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CONTINUE RAIL TRANSPORTATION SERVICES

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HEARING

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

S. 2494

TO AMEND SECTION 1(16) OF THE INTERSTATE COMMERCE ACT AUTHORIZING THE INTERSTATE COMMERCE COMMISSION TO CONTINUE RAIL TRANSPORTATION SERVICES

SEPTEMBER 16, 1971

Serial No. 92–43

Printed for the use of the Committee on Commerce

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CONTINUE RAIL TRANSPORTATION SERVICES

THURSDAY, SEPTEMBER 16, 1971

U.S. SENATE,
COMMITTEE ON COMMERCE,
SURFACE TRANSPORTATION SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 5110, New Senate Office Building, Hon. Vance Hartke (chairman of the subcommittee) presiding.

Present: Senator Hartke.

OPENING STATEMENT BY THE CHAIRMAN

Senator HARTKE. Good morning, gentlemen.

The hearing this morning is on S. 2494 which would authorize the Interstate Commerce Commission to order one railroad to operate over the lines of another railroad. The bill was introduced at the request of the Commission. It arises from the Commission's concern over the precarious financial condition of bankrupt and marginal railroads and the constant threat of cessation of their needed rail services.

The bill is the first of numerous legislative proposals that the Commission has sent up to us recently. It has been scheduled for an early hearing because the Commission's rationale for the measure presents it as a tool for dealing with the emergency situations that might arise should essential rail services be on the verge of cessation. I hope that we will not be faced with a rail crisis again this winter, but we should prepare ourselves with insurance against that event.

Our purpose in this hearing is to examine carefully the scope and potential effect of the measure.

(The bill and agency comments follow:)

Staff member assigned to this hearing: John M. Cary.

92D CONGRESS
1ST SESSION

S. 2494

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 8, 1971

Mr. SPONG (for Mr. MAGNUSON) (by request) introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To amend section 1 (16) of the Interstate Commerce Act authorizing the Interstate Commerce Commission to continue rail transportation services.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 1 (16) of the Interstate Commerce Act (49
4 U.S.C. 1 (16)) is amended to read as follows: "Whenever
5 the Commission is of opinion that any carrier by railroad
6 subject to this part is for any reason unable to transport the
7 traffic offered it so as properly to serve the public, it may,
8 upon the same procedure as provided in paragraph (15),
9 make such just and reasonable directions with respect to the
10 handling, routing, and movement of the traffic of such carrier

1 and its distribution over such carrier's or other lines of roads,
2 as in the opinion of the Commission will best promote the
3 service in the interest of the public and the commerce of the
4 people, and upon such terms as between the carriers as they
5 may agree upon, or, in the event of their disagreement, as the
6 Commission may after subsequent hearing find to be just and
7 reasonable."

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., September 15, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your August 27, 1971, letter to Secretary Volpe announcing the scheduling of hearings on September 16, 1971, on the Interstate Commerce Commission draft bill to amend section 1(16) of the Interstate Commerce Act authorizing the Interstate Commerce Commission to continue rail transportation services.

The Department does not plan to present testimony at the hearings. However, we would like to offer the following comments on the draft bill.

Section 1(16) of the Interstate Commerce Act authorizes the Commission, whenever it finds that any carrier by railroad is unable to transport traffic offered it so as properly to serve the public, to issue orders with respect to the routing and movement of the carrier's traffic and its distribution over the lines of other railroads. The Commission may make such orders under the procedure prescribed in section 1(15) of the Act which allows the Commission to act without the benefit of notice or hearing. Section 1(16) is not sufficiently broad to permit the Commission to order an operating rail carrier to move the traffic of an incapacitated railroad over the latter railroad's lines. The Commission draft bill is designed to remedy that deficiency.

The Department favors enactment of the Commission draft bill. We are particularly concerned about the possible adverse impact on the public of the cessation of operations by a railroad in reorganization prior to an appropriate rationalization of its properties. Particularly in cases where there is no parallel service offered by another rail carrier, the sudden termination of such operations would be a serious blow to many commercial interests and could have serious implications for the health and well-being of the region served by the railroad. The Commission draft bill provides an effective short-run solution to this type of situation.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the submission of this report to the Congress.

Sincerely,

JOHN W. BARNUM,
General Counsel.

NATIONAL RAILROAD PASSENGER CORPORATION,
Washington, D.C., September 21, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of September 9, 1971, requesting any comments we may care to offer concerning S. 2494 to amend section

1(16) of the Interstate Commerce Act authorizing the Interstate Commerce Commission to continue rail transportation services.

Under the Bill, whenever the Commissioon is of the opinion that any carrier by railroad is unable to transport the traffic offered it so as properly to serve the public, it may make such just and reasonable directions with respect to the handling, routing, and movement of the traffic over such carrier's or other lines of roads as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people. The only change made by the Bill in existing law is the insertion of the words "such carrier's or" before "other lines of roads".

Amtrak is concerned that "traffic" as used in S. 2494 may be construed to include passenger traffic. We believe the Bill should be clarified so as to make it applicable to freight traffic only.

Sincerely,

GERALD D. MORGAN,
Vice President, Government Affairs.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., September 27, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate

DEAR MR. CHAIRMAN: Your letter of September 9, 1971, requests our comments on S. 2494, which would amend section 1(16) of the Interstate Commerce Act, 49 U.S.C. 1(16), so as to authorize the Interstate Commerce Commission, where any rail carrier is for any reason unable to transport traffic offered it so as to properly serve the public, to make just and reasonable directions for handling the traffic over such carrier's lines as well as, as is now provided, over the lines of other railroads.

The Interstate Commerce Commission recommends its authority be so broadened so as to permit it where necessary to continue needed rail service.

In view of the known precarious financial condition of several of the railroads, particularly in the eastern section of the United States resulting in their going into reorganization under the Bankruptcy Act and threatening discontinuance of needed rail service, it is our view that enactment of the bill may well serve the public interest and we would have no objection to its favorable consideration by your Committee.

Sincerely yours,

PAUL G. DEMBLING,
Acting Comptroller General of the United States.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF EMERGENCY PREPAREDNESS,
Washington, D.C., December 20, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for comments of this Agency concerning S. 2494, 92nd Congress, a bill, "To amend section 1(16) of the Interstate Commerce Act authorizing the Interstate Commerce Commission to continue rail transportation services."

The Office of Emergency Preparedness favors legislation that will strengthen the Nation's transportation service, particularly in an emergency. However, we are unable to advise whether this legislation will accomplish that purpose. Accordingly, we defer to the Interstate Commerce Commission.

From the standpoint of the Administration's program, the Office of Management and Budget advises that it has no objection to the submission of this report.

Sincerely,

G. A. LINCOLN, *Director.*

Senator HARTKE. With that, let us turn to Mr. Stafford who can tell us all about the bill.

STATEMENT OF HON. GEORGE M. STAFFORD, CHAIRMAN, INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY FRITZ R. KAHN, GENERAL COUNSEL; AND THADDEUS W. FORBES, ASSOCIATE DIRECTOR, OFFICE OF PROCEEDINGS

Mr. STAFFORD. Thank you, Mr. Chairman.

I have with me at the table this morning, Mr. Ted Forbes, and Mr. Fritz Kahn, who will be assisting me.

Mr. Chairman, the Commission is grateful for this opportunity to appear and to testify in support of legislation designed to grant us the power to order one railroad to operate over the tracks of another in an emergency.

As I indicated in my letter to Chairman Magnuson on July 2, because of the financial condition of the railroad industry and certain railroads in particular, the threat of cessation of needed rail service is constantly before us. We know the subcommittee shares our concern, and we are appreciative of the prompt consideration that you have granted to our legislative recommendation, which is now known as S. 2494.

The railroads of this country operate as an integrated nationwide system, notwithstanding the fact that the system is made up of a large number of individual private enterprises. By law they are required to do many things, such as interchange traffic and rolling stock, so that a person turning his cargo over to one railroad can expect that cargo to be delivered by any other railroad at almost any place in the country in accordance with his routing instructions.

Consequently, when one railroad is having operational difficulties, all other railroads are affected, some, of course, more than others. If one railroad shuts down, it is like the dropping of a stone in a pond. The adverse impact is felt not only in the immediate service territory of the nonoperating railroad, but also in the surrounding and eventually more distant territories served by connecting carriers which join with it to form the national rail system.

On July 21, I appeared before this subcommittee and presented testimony about the state of the railroad industry. At that time I identified four class I railroads in reorganization and 18 others whose financial condition the Commission considered to be marginal. The same situation continues to exist today.

Three of the largest seaports in the populous northeastern quadrant of the United States rely heavily for rail service upon bankrupt or marginal railroads.

Boston looks for rail service almost completely from the Boston & Maine and the Penn Central, both of which are major railroads currently in reorganization.

The Port of New York is linked with its commercial hinterland by the Penn Central and the Central Railroad of New Jersey, both bankrupt, and by the Erie-Lackawanna, which because of an onerous debt structure, among other things, has long been a marginal operation.

Philadelphia depends largely on Penn Central and, to some extent, on the marginal Reading Railroad.

A fourth eastern port, Baltimore, also relies on Penn Central's service, although it is also served by major roads in relatively sound condition.

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It is thus painfully apparent that if one or more of these bankrupt railroads were to shut down for lack of operating funds, the ramifications would be extremely severe and far reaching.

Many millions of people in the most densely populated part of the country could be cut off from fresh meat, fresh fruits and vegetables, and other products of agriculture. Their electric supply, dependent upon enormous amounts of coal delivered by railroad unit trains, would be seriously curtailed causing brownouts, stalled commuter trains and elevators, spoilage of refrigerated foods, and so forth. Commerce and industry in general would be dealt a severe blow; and unemployment would necessarily hit many industries.

The Commission today has no means to provide for a continuation of essential service if a major railroad runs out of operating cash and is forced to discontinue service. We are urging Congress to make those means available through an amendment of paragraph 16 of section 1 of the Interstate Commerce Act.

As it now stands, section 1(16) contemplates that a railroad may become unable to transport the traffic offered it, but the most it authorizes us to do is, and I am quoting, "make . . . just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of railroads . . . ."

Note that I emphasize the word "other."

If the Central Railroad of New Jersey, for example, were to close down, we could not—under that quoted language—direct any one of the connecting lines (B. & O., Erie-Lackawanna, Penn Central, Reading, or others) to enter upon the Jersey Central tracks and serve the essential port facilities on the west side of the Hudson River, or transport the 30,000 or 40,000 commuters who daily use the CNJ to and from work in downtown New York City and Newark.

We believe it imperative that this void in authority be filled immediately, considering the straitened circumstances of many railroads, large and small, especially in the eastern district. Our proposal is to add three words to section 1(16) of the act.

In enacting this amendment, Congress would also go a long way toward repairing certain inadequacies in section 77 of the Bankruptcy Act. That statute was enacted as a device to keep railroads operating during a bankruptcy, pending the development and adoption of a reorganization plan. Yet the nature of the bankruptcy situation and section 77 itself, contain elements which make it difficult to fulfill that objective.

