with the Commission * * * notice at least thirty days in advance of any such proposed discontinuance or change. The carrier * * * filing such notice may discontinue * * * any such operation * * * pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, * * *."

I pointed out to Mr. Block that while Section 13a(1) may be liberal in its permissiveness to railroads to discontinue passenger service, there is a clear 30-day restriction on the discontinuance of that service. I stated that the restriction was for the protection of the traveling and shipping public and the employees and might not be changed by a railroad regardless of its knowledge of the intentions of the Commission with regard to entering upon an investigation of the discontinuance.

I wonder, for example, how many of the 37 passengers who rode trains 7 and 8 every day and the 66 passengers who rode trains 3 and 4 every day were left waiting at some desolate point between Chicago and Los Angeles or Kansas City and Gallup, New Mexico, for a train that they had been informed would not be discontinued until November 10. I don't suppose we will ever know how many of the 39,434 passengers carried annually by these trains were stranded by the Santa Fe's action, but the 30-day notice requirement obviously was intended to protect them from precisely what occurred to them when that notice requirement was violated by the Santa Fe railroad. A copy of my letter to Mr. Block of October 24, is attached as Appendix 4 to my statement.

When I had had no response to my letter by October 27, I addressed a telegram to each member of the Commission with a copy to Mr. Starr Thomas, Vice President-Law, Santa Fe. A copy of this telegram is attached to my statement as Appendix 5. In the telegram I pointed out that the principle involved was unique in the history of the administration of Section 13a (1) and would affect many, if not all, future passenger train discontinuances under those provisions. I also pointed out that the jobs of approximately 100 employees had been abolished without notice and that some crews had found themselves at the far end of their runs and had to wait until they could get transportation back to their home terminals. I also pointed out that I had contacted the Santa Fe with regard to the violation and the injury inflicted upon their employees but they had refused to do anything about it. In view of the fact that approximately 100 employees of the Santa Fe would very soon commence the irreversible process of exercising their seniority rights and displacing employees junior to them by virtue of the abolishment of the jobs on trains 7 and 8, I requested the full Commission to treat the matter as one of general transportation importance and order the Santa Fe "immediately to restore the operation of trains 7 and 8 and 3 and 4 and to re-post and re-file a proper 30-day notice with which Santa Fe shall comply."

On October 31, 1967, Division 3 of the Commission, issued the order which resulted in the passage of S. 2711. In that order Division 3 of the Commission held that the Santa Fe, by discontinuing the two pairs of trains prior to the expiration of the 30-day statutory period, had violated the provisions of Section 13a(1) and, in addition, had violated its own notices. But Division 3 then reached the startling conclusion that the railroad, by violating the law which the Commission is charged to administer, "vitiated" the Commission's jurisdiction. The two orders of Division 3, dated October 31, 1967, are attached to my statement as Appendices 6 and 7, respectively.

Immediately upon my receipt of this order on November 1, 1967, I forwarded a second telegram to each member of the Commission with a copy to Santa Fe Vice President-Law Thomas in which I pointed out that the action of Division 3 "would absolve the Commission of any responsibility to protect the public interest". I further pointed out that the jurisdiction of the Commission had been properly invoked by the Santa Fe when it filed its notices under Section 13a(1) and that the Santa Fe could not unilaterally and at its own convenience divest the Commission of jurisdiction by violating the law. My telegram further stated that once Commission jurisdiction properly attached as it had in these proceedings,

it could be dissolved only in accordance with the terms of that statute; that since the statute requires 30 days' notice in advance of a discontinuance and since the statute permits discontinuance automatically at the end of the 30-day period, the Commission is not required to act—even to the extent of issuing a notice that it intends not to act—during the 30 days it has jurisdiction; but, that during that 30-day period the Commission is the sole agency with the responsibility of seeing to it that the railroad under its jurisdiction obeys the law. I again, on behalf of the RLEA, requested the Commission to accept the telegram as a request for the full Commission to treat the matter as one of general transportation importance; to reverse the orders of October 31 in the two cases; and to require the Santa Fe to restore the service pending the filing of an additional 30-day notice. A copy of this telegram is attached as Appendix 8.

On November 9, 1967—the last day on which the Commission had jurisdiction under the statute—the full Commission issued a decision which denied the requests I had made in my telegrams. The Commission's order held that when a carrier filed a notice of proposed discontinuance with it under Section 13a(1) it thereby became "sheltered from prosecution, restriction, or other action by any state by reason of such discontinuance". The Commission went on to indicate that "actual discontinuance of operations otherwise than pursuant to the notice filed under said section removes that shelter and exposes the carrier to the provisions of the laws and constitution of any State served by the discontinued trains". The Commission rejected the Association's telegraphic petitions and affirmed the action of Division 3. The full Commission has now held that violations of Section 13a(1) by railroads "vitiate" Commission jurisdiction.

I think all reasonable men must agree that it is a very strange law which disappears when it is violated. The Commission seemed to believe that the railroad, because of its voluntary act, would now be "prosecuted or restricted" by the states through which it operated. That belief may have been warranted ten years ago, but not today. We have sought to secure state action in these cases but the states, having lost case after case in the courts involving interstate trains in the past nine years, are of the opinion that once a railroad files a notice with the Commission on an interstate train and discontinues that train, there is nothing the state can do about it. I disagree with the legal validity of that position, but that position is a fact of life in the regulation of interstate passenger trains nine years after the enactment of Section 13a(1). In short, by virtue of the Commission's decision in this case, any railroad can file a notice with the Commission and remove the trains on the same day without fear of sanction from the Commission or from the states through which it operates. This utterly incredible situation certainly cannot be permitted to exist.

The day before the Commission issued its final order in this case affirming Division 3, Mr. Beattie sent a letter to Chairman Staggers outlining the problem which had arisen. A copy of that letter is attached to my statement as Appendix 9. A similar letter was sent to Chairman Magnuson of the Senate Committee on Commerce. The Senate Committee immediately reported out a bill which, as I have said, passed the full Senate by consent.

In its Report accompanying S. 2711, the Senate Committee on Commerce stated:

"If removal of passenger train service in violation of section 13a(1) would 'vitiate' Federal jurisdiction within the statutory 30 days' notice, it would appear to be equally true that ICC jurisdiction would also be 'vitiating' by discontinuance of train service in violation of Commission's orders within the 1-year statutory continuance of service period.

"No such results were contemplated in the enactment of section 13a(1). No such results can be permitted by the interpretation of the Commission or otherwise."

I am in complete agreement with the statement both as to the effects of the Commission's orders and as to, what I believe to be, the intent of Congress in enacting Section 13a(1).

S. 2711 is not a complicated piece of legislation. It makes one substantive change in the existing law. It is a change which must be made if the railroads are not to be left completely free to discontinue passenger trains at will. In the second sentence of Section 13a(1) the word "not" is inserted and the word "otherwise" is removed. Several other language changes are made to conform the remainder of Section 13a(1) to the substantive change caused by the two-word change in the second sentence.

After stating in its first sentence that carriers whose right to change or discontinue their passenger train service is subject to state law may file a 30-day notice of such change or discontinuance with the Commission and thereby supersede state law, Section 13a(1) states the following in its second sentence:

"The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any state, or decision or order of, or the pendency of any proceeding before, any court or state authority to the contrary notwithstanding."

As I noted above, the word "otherwise" was removed from that sentence and the word "not" inserted so that the sentence would read as follows:

"The carrier or carriers filing such notice may *not* discontinue or change any such operation or service pursuant to such notice except as ordered by the Commission pursuant to this paragraph * * *."

The effect of this change is to require the carrier to continue the operation of its trains until such time as it receives an affirmative order from the Commission permitting it to discontinue those trains. In short, the carrier could no longer "vitiate" the Commission's jurisdiction by violating the provisions of the law which the Commission is charged to administer in the public interest.

