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compensation no less than his average monthly compensation during the twelve months prior to his displacement;

2. A monthly dismissal allowance, if the employee was deprived of all employment by the carrier as a result of the transaction, which generally insured the employee a monthly compensation (after allowing for compensation from other sources) no less than his average monthly compensation during the twelve months prior to such deprivation of employment;

3. Protection of fringe benefits;

4. Reimbursement of certain moving expenses and wage loss if the employee is required to change his place of employment as a result of the transaction;

5. Arbitration of disputes; and

6. Reimbursement of certain losses on sale of his home by an employee forced to move to a new residence as a result of the transaction.

The protective period during which these protections could apply was limited to four years from the effective date of the Commission's order approving the transaction, but not to exceed the period for which the particular employee was employed by the carrier prior to that date.

Two features of the Washington Job Protection Agreement were not included in the *Oklahoma Conditions*: (1) Ninety day notice of an intention coordination, and, if the plan of coordination would result in the displacement of employees or a rearrangement of fares, the assignment of employees would be settled by an implementing agreement between the carriers and unions involved, or by arbitration if they could not agree; and (2) an authorization to dismiss employees who elect to receive a lump sum payment in lieu of all other protections.

The *Oklahoma Conditions* were imposed as recently as 1978 in track-age rights and lease cases: *Mendocino Coast Railway—Lease Operate*, 354 ICC 732 (1978); *Norfolk and Western Railway Company—Track-age Rights—BN*, 351 ICC 605 (1978).

### THE NEW ORLEANS PASSENGER TERMINAL CASE

The next important case putting forth "standard" conditions arose in *New Orleans Union Passenger Terminal Case*, 282 ICC 271 (1952).

The conditions were a blend of the *Oklahoma Conditions* and the Washington Job Protection Agreement with minor changes. In particular a provision was added requiring any income derived from employment in other than the railroad industry shall be offset against the coordination allowance being paid by a specific proportion. Thereafter in the *Southern Railway Company—Control—Central of Georgia Railway Company*, 317 ICC 577 (1962), clarified 317 ICC 729 (1963) and 331 ICC 151, 161 (1967), minor changes were made to the *New Orleans Conditions* and to the *Oklahoma Conditions*.

Abandonments, while not covered by section 5(2)(f), received labor protection conditions first adopted in *Chicago, B&O Railroad Company, Abandonment*, 257 ICC 700 (1911). These conditions were in substance identical to the *Oklahoma Conditions*.

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### THE 4-R ACT AMENDMENTS

Congress by a 4-R Act amendment added a sentence to section 5(2)(f). The amended 5(2)(f) reads as follows:

"As a condition of its approval, or for this paragraph (2), of any transaction involving a carrier or carriers subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carrier by railroads affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to Section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding any other provision of this Act, an agreement pertaining to protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (New 4R Act material in *italics*)

Abandonments were given similar treatment by section 802 of the 4-R Act. Both were recodified as 49 USC 11317.

The Rail Passenger Service Act of 1970, referred to by the 4-R Act Amendments, had in section 405 provided a statutory outline for protective employee conditions. Benefits could be no less than those provided by section 5(2)(f) of the Interstate Commerce Act. The Secretary of Labor was required to certify that Amtrak's labor protection agreements met this standard. In fact, the conditions Amtrak negotiated went far beyond those that the ICC had opposed in four significant aspects:

1. The maximum protective period was extended from four to six years from the date on which a protected employee was displaced.

2. Monthly compensation guarantees created by displacement and dismissal allowances were escalated with general wage increases.

3. Once an employee came forward alleging that he had been affected by a transaction, the burden was on the carrier to show the employee had not been affected.

4. Priority rights to employment in other crafts or classes in training or retraining rights were established.

The Amtrak Conditions also provided that twenty days notice of an intended transaction was required but that implementation could take place even without an agreement. Duplication or pyramiding of benefits were prohibited.

The ICC first considered the effect of the 4-R Act Amendments in *Mafac-Merger-TdP, C&E*, 318 ICC 411 (1976). It concluded, "that Congress did not intend to have the Commission significantly change its policy in this area." (At page 427). It conditioned approval upon the *New Orleans Conditions* as modified by the *Amtrak Conditions*.

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NEW YORK DOCK CONDITIONS

New York Dock Railway's application to acquire the Brooklyn Eastern District Terminal was a small merger case, yet the ICC chose this as the vehicle to address the minimum labor protective conditions required in mergers, consolidations, and acquisitions. New York Dock Railway—Control—Brooklyn Eastern District, 360 ICC 60 (1979). Labor organizations had petitioned that the labor protective conditions imposed in this case become the minimum standard in all subsequent mergers, acquisitions, or controls. The determination that New York Dock's protective conditions were a matter of general transportation importance occurred after the initial decision approving the application had imposed the New Orleans Conditions as modified by the Amtrak Conditions. In reviewing the newly fashioned New York Dock Conditions, the Court of Appeals used these words to describe them: "In overall effect, the single 'New York Dock Conditions' can be fairly characterized as significantly more protective of the interests of railway labor than any previously imposed single set of employee protective conditions." *New York Dock Railway Company v. U.S.*, F. 2d, (Second Cir. 1979).

The ICC imposed the most beneficial protective conditions of both *New Orleans* and *Amtrak* and made three major changes not contained in either:

1. It accepted the Railway Labor Executives Association's substitute definition of "transaction" for the Washington Job Protection Agreement's "coordination". Transaction was defined to mean: "any action taken pursuant to authorizations of the Commission on which the protective provisions were imposed."