At the outset, there is a devision of responsibility between the Commission and the reorganization court, neither being able to expedite matters within the other's charge. Then there is a problem of the dual functions of the court to preserve the debtor's estate, but at the same time keep the railroad running—even though the latter involves a deficit operation.

Creditors are reluctant to compromise claims, particularly when liquidation holds out a promise for a greater recoupment. Connecting carriers—even though they may be greatly dependent upon the debtor's service for their own survival—often are generally not willing voluntarily to undertake the service responsibilities of the bankrupt, or to propose takeover arrangements, when there is the prospect that, in

time, desirable portions of the bankrupt road may be acquired at a bargain price.

These, and other factors, tend to prolong the process of reorganization, and in most instances, this is accompanied by a continual, sometimes massive, cash attrition. Obviously, when the debtor's liquidity comes to an end, operations must cease. There is nothing in the Bankruptcy Act to provide for continued operation of a railroad that cannot meet its payroll. Efforts to cannibalize a railroad to obtain funds for continued operation are restricted to constitutional prohibitions against the taking of private property for public use without just compensation.

With section 1(16) amended as we propose, at least three important objectives can be achieved.

First, the Commission would be able to prevent a cessation of essential service by directing adjacent or other connecting carriers to conduct operations over a defunct carrier's lines.

Second, by maintaining such service, the Commission can prevent a chain reaction which otherwise could thrust marginal connecting carriers into bankruptcy.

And third, the connecting carriers, knowing that they could be subjected to mandatory orders by the Commission to take over temporary operation of some or all of the debtor's services, and knowing that a crisis-caused bargain will not be available to them, would be more apt to enter into constructive negotiations on a timely basis with the debtor and among themselves for the preservation of service through participation in the debtor's reorganization.

That concludes the presentation of my formal statement. I will be happy to answer any questions that you may have at this time.

Senator HARTKE. Thank you, Chairman Stafford.

For the record, we have included a letter from the Office of the Secretary of Transportation, in which they favor enactment of the Commission draft bill, and also the Office of Management and Budget advises from their standpoint there is no objection to the submission of the report to Congress dated September 15.

Chairman Stafford, this bill really changes just three words in existing law.

Mr. STAFFORD. Yes; that is right.

Senator HARTKE. Those words are on page 2 of the bill; is that correct?

Mr. STAFFORD. Yes.

Senator HARTKE. In its original offering, the bill sounds rather simple and sounds like it has a laudatory purpose. I might say that the Secretary of Transportation's letter[1] is not much help in view of the fact they do not examine the bill or give an analysis of the bill whatsoever.

I hope they have done more work on it than they have on their massive transportation program for which we are still waiting after 2 years—2 years, 8 months and some more.

But I noticed the announcement by DOT this morning of a massive new program for the northeast corridor, and yet we can't get a program for a transportation policy on national level.

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[1] See p. 3.

I know my comment in that regard does not refer to you. But the fact remains that frequently the comment is made that DOT cannot give us specific information upon specific bills and procedures in view of the fact that they need to work it into their total transportation policy—which they still have not developed.

It would be interesting to note how they could have come up with this grandiose public relations scheme today without having any real policy into which they could integrate it.

Be that as it may, I reiterate their analysis of this bill is rather superficial.

You say, Mr. Chairman, this would be an emergency-type jurisdiction to be used in the limited situation where the railroad can no longer serve the public. You gave an example of a case where a railroad runs out of cash and its curtailed services are deemed to be essential. Yet the bill before us is much broader in scope than what you have sketched in your statement. For example, it would apply when the Commission is of the opinion that when any carrier is unable to transport so as to properly serve the public—will you explain to me how you can justify the large scope of the bill?

Mr. STAFFORD. There may be some instances when it is not bankruptcy that forces them out. This can be, as we had indicated, a big snowstorm in the Northeast, for instance, and much money would need to go into clearing the tracks, getting the traffic moving again. Some of the railroads there are so close financially that they may not be in bankruptcy, but they are so close to the edge that they would stop operating just because they don't have any cash left. And there are other situations. For instance, a road in Florida just recently stopped operating on its own, and, while we have been able to act very expeditiously in the case, it might have happened that we found we had an absolute need for getting service on that line. It was not in bankruptcy: it just stopped.

Senator HARTKE. Is it your intention with this bill—is it your desire—to apply it to the cases where there is either a threat or a bankruptcy situation or about to run out of cash?

Mr. STAFFORD. That is right.

Senator HARTKE. The bill is not defined in those terms.

Mr. STAFFORD. I personally would have no objection to its amendment, if somebody felt this was too broad.

Senator HARTKE. How would you determine when a railroad reached that point? What would be the standard?

Mr. STAFFORD. If it is no longer able to give needed service.

Senator HARTKE. Who would make that determination? Would the railroad say it could no longer serve?

Mr. STAFFORD. No, we have a number of ways of determining what services need to be provided. You know, for instance, we have had many strikes in the United States where service has ceased. We have some of the best field men in the country, who would keep the Commission apprised of the current situation and of the critical needs of the area. We could follow guidelines laid down by the OEP, as to what are critical items to be carried immediately, and as for the situation in the countryside, it is initially the communities which will determine if some schools need coal, for example, for the heating and powerplants. Then our men are able immediately to give confirmation to the Commission for us to get going.

Senator HARTKE. I do want to ask more questions concerning the labor provisions and labor will be here to testify later as well as the AAR, but what I want now to find out if under the ICC Act at the present time, you don't have authority to do that now under section 1(15), 1(16), and 1(21)?

Mr. STAFFORD. No, sir, we cannot. We can authorize trucks to temporarily service an area, but we do not have the authority, under these circumstances, to order another railroad temporarily to service an area.

Senator HARTKE. Let's look at that for a moment. Section 1(21) gives authority for a carrier to extend its lines. Of course, if you give that authority, automatically it would have authority to extend its service. That is not a direct grant of authority but there is enough of a color of authority, isn't there, that you could accomplish the purpose to which you refer without this new legislation?

Mr. STAFFORD. That would be voluntary action. That is where they want to do it or are willing to.

Senator HARTKE. Let me read section 1(21)——

Mr. STAFFORD. If they file an application to extend their service, we can do it. But we are talking about some railroad that doesn't want to undertake the service.

Senator HARTKE. Section 1(21) I think is a little broader than that, subsection 21, "The Commission may after hearing in a proceeding upon complaint or upon its own initiative without complaint authorize or require by ordinary carrier by railroad, subject to this part, to provide itself with safe and adequate facilities for performing as a common carrier, its car service as that term is used in this part or extend its line"—necessarily if you order it to extend its lines wouldn't you extend its service with that?

Mr. STAFFORD. May I ask the general counsel to speak to that?

Senator HARTKE. All right.

Mr. KAHN. The authority the ICC seeks is patterned after section 1(15) of the ICC act, which permits the Commission to act without hearing. This is the essential difficulty with section 1(21) which requires a hearing before the Commission can act.

Senator HARTKE. That hearing could be rather short, could it not? What I am trying to find out is whether or not you have looked to see whether this legislation is necessary or whether we need this type of change.

Mr. KAHN. Yes, the Commission is persuaded that it has no existing authority to do what this bill would permit it to do.

Senator HARTKE. Have you ever found a case in which you used the authority granted in section 1(15)?

Mr. KAHN. Yes, we use that authority all the time.

Senator HARTKE. For example, what cases?

Mr. STAFFORD. Section 1(15) cases include the washout of tracks, where a railroad is unable to serve its customers. We give them authority to bypass the washout or the bridge that is down, to go unto someone else's tracks and come back from the other side. This we can do under section 1(15).

Senator HARTKE. What about section 1(16)? Have you ever used that authority?

Mr. KAHN. Section 1(16), the section which we would amend by this proposal, permits a rerouting of traffic. For example, South Bend,

Ind., is served by Penn Central and the Norfolk & Western. If the Penn Central were forced to cease operating for want of operating cash, section 1(16) would permit us to enter an order which would require Penn Central traffic to be rerouted over the Norfolk & Western. But let's take Elkhart, Ind. That is served by Penn Central alone. If Elkhart found itself without rail service by a cessation of operations by Penn Central, what would we do?

Senator HARTKE. Do you have authority to order those tracks to be served by somebody else?

Mr. KAHN. No, sir; that is the authority we seek.

Senator HARTKE. What about section 1(21)? If you order it to extend its lines wouldn't that cover you?

Mr. KAHN. Yes, but at best that is after a hearing. Suppose the judge ordered the Penn Central shut down, and Elkhart found itself without rail service. The Commission feels in an emergency situation we should be able to order Norfolk & Western to run those 15 additional miles from South Bend to Elkhart if Elkhart otherwise would be left without rail service.

Senator HARTKE. In other words, what you are saying is that in your opinion there is no existing authority within the ICC act to accomplish the purposes for which you are directing your attention in this bill?

Mr. KAHN. That is correct.

Senator HARTKE. All I am asking you to do is look hard again. Because I don't want to be in a position where we pass another law that is unnecessary. All right?

Mr. STAFFORD. Of course, section 1(21) does not permit us to extend one railroad's operations over another railroad.

Senator HARTKE. I don't know if it does or not. Do you have any cases where it has been denied? If you have gotten authority in the law to extend the lines implicit with that and certainly under color of authority is the fact you extend the service, isn't that right?

Mr. FORBES. We permit carriers to obtain trackage rights over another carrier's lines, but that is under section 5(2) of the act, which requires an application to be filed by the carrier. That is under section 5(2)(a)(ii). I don't know of any instance where we required the carrier under section 1(21) to extend its lines over another carrier's track. Under section 5(2), applications for trackage rights result from voluntary agreements entered into between two carriers.

Senate HARTKE. I hope you understand, I am not saying the authority is there. I am asking you to give your opinion and to look again to see if there is authority there, either direct or implied.

We are not going to finish this bill today anyway, so you have time to look at that.

(The following information was subsequently received for the record:)

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., October 12, 1971.

HON. VANCE HARTKE,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HARTKE: At a session of the Subcommittee on Surface Transportation on September 16, 1971, you asked whether the Commission can order one railroad to operate over the lines of another railroad under Section 1(21)

of the Interstate Commerce Act. I have concluded that the Commission has no such authority.

Section 1(21) was added by the Transportation Act of 1920 (41 Stat. 456). In its 33rd Annual Report (1919), the Commission noted in its support of the enactment of the 1920 Act that it had no power to authorize or compel extensions of existing lines of railroads. Such powers, if any, then rested in the States. There was a lack of uniformity of statutory authority among the States, and in some, no such statutory authority existed. The 1920 Act was enacted to effectuate a uniform system.