The Report of the Senate Committee on Commerce describes the purpose of S. 2711 as follows:

"The provisions of this bill are designed to close a jurisdictional loophole in Section 13a(1) created as a result of a recent ICC decision involving removal of certain Santa Fe Railway Co. interstate passenger train service."

One might argue, in fact some have argued, that this is a tempest in a teapot because the trains involved could not have supported themselves once the Santa Fe had removed all mail revenue from them. I do not disagree with the probable inability of the public to prove under Section 13a(1) that the trains should have remained in service following removal of all mail revenue. Such an argument, however, misses the point. We are dealing here with an interpretation of a statute by the agency charged to administer that statute. That agency has held that when a carrier violates that statute the agency is helpless to do anything about it, indeed, the agency is removed from the scene by the very act of violation.

We could also argue as to whether the Commission's jurisdiction continues through the 30-day notice period. I am convinced that it does since the statute requires the carrier which files a notice with the Commission to comply with that notice by discontinuing the train on the date indicated in the notice and not before. Consequently, even if the Commission had no intention of investigating the particular discontinuance and communicates that intention with the public, the carrier is compelled to keep the trains on until the date indicated. During that time the Commission, as the agency charged with the responsibility of seeing to it that the carrier obeys the law during that period, has jurisdiction over that carrier with regard to the service of those trains. But arguments as to whether the Commission's jurisdiction continues throughout the 30 days are likewise irrelevant to the point under consideration. Quite obviously, whether or not the Commission has jurisdiction during that 30-day period, it *should* have jurisdiction during that 30-day period and *should* be able to require the carrier to obey the law. By violating the law, the carrier deprived the 104 passengers who rode those trains every day of train service without notice and it deprived approximately 100 employees of 21 days' wages. But much more important, it deprived the public of protection against violations of this federal law and, I respectfully submit, that must not be tolerated.

I notice that at the end of the Report of the Senate Committee on S. 2711, there is a statement to the effect that the bill arose out of the situation precipitated by the action of the Santa Fe and "is not intended to prejudice subsequent consideration of these other pending bills and measures" which would amend Section 13a of the Interstate Commerce Act. I do not know, of course, whether this Committee would approach this problem in the same manner. The Senate Committee has indicated it may report favorably other bills involving the amendment of Section 13a and consequently other matters with which the RLEA is vitally concerned might be disposed of in later bills. In the event this Committee is not of the mind to report out this bill and then later another bill amending section 13a, I would respectfully request this Committee to consider an amendment to S. 2711.

I would recommend that S. 2711 be amended by inserting in line 6, a comma after the word "not", by striking the word "and" immediately following the word "not", and by inserting after the word "otherwise" on line 7 the following clause: "and by inserting before the first comma the phrase 'upon such terms and conditions as in its judgment the public convenience and necessity may require'."

Determination of whether to permit the discontinuance of an interstate passenger train seldom resolves itself into an "either, or" situation. Usually the public convenience and necessity require something in between. For example, public convenience and necessity may permit the carrier to discontinue train A if train B is rescheduled. It may permit the carrier to discontinue train A if train B is rescheduled with the addition of a dining car or sleeping car to its consist. To date, the Commission has been faced with permitting the discontinuance or refusing to permit the discontinuance of passenger trains without the consideration of conditions which would not be unduly burdensome on the carrier and which would serve the public interest. The Commission should not be so restricted in the administration of complex interstate transportation matters. For that reason, we recommend the addition of language which would authorize the Commission to permit the discontinuance of trains on condition that other trains would serve the public convenience and necessity.

The language which we suggest would also permit the Commission, in its discretion, to impose conditions for the protection of employees adversely affected as a result of the discontinuance of a particular train operation. The language which we suggest is identical to the language found in Section 1(20) of the Interstate Commerce Act which authorizes the Commission to approve the abandonment of lines of railroad "subject to such terms and conditions as in its judgment the public convenience and necessity may require." The use of such language in 13a would not only give the Commission authority to require a certain level of quality and service in operation but would also give the Commission the discretionary authority to protect employees as they are now protected when a line of railroad is abandoned under Section 1. In previous testimony before this Committee and the Senate Sub-Committee on Surface Transportation, no one interested in legislation to amend Section 13a has argued that the effects upon employees in train discontinuance cases are any different from the effects upon employees in line abandonment cases arising under Section 1(18)-(20) of the Interstate Commerce Act. The Interstate Commerce Commission has imposed employee protective conditions in line abandonment cases since 1943. The imposition of such conditions has in no way deterred the railroads' utilization of Section 1 to rid themselves of lines which they consider uneconomical. As a matter of fact, the number of line abandonment proceedings has increased steadily through the years. The railroads themselves readily agree in many abandonment cases to the imposition of such conditions by the Commission and frequently express such agreement in the original application which they file with the Commission. The obvious purpose of employee protective conditions is to permit the employees of the railroads to share, to some extent at least, in the savings to the railroads realized directly at their expense. This result has not only been recognized by the Congress and the courts as just and equitable, but also as tending to maintain a stable work force in this vital industry.

To my knowledge, there has been no instance in which a serious, considered objection has been offered by any railroad or railroad official to the reasonableness of the protective conditions imposed by the Commission in line abandonment cases. Recently, the Department of Transportation expressed its agreement with and support for language amending Section 13a which would provide for the protection of employees adversely affected by train discontinuance cases.

In the Statement in Support of its notice to discontinue trains 7 and 8, the Santa Fe claims that its crew wages on those trains amount to approximately \$1,242,204 per year. This is a bit over half the expenses which it will no longer have to pay as a result of the discontinuance of those trains. The Santa Fe does not inform the Commission of the many millions of dollars which it will retain in mail revenues even though it eliminates all the expenses of trains 7 and 8. In Exhibit J to its Statement, the Santa Fe sets forth the operating results of trains 7 and 8 for the years 1965, 1966, and for the first six months of 1967. The figures on that page show a profit from these trains in 1965 of \$5,535,293; in 1966 of \$5,884,011; and, in the first six months of 1967, of \$2,613,725. This profit was based upon expenses in 1965, 1966, and the first six months of 1967 of \$8,187,098; \$8,436,347; and, \$4,433,775, respectively; and, on total revenues of \$13,722,391; \$14,320,358; and \$7,047,500. No where does the Santa Fe inform the Commission what percentage of those millions of dollars in revenue it will retain by handling mail and express in expedited freight service. Added to these millions in retained mail revenues will be the saving of \$2,145,850 in the elimination of the expense of operating trains 7 and 8. It would seem a financially minor thing, indeed, for the Santa Fe to protect employees from the severe economic adverse effects of the abolishment of their jobs for the limited period of time provided by the protective

conditions imposed by the Commission in abandonment cases in view of the many millions of dollars in net profit which the railroad will realize as a result of the discontinuance of these trains and the transfer of the mail from these trains to freight trains.

Today there are relatively few interstate passenger trains in existence. The year 1967 was a record year for the discontinuance of interstate passenger trains under Section 13a(1). December, 1967, was a record month in that record year for the filing of notices to discontinue passenger trains. During that month 36 interstate passenger trains were noticed for discontinuance by 8 different railroads. January, 1968, has seen no let-up in the filing of train discontinuance notices. This sharp acceleration in the filing of notice applications followed quickly upon the heels of the passage of S. 2711. Unless S. 2711, with the recommended modification I have submitted for your consideration, is enacted immediately interstate passenger train service in this country will cease. I respectfully submit that this country, growing and expanding within its borders as it is, can ill afford to eliminate rail passenger service. Regardless of what the railroads do today, rail passenger service will be re-instated in the future. But without existing passenger train service that re-instatement will be purchased by the public at an exorbitant price.

Thank you for the opportunity of expressing to you today my views and those of my client on S. 2711.

APPENDIX 1

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Washington, D.C., October 11, 1967.