2. It required that no change in operations, services, facilities or equipment shall occur "until after notice, negotiations, agreement or binding arbitration."

3. It deleted the Amtrak provision that prevented an employee from selecting only the best portions of *New York Dock* and the best portions contained in other contractual agreements. Duplication of benefits was no longer clearly prohibited.

These three changes raise issues of interpretation and application that have not yet been resolved.

Appeals were rejected in *New York Dock Railway v. U.S.*, F. 2d (Second Cir. 1979). The Court held the ICC acted within its discretion in fashioning protective benefits beyond the minimum required by law. The Court, however, noted problems arose because of the definition of transaction as well as the language concerning benefit selection.

As recently as December 14, 1979, the ICC has held that these are minimum protective conditions it will impose and chose not to clarify the language mentioned by the Court. On that occasion it reopened the *Missouri Pacific Railroad Company—Merger—T&P, C&STL*. Financial Docket Number 27773, reversed itself and imposed *New York Dock Conditions*. Similar conditions were required in abandonments: *Oregon Shortline Railroad Company—Abandonment—Goshen*, 360 ICC 91 (1979).

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THE MILWAUKEE AND ROCK ISLAND CONDITIONS

Failing railroads and the resulting effect on employment which would not necessarily be covered by either existing collective bargaining agreements or the Interstate Commerce Act focused more attention on job protection for railroad employees. The first example was the law granting almost complete income protection for Conrail's employees with an alternative of severance pay. Since the 250 million dollars appropriated for Conrail's employees proved inadequate, a more tailored approach was developed for the Milwaukee employees. This is set forth in the Milwaukee Railroad Restructuring Act of 1979. It provided federal assistance to pay benefits to Milwaukee employees who were adversely affected by the restructuring in the following areas:

1. 80 percent of base income protection for up to 3 years
2. Supplemental unemployment benefits
3. Moving expenses and sale-of-home benefits
4. Separation allowance
5. Preferential hiring within the industry
6. Retraining

The basic protection plan of the law was spelled out in an agreement between the Milwaukee Road and the labor organizations representing its employees on December 14, 1979.

The circumstances of the Rock Island bankruptcy were different from those of the Milwaukee, but the impact on employees was similar, and an agreement was reached on March 4, 1980, between various railroads and the labor organizations representing Rock Island employees to provide for preferential hiring of Rock Island employees and monetary protection patterned after the Milwaukee Act with certain exceptions. The agreement also covers Milwaukee employees hired by carriers acquiring segments of its lines. The following describes the major components of the agreement:

1. Carriers acquiring Rock Island or Milwaukee trackage will give preference in hiring to employees of the lines to fill its needs.
2. Employees so hired will have monetary protection of 80 percent of base income for up to 3 years.
3. The labor agreements of the acquiring carrier will apply to the acquired lines.
4. Issues involving seniority of new hires will be resolved by agreement or if necessary by arbitration.
5. Moving expenses are not provided.
6. Separation pay is not an option.
7. Employees not hired have no protection provided by the acquiring carrier.
8. The protection of the agreement is the total protection available to the hired employees. It satisfies the requirements of the Interstate Commerce Act.

Legislation to provide protection similar to that in the Milwaukee law for employees of Rock Island who are not hired by a purchasing carrier is pending. The March 4, 1980, hiring agreement is already being carried out on several carriers which have been granted temporary operating authority on Rock Island lines by the ICC.

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### ADDITIONAL VIEWS OF HON. TOBY MOFFETT

I fully support title VII of the Rail Act of 1980 relating to supplemental transactions. Of particular interest to me is the provision within title VII to carry out the orderly transfer of Conrail properties in my own State of Connecticut and in Rhode Island.

In both of these States, Conrail has classified all of the lines it runs as branch lines, and the boxcar operations, which make up a majority of the freight traffic in Connecticut and Rhode Island, are losing operations for Conrail. In addition, a recent U.S.R.A./New England regional commission study found, based on 1977 data, that Conrail would have reduced its deficit by \$9 million by not operating in Connecticut, Rhode Island, and southeastern Massachusetts.

For these reasons, it is appropriate that this legislation develop a procedure for transfer of Conrail lines in the two States. This bill provides that within 180 days of its enactment, the Secretary must hold a hearing to entertain proposals for acquisition of Connecticut and Rhode Island Conrail properties. In that same 180-day period, the Secretary must evaluate the proposals to see if any meet the criteria set out in this bill. If there are any such proposals, the Secretary is charged with developing them.

Key to this proposal and transfer procedure are the criteria set out in the act. Any railroad coming forward with a proposal must demonstrate that it can take over all the lines in Connecticut and Rhode Island, that it can do so with no Federal subsidy and that it has the financial capability to run the lines.

I am satisfied that these provisions will give us the procedural tools needed to accomplish an expedited transfer of rail lines in Connecticut and Rhode Island. I commend the staff and members both of the subcommittee and full committee for their support and cooperation in adopting this section of the bill.

TOBY MOFFETT.

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### SEPARATE VIEWS OF HON. JOHN E. JINGELL AND BOB ECKHARDT

The Rail Act of 1980, H.R. 7235, falls short of providing an equitable framework for regulatory reform of the Nation's railroad system.

One of the most objectionable sections in H.R. 7235 is Section 301, which is captioned "joint rate relief" and is intended to solve indirectly a problem which the major railroads are unwilling to settle directly, *viz.*, equitable divisions