State action requiring involuntary extensions had been attacked on the grounds that it compelled the taking of private property for public service without compensation. The Supreme Court had, however, sustained such State action on the express grounds that the railroad had undertaken the service and must supply facilities adequate and necessary to its performance. *Wisconsin, Minnesota & Pacific R.R.* v. *Jacobson*, 179 U.S. 287; *Michigan Central R. Co.* v. *Michigan R. R. Commn.*, 236 U.S. 615; *Minneapolis & St. Louis R. Co.* v. *Minnesota*, 193 U.S. 53; *Missouri Pac. Ry. Co.* v. *Kansas*, 216 U.S. 262; *Atlantic C.L.R. Co.* v. *North Carolina Corp. Commn.*, 206 U.S. 1; *Chesapeake & Ry.* v. *Public Service Commn.*, 242 U.S. 603; *Phoenix Ry Co.* v. *Geary*, 239 U.S. 277; *Chicago & N.W. Ry. Co.* v. *Ochs*, 249 U.S. 416; *Norfolk & Western Ry Co.* v. *Public Serv. Commn.*, 265 U.S. 70. The required extensions were found not to involve the rendition of a new or different service from that to which the owners had agreed when they dedicated their property to a public use. Where, however, the State's mandate involved the rendition of a service beyond the agreement of the carrier, the order was annulled. *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U.S. 403, 417; *Oregon R. & N. Co.* v. *Fairchild*, 224 U.S. 510; compare *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U.S. 585, 595.

Section 1(21) broadly empowered the Commission to require a carrier by railroad to "provide itself with safe and adequate facilities for performing as a common carrier its car service . . . and to extend its line or lines: *provided*, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

In 1929 the Commission entered an order pursuant to Section 1(21) requiring the construction of a new line (159 I.C.C. 630). The United States District Court for the District of Oregon struck down the order in *Oregon-Washington Ry. Co.* v. *I.C.C.*, 47 F. Supp. 250, D. Ore., 1931; and the Supreme Court sustained the District Court in *I.C.C.* v. *Oregon-Washington Ry. Co.*, 288 U.S. 14, 1933. The order compelled the Oregon-Washington to build an extension of 185 miles "across the largest area within the United States which is without rail facilities." (159 I.C.C. at 632).

The Supreme Court set aside the Commission's order. In construing Section 1(21), it stated that, "The power granted . . . is confined to extensions within the undertaking of the carrier to serve, and cannot be extended to embrace the building of a new line to reach new territory" ,(page 40). The Court said further (at page 35):

"The phrase 'and to extend its line or lines' is part of a single sentence committing to the Commission the power to require carriers to provide safe and adequate facilities for car service as defined in the act. The reasonable conclusion is, therefore, that the extensions mentioned have to do with car service and are not intended to create a wholly independent subject of jurisdiction. In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, if Congress were intending to grant to the Commission a new and drastic power to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, the intention would be expressed in more than a clause in a sentence dealing with car service. As said in *Interstate Commerce Comm.* v. *Los Angeles*, 280 U.S. 52, 70:

"If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act."

The Court then added the following (at pages 40–41):

"The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation. (Citations omitted.) The Transportation Act (1920) has not abolished this proprietorship. State courts have uniformly held that to require extension of existing lines beyond the scope of the carrier's commitment to the public is taking of property in violation of the Federal Constitution. (Citations omitted.) The decisions of this court (Supreme Court) will be searched in vain for the announcement of any principle of Constitutional interpretation which would support the order of the Commission."

The Court's basic reason for limiting the section 1(21) authority seems to have been that Congress has not clearly intended to empower the Commission to require a railroad to serve a region it had "never theretofore entered or intended to serve." Such reasoning would apply to requiring a carrier to construct new lines as well as requiring it to operate over the lines of another carrier. Of course, there may in a few cases be close factual questions as to whether one carrier had over the years ever "served" the region of another carrier. But at best such cases would result in time-consuming litigation that should be avoided.

Section 1(21) has remained unchanged since the foregoing decision of the Supreme Court. I believe its reasoning applies here to preclude the Commission's requiring one railroad to operate beyond the "undertaking of the carrier to serve" over the lines of another railroad.

Very truly yours,

FRITZ R. KAHN, *General Counsel.*

Senator HARTKE. You mentioned some types of service. How does this S. 2494 relate to the proposal which you made in our July 21 hearings for restructuring railroads in an emergency situation?

At that time you suggested that you had a proposal which has not yet been introduced as a bill to authorize the Commission to direct railroads in the area of the bankrupt road to restructure their railroad service. Those are your words, and also to require the granting of trackage rights over the bankrupt roads to other railroads in that area.

Also, how would S. 2494 relate to section 4 of the ICC Act Amendments of 1971 that you have sent up as a recommended bill? That section would authorize the Commission to grant temporary authority limited to 180 days to a railroad to provide service within a territory having limited rail service, and also grant temporary authority for acquisition of a line in order to continue rail service to a point.

In other words, what we have here is two other suggestions which have been independently raised. How does this bill relate to those; isn't it redundant?

Mr. STAFFORD. Senator, we rather expected you would get into this area because there appears to be similarity, but we think they complement one another.

If you would permit me to read about three pages that we had prepared this morning in case you brought this up.

Senator HARTKE. Go right ahead; fine.

Mr. STAFFORD. So the record will be clear, I have a copy of the recommended bills, the two that you are speaking of, which I would be happy to submit.

RESTRUCTURING OF BANKRUPT RAILROADS

We recommend that new legislation be enacted which would give the Commission authority to restructure essential railroad service to insure its continuance when the bankruptcy of a railroad threatens the cessation of such service.

Unusual measures are needed to restore the health of sick railroads. For instance, a necessary condition for any meaningful recovery depends on a particular road's ability to streamline operations so as to reduce overhead costs. The initial and primary responsibility for such action under a private enterprise

system lies with the railroads themselves, but the public has a compelling interest when the continued operation of essential railroad service is threatened.

In certain areas such as the shipment of coal, structural steel, cement, and other vital commodities, the economy is almost wholly dependent upon railroads. A nightmare would result if essential rail lines were dismantled and traffic of such nature and volume were shifted to the highways, particularly in large metropolitan areas. The streamlining needed includes not only abandonment of marginal lines and losing operations but a more effective joint use of lines and facilities, where duplications exist.

The Commission has concluded that where a railroad in reorganization is threatened with cessation of service, the public is entitled to swift and affirmative action which would seek to restructure railroad service in the area so as to overcome such a crisis. At present the Commission has no affirmative authority to cope with such a situation. Accordingly, the Commission recommends that immediate consideration be given by the Congress to the restructuring bill attached hereto.

The draft bill is designed—

1. To provide for an expeditious streamlining of railroad facilities, while preventing indiscriminate abandonment of essential railroad operations and facilities.
2. To impose a duty on railroads in such proceeding to provide essential railroad service, if necessary, beyond their own lines, and to seek a reduction in overhead expenses where possible through joint use of facilities while preserving to the extent feasible their competitive status in the areas they serve.
3. To preserve essential rail service necessary to the public convenience and necessity at the lowest cost.
4. To promote a fair return on essential railroad investment while avoiding the need to support railroad corporations with excessive debt structures which cannot support themselves.
5. To promote railroad labor in the long run by promoting a more viable and competitive railroad industry and by avoiding cessation of essential railroad operations. Where labor in the short run may be adversely affected, the Commission would be able to impose reasonable conditions for the protection of employees. Should a plan of restructuring involve a substantial dislocation of labor which could not reasonably be protected by conditions imposed on the railroads without negating the advances of such restructuring, the Commission could recommend legislative or other relief to the President and the Congress to help overcome such a negative social problem.
6. To encourage needed investment in the railroad industry by reluctant investors, through the corrective measures proposed.
7. To promote railroad viability during or after restructing by providing for a report to Congress and the President recommending such subsidies as may be needed to preserve essential but non-profitable facilities, if such should be found to exist.
8. To preserve intact for a year railroad facilities found not to be essential to railroad service in order to permit further modifications in the restructuring and/or afford other agencies, State, or local governments an opportunity to acquire such property for other public usage at a fair price.
9. To assist railroads in reorganization to reemerge as healthy railroads or to sell or lease their essential railroad facilities to viable railroads, thus reducing or terminating the losses which creditors would otherwise have to absorb.

A key element of the bill would be the imposition of a duty upon all those involved in railroad reorganization proceedings—creditors and governmental agencies as well as carriers—to exert the maximum effort to bring about a meaningful solution to the problem, but at the same time give the Commission authority to adopt and enforce a plan of restructuring if the parties cannot agree.

The proposed bill would enable the Commission to act swiftly to effect economies readily recognized as desirable, while allowing it to make further changes as the proceeding develops and new facts come to light.

Of course, it cannot be ascertained in advance of a proceeding whether a feasible plan of restructuring can be effected without some Government assistance, and the proposed bill, therefore, provides for a report to the President and Congress in the event it apears that some further Government assistance is necessary to preserve essential services. However, if the Government is to be called upon to assist the industry, it should have assurance that an expeditious and determined effort will be made to increase efficiency and preserve essential railroad service to the public.

71-012—72——3

Part VI

Section 1. It is the purpose of this part to provide for restructuring of railroad service and operation in any part of the United States when the Commission determines, within the limits of this part, that an emergency situation exists, or is imminent, which threatens cessation of essential railroad service by a railroad in financial distress, it being the aim of such restructuring to provide emergency relief through facilitating the most efficient use of facilities, and, if necessary and feasible, to provide for alternate service to be performed by other railroads on an emergency basis so as to preserve railroad services essential to the commerce of the United States and its national defense.

Definition

Section 2(a). A distressed railroad shall be a debtor railroad in reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205) which, as determined by the Commission upon information from the United States District Court exercising jurisdiction thereof, is expected to cease operations in the near future due to a lack of funds necessary for continued operations.

(b) An emergency situation shall exist if the Commission finds that the distressed railroad performs services essential to the public convenience and necessity.

Section 3. In order to carry out the purpose declared in Sec. 1, the Commission, upon the terms and conditions prescribed by it and consistent with the provisions of this part, may declare, upon petition filed pursuant to an order of the United States District Court exercising jurisdiction over the distressed railroad, as provided in Sec. 4(b) hereof, that certain essential railroad service of the United States is threatened and may be compelled to cease operations and that an emergency exists, whereupon the Commission may direct a railroad or railroads in the area, including the distressed railroad, and other interested parties, to submit within 30 days, unless such period is extended by the Commission, recommendations indicating steps deemed prudent to ovecome such emergency, and upon considering such factors and other information available to it, the Commission may adopt a plan which may (a) immediately permit or direct a railroad or railroads in the area, including the distressed railroad, to restructure their railroad service, which plan may permit or require, if found feasible, the joint use of the most economical railroad lines and terminals at a fair compensation, the abandonment of operations of lines, terminals, or other facilities which are not found to be essential to the public convenience and necessity, and the lease of facilities and equipment or the granting of trackage rights of essential railroad tracks and facilities of the distressed railroad, no longer capable of being operated by the distressed railroad, at a fair compensation to another railroad or railroads in the area, and (b) after hearings as set forth in Sec. 13 hereof may permit or direct the abandonment of lines, terminals or other operations or facilities and the sale, lease or operation of essential railroad properties of the distressed railroad and purchase, lease or operation thereof by another railroad or railroads at a fair compensation and on reasonable terms; and the emergency restructuring plan reflecting actions taken under provision (a)of this Section shall become effective within 30 days after such order is served, unless extended by the Commission, without the necessity of awaiting final determination of appeal on reconsideration to the Commission as provided in Sec. 13 hereof.