Mr. H. NEIL GARSON,
Secretary, Interstate Commerce Commission,
Washington, D.C.

DEAR MR. GARSON: Please refer to the notice filed by the Atchison, Topeka and Santa Fe Railway System under Section 13a of the Interstate Commerce Act regarding the proposed discontinuance of its passenger trains Nos. 3 and 4 between Kansas City, Missouri and Gallup, New Mexico. This case is covered by Finance Docket No. 24772.

We find that this discontinuance, if carried out, will result in adverse effect to certain employees of the carrier. Therefore, the Railway Labor Executives' Association, composed of 23 of the standard railway labor organizations, representing practically all of the several classes of employees of the carrier, enters its protest and complains against the discontinuance and hereby requests the Commission to institute an investigation pursuant to the provisions of Section 13a(1) to determine whether the public convenience and necessity permits the discontinuance of these trains and to require the continuance of operation of the trains pending hearing and decision subsequent to a conclusion of the investigation requested.

It is also requested that the Association be given notice of any hearings which may subsequently be held in this proceeding.

Very truly yours,

DONALD S. BEATTIE,
Executive Secretary.

APPENDIX 2

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Washington, D.C., October 11, 1967.

Mr. H. NEIL GARSON,
Secretary, Interstate Commerce Commission,
Washington, D.C.

DEAR MR. GARSON: Please refer to the notice filed by the Atchison, Topeka and Santa Fe Railway System under Section 13a of the Interstate Commerce Act regarding the proposed discontinuance of its passenger trains Nos. 7 and 8 operating between Chicago, Illinois and Los Angeles and Bakersfield, California. This case is covered by Finance Docket No. 24774.

We find that this discontinuance, if carried out, will result in adverse effect to certain employees of the carrier. Therefore, the Railway Labor Executives' Association, composed of 23 of the standard railway labor organizations, representing practically all of the several classes of employees of the carrier, enters

its protest and complains against the discontinuance and hereby requests the Commission to institute an investigation pursuant to the provisions of Section 13a(1) to determine whether the public convenience and necessity permits the discontinuance of these trains and to require the continuance of operation of the trains pending hearing and decision subsequent to a conclusion of the investigation requested.

It is also requested that the Association be given notice of any hearings which may subsequently be held in this proceeding.

Very truly yours,

DONALD S. BEATTIE,
Executive Secretary.

APPENDIX 3

[Telegram]

CHICAGO, ILL., October 18, 1967.

W. H. TUCKER,
*Chairman, Interstate Commerce Commission,
Washington, D.C.:*

On October 6 Santa Fe filed notice with Commission of intent to discontinue Trains 7 and 8 effective November 9 operating between Chicago and Los Angeles. This train has been purely a mail and express run with a consist up to 45 cars of RPO cars, storage mail cars, express cars and one coach used primarily for train crew but used occasionally for convenience of local passengers in some areas, although not shown in published time tables. Relatively short advice of loss of mail prevented earlier filing of this petition. Now effective October 16 all mail and express is gone off this train leaving consist of only the locomotive and coach. There exists a technical question as to need of continuing 4,444 train miles of operation per day on an unproductive basis where all mail and express has disappeared from train and only revenue is the insignificant amount that comes from an average of less than one local passenger at coach rate per train mile.

Exhibit J (F.D. 24,774) in application shows this average for the first six months 1967 as 0.86 which of course is far less than the four-man crew required for entire distance between Chicago and Los Angeles. With a surplus of alternate transportation available to the very few patrons who might use the train, the expenditure of some \$10,000 per day is an outright waste in cost of transportation. There is no justification for continuing this unproductive expenditure for even an interim period between now and November 9 which would mean a total loss of almost one-quarter million dollars for the period involved. Our obligation to avoid waste and unnecessary cost of transportation strongly suggests that we annul Trains 7 and 8 for remainder of this period and as a matter of common sense we propose to do this unless we are required by insistence of regulatory authority to continue the unproductive operation of the last three days for no other reason than technical compliance with procedural provisions. We would appreciate the benefit of Commission direction in this regard as to whether you will insist on this operation pending consideration of application on which we urge prompt handling. (Orig: Chairman Tucker Copies: Secy. I.C.C. and I.C.C. Commissioners.)

E. S. MARSH,
*Chairman and Chief Executive Officer,
Santa Fe Railway Co.*

APPENDIX 4

MULHOLLAND, HICKEY & LYMAN,
WASHINGTON, D.C., October 24, 1967.

Mr. RICHARD BLOCK, Jr.,
*Assistant Deputy Director, Section of Opinions, Interstate Commerce Commission,
Washington, D.C.*

DEAR Mr. BLOCK: On October 10, 1967, the Atchison, Topeka & Santa Fe Railway Company (Santa Fe) filed with the Commission a notice under Section 13a(1) of the Interstate Commerce Act proposing to discontinue trains nos. 7 and 8 operating daily between Chicago, Illinois, and Los Angeles and Bakersfield, California. The discontinuance was to be effective November 10, 1967. On October 19, 1967, the Commission determined not to enter upon an investigation of the proposed discontinuance and served the notice of its intention on October 20, 1967. However, the crews reporting for work on train no. 8, which was scheduled to leave Los Angeles at 12:30 a.m. October 20, 1967, were informed

that the train had been discontinued. Train No. 7, which was scheduled to leave Chicago at 11:55 p.m., was discontinued on the night of October 19, 1967, or the night of October 20, 1967.

As a result of this precipitate action on the part of the Santa Fe, a large number of train and engine crewmen were deprived of their employment without notice of any kind.

It is the position of the Railway Labor Executives' Association that the Santa Fe is in violation of the explicit provisions of Section 13a(1):

"A carrier * * * may * * * file with the Commission * * * notice at least thirty days in advance of any such proposed discontinuance or change. The carrier * * * filing such notice may discontinue * * * any such operation * * * pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, * * *."

While Section 13a(1) is liberal in its permissiveness to railroads to discontinue passenger service, there is a clear 30-day restriction on the discontinuance of that service. This restriction is for the protection of the travelling and shipping public and the employees and may not be changed by a railroad regardless of its knowledge of the intentions of the Commission with regard to entering upon an investigation of the discontinuance.

Indeed, the Santa Fe has violated its own notice by discontinuing in nine or ten days rather than in the stated thirty days. The Santa Fe did not post a notice which said it would discontinue on November 10, 1967, unless informed at an earlier date that the Commission would not interfere with the discontinuance. The Commission's notice of October 19, 1967, served October 20, 1967, acknowledged the fact that the discontinuance was not to be effective until November 10, 1967, and no Commission permission to discontinue prior to that date can be read into its notice.

The Association respectfully requests the Commission to take immediate action to restore the service of trains 7 and 8 and require the continued operation of trains 7 and 8 in accordance with the provisions of Section 13a(1) and the Santa Fe's notice of discontinuance of October 10, 1967.

Since the notice filed by the Santa Fe is to be effective November 10, 1967, and since between 50 and 75 employees have had their jobs abolished by this violation of Section 13a(1) and will shortly commence the irreversible process of "bumping" in the exercise of their seniority rights, it is urgently requested that the Commission give its immediate attention to this most serious matter.

Sincerely yours,

MULHOLLAND, HICKEY & LYMAN,
By WILLIAM G. MAHONEY
Attorneys for Railway Labor Executives' Association.

[Telegram]

APPENDIX 5

OCTOBER 27, 1967.

On October 10, 1967, Atchison, Topeka & Santa Fe Railroad Co. filed notices with the ICC under section 13a(1) of the Interstate Commerce Act stating its intention to discontinue trains numbered 7 and 8 and 3 and 4 on November 10, 1967. These notices were designated finance dockets Nos. 24772 and 24774. In apparent response to a telegraphic request from the Santa Fe the Commission issued a press release on October 19, 1967, stating that on October 20, 1967, it would issue a notice informing the public that it had determined not to enter upon an investigation of the discontinuance of Santa Fe trains numbered 7 and 8 and 3 and 4. The Santa Fe immediately discontinued those trains.