Section 4. No plan shall be adopted under Sec. 3 hereof unless:

(a) The United States District Court exercising jurisdiction over the distressed railroad by order finds upon its own motion, or upon petition of the distressed railroad or its trustee or trustees, or of any railroad, shipper, community, or other interested agency or person, that operations of the distressed railroad will cease in the near future due to inability to obtain funds necessary to continue operations; and

(b) The Commission finds upon a petition filed pursuant to an order of the United States District Court exercising jurisdiction over the distressed railroad entered as provided in paragraph (a) of this Section, that cessation of all or part of the operations of the distressed railroad will have a seriously adverse effect on the public convenience and necessity.

Section 5. A petition requesting restructuring of railroad service under this part shall include, as a condition of acceptance, a proposed plan of restructuring, setting forth in detail the public need for such service as is proposed to be re-

tained, the restructuring proposed and the effects and feasibility thereof, and an estimate of the time needed to implement such restructuring.

Section 6. In adopting a plan of restructuring the Commission shall give consideration (a) to the effect cessation of such railroad service would have on the industries in the area involved as well as its effect on affected parts of the national railroad system and the industries it serves, (b) to any plans which may mutually have been agreed to by employee unions and railroads to increase the efficiency of operations of the distressed railroad, (c) to any aid which the States or other governmental agencies in the area are granting or propose to grant to preserve such service, and (d) the availability of alternate transportation.

Section 7 In any plan of restructuring which involves the lease or sale of essential railroad properties of a distressed railroad to another railroad or railroads, the Commission, after hearing, under Section 13 hereof, shall set the fair lease or purchase price unless agreed upon by the parties involved, but the plan of restructuring shall not require the purchase or lease of property deemed not necessary to essential railroad service.

Section 8 The provisions of this part shall preempt other parts of the Interstate Commerce Act and Sec. 77 of the Bankruptcy Act, within the limitations set forth herein, and action taken pursuant thereto shall not be subject to the antitrust laws as defined in Section 5a of Part 1 of this Act.

Section 9 In order to permit early implementation of a plan of restructuring as provided in Sec. 3(a) hereof, so as to achieve the purposes of this part, the plan of restructuring may provide for interim findings with respect to property rights affected or may defer consideration of property rights until after oral hearing as set forth in Sec. 13 hereof.

Section 10 Any plan of restructuring shall provide for reasonable protection for employees affected, subject to further relief which may be recommended to the President and Congress pursuant to Sec. 14 hereof.

Section 11 The Commission may request such information as it deems necessary from the carriers involved and their subsidiaries, affiliates, or parent companies, to accomplish the purpose of this part, and may, if it deems it necessary, helpful and timely, hold preliminary hearings to gather information.

Section 12 The willful failure or refusal of any carrier or subsidiary, affiliate, or holding company, or of any officer or employee of any carrier, subsidiary, or holding company, to comply with the terms of any order of the Commission pursuant to this part shall be a misdemeanor, and upon conviction thereof the carrier, subsidiary, affiliate, or holding company, or person offending shall be subject to a fine of not less than $1,000 or more than $5,000 for each offense, and each day during which such party shall willfully fail or refuse to comply with the terms of such order shall constitute a separate offense. It shall be the duty of the Attorney General of the United States to prosecute all necessary proceedings for the enforcement of the provisions of this part and for punishment of all violations thereof upon application by the Commission.

Section 13 After a plan of restructuring is adopted, the Commission shall hold hearings and all interested parties shall have an opportunity to present their views and comments in favor of or in opposition to such plan, and the Commission may, during such pending proceedings or within one year after the conclusion thereof, order such further changes consistent with this part and subject to subsequent further hearings, as it shall conclude to be desirable to improve such plan of restructuring, including the sale or lease of the facilities of a distressed railroad to, or their operation by, another railroad or railroads, and the fair price of such sale, lease, or contract to operate or the fair compensation for joint use of railroad lines and terminals if not agreed to by the parties and shall set such other conditions as it deems necessary to assure that the plan of restructuring is carried out.

Section 14 If, while considering a plan of restructuring of railroad service or subsequent to the adoption thereof, the Commission finds that notwithstanding such restructuring essential railroad service of the distressed railroad cannot be reasonably assured against cessation of operations, it shall file a report with the President and Congress of the United States and shall recommend such further legislative or other relief as it deems appropriate, including legislative relief to employees that may be adversely affected by the plan of restructuring.

Section 15 Any railroad facilities which the Commission authorizes to be abandoned pursuant to this part shall be kept intact for a period of one year to afford an opportunity to make further modifications in the plan of restructuring pursuant to Section 13 hereof and/or to afford other agencies, State, or local gov-

ernments, an opportunity to purchase such property at a fair price for other public usage.

Section 16 The Commission may use available services and facilities of other departments, agencies and instrumentalities of the Government, with their consent, on a reimbursable basis. Departments, agencies and instrumentalities of the Government shall exercise their powers, duties and functions in such manner as will assist in carrying out the objectives of this part.

Section 17 Administrative expenses under this part shall be paid from appropriations made to the Commission for administrative expenses, and the Commission shall request supplemental appropriations for the purpose when it deems it necessary.

We recommend that a new section 1(23)(b) be enacted so as to empower the Commission to temporarily authorize the acquisition of one railroad by another pending a final determination of an underlying permanent application.

Section 210(b) of the Act empowers the Commission to grant temporary authority to the consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, if it should appear that failure to grant such temporary authority may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public pending disposition of the application for permanent authority. The Act does not grant the Commission similar authority with respect to railroad carriers, and we propose that the Act be amended to provide for such temporary authority in railroad proceedings.

Applications for permanent authority to consolidate or merge the properties of two or more railroads, or for the purchase, lease, or contract to operate the properties of one or more railroads generally involve prolonged prceedings while applicants and protestants present and develop their cases. A period of several years is not unusual particularly where the parties appeal the results through the various courts as frequently occurs. In the meantime, a railroad applicant often continues to deteriorate financially, its maintenance is neglected, and its service to the public impaired. We propose that the Commission be granted the discretionary authority to grant temporary authority in appropriate cases pending disposition of the application for permanent authority. Such authority would particularly be helpful in proceedings where financially viable railroads seek to acquire through merger, control or purchase, the properties of financially troubled railroads. This would help avoid deterioration resulting from delay in processing applications and would equalize the treatment of motor and rail carriers.

We recommend that a new section 1(23)(a) be enacted so as to empower the Commission to grant temporary operating authority to railroads, pending the Commission's determination of corresponding application for permanent operating authority.

Under the Interstate Commerce Act, as presently worded, the Commission cannot authorize temporary railroad operations. Section 210(a) of the Act empowers the Commission to grant temporary authority to motor carriers to operate where there is an immediate and urgent need, pending disposition of an application for permanent authority. Similar authority with respect to railroad operations is highly desirable since applications for permanent authority frequently require a long period of time to be processed, and in the meantime there is a danger that the public could be denied essential railroad service. Such temporary authority is particularly needed with respect to railroads in reorganization. The United States District Courts in several railroad reorganization proceedings have indicated from time to time that they would dismiss the reorganization proceeding before the Court and liquidate the debtor railroad in the event such railroad ran out of cash to operate. If such a point were reached it would be highly important that the Commission be able to grant temporary authority to other railroads to operate essential rail service of the debtor railroad, so as to avoid the lapse of service pending disposition of an application for permanent authority. Such authority was urgently needed in the past when the New York, Ontario and Western Railroad Company and the Tennessee Central Railroad ceased operations due to lack of funds.

SEC. 4. Section 1 of the Interstate Commerce Act (49 U.S.C. 1) is amended by adding at the end thereof the following new paragraphs:

"(23)(a) Upon application and a showing of an immediate and urgent need for service to a point or points, or within a territory having limited or restricted

rail carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a rail carrier. Such temproary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days. Extension of such temporary authority beyond one hundred and eighty days may be determined by the Commission upon written request by any interested party or it may determine the need therefor upon its own initiative. No temporary approval granted under this subsection shall carry any presumption that corresponding permanent authority will be granted thereafter.

"(b) Pending the determination of an application filed with the Commission for approval of an acquisition or operation of a line of railroad, or any extension thereof, under section 1(18), or a transaction within the scope of section 5(2), the Commission may in its discretion, and without hearing or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the railroad properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such railroad properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public, or to leave a point or points or a territory having limited or restricted railroad service available with an immediate and urgent need for the operation of the railroad properties sought to be acquired. The Commission may, in its discretion, attach to any order granting such temporary approval such terms and conditions as in its judgment the circumstances surrounding such temporary approval shall warrant. Extension of such temporary authority beyond one hundred and eighty days may be determined by the Commission upon written request by and interested party, or it may determine the need therefor upon its own initiative.

"No temporary approval granted under this subsection shall carry any presumption that corresponding permanent authority will be granted thereafter."

Mr. STAFFORD. The first restructuring proposal was presented to this subcommittee in accordance with my testimony on July 21. The temporary authority involving amendments to section 1 of the ICC act were submitted by letter to Chairman Magnuson on September 10 of this year.

The most ambitious of these is our restructuring proposal. It would allow the Commission to develop a comprehensive plan to assure that needed services of a railroad in reorganization are preserved and that the railroad itself is brought into a posture which would permit it to emerge from the bankruptcy proceedings and become a profitable operation.

The restructuring plan could include abandonment of some lines, the operation over other lines by other railroads, the joint use of rail lines or terminals, and leasing of tracking facilities or equipment.

The restructuring proposal would be limited to railroads in reorganization under section 77 of the Bankruptcy Act and the Commission's jurisdiction to develop such a plan could be invoked only by the bankruptcy court. The court in turn might ask the Commission to do this at the request of the carrier itself, a debtor, a shipper, or interested local government. The restructuring legislation which we propose envisions an emergency situation, but not one requiring immediate action. Notice would be given to all interested persons, and they would have 30 days within which to submit the suggested courses of action.

It is to be hoped that if a shutdown of rail services by a railroad in reorganization is imminent, the bankruptcy court would have sufficient advance knowledge to allow it to invoke the Commission's juris-

diction. Thus the Commission, in turn, would have the time it needed—perhaps 2 or 3 months—to come up with a reasonable and workable plan which would meet the needs of the territory affected, and would be equitable to the various railroads that might be involved.

The amendment to section 1(16), which is the principal subject of today's hearing, is designed to allow us to act on much shorter notice than the restructuring proposal would require, and in the absence of a request from a bankruptcy court. Hopefully we would never have to use this power.

Unfortunately, however, the possibility of a sudden cessation of services does exist. It is conceivable that it would occur so quickly or unexpectedly that the carrier or a reorganization court might fail to anticipate it in time to take corrective action.

A series of heavy snowfalls, for example, might require so great a cash expenditure as to stop the train right there. A strike on a connecting line or the closing of a plant of a major shipper might spell disaster for an already marginal carrier. This is the sort of an emergency for which we think we should be prepared.

Finally, it should be clear that our recent request for legislation authorizing the grant of temporary authority to railroads to operate over the lines of other railroads differs completely from the others I have discussed.

It would entail a voluntary action by the railroad assuming the burden of performing service. That carrier would file an application with the Commission requesting such authority on a temporary basis. In most cases, it would probably have pending a corresponding application for permanent authority, either to obtain trackage rights over the other railroad's lines, or to purchase the facilities of, or to merge with that other carrier.

The Commission considers these three proposals, as I said before, to be complementary to one another, and not as duplicative, and we would like to see all enacted.

Thank you.

Senator HARTKE. Would you suggest, Mr. Chairman, before we proceed finally upon this legislation, that we wait until such time as we have completed hearings on the other measures?

Mr. STAFFORD. I would hope not. However, naturally we would defer to the will of the Senate.

Senator HARTKE. Let me ask you in regard to one provision. You mentioned strikes now several times. Would you order a railroad to operate over the lines of another if the second railroad were selectively struck by a union?

Mr. STAFFORD. No, sir. We canot enter into any matter dealing with labor problems.

You will recall we had a case at one time known as the *Burlington Trucklines* case, decided by the Supreme Court, in which it stated the Commission was acting in a most delicate area because whatever it did affirmatively, whether it granted a certificate or entered a cease-and-desist order, may have important consequences upon the labor-management process. The policies of the ICC act and labor acts necessarily must be accommodated one to the other.

We do not foresee our use of this authority in any manner that would get us involved in labor disputes. If we did, I am sure the courts would strike us down quickly.

Senator HARTKE. Do you see anything in this bill that would prohibit using that authority in the case of a selective strike by one union?

Mr. STAFFORD. Good judgment itself tells you you don't go against court action.

Senator HARTKE. That is under existing law, right?

Mr. STAFFORD. Right.

Senator HARTKE. Let me ask you a question. Take the Penn Central last January. Assume we had not given any authority for the emergency loan, and assume that they were on the verge of shutting down. Tell me what would have happened. Can you briefly tell me, would you require other railroads to service every point they had on the railroad?

Mr. STAFFORD. No, sir. We would not have asked for service to every point on the railroad. In the first place, many railroads and shippers shipping into the area would find that they were able to reroute by other roads, by other carriers going to much nearer points to the final destination, rather than giving a longhaul to the Penn Central.

Thus, traffic would be rerouted to a point very close to the destination point, and then we probably would order the road that delivered it to that point, that close point, to deliver on to the Penn-Central items of this kind.

Senator HARTKE. Who would operate those trains, Penn Central personnel or the others?

Mr. STAFFORD. We have done a great deal of thinking on this subject. In the first place, if they are bankrupt and, of course, out of business, the Penn Central in this case—their employees would be out, so to speak.

But we can foresee the need to have personnel who are familiar with the routing, Penn Central in this case, and as such, we would foresee that the railroad which we have required to service that area would likely have employees of the bankrupt—I might call them scouts, which has been done in the past—to ride in the cab, to advise of peculiarities, difficulties in the area, and so on.

Or possibly, if it is a long run, the delivering railroad might employ entire crews of the defunct railroad to service that area.

Senator HARTKE. Whose equipment would they use?

Mr. STAFFORD. Well, this depends entirely upon how freight is being delivered. If they are delivering a train load of coal, they may use their own equipment and run it on in. It depends on whether there is a marshaling of equipment. This is all a matter that I think the railroads work out even today in their interchanges, things of this kind. So basically they would use their own equipment where possible.

Senator HARTKE. The Penn Central would use——

Mr. STAFFORD. Costs would be worked out——

Senator HARTKE. The other railroad other than the Penn Central on the Penn Central line?

Mr. STAFFORD. Yes, in most instances.

Senator HARTKE. It is your opinion that they would use their own men and equipment other than the Penn Central?

Mr. STAFFORD. Basically.

Senator HARTKE. Who would maintain the tracks?

Mr. STAFFORD. The carrier operating over those tracks would have to work this out, and this would all be figured in, with the approval of

bankruptcy judge, as to what a carrier operating over the defunct road had to pay for the right to operate over that road.

Now then, remember that the roads delivering the freight are the ones who have received the money from the shippers.

Senator HARTKE. I was going to ask that, whose personnel will deal with the shippers as to the orders?

Mr. STAFFORD. The delivering railroad.

Senator HARTKE. Not the Penn Central?

Mr. STAFFORD. That is right. They are out.

Senator HARTKE. What type of——

Mr. STAFFORD. This is all supposition; we hope it never happens on the Penn Central or any other railroad.

Senator HARTKE. What you have referred to generally speaking is interchange. What if something is just intra-Penn Central? Strictly their business? That is a pretty big operation. Some of this stuff is picked up, handled by personnel who take the orders, and delivered on the Penn Central line. It never leaves the Penn Central line.

Mr. STAFFORD. We think this authority in a case like this——

Senator HARTKE. In your opinion the people taking the orders, the men operating the trains and the equipment would all be the substitute carrier?

Mr. STAFFORD. Not necessarily, no, sir. If we were given this authority—and we knew from our field people, from direct requests that we had from the Governors, and we knew that the areas were absolutely without service and needed it—this authority would give us the right to put some other road over that defunct railroad's run. They would handle the business.

Mr. FORBES. I think the carrier which we would require to operate over the line may of necessity have to hire some of the people of the defunct carrier as well as their salespeople——

Senator HARTKE. Employees of the Penn Central or employees of the substitute carrier?

Mr. FORBES. They could hire employees of the Penn Central.

Senator HARTKE. But who would they be employees of?

Mr. FORBES. At least temporarily, employees of the new carrier operating in that area.

Senator HARTKE. Of the operating carrier.

What about the situation where you pick up in the Penn Central and move out into another line? Who makes the decision what other line takes it?

Mr. FORBES. Ordinarily they would be going through the interchanging points in existence now. The Commission would require a carrier to operate into the Penn Central area and move its traffic out to the normal interchanging point. If it is with that same carrier, it would continue to carry it forward to its next interchanging point.

Senator HARTKE. What compensation would be paid to Penn Central for this service—any?

Mr. STAFFORD. This would be worked out between the carrier that is delivering it and the bankrupt, subject to approval of the judge.

Senator HARTKE. Who would make that decision finally?

Mr. STAFFORD. If the carriers could not arrive at a decision, we are asking for the authority to make a determination.

Senator HARTKE. You would make a final decision in the ICC?

Mr. STAFFORD. Yes, sir.

Senator HARTKE. What standard would you use to make the decision as to what railroad was going to substitute their service?

Mr. STAFFORD. Normally, the closest railroad, sir, the one that came nearest to serving that area.

Senator HARTKE. What if you had two competing railroads, both wanted the business?

Mr. STAFFORD. We talked about that this morning at some length. This bill would give us the authority only until we have from them their permanent applications. This is not the grant of authority that we ask for here. This is the right for an order to serve the area until we can go into a hearing process to determine which one we think is the most able and proper one to have that.

Senator HARTKE. Would you have any standards for all this? In other words, to determine what service, what carrier, how it was going to be done? Or is it the discretion of the Commission?

Mr. STAFFORD. This would be within its discretion.

Senator HARTKE. You would not have any general standards set or specific standards?

Mr. STAFFORD. I assume we would be going through a rulemaking procedure to set up standards. But each movement would be so different it is hard to set definite standards. It is going to be based a lot on judgment. I realize——

Senator HARTKE. Let me ask you, Mr. Chairman, do you have available in the ICC sufficient information that could tell you what service was to be continued and how that service was to be continued or would you have to have hearings to make that determination?

Mr. STAFFORD. No, we would not need hearings.

Senator HARTKE. You would not need hearings?

Mr. STAFFORD. No. As we were saying a few moments ago, in determining what needs to be carried, what is essential in a strike situation or a breakdown of that kind, in the past OEP has had a list, starting with the most essential matters to be carried. But we, of course, could not order one road to operate over the other road unless able to transport the traffic.

Senator HARTKE. Let's come back to the Penn Central situation; have you done any planning in the event that the Penn Central should not be able to continue? After all you know it is a peculiar assumption that runs through a lot of people's minds on the Penn Central; they seem to think merely because certain authority has been granted to them—they have drawn down $75 million of their loan authority—that they are out of the woods. I want to say they have made substantial improvements. I am not criticizing what they have done, but if anybody believes they are out of the woods, they are deceiving themselves and deceiving the public, too.

What I am asking you in regard to the Penn Central which still is a major factor in our transportation crisis today, have you made any studies as to how you could accommodate the situation if the Penn Central collapsed tomorrow?

Mr STAFFORD. This is the basis on which we want this legislation. If it were not going to operate, and we hope it never does, but if it were to cease, with this legislation we could move right in——

Senator HARTKE. I understand you are asking for the legislative authority. I am asking whether you have the factual information and

completed studies or have you made necessary research to implement this if you had this authority tomorrow morning?

Mr. STAFFORD. I don't think we need any studies as you call them. We need a basis for invoking the statute, and we hear immediately of the needs, just as every time they run out of coal we know——

Senator HARTKE. What if the Penn Central were to—let's assume we hadn't granted the emergency loan authority and they closed in January, and this is January. Do you have sufficient information available that you could have implemented this legislation?

Mr. KAHN. I think, Senator, Penn Central operates in an area that has abundant competitive rail service, Norfolk & Western, and C. & O. primarily. The shippers and receivers of freight would immediately route traffic over competing lines. There would be a number of points and industries not served competitively. I hate to come back to Elkhart, Ind., as an example, but I think it well illustrates the thing that we are talking about. Elkhart would be left stranded if Penn Central shut down. And the shippers and receivers of freight could not route competitively. Pretty soon Elkhart would be running out of coal, running out of food, etc., etc. Pending a more long-term solution to the problems of Elkhart, Ind., what would we do? Obviously under this authority we would order Norfolk & Western, which is only about a dozen miles away, to run its equipment into Elkhart, Ind., to meet those pressing requirements.

Senator HARTKE. Let me ask you a question. When would you implement the legislation? Would you wait until they stop service or the day before?

Mr. KAHN. A prerequisite would be the inability on the part of the Penn Central to serve the community. When we would come in, invoke the authority, would depend on the circumstances as we then would find them. I dare say we promptly would hear from the municipal officials that a crisis is developing in the community and there is a need for the Commission to act.

Mr. STAFFORD. And our field agencies.

Senator HARTKE. Are you saying you wait until afterwards, or would it be an anticipatory action?

Mr. KAHN. The legislation is couched in terms of inability of the railroad to provide services.

Senator HARTKE. Is that after it stops, that inability? Define that for me.

Mr. KAHN. I am sure we would have a few days' notice and the actual order could not be——

Senator HARTKE. In other words, you don't have a stoppage of service?

Mr. KAHN. Not necessarily.

Senator HARTKE. Not necessarily a stoppage of service?

Mr. KAHN. Right.

Senator HARTKE. How long do you consider this authority could be continued?

Mr. KAHN. It would be a stopgap measure until the Commission would be able to have the hearing under subsection 21, if that proves to be the section we could utilize, or until such point as the Norfolk & Western or other railroads in the area themselves determine to seek authority and render service to the area.