Said discontinuance violates the explicit provisions of sections 13a(1) which requires a railroad to post notices of discontinuance at least 30 days in advance of a proposed discontinuance and permits discontinuance only in accordance with the notices as posted and filed with the Commission. Santa Fe's notices stated the trains would be discontinued on November 10, 1967. They were in fact discontinued on October 19 and 20, 1967. Crews reporting to work on train No. 8 on October 19, 1967, were told that train No. 8 and the jobs thereon had been canceled. Train No. 3 was stopped in Amarillo, Tex., and canceled and the jobs thereon abolished. Train No. 4 was canceled on October 19, 1967. Train No. 7 was canceled on October 20, 1967. The jobs of approximately 100 employees were abolished without notice and some crews found themselves at the far end of their runs and had to wait until they could get transportation back to their home terminals.

Santa Fe has been contacted with regard to this violation of law and the injury inflicted upon their employees between October 19, 1967, and the date the trains legally could have been discontinued—November 10, 1967—but refused to do anything about that injury.

On October 24, 1967, the Railway Labor Executives' Association delivered a letter to Mr. Richard Block with copies for the members of division 3 requesting immediate action to require restoration of these trains to November 10, 1967. Association counsel was told a reply could be expected before November 10, 1967.

The principle here involved is unique in the history of the administration of section 13a(1) of the Interstate Commerce Act and one which will affect many if not all future passenger train discontinuances under those provisions. It is submitted that the discontinuance of a train in disregard of the 30-day restriction in the statute and in disregard of the railroad's posted notice regarding that discontinuance violates the intent and purpose of the 30-day notice restriction in section 13a(1). Commission concurrence in Santa Fe's actions would effectively remove the 30-day notice provision from the statute.

The approximately 100 employees of the Santa Fe will shortly commence the irreversible process of "bumping" in the exercise of their seniority rights. It is therefore respectfully requested that the full Commission treat this matter as one of general transportation importance and order the Santa Fe immediately to restore the operation of trains 7 and 8 and 3 and 4, and to repost and refile a proper 30-day notice with which the Santa Fe shall comply.

Fourteen copies of this telegram are being filed this date with the Office of the Secretary of the Commission in compliance with rule 101(4) of the Commission's Rules of Practice.

This telegram furnished all members of the Commission, Secretary Garson, and Starr Thomas, vice president, law, Santa Fe.

Respectfully submitted.

WILLIAM G. MAHONEY,
Attorney for Railway Labor Executives' Association.

APPENDIX 6

ORDER—OCTOBER 31, 1967

At a Session of the Interstate Commerce Commission, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 30th day of October A.D. 1967.

(Finance Docket No. 24772)

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO. DISCONTINUANCE OF TRAINS
Nos. 3 AND 4 BETWEEN KANSAS CITY, MO., AND GALLUP, N. MEX.

Upon consideration of the matters in this proceedings, including the notice and supporting statement filed October 9, 1967, by the Atchison, Topeka, and Santa Fe Railway Company under section 13a(1) of the Interstate Commerce Act proposing discontinuance, effective November 10, 1967, of its trains Nos. 3 and 4 between Kansas City, Mo., and Gallup, N. Mex.; the notice served October 20, 1967, by the Commission, Division 3, that it had concluded not to enter upon an investigation of the proposed discontinuance; protests by certain States, individuals, associations, and communities, and railway employees; the letter of October 25, 1967, by the Railway Labor Executives' Association, treated here as a petition for reconsideration of the notice served October 20, 1967, and stating that the subject trains were discontinued on October 19 or 20, 1967:

It appearing, That section 13a(1) of the statute specifically prescribes that notice of a proposed discontinuance be properly posted and filed "at least thirty days in advance of any such proposed discontinuance or change" and that the carrier may discontinue or change any such operation or service "pursuant to such notice . . .";

It further appearing, That the discontinuance of the said trains by the Atchison, Topeka and Santa Fe Railway Company prior to the expiration of this 30-day period was a breach of its own notice and of this provision of the statute and therefore vitiates our jurisdiction in this matter;

It is ordered, That the notice and supporting data filed herein, be, and they are hereby, dismissed for failure by the carrier to sustain the jurisdiction of this Commission.

By the Commission, Division 3, acting as an Appellate Division.

[SEAL]

H. NEIL GARSON, *Secretary.*

APPENDIX 7

ORDER—OCTOBER 31, 1967

At a Session of the Interstate Commerce Commission, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 30th day of October, 1967.

(Finance Docket No. 24774)

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO. DISCONTINUANCE OF TRAINS
Nos. 7 AND 8 BETWEEN CHICAGO, ILL., AND LOS ANGELES AND BAKERSFIELD,
CALIF.

Upon consideration of the matters in this proceeding, including the notice and supporting statement filed October 9, 1967, by the Atchison, Topeka and Santa Fe Railway Company under section 13a(1) of the Interstate Commerce Act proposing discontinuance, effective November 10, 1967, of its trains Nos. 7 and 8 between Chicago, Ill., and Los Angeles and Bakersfield, Calif.; the notice served October 20, 1967, by the Commission, Division 3, that it had concluded not to enter upon an investigation of the proposed discontinuance; protests by certain States, individuals, associations, and railway employees to the proposed discontinuance; and the letter of October 24, 1967, by the Railway Labor Executives' Association, treated as a petition for reconsideration of the notice served October 20, 1967, and stating that the subject trains were discontinued on October 19 or 20, 1967; and

It appearing, That section 13a(1) of the statute specifically prescribes that notice of a proposed discontinuance be properly posted and filed "at least thirty days in advance of any such proposed discontinuance or change" and that the carrier may discontinue or change any such operation or service "pursuant to such notice . . .";

It further appearing, That the discontinuance of the said trains by the Atchison, Topeka and Santa Fe Railway Company prior to the expiration of this 30-day period was a breach of its own notice and of this provision of the statute and therefore vitiates our jurisdiction in this matter;

It is ordered, That the notice and supporting data filed herein be, and they are hereby, dismissed for failure by the carrier to sustain the jurisdiction of this Commission.

By the Commission, Division 3, acting as an Appellate Division.

[SEAL]

H. NEIL GARSON, *Secretary*.

APPENDIX 8

[Telegram]

NOVEMBER 1, 1967.

By action of the Appellate Division 3 in its orders of October 31, 1967, the Commission has held the Santa Fe Railroad to be in violation of its own notices and in violation of the explicit requirements of section 13a(1) of the Interstate Commerce Act. But the Division 3 action would absolve the Commission of any responsibility to protect the public interest in this matter by absolving itself of jurisdiction in this case. We respectfully submit that the jurisdiction was properly invoked by the Santa Fe when it filed its notices under section 13a(1) and that railroad cannot unilaterally and at its own convenience divest the Commission of jurisdiction by violating the law.

We respectfully submit that once Commission jurisdiction properly attaches as in these proceedings it can be dissolved only in accordance with the terms of the statute. Since the statute requires 30 days' notice in advance of discontinuing and since the statute permits discontinuance automatically at the end of the 30-day period, the Commission is not required to act—even to the extent issuing a notice that it intends not to act—during the 30 days it has jurisdiction. However, during that 30 days the Commission is the sole agency with the responsibility of seeing to it that the railroad, under its jurisdiction obeys the law. If a violation of the law and the 30-day notice by premature discontinuance vitiates the jurisdiction of the Commission as held in the Commission's orders of October 31, then the law is rendered a nullity. A carrier could file its notice with the Commission and immediately discontinue its trains in violation of the law and the Commission would be without jurisdiction to compel obedience to the explicit requirements of the act.

Association respectfully requests the Commission to accept this telegram as an amendment to its telegraphic request for the full Commission to treat this matter

as one of general transportation importance; reverse the orders of October 31, and require the Santa Fe to restore service pending the filing of an additional 30-day notice which shall be complied with by Santa Fe.

Fourteen copies of this telegram have been filed with the office of the Secretary of the Commission this date in compliance with rule 101(4) of the Commission's rules of practice.

This telegram sent to each member of the Interstate Commerce Commission, Secretary Garson and Santa Fe Vice President Law Thomas.

Respectfully submitted.

WILLIAM G. MAHONEY,
Attorney for Railway Labor Executives' Association.

APPENDIX 9

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Washington, D.C., November 8, 1967.

HON. HARLEY O. STAGGERS,
*Chairman, Interstate and Foreign Commerce Committee,
House of Representatives, Washington, D.C.*

DEAR CHAIRMAN STAGGERS: This letter is written to you and the members of the House Committee on Interstate and Foreign Commerce to apprise you of a shocking situation involving the Interstate Commerce Commission and the Santa Fe Railroad.

On October 19, 1967, the Santa Fe filed with the I.C.C. notices to discontinue a pair of passenger trains operating between Los Angeles and Chicago and a pair of passenger trains operating between Kansas City and Gallup, New Mexico. These notices were filed under the provisions of Section 13a(1) of the Interstate Commerce Act which, as you know, requires at least a 30-day notice to the public before any interstate passenger train can be discontinued.

The notices stated that the trains would be discontinued on November 10, 1967. Shortly after filing these notices with the Commission, the Santa Fe sent telegrams to all members of the Commission requesting them to indicate as soon as possible whether they were going to investigate these discontinuances. On the afternoon of October 19, 1967, the Commission, apparently to accommodate the Santa Fe, took the unprecedented step of issuing a press release stating that on the following day it would issue a notice informing the public that it was not going to investigate or interfere with the proposed discontinuance of these trains. The Santa Fe discontinued them on October 19 and 20, 1967. Consequently, the public did not have 30 days' notice which the federal law requires and their notice contained, but nine and ten days' notice.

The Santa Fe discontinuances not only resulted in depriving travellers and shippers of the 30 days granted them by Congress, but also resulted in the abolishment of the jobs of approximately 100 crewmen of the Santa Fe. It deprived each of these employees of at least three weeks' work which they would have performed had the trains been discontinued on the thirtieth day rather than on the ninth and tenth days following the filing of the notices of discontinuance.

Attached is a photocopy of a telegram which counsel for the Railway Labor Executives' Association sent to each member of the Commission on October 27, 1967, regarding this matter.

The Commission did not respond to this telegram, but at 3:00 p.m. E.S.T. on October 31, 1967, Division 3 of the Commission, composed of three members, issued two identical orders holding the action of the Santa Fe in discontinuing the two pairs of trains to be *in violation of the 30-day notices of discontinuance* which that railroad had filed with the Commission and *in violation of 30-day notice requirements of Section 13a(1)*. However, instead of compelling obedience to the law by a railroad which had evoked Commission jurisdiction, the Division 3 orders conclude that *a railroad can unilaterally remove itself from Commission jurisdiction by violating the law*. Because the Santa Fe violated the law in prematurely discontinuing its trains, says Division 3, the Commission no longer has jurisdiction over the Santa Fe regarding the discontinuance of these trains. Copies of these orders are enclosed.

Immediately following the receipt of these orders, counsel for the Association again telegraphed each member of the Commission and reminded them that they had not acted upon or responded the Association's previous telegraphic request that the entire membership of the Commission take action in this matter. It was

also pointed out that for the Commission to hold that a railroad can remove itself from Commission jurisdiction by violating the Interstate Commerce Act makes a mockery of that Act and the protection to which the public is entitled under its provisions. A copy of this telegram is enclosed.

Under the ruling of Division 3, a railroad can invoke the jurisdiction of the Commission by filing a 30-day notice and the very next day discontinue the trains with impunity since it would have removed itself from Commission jurisdiction.

As a practical matter, once the trains are removed following the filing of a notice with the Commission there is no chance the regulatory agencies of each state through which the trains pass can be prevailed upon to require restoration of service within their respective borders. The result will be the elimination of all regulation over the discontinuance of passenger trains. And it will be accomplished by admitted violations of the Interstate Commerce Act.

The Commission issued its press release announcing it would not investigate or otherwise interfere with the discontinuance of these trains within nine days of the filing of notices by Santa Fe. It has been 12 days since we first telegraphed the full Commission to act on this matter and eight days since we sent our second telegraphic request to the Commission.

I have just been informed the Commission very probably will not act on our requests until tomorrow afternoon, November 9, 1967—and the next day, the day on which Commission jurisdiction would have expired, is a national holiday. It is now expected that the full Commission will, in some fashion, affirm the action of Division 3 in absolving the Commission of responsibility to the public under Section 13a when that law is violated by a railroad which has invoked its provisions.

Your committee is presently considering bills which would amend Section 13a of the Interstate Commerce Act dealing with the discontinuance of passenger trains. The Interstate Commerce Commission sponsored the amendments embodied in H.R. 7004 which would have no effect upon the 30-day notice requirements of Section 13a and which the Commission has held can be violated with impunity by the railroads.

It is now imperative that Section 13a be amended immediately to eliminate the "30-day automatic discontinuance" feature by requiring the railroads to apply for and secure Commission permission to discontinue interstate passenger trains. This can be accomplished by enactment of H.R. 12410. We, therefore, urge you to give immediate favorable consideration to the enactment of H.R. 12410.

Respectfully,

DONALD S. BEATTIE,
Executive Secretary.

The CHAIRMAN. Thank you very much.

Are there any questions?

Mr. KYROS. I have one question, Mr. Chairman.

The proposed phrase that you would put in here is "upon such terms and conditions as in its judgment the public convenience and necessity may require." The draft as I read it has the statement in it "may require such train or ferry be continued in operational service in whole or in part pending hearing and decision."

Apparently you don't feel that that clause as it appears twice in S. 2711 is broad enough to pick up all the possible discretion that the Commission should exercise.

Mr. MAHONEY. No. It has been so interpreted by the Commission.

Mr. KYROS. It just means tying up trains in whole or in part?

Mr. MAHONEY. That is right.

Mr. KYROS. And nothing else?

Mr. MAHONEY. Nothing else. That is the way they interpreted it.

I might say one quick word with regard to the Commission amendment, the first language the Commission would insert is "carrier or carriers filing such notice may, upon the expiration of but not during the notice period discontinue." If the carrier removed the trains in violation of that language, it would be doing no more than the Commission found the Santa Fe did when it violated the present law in removing trains 7 and 8 and 3 and 4.

So that language is meaningless to keep the jurisdiction in the Commission. The Commission's second suggested language modification, however, which appears at the bottom of page 2 and the top of page 3 of the appendix is the language which apparently the Commission intends to provide them with jurisdiction.

It is not effective. It isn't effective for this reason: It only permits, it doesn't require, the Commission to make the carrier restore service when it has violated the law. It permits the Commission to require the carrier to restore service when it violates the law. It permits them to do this until expiration of the notice period.

Suppose the Commission issued a notice, as it did in this case, and as it does in many cases. Very early in that 30-day period they get the statement in and in 10 or 15 days they say, "We won't investigate," and they issue a notice they will not investigate, and the carrier waits 21 days.

After 20 days the Commission has no longer any authority under the present law, or even as the Commission would amend it, to require the carrier to keep that train on. After 20 days the carrier can take it off, even if the Commission is investigating it, and then the Commission, after investigation, can require it to be restored.

So the carrier waits 21 days and takes the train off. The most the Commission can do is to require the carrier to keep the trains on until the end of the 30 days and then the carrier can take it off again.