This is one of the things I want to point out, Senator, if the other railroads in the area, Norfolk & Western or C. & O., for example, wanted to perform the services, there is ample opportunity in the statute to enable them to do so pursuant to Commission authorization.

It is only when they fail, when they hold back and do not willingly service a community such as Elkart, that we feel we must have the authority temporarily to order such service into the community.

Senator HARTKE. Would you require additional personnel to carry out the authority of this law?

Mr. STAFFORD. No. I think we have personnel—well, we are in a generally bad position at this time because of low number of field personnel.

Senator HARTKE. Let me say, I am trying to correct that. I will get you out from under that as quickly as I can.

Mr. STAFFORD. Thank you.

Senator HARTKE. But you think that under normal circumstances you have a sufficient—you are not saying you need additional personnel to operate this legislation?

Mr. STAFFORD. No. If we get our original limitation back, we won't need extra personnel for this action.

Senator HARTKE. Let me come back. I don't think you answered one question. How long would you continue this authority? How long would it run?

Mr. STAFFORD. Just so long as we need to work out a permanent authority.

Senator HARTKE. The excise tax has been on since 1949, and I have been trying to get those off. The President found that action acceptable now, and I am glad he got a late conversion. But how long is "necessary"?

Mr. STAFFORD. Only until we can get permanent action worked out. We hope that it will be a very short period of time because we want to put somebody in permanently.

Senator HARTKE. Do you think we ought to have a limit of time?

Mr. STAFFORD. No; I doubt that we need that. But it would be at most, I would think, a very few months.

Senator HARTKE. I am just going to tell you I have watched emergency legislation. I have never seen it yet that didn't become almost permanent.

Mr. KAHN. Senator, under section 1(15) of the ICC Act, the Commission presently has emergency car service power, and our car directions have a duration of no more than 60 to 90 days in time. Ordinarily, though, if an emergency does persist, the Commission takes a further look, enters a further order that may extend it for another 60 to 90 days. We anticipate that the exercise of this authority would be comparable.

Senator HARTKE. I understand that the Central of New Jersey has applied to abandon its lines in Pennsylvania, is that correct, and the Lehigh wishes to acquire those?

Mr. STAFFORD. That is right, portions of it.

Senator HARTKE. Would the authority granted by this bill have any affect on disposition of that case?

Mr. STAFFORD. Not directly; no.

Senator HARTKE. None?

Mr. STAFFORD. No.

Mr. KAHN. Here, again, the C.N.J. in January, you recall, was on the verge of being shut down by the reorganization court. It was only the financial infusion of the emergency legislation passed by the Congress and assistance by the State of New Jersey that kept that railroad going. Here, again, in the C.N.J. other communities which have no competitive service would be left stranded without any rail service whatever, if it failed to operate.

It is in that context that we at the Commission are supporting this legislation, and the affect upon the Reading & Lehigh Valley would only be remote or incidental.

Senator HARTKE. Can you tell me—do you think there is any possibility of reading this bill as written today, not with your ideas of what you consider to be the authority which you are requesting, but just considering the way it is written, would the authority which is granted here permit the Commission to decide a merger case by the back door; this is, ordering other railroads to run over the lines of another railroad without conducting proceedings which are now required?

Mr. KAHN. We don't believe that is a real threat, Senator.

Senator HARTKE. You don't think that is a threat? Is it possible?

Mr. KAHN. No. The immediate operation by another railroad over the tracks of a railroad that has terminated operations would not be a factor in determining whether the transfer under section 5 of the act would be consistent with public interest.

Mr. STAFFORD. I think you may be placing your question in the context of some other roads maybe wanting this authority.

Senator HARTKE. That is better.

Mr. STAFFORD. If they want the authority, they file for it and let us look at it and see. That will require us to go into a regular hearing.

Senator HARTKE. This is not what I had reference to.

Mr. KAHN. If I may amplify, in the supplemental legislative package which the ICC submitted to you for your consideration, the Commission felt specific temporary authority legislation to permit one railroad to operate another railroad's tracks pending application for acquisition was required. Certainly the Commission would not have asked for this additional authority if it felt it could do indirectly through section 1(16) what it seeks authority to do under section 1(23).

Senator HARTKE. Those are all the questions I have.

Senator Pearson is unavoidably absent today, but he has indicated that he has some questions he would like to submit to you for you to answer.

I would like to call your attention to the fact that by the questions I asked I don't want to imply that I am opposed to or in favor of or expressing any opinion on the bill. I am trying to avoid any possibility of Gulf of Elkhart resolution being passed by this committee.

Mr. STAFFORD. Senator, we appreciate your having brought this bill up so quickly to give us an opportunity to express our views.

Senator HARTKE. Thank you.

(The questions of Senator Person and ICC responses follow:)

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., October 29, 1971.

Hon. JAMES B. PEARSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR PEARSON: Thank you so much for your letter of October 12, 1971, which submitted a list of questions that occurred to you after reviewing the record of my appearance before the Surface Transportation Subcommittee on September 16, 1971. First of all, I would like to apologize for not responding to you sooner; however, due to the nature of the questions posed, I thought you would prefer a comprehensive reply. I shall answer the nine questions propounded *seriatim.*

Question 1: You and the Commission's General Counsel were discussing the present applicability of section 1(21) of the Act. Have there not been certain judicial limitations placed upon the Commission's resort to section 1(21) in addition to the statutory requirement of hearings which would render that section less than useful in dealing with the sort of situation the proposed amendment to section 1(16) is intended to cover?

Answer: Yes; a number of decisive cases are discussed in an opinion of our General Counsel addressed to Senator Hartke October 12, 1971, copy attached. Probably the biggest obstacle to reliance upon section 1(21) for the purpose we have in mind is the deep-rooted attitude of the courts that an explicit grant of jurisdiction from Congress is needed. Not only in section 1(21) cases, but others as well, there has been a clear reluctance to accord to the I.C.C. by implication a power to direct railroads to serve beyond the territory of their voluntary commitment. We believe the law on the point is clear and settled; but even if there is room for doubt as to what a court might do today under variant circumstances, there is neither room nor time for extensive legal jousting about it. We are asking for a clear mandate from Congress to deal decisively and expeditiously in an emergency where the stakes in terms of the public interest could be extremely high.

Question 2: You appeared to indicate you would have no objection to limiting the applicability of section 1(16) as amended to cases where there is either a bankruptcy situation or a railroad is about to run out of cash. If the proposed amendment were limited to railroads in bankruptcy, its effect would be limited to a sort of "temporary authority" pending restructuring under the Commission's proposed new Title VI to the Interstate Commerce Act (S. 2629), would it not?

Answer: Yes; the two proposals would be complementary. The restructuring bill contemplates the passage of some time before the inauguration of service under the first phase—time during which the initial restructuring plan is being evolved. The section 1(16) jurisdiction we seek would enable the Commission to move summarily for a continuation of essential service without a significant hiatus.

Your question stems from a hypothesis that the section 1(16) proposal would be limited to cases where there is a railroad either in bankruptcy or about to run out of cash. No doubt the jurisdiction would be tremendously useful even with those limitations—especially under the current situation in the populous northeast quadrant of the country where four major railroads are in bankruptcy.

I wish to urge upon you the great utility the measure would have in certain situations. For example, if the Western Pacific were forced to curtain service (short of an absolute shutdown), it could create a bottleneck of perhaps disastrous proportions in one of the main transcontinental routes through the central corridor. Think of the consequences in the event that happened during a military emergency in Southeast Asia. If the Milwaukee Road, the Rock Island or the Katy Line were forced by a financial predicament to cut back on through trains or schedule through trains to perform way-train or peddle service, there could be a major interruption in main highways of commerce to the serious detriment of millions of our people. In terms of fresh vegetables alone (from California, Texas, Arizona, etc., to Chicago and the East), the magnitude of the detriment becomes patent. I visualize the sought jurisdiction as a precision instrument for

deft employment in emergencies when the Nation's rail system is clearly in danger of a breakdown likely to bring great harm upon a substantial segment of the public.

Substantial drafting problems would be encountered in attempting to stautorily define when a railroad is "about to run out of cash." The amount of money that is necessary to keep one road running would no doubt be different from another. To avoid any ambiguity and resulting problems of administering the statute, we would prefer that no limitations be inserted.

Question 3: If the proposed amendment section 1(16) were limited as indicated in question 2 above, any potential interface with section 5(2) would be destroyed, would it not?

Answer: If I understand this question, you are suggesting that the sought jurisdiction could not be used where the bankrupt or moribund railroad is an actual or potential party to a section 5(2) transaction. If I am correct in that understanding, then the answer must be: "Not necessarily." Section 77 of the Bankruptcy Act specifically contemplates the possible involvement of the debtor in a section 5(2) transaction during the pendency of the reorganization, and even further, a reorganization predicated upon the inclusion of the debtor's rail facilities in another carrier. Thus, it would be possible, *if an emergency were actually present as a basis for employing the section 1(16) jurisdiction*, for this exercise of jurisdiction to occur in the face of a pending or impending section 5(2) transaction. The important distinction to be made here is that the circumstance which invokes the exercise of the sought jurisdiction is *not* the section 5(2) transaction, but the section 1(16) emergency. It should also be considered that the criteria for our assigning participation in a section 1(16) emergency would not necessarily be on all fours with the criteria governing a section 5(2) acquisition. Under the former, the Commission would be the initiator and could make its allocations in accordance with its concept of the "best available" in terms of the public interest; whereas, in the latter, the carriers are the initiators, operating from a sense of self-interest, and the Commission measures their proposals not in terms of the "best available" but rather of "consistency with the public interest."

Question 4: If the proposed section 1(16) were limited as indicated, it would not truly be useful as an emergency tool by the Commission until the Commission is also granted the restructuring authority contained in S. 2629, would it?

Answer: The section 1(16) amendment would truly be useful as an emergency tool if the restructuring proposal were also enacted. As noted in the answer to question 2, the two proposals are couplementary. That is not to say, however, an amended section 1(16) could not otherwise be useful. Of course, the very essence of the section 1(16) proposal is the fact that, under our legal concept, the railroads of the country form a single integrated system such that, when one railroad has serious operating difficulties or shuts down service, all connecting railroads are adversely affected in some degree. As pointed out in my oral testimony, some connecting railroads could be vitally affected. And while I speak here in terms of railroads, I mean by implication to include also the people and industries in the territories they serve. Consequently, resort to territory-wide restructuring would be appropriate where the threatened service breakdown would be widespread or have far-reaching effects, and the situation defies rectification through available means, e.g., reorganization under section 77 of the Bankruptcy Act; abandonment, consolidation or sale under the Interstate Commerce Act, etc. But for serious emergencies short of that, we believe the section 1(16) proposal would be immeasurably useful. In fact, we believe the present critical situation among the railroads, especially in the East, is cause enough for Congress to enact the section 1(16) proposal immediately.

Question 5: In view of the Burlington Truck Lines case to which you referred in the transcript, I gather it is your position that there is no need to include within the proposed legislation a provision prohibiting its use to break a strike. Is that correct?