So the Commission's suggested language changes are virtually worthless from the point of view of protecting the public. That is my opinion from reading the Commission's suggestions rather quickly this morning.

This is the Commission's proposed amendment. The only way it can be done, I think, is the way the Senate committee did it in S. 2711. You keep that train on until the Commission issues an order permitting them to take it off. That is a very simple order to issue, if the Commission is convinced it should come off. That is the way it should be done.

I don't understand why the Commission has so timidly approached the problems created by section 13a(1), but I am not privy to their consideration. They may have good reason, but I have not seen them expressed in their statements.

Mr. KYROS. I would also like to commend Mr. Mahoney. This is a complex question. He has made one of the clearest statements I have heard as set forth in his statement of position and facts on what occurred.

Mr. MAHONEY. Thank you.

The CHAIRMAN. Mr. Skubitz?

Mr. SKUBITZ. Under existing law, 13a(1), is it your position that once the railroad files, that it can do nothing for 30 days? Is this the point you are making?

Mr. MAHONEY. The railroad can do nothing for 30 days; that is right.

Mr. SKUBITZ. It can do nothing until the Commission rules?

Mr. MAHONEY. That is right.

Mr. SKUBITZ. Then what does this mean—I am taking it from your statement on page 9—"that the carrier filing such notice may discontinue any such operation"?

Mr. MAHONEY. This is a quote from the statute. The carrier may file with the Commission a notice at least 30 days in advance of such proposed discontinuance or change.

Mr. SKUBITZ. But the next statement says that the carrier filing such notice may discontinue.

Mr. MAHONEY. Any such operations pursuant to such notice. That means only pursuant to such notice because there is no alternative permitted the carrier. They must file their notice at least 30 days in advance of when they want to take it off.

They might say, "We are going to take it off 50 days from today," and if they say that, they are stuck with the 50 days, not 30 days.

Mr. SKUBITZ. Are you saying that if the Commission 10 days after the filing of this notice completes its investigation and says, "It looks to us like you can take it off," that they must still go on for 20 days?

Mr. MAHONEY. Yes; for that 30 days is for the public, like this poor woman left out in the cold in the middle of Oklahoma.

Mr. SKUBITZ. I feel sorry for the woman, but I am also thinking about a railroad that is losing a lot of money.

Mr. MAHONEY. The railroads prepare these statements and file the notices when they want to. It is up to them to make the value judgment that "We shouldn't carry this train any longer than 60 days from now. It is too much of a burden. We will file our notice today and get rid of it in 30 days." It is up to the railroad. If they wait, they have to wait.

Mr. SKUBITZ. I am trying to put myself in the position of Mr. Marsh. I think I would have done the same thing he did. I probably would have violated the law, but after I notified the Commission that they are not going to do anything—

Mr. MAHONEY. Mr. Marsh had a choice. He could have left that mail on those trains and still made a profit on those trains. But Mr. Marsh decided to take the storage mail off. He could have left that mail on and it could still have been a profitable train. But he decided to take it off. He set up his case. He made his own facts.

The CHAIRMAN. In the light of the revised second sentence, which would read that a carrier filing the notice may not discontinue a train except as ordered by the Commission, in the second sentence, do you read the new third sentence to mean that as a discontinuance of a train at the end of a 30-day period the infinitive "to permit" is implicitly modified by the phrase "by order" in every instance?

Mr. MAHONEY. Yes; I do.

The CHAIRMAN. Thank you very much.

Our next witness will be Mr. Paul Rodgers, general counsel, National Association of Regulatory Utility Commissioners.

I understand you have a prepared statement, Mr. Rodgers, and you are prepared to submit it for the record and to summarize it.

STATEMENT OF PAUL RODGERS, GENERAL COUNSEL, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Mr. RODGERS. That is correct, Mr. Chairman.

Mr. Chairman and members of the committee, my name is Paul Rodgers. I am the general counsel for the National Association of Regulatory Utility Commissioners.

Our association is composed of the State regulatory commissions in 50 States that regulate carriers. We believe that the decline in the use of rail

passenger service is merely a temporary episode in the Nation's transportation history because crowded airways and clogged highways of America will not be equal to tomorrow's transportation tasks.

It seems to us quite important to make a determined effort to preserve rail transportation because our trend of rapid urbanization and population growth unmistakably foretell that America will have to return to the use of widespread rail passenger service. Japan's line and the European railroads prove the feasibility and desirability of modern rail passenger systems.

I will not review, Mr. Chairman, the facts in the *Santa Fe* case because that has been well covered by previous witnesses. I will review, though, briefly, what our views are as to the ICC decision.

Actually, the ICC decision in this case could well be adequate to cope with the problem which S. 2711 seeks to solve. The reason a carrier resorts to the section 13a remedy is to override a State law requiring continuation of passenger service. Since the ICC has determined that a premature discontinuance vitiates Federal jurisdiction and returns the carrier to the original position of being subject to State law, I see little value in S. 2711. However, we do support the bill.

Irrespective of the merits of S. 2711, it is simply a device to preserve the status quo as some have interpreted it. Beyond that, S. 2711 is of no value in seeking to preserve the nucleus of rail passenger service in the Nation. We believe that the committee should not limit itself at this time to considering a bill as narrow as S. 2711, but that it should review all of the pending bills to amend section 13a and the testimony submitted in connection therewith, and report out the kind of an amendment which it determines will best serve the public interest.

In the latter part of my statement, Mr. Chairman and members of the committee, I reassert our earlier proposal which we have already submitted, to amend section 13a to require that discontinuance petitions should receive initial consideration by a State joint board that would sit as a trial court sits to consider these things, to find the facts, and that a decision of the State joint board would then be appealed by an aggrieved party to the ICC, who would review errors of law, as trying to restore some kind of balance in the working of section 13a.

That is a summarization of my statement.

(Mr. Rodgers' prepared statement follows:)

STATEMENT OF PAUL RODGERS, GENERAL COUNSEL, NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS

Mr. Chairman and members of the committee, my name is Paul Rodgers. I am the General Counsel for the National Association of Regulatory Utility Commissioners (NARUC), formerly known as the National Association of Railroad and Utilities Commissioners.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the *fifty* States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. Our chief objective is to serve the public interest through the improvement of government regulation.

The members of the NARUC appreciate the opportunity you have given me as their spokesman to make their views known on S. 2711, which proposes an amendment to Section 13a(1) of the Interstate Commerce Act relative to passenger train discontinuance procedures.

We of the NARUC are vitally concerned with the development of a sound and adequate rail passenger service which will be responsive to the needs of a growing America.

We believe that the decline in the use of jail passenger service is merely a temporary episode in the Nation's transportation history because the crowded airways and clogged highways of America will not be equal to tomorrow's transportation tasks.

It seems to us quite important to make a determined effort to preserve rail transportation because our trend of rapid urbanization and population growth unmistakably foretells that America will have to return to the use of widespread rail passenger service. Japan's Tokaido Line and the European railroads prove the feasibility and desirability of modern rail passenger systems.

A simple amendment to Section 13a of the Interstate Commerce Act will of course not solve our rail passenger problem. However, the proper amendment of Section 13a will be an important tool in conserving a nucleus of rail passenger service to provide the foundation for expanding to meet tomorrow's transportation needs.

In the light of the enormous problems which confront rail passenger service, we have reviewed S. 2711 and find that it falls far short of the kind of amendment of Section 13a which is required in the public interest.

S. 2711 was spawned by the recent misuse of Section 13a procedures by the Santa Fe Railway Company in discontinuing several interstate passenger trains.

Section 13a was enacted in 1958 to permit a railroad, which was required by state law to continue the operation of passenger service, to override such requirement by applying to the Interstate Commerce Commission for discontinuance.

Section 13a(1) provides that a railroad may discontinue such service upon the expiration of at least thirty days advance notice to the ICC and the public, unless within twenty days after the filing of such notice, the ICC institutes an investigation and requires the continuation of passenger service for an additional four months, pending hearing and decision. If after hearing, the ICC finds that the continuation of such passenger service is justified, it may require the continuation thereof for a period not to exceed one year. Upon the expiration of this period, the train service reverts to state jurisdiction which again may be ousted by the filing of a subsequent petition under Section 13a.

Taking advantage of this remedy, the Santa Fe notified the ICC on October 9, 1967, of its intention to discontinue certain passenger service effective November 10, 1967. The ICC's Division 3 on October 19, 1967, decided not to institute an investigation, and on that day and the following day the Santa Fe discontinued the passenger service.

The ICC held that such a premature discontinuance violated Section 13a, vitiated its jurisdiction, and re-exposed the Santa Fe to the requirements of state law—the very requirements which the Santa Fe attempted to avoid by filing the notice in the first instance.

Actually, the ICC decision in this case could well be adequate to cope with the problem which S. 2711 seeks to solve. The reason a carrier resorts to the Section 13a remedy is to override a state law requiring continuation of passenger service, and since the ICC has determined that a premature discontinuance vitiates federal jurisdiction and returns the carrier to its original position of being subject to state law, I see little value in S. 2711.

Irrespective of the merits of S. 2711, it is simply a device to preserve the status quo as some have interpreted it. Beyond that, S. 2711 is of no value in seeking to preserve a nucleus of rail passenger service in the Nation.

We believe that the subcommittee should not limit itself at this time to considering a bill as narrow as S. 2711, but that it should review all of the pending bills to amend Section 13a and the testimony submitted in connection therewith, and report out the kind of amendments which it determines will best serve the public interest.

We have previously submitted our views to this Subcommittee on the deficiencies in the present law.¹

You may recall that one of the several amendments advocated by the NARUC provided that petitions filed under Section 13a(1), concerning trains crossing state borders, would be first heard and determined by a joint board of state commissioners when the proposed discontinuance involves not more than nine states. Such a joint board would be constituted in a manner similar to the joint boards which are now provided for in Part II of the Interstate Commerce Act.² 49 U.S.C., Section 305.

¹ See NERUC testimony submitted on April 26, 1967, regarding H.R. 7004, a bill to amend Section 13a of the Interstate Commerce Act, and for other purposes.

² Proposed language to make such an amendment is set forth in the Appendix to this Statement.

The joint board procedure has worked successfully in motor carrier regulation and has significantly strengthened federal-state relations. We believe it should be extended to Section 13a.

Under our proposal, a Section 13a joint board would apply the same legal standards for deciding railroad petitions as are now applied by the ICC. On appeal, the ICC could reverse or modify the decision of the joint board if it determine that the board failed to apply the proper legal standards on the basis of the findings of fact made by the board.

The use of the joint board procedure would not unduly lengthen the administrative process because it would be largely a substitute for preliminary consideration of discontinuance petitions by the ICC.

Section 13a was enacted because some believed that some state commissions were too reluctant in permitting railroads to discontinue unprofitable passenger train services. However, it appears to us that the pendulum has now swung too far in the opposite direction. The ICC, acting under Section 13a, has permitted hundreds of trains to be discontinued in the past several years with the result that railroad passenger service is at best sparse throughout the country and in some areas has ceased to exist. During the past five years rail travel has decreased sixteen percent and is now but one-fifth of the all time peak set in the World War II year of 1944.

We believe that a joint board composed of state commissioners applying national standards will give a proper balance to regional and national needs in passenger train discontinuance cases. If the joint board errs in its decision then of course the ICC would be free on appeal to correct any misapplication of national standards.

Summarizing, we support the enactment of S. 2711, but we hope the Subcommittee will go much farther by affording full consideration to all aspects of the problem, and report out proposed amendments of the nature recommended by the NARUC.

Thank you for your attention.

APPENDIX

In order to permit the use of state joint boards in proceedings under Section 13a, the NARUC recommends that the following provisions be added at the end of such Section:

"(a) Notwithstanding the provisions of subsection (1) of this section, where the discontinuance or change, in whole or in part, by any carrier subject to this part, of the operation or service of any train or ferry operated in service in a plural number of states not in excess of nine is prohibited by any provision of the constitution or statutes of any state or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any state, and where such carrier desires to discontinue or change, in whole or in part, the operation or service of any such train or ferry, such carrier shall petition the Commission for authority to effect such discontinuance or change. Within five days after the receipt of such petition, the Commission shall forward written notification thereof to the state commission of each state involved and advise that it is entitled to furnish one official to serve as a member of a state joint board established under the provisions of this subsection to hear and decide such petition, provided that the state commission certifies the name, title and address of its official to the Commission within fifteen days after receipt of such written notification from the Commission. A state commission which fails to make a timely certification of its official shall forfeit its right to furnish a member for such state joint board.

"(b) Upon the expiration of such fifteen day period, the Commission shall issue an order showing the names, titles and addresses of the state officials so certified and shall specify a time (within thirty days after the date of the order) and place (within the area involved) for them to convene to hear and decide such petition. The state joint board shall be composed solely of the state officials so named in such order and each shall have one vote in the deliberations of the board. All decisions by a joint board shall be by majority vote. The Commission shall designate an examiner to advise with and assist the state joint board in handling the case. The Commission shall also provide necessary stenographic assistance. A state joint board shall be vested with the same rights, duties, powers, and jurisdiction as are vested in members or examiners of the Commission to whom a matter is referred for hearing. An order of a state joint board shall be deemed an order of the Commission unless reversed or modified by the Commission. Members of a state joint board when administering the provisions of

this subsection shall receive such allowances for travel and subsistence expenses as the Commission shall provide. A substitution of membership upon a joint board from any state may be made at any time by the certification of a successor by the state commission and recognition of the successor by the Commission.

"(c) The petitioner shall have the burden of proving the allegations of the petition. If, after hearing, the state joint board finds that public convenience and necessity do not permit the proposed discontinuance or change, in whole or in part, and that the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will not unduly burden interstate or foreign commerce, the state joint board may by order require the continuance of operation or service, in whole or in part, subject to such terms, conditions, and modifications pertaining to operations or service as it shall find to be reasonable and just, for a period not to exceed one year from the date of such order. Otherwise, the state joint board shall by order permit the discontinuance of operation or service of such train or ferry, in whole or in part, to become effective seventy days after the date of the order. The state joint board shall immediately certify its findings and order to the Commission and shall serve a copy thereof on the petitioner and each intervenor in the case. On the expiration of an order of the state joint board after such investigation requiring the continuance of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this subsection shall again be invoked by the petitioner.

"(d) Within thirty days after the date of such findings and order by the state joint board, an aggrieved party may appeal same to the Commission. On appeal, the Commission shall review the record of the proceeding before the state joint board and correct any legal errors found therein. The Commission shall be bound by the findings of fact made by the state joint board if supported by evidence. The Commission shall decide the appeal within thirty days after the date of appeal.

"(e) If the state joint board fails to issue its findings of fact and order in the proceeding within one hundred and fifty days after the date of the Commission order showing the membership of the board and appointing a time and place for convening, the petitioner then, and only then, shall be entitled to pursue the remedy prescribed in subsection (1) of this section for obtaining such discontinuance of or change in operation or service of the train or ferry.

"(f) As used in this subsection: the term 'state commission' shall mean the state commission, board or official engaged in the regulation of railroad rates and services, or if none, the governor of the state; and the term 'state' shall include the District of Columbia."

The CHAIRMAN. You have certainly summarized it very quickly.

I want to compliment you.

Mr. KYROS?

Mr. KYROS. No questions.

The CHAIRMAN. I have no questions, but I might ask you the same question I have asked the others.

Mr. RODGERS. I have heard the question and my answer is "Yes," Mr. Chairman.

The CHAIRMAN. I have one other question, if you don't mind.