Answer: That is correct. The "hot cargo" cases and others stand clearly as a bar to the ICC's use of its jurisdiction in the field of transportation to interfere with the processes meticulously and studiously developed in the field of labor law. There are adequate legal safeguards against the Interstate Commerce Commission encroaching upon the jurisdictional area assigned to the labor agencies or interfering with the mechanism in the hands of the President. Under the present law, there is to be an accommodation of the policies in both fields, and while there will always be a somewhat hazy line between the two jurisdictions (re-

quiring that regulatory agencies in both areas tread carefully), we do not believe there is any need for a specific prohibition of the kind you mention.

In addition, there are practical considerations making the specification unnecessary. Chief among them is the unwillingness of organized labor to cross picket lines. And the section 1(16) amendment we have proposed would not assign us any power to order employees to do so. For well over 50 years, the Commission has had car service powers to compel certain actions and conduct by the railroads; and Congress has never had occasion to consider imposing a specific prohibition regarding strike situations.

Question 6: Would an absolute prohibition against use of the proposed section 1(16) power in a strike situation be harmful?

Answer: Not necessarily; however, as I pointed out in the answer to number 5 above, the "hot cargo" cases and others stand as a bar to the exercise of ICC jurisdiction to frustrate the processes provided in the field of labor law. You should keep in mind, however, that there have been cases in the past where railroads have been struck, but the striking employees have voluntarily agreed to move essential traffic, e.g., war materials to Vietnam. In light of such a possibility an absolute prohibition may be prudent; second, a qualified prohibition would be most difficult to define.

Question 7: There is a discussion as to whether and under what circumstances the Commission might require a carrier operating over the lines of a defunct railroad to use the employees of that railroad in performing the service. Even if the ICC did not require a railroad providing sevice over the lines of defunct railroad those employees could not be any worse off than if the service of the defunct carrier were simply permitted to terminate with no replacement service provided, could they?

Answer: What you say is perfectly correct. We have seen similar situations in abandonments and section 5(2) takeovers, where an impoverished railroad can no longer hang on and its employees face the certain prospect of job loss; and another railroad moving in to take over part of the abandonment line hires those employees. A case in point is the Tennessee Central. There the railroad was about to expire, and with it, all of its jobs. Three connecting railroads acquired segments of the Tennessee Central and hired, out of necessity, experienced hands of the former Tennessee Central.

Question 8: There appears to be a suggestion that the Commission presently has authority to deal with the situation where a carrier desires to provide service over the lines of another carrier. I assume you are referring to your power to grant trackage rights under section 5(2) of the Interstate Commerce Act. My understanding is that that provision requires hearing before action and, hence, that it would not be a satisfactory provision for dealing with an emergency situation such as would be covered under the Commission's proposed amendment to section 1(16) or its proposed new section 1(23). Is that correct?

Answer: Under section 5(2)(b) the Commission has some discretion as to whether a public hearing is necessary in the public interest; and in some situations, in the absence of material opposition, it has the latitude to act quickly with consenting parties. But that kind of situation has too many "ifs." It is not a reliable alternative; in fact, it should not be considered as an available alternative for dealing with real emergencies. The Commission should have clearly defined, unambiguous jurisdiction to act quickly and in due time, whenever an emergency warrants summary action.

Question 9: With respect to the duration of an emergency order by the Commission under section 1(16) as it would be amended by S. 2494, would there be any objection to including a 180-day limitation comparable to that found in section 210a of the act governing the issuance of temporary authority to motor carriers?

Answer: Although the exercise of the requested additional power under section 1(16) primarily envisages an emergency situation of a few weeks or months, we would prefer to have no time limitation, so as to preserve as much flexibility as possible. As previously stated, the power would only be utilized "where a railroad can no longer serve the public * * * and its curtailed services are deemed to be essential." Obviously, those services would still be essential at the end of the suggested 180-day period. If Congress fails to enact any of the presently pending restructuring proposals such as S. 2629, then as a bare minimum, we feel that upon the finding of good cause shown, the Commission should have the right to extend its order for an additional 180 days. We feel that the railroads would have adequate safeguards from arbitrary actions through the due process clause as interpreted by the courts.

I trust that the above is sufficient for your purposes, but should you require additional information, please feel free to contact me at any time.

Sincerely yours,

GEORGE M. STAFFORD, *Chairman.*

Senator HARTKE. We do have another witness, Mr. Gordon P. MacDougall, special assistant attorney general, Commonwealth of Pennsylvania.

You may proceed, Mr. MacDougall.

STATEMENT OF GORDON P. MacDOUGALL, SPECIAL ASSISTANT ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA

Mr. MACDOUGALL. Mr. Chairman, my name is Gordon P. MacDougall. I serve as a special assistant attorney general for the Commonwealth of Pennsylvania, with offices at 705 Ring Building, Washington, D.C.

I have a prepared statement which I do not think I will need to read.

Mr. Chairman, we oppose this bill.

The key provision is that it would authorize the ICC to do certain things over the protest of the State. It is the hearings that the ICC wants to avoid. I wish to take it away from a theoretical basis, and give you the Jersey Central situation.

Jersey Central in March received a loan guarantee under the new legislation. They asked for $10 million for the purpose of being permitted 2 years in which to effect certain abandonments and a plan of reorganization.

Secretary Volpe in March granted $6 million and contemplated it would take them 1 year to process certain proceedings. He also required the Jersey Central to get things started at the ICC. So Jersey Central in May filed applications. We requested hearings—the Governor and the Public Utilities Commission—we requested hearings.

So far we have not been given hearings.

It's 4 months now. The railroad claims delay, and has asked for immediate summary approval for abandoning all lines in Pennsylvania.

Now at this point, of course, the Lehigh wants to take over. We are opposed to the Lehigh Valley taking over these lines in Pennsylvania. We feel this bill if enacted would give the Commission, through this emergency power, power to do certain things without a public hearing.

I say the hearing is the key factor. There is enough power I believe today at the Commission to do certain things. They want to get into the emergency area. To use the Elkhart example—suppose somebody opposed another railroad coming in to serve Elkhart. Say the Governor did. The Commission would be given the power to make such determinations as to which railroad should immediately serve Elkhart. Now, there is no problem of one railroad operating the lines of another, if everyone agrees. If there is a waiver by the Governor and Public Utility Commission, then things move fast at the ICC.

I know we have not taken our statutory time on a number of occasions. We have informed the ICC we have no objections and they moved ahead. I think it is a dangerous situation for them to come in and ask for this broad authority.

I think if there is a problem with the Jersey Central and Penn Central, it should be the subject of specific legislation. Usually we

know this well enough in advance. We have asked for these hearings and we haven't gotten them, and we are told Jersey Central will be in another crisis soon. We do not think that the Commission by this process of deferring hearings should be allowed to precipitate a situation where, at least in our judgment, we cannot make our views known before the Commission.

Senator HARTKE. Where did you say you had been trying to get hearings?

Mr. MACDOUGALL. On the Jersey Central situation.

Senator HARTKE. With whom?

Mr. MACDOUGALL. With the ICC. They have not set it down for hearing now in 4 months. We have petitioned for reconsideration on this to the ICC, and about a hundred shippers sent in protests, and so on.

Senator HARTKE. I will ask the staff to inquire into that and we will report back to you. Let me ask you, though, let's take the Elkhart situation to get you away from Pennsylvania for a moment. They are served by one railroad at the present time, so they shut down service. Is it your contention that if two railroads want to serve Elkhart they have to go for hearing?

Who serves in the meantime?

Mr. MACDOUGALL. The only parties in an abandonment case now that have, we think, the unqualified right to request a hearing, are the Governor of the State or the Public Utility Commission.

Under trackage rights I don't think that any specific hearing is required by statute, in fact section 5(2) says or implies there should be hearings, but maybe only if needed in the public interest.

The question here is: say two railroads want to go in there. There may or may not be a hearing requested. I don't think, at this point, that we should give the ICC power to override the request of a hearing from the parties who are entitled to a hearing if they want it.

Senator HARTKE. What do you do about the service in the meantime?

Mr. MACDOUGALL. I think that if two railroads want to serve——

Senator HARTKE. What if no one wants to serve?

Mr. MACDOUGALL. Under the present legislation I don't think the Commission can require anybody to serve.

Senator HARTKE. That is the Commission's contention, that they do not have authority to require service.

Mr. MACDOUGALL. I agree with that.

Senator HARTKE. Their contention is that in such a situation, they need the authority to require that these lines be used by some substitute carrier.

Mr. MACDOUGALL. That is one problem this committee could direct its attention to, but the bill goes broader and gives the Commission authority to do certain things where two or more railroads want to get into a certain territory. I can see the problem theoretically if it should come up that no one wants to serve Elkhart, and they would force some carrier to serve Elkhart, but the way this is drafted we would have a situation like the Jersey Central.

Senator HARTKE. What if two railroads wanted to operate in such a situation on the failing railroad's lines? Should they both be allowed to serve?

Mr. MACDOUGALL. It may be they both should be allowed to.

Senator HARTKE. All you say is that you think there ought to be a hearing.

Mr. MACDOUGALL. I think if the Governor or the Public Utilities Commission request a hearing, then I think there should be a hearing under section 1(18). Now the Commission has other powers under the Car Service Act, apart from this.

Senator HARTKE. Would you distinguish between an abandonment case and a total-stoppage-of-service case?

Mr. MACDOUGALL. There is a difference, one you could say is temporary stoppage of service, the other is permanent. As a practical matter, once you allow a railroad to come in and perform the service you are giving that railroad 95 percent of the way home to getting permanent authority. In fact, in motor carrier and water carrier temporary operations the experience under the temporary authority must be given weight, if the carrier so desires, in considering whether he should be given permanent authority. So that, as a practical matter, when you let somebody temporarily come in and—although we can change that when the permanent application comes—nevertheless being realistic the fellow is 95 percent of the way there.

Senator HARTKE. I don't disagree with that, once you get your foot in the door it is hard to get back out.

Mr. MACDOUGALL. I believe so, sir. I point out we have not yet seen the Commission's legislative package sent up here Friday. The Commonwealth will give its views when we see those proposals. I understand, as Mr. Kahn said, certain of those recommendations are in this same area; that is, what to do in the emergency situation. On the last page of my statement I mention that we will forward our views to the subcommittee.

Senator HARTKE. You say in your statement that there is no imminent danger that a reorganization court will require immediate cessation of operations—for any railroad.

Mr. MACDOUGALL. Right. I don't see any right now.

Senator HARTKE. But is the basis of that your experience with the Central New Jersey situation?

Mr. MACDOUGALL. No. I would say Penn Central also. I was in Chicago yesterday where there was a meeting conducted by the Railway Systems and Management Association, and Mr. Jervis Langdon was there, and he saw no problem. There could be a cash squeeze in the first quarter of next year. Of course, we can't project that too well now, but I don't see any emergency that we need it right now for any railroad. Right today, that is.

It is now September. If Penn Central will be a problem, it will be early next year, at least as I heard it yesterday and as reported in the Chicago Daily Tribune and other newspapers as well. There is no problem for the rest of the year, with Penn Central.