On page 4 of your statement you say that the Interstate Commerce Commission decision in the *Santa Fe* case, that the railroad's taking off its trains vitiated the Commission's jurisdiction and reexposed the *Santa Fe* to the requirements of the State law could well be adequate to cope with the problem which S. 2711 seeks to solve. You continue that you see little value in S. 2711.

In view of the fact that the matter is now in State hands and not before the Interstate Commerce Commission, would you indicate to us just how many of the regulatory bodies of the eight States through which these trains ran have now issued orders requiring the reinstatement or reinstitution of the trains?

Have they gone to the courts to seek an injunction or otherwise taken action to exercise their jurisdictions?

Mr. RODGERS. Based upon the testimony from the labor witness, apparently none have. I frankly do not understand that.

I have not been in communication with the chairmen of those State commissions. But it seems difficult for me to understand why such action was not taken unless they felt the service was such it would be futile to make an effort to restore it.

I would think that the State commissions would clearly have the authority when the section 13a shield is removed to step in and require the restoration of that service, because prior to section 13a, the State commissions made quite a reputation for themselves in maintaining passenger service.

That is one reason why Congress adopted section 13a in the first instance.

The CHAIRMAN. I wonder if you could find out from the different State agencies as to what they have done, whether they have done anything, or why they haven't, and submit the information to this committee?

Mr. RODGERS. I will be glad to.

(The information requested was not available at time of printing.)

The CHAIRMAN. If there are no further questions, thank you very much. We appreciate your coming and presenting us with your testimony.

This completes the hearings on this bill, S. 2711.

The committee is hereby adjourned.

(The following material was submitted for the record:)

TRANSPORTATION ASSOCIATION OF AMERICA,
Washington, D.C., February 16, 1968.

HON. HARLEY O. STAGGERS,
Chairman, House Committee on Interstate and Foreign Commerce,
Washington, D.C.

DEAR CHAIRMAN STAGGERS: On behalf of the Board of Directors of the Transportation Association of America, I should like to pass along its views on S. 2711, the bill now under consideration by your committee.

As indicated by a TAA witness in testimony before your Subcommittee on Transportation & Aeronautics last May, our Association is opposed to any substantive change in Section 13a, the provision in the Interstate Commerce Act that permits the Interstate Commerce Commission to authorize discontinuance of unprofitable passenger trains. For reasons outlined in detail at that time, TAA believes Section 13a, has proved to be a fair and expeditious means by which railroads can seek relief from unprofitable services that in total represent a drain of several hundred million dollars a year on their overall operations.

In order to determine the current thinking of the TAA Board on this important and timely legislative issue, this subject was reviewed at its May 23, 1967, meeting. Not only did the Board reaffirm its support of Section 13a, but it took a position as being opposed to attempts to weaken ICC's authority over passenger-train discontinuances.

As to S. 2711, our interpretation of this bill is that it contains "technical," rather than "substantive," amendments that are designed to clarify the ICC's authority in such proceedings. Therefore, while we would not object to its passage, we should stress that our strong opposition to any substantive changes remains as stated last May. We thus urge your Committee, in its consideration of this bill, to reject any proposals to broaden it by incorporating one or more of the substantive changes under consideration by our Subcommittee on Transportation & Aeronautics last May.

We request that this letter be made a part of the official transcript of the hearings on S. 2711.

Sincerely,

HAROLD F. HAMMOND, *President.*

WILMINGTON, N.C., February 19, 1968.

Congressman HARLEY O. STAGGERS,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN STAGGERS: I have received notice from the Clerk of the House Committee on Interstate and Foreign Commerce that hearings will begin tomorrow on legislation pertaining to passenger train service jurisdiction. I do not have enough time to make plans to come to Washington and testify before your committee and so I would like to have my letter of October 25, 1967, and this letter entered in the record of this hearing. I am enclosing five (5) copies of each as the notice of hearing stipulates. These are my own views. I represent only myself.

Since writing you back in October, the passenger train situation has worsened. Almost daily the newspapers carry stories of trains being discontinued. This crisis began back in 1946. After the war the nation went back on a peace time basis and quite naturally the number of people using rail transportation declined. Some railroads made attempts to keep this business, but others seeing an opportunity to get out of the passenger business for good began to trim their schedules. At this time there were about 10,000 passenger trains operating in the country. Today there are about 750 and the number is steadily declining.

I have always believed that the railroads could get any business they went after. They have proved this in the freight business, but their efforts have not been sincere enough to get the passenger business and hang onto it. The railroads that have made an honest effort to get the business have suffered because the railroads which have not wanted the business and took off their trains reduced the connections available to the traveler.

Canada had the same problem with its railroads and several years ago passed a law making it almost impossible to discontinue passenger trains. The result was the Canadian railroads when they saw that they had to make these trains pay. Passenger trains in Canada that were showing a loss are now making a profit.

The facts are that the railroads offer a transportation service which cannot be duplicated by any other mode of transportation. If properly worked out they could furnish a service that would enable the customer to take his car along on a trip. You can eat and sleep on the train. It is safe transportation. Many people prefer to ride the train, and this is not based on sentiment for most.

Concerned citizens like myself have in community after community tried to save this passenger service. Wilmington is a prime example of this and the result. After the Seaboard Coast Line Railroad petitioned the N.C. Utilities Commission to discontinue Trains 42 and 49 to and from Wilmington the local protest took the form of resolutions from the Wilmington City Council and the New Hanover County Commissioners. The Greater Wilmington Chamber of Commerce along with these two governing bodies objected to the planned discontinuance. The railroad lost before the Utilities Commission and the railroad filed an appeal to the Interstate Commerce Commission. Between these two actions the local Transportation Committee met with the President of the railroad, Mr. W. T. Rice, to see what they could do to save the trains. They asked him point blank what they could do, and offered to do anything they were asked. In other words they were going to do what the railroad should have been doing, going out after the business. They were told point blank to go soak their heads. Nothing would be done to try to get more business for the trains.

This has been repeated many times by many railroad presidents, vice presidents, and lesser officials in many communities throughout the country. I think that what is needed is a law that will first of all stop all discontinuances, and second one which will require the railroads of the nation to place back in service all passenger trains operating on January 1, 1957. This is the half way mark in the decline of passenger service in the United States. Something must be done soon, for even as I type this letter, the railroads are busy scrapping passenger equipment, and tearing down passenger stations.

Very truly yours,

CHARLES B. PEGRAM.

WILMINGTON, N.C., October 25, 1967.

Congressman HARLEY O. STAGGERS,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN STAGGERS: I am writing to you as chairman of the House Interstate and Foreign Commerce Committee in the hope that you will give my thoughts some consideration. I would like to say first of all that I am not employed by any railroad and am not a member of any Union.

For some years now, I have watched with a great deal of sadness the decline in the number of passenger trains operating in this country. In recent years I have taken a closer look, and am shocked by what I have found. Recent events here in my home town of Wilmington brought me to this latest conclusion. Twelve years ago there were eight passenger trains serving Wilmington. Today there are two, and the Seaboard Coast Line has a petition before the ICC to discontinue them. The railroad has done it's best to make them a losing proposition so that they could be eliminated.

The truth is that the railroads could provide the finest transportation possible for the citizens of our nation, but under present law they will undoubtedly eliminate the remaining trains within about two years. I think this situation is serious enough to warrant your committee's holdings a hearing to get the facts, and see what can be done. It is apparent that if in the future we are to have an adequate transportation system in the United States things like this are going to have to be stopped, and we are going to have to replace some trains which have been discontinued.

I am enclosing a letter which I received from Mr. A. S. Lang, Federal Railroad Administrator, and also some copies of letters I have written locally about passenger train service. I will appreciate your consideration of my ideas. All that I ask is that I be heard.

Very truly yours,

CHARLES B. PEGRAM.

(Whereupon, at 12:30 p.m., the committee adjourned.)