Senator HARTKE. All right. We want to thank you again for your testimony, and we will certainly consider your proposition. This is not the end of the hearings, of course.

Mr. MACDOUGALL. Thank you.

Senator HARTKE. No more witnesses will be heard at this time; the hearing is adjourned.

(The statement follows:)

STATEMENT OF GORDON P. MACDOUGALL, SPECIAL ASSISTANT ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA

Mr. Chairman and members of the subcommittee, my name is Gordon P. MacDougall. I serve as a Special Assistant Attorney General for the Commonwealth of Pennsylvania, with offices at 705 Ring Building, Washington, D.C.

I appear here today on behalf of the Governor of Pennsylvania, Milton J. Shapp, in opposition to S. 2494. Governor Shapp assumed office on January 19, 1971. As this subcommittee is aware, the Governor has maintained a longstanding and continuing interest in railroad matters, in his business and private life, which interest has not abated upon the assumption of his public duties. He was a witness in complete opposition to the ill-fated Penn Central merger, when the case was before the ICC in the early 1960's. He personally argued his own case in oral argument before the entire ICC in 1965, although he is not an attorney. Subsequently, he twice took his case to the U.S. Supreme Court.[1] The Governor has further expressed his interest in transportation matters by various appearances before Congressional committees, and in proceedings before the ICC and the Federal Maritime Commission.

S. 2494 was introduced September 8, 1971, and assigned for early subcommittee hearings. It would amend section 1(16) of the Interstate Commerce Act, 49 U.S.C. 1(16), so as to authorize the ICC, whenever in its opinion a railroad is unable to properly transport property, to order or to allow another railroad to perform the service over the lines of the railroad found to be improperly transporting property. This would be achieved by adding three words—"such carrier's or"—to the present language of section 1(16), as explained in the ICC's letter of July 2, 1971, to this subcommittee.[2]

Under the present law, the substitute railroad may not operate over the lines of the railroad found to be transporting freight improperly, unless the ICC first authorizes abandonment or grants trackage rights. S. 2494 would allow a "quickie" method for a railroad to acquire control of the lines of another railroad without the usual ICC procedures and an opportunity for public hearings.

The justification advanced by the ICC for this legislation, set forth in its letter of July 2, 1971, is a desire to order one railroad to operate over the lines of another railroad, when the latter may have ceased operating, as, for example, as a means of preserving assets during a reorganization proceeding under section 77 of the Bankruptcy Act.

We see no need for giving the ICC the carte blanche power which it seeks here. The trend in the past several years is to take away powers from the ICC; for example, as a result of the creation of the Department of Transportation, and as a result of the creation of National Railroad Passenger Corporation (Amtrak). There is no imminent danger that a reorganization court will require immediate cessation of operations for any railroad; indeed, the ICC's requested legislation may create the very incentive for a court to suggest immediate termination of operations.

THE LEHIGH VALLEY-JERSEY CENTRAL SITUATION

I would like to bring to the attention of the subcommittee a proceeding, presently pending before the ICC, which might be affected by the proposed legislation. The Central Railroad Company of New Jersey (Jersey Central), which is presently in reorganization under section 77 of the Bankruptcy Act, on May 25, 1971, filed applications with the ICC seeking to abandon all of its lines in Pennsylvania, and much of its lines in the State of New Jersey. The Jersey Central filed for these massive abandonments under section 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-(20). Governor Shapp and the Pennsylvania Public Utility Commission requested that the case be set for hearings, which is the longstanding right of a Governor or a State regulatory commission under present law.[3]

The ICC early indicated that it would be in a position on July 6, 1971, concerning hearings; however, it was not until August 20, 1971, that an order was entered, and that order has set the matter for an unusual four-day prehearing conference at Allentown, Pa., beginning October 4, 1971, with the

[1] By counsel, at his own expense.
[2] 117 Cong. Rec. S13849–50 (Daily Ed.).
[3] See *Illinois Central R. Co. Operation in Jeff. County Ill.*, 328 I.C.C. 586, 589–90 (1967).

public still not assured that there will be hearings, either oral or under the Commission's modified procedure. Meanwhile, Jersey Central had secured a $6 million guarantee of trustee certificates from the Secretary of Transportation, under Emergency Rail Services Act of 1970, P.L. 91–663, enacted January 8, 1971. Jersey Central received its approval from Secretary Volpe on March 24, 1971. However, it has been necessary to draw down only $1.5 million thus far.

Lehigh Valley Railroad Company on August 18, 1971, filed an application to acquire all of Jersey Central's lines in Pennsylvania, upon approval of abandonment by Jersey Central from the ICC, and on the following day Jersey Central requested summary abandonment, without any hearings, by a motion filed with the ICC.

The Governor and the Public Utility Commission have objected to the Lehigh Valley Railroad Company takeover, for a number of reasons which need not be detailed here. It is sufficient to point out that Lehigh Valley is itself in reorganization, as a subsidiary of Penn Central, under Judge Fullam in the U.S. District Court for the Eastern District of Pennsylvania; that we are worried as to the impact of further Penn Central invasion upon Reading Company, an important railroad in our State which is not in reorganization; and that we have serious doubt whether the present Jersey Central operation is being performed at a loss in Pennsylvania.

S. 2494 would seem to permit the ICC—in its discretion—to allow a railroad to operate the lines of another railroad—without public hearings. In short, the ICC could destroy our right to a hearing, or to orderly procedures under section 5 or sections 1(18)–(20) of the Interstate Commerce Act. I have set forth, at some length, the present Lehigh Valley-Jersey Central situation, to indicate the massive dislocation which might arise under "car service" amendments to section 1(16) of the Interstate Commerce Act, which contemplate "emergency" orders without a right to be heard.

In conclusion, I wish to thank you for giving the Commonwealth of Pennsylvania the opportunity to be here today, and to present its views. We note that the ICC, on September 10, 1971, has transmitted additional proposed legislation to the Congress, in this same subject area. Time has been insufficient within which to analyze these proposals. However, the Commonwealth will give its considered attention to these new bills, when introduced, and will advise this subcommittee accordingly.

(Whereupon, at 11:15 a.m., the hearing was adjourned).

(The following information was subsequently received for the record:)

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C., September 28, 1971.

GORDON P. MACDOUGALL, Esq.,
Washington, D.C.

DEAR MR. MACDOUGALL: As I am sure you are aware, in my position as the senior Republican member of the Senate Committee on Commerce, I am also ex officio a member of each of the subcommittees thereof. I regret that I was unable to be present when you testified before the Subcommittee on Surface Transportation on September 16, 1971 on behalf of the Governor of Pennsylvania and in opposition to S. 2494.

I have reviewed your testimony and am particularly interested in the basis for your statement that "There is no imminent danger that a reorganization court will require immediate cessation of operations for any railroad * * * ." I wonder if your assessment takes into account the situation of the Boston & Maine Railroad?

I would appreciate your response to the above questions at your earliest convenience so that this letter and your response may be incorporated in the record of the subject hearing.

Very truly yours,

NORRIS COTTON, U.S. *Senator.*

Gordon P. MacDougall,
Washington, D.C., October 1, 1971.

Re S. 2494.

Senator Norris Cotton,
U.S. Senate,
Washington, D.C.

Dear Senator Cotton: This is in response to your letter of September 28, 1971, concerning the Boston & Maine Railroad.

My assessment did not consider the B&M, but only The Central Railroad Company of New Jersey and Penn Central Transportation Company. At the time of my testimony, to my knowledge, only the Jersey Central and Penn Central were considered candidates under S. 2494. Attached is the report of an interview with I.C.C. Chairman Stafford, as contained in the September 17, 1971, issue of the N.Y. Journal of Commerce, which would seem to confirm a general understanding that Jersey Central and/or Penn Central are the carriers in mind in connection with S. 2494.

Pennsylvania is concerned with B&M, even though that carrier does not operate in the state. B&M is an important connection to Delaware & Hudson in the Albany, N.Y. area, and, of course, to Penn Central at numerous points. I attended the conference held June 22, 1971, at the I.C.C. concerning B&M, as an observer. Governor Shapp has a continuing interest in the B&M situation because of the indirect impact of B&M upon Pennsylvania.

Senator Hartke has indicated there will be further bearings on this and related legislation in November, 1971. I will have the B&M situation studied, and report to the Subcommittee, prior to or at the resumed hearings, with respect to Governor Shapp's position.

Very truly yours,

Gordon P. MacDougall.

ICC "Ready" Should CNJ, PC Collapse

(By William A. Martin)

Washington, September 16.—The chairman of the Interstate Commerce Commission said today the regulatory agency is working under the assumption that the bankrupt Penn Central Railroad or Central of New Jersey "will collapse tomorrow" and it has to be prepared for any such possibility.

At this time, said ICC Chairman George M. Stafford, the agency could not order other carriers to provide service to shippers in a community served exclusively by the Penn Central or CNJ, or any other railroad which was forced to close because of financial difficulties.

While Mr. Stafford was appearing before Sen. Vance Hartke's Surface Transportation Subcommittee, officials of the nation's railroads and a transportation organization were testifying before a House subcommittee. The House is considering an administration measure to give the President an "arsenal of weapons" to end transportation strikes.

LABOR LAWS

The administration proposal includes final and binding arbitration. It is being bitterly contested by the rail labor organizations.

Neither subcommittee indicated it would move quickly on either proposal.

Sen. Hartke, chairman of the subcommittee, encouraged the ICC to "look hard again" at the proposal.

"I don't want to be in a position of passing an unnecessary law," he said. However, Sen. Hartke said he would take no position on the bill at this time.

Under the ICC proposal, the agency would be able to order, without a hearing, a rail carrier to serve a community during a temporary cessation of its regular service.

"As it now stands we can't order a carrier to serve such a community if it doesn't want to," said Mr. Stafford. The ICC official said the eastern railroads, particularly the PC or CNJ could theoretically shut down overnight if a strike, or bad weather developed, or a big shipper decided to close.

CNJ CONCERN

Mr. Stafford told The Journal of Commerce the agency presently is more concerned with the CNJ than with the PC. Trustees of the Penn Central have indicated they run out of cash early next year.

"We are right concerned with the CNJ," Mr. Stafford said. He explained the CNJ, which is seeking to abandon all 80 miles of its Pennsylvania mileage, could cut off service to several communities.

A spokesman for the State of Pennsylvania voiced objection to the proposal because such orders could be issued without an oral hearing.

In the House hearing support for the administration's labor proposal came from the Transportation Association of America and the Association of American Railroads.

Stephen Ailes, AAR president, said the industry needs an arsenal of weapons approach to encourage settlement of labor disputes.

"We want to make the arsenal as broad as possible and capable of meeting all sorts of issues. We welcome ideas on how to improve the bill," Mr. Ailes said.

John P. Hiltz, chairman of the industry labor negotiating group, came out in opposition to a bill supported by rail labor. The measure would allow for selective strikes. "All things considered," he said, ". . . it would be a disaster to the railroad industry, to the public and ultimately to railroad employes themselves."

A spokesman for the TAA supported the administration's measure, pointing out that recently the Railway Labor Act has been a failure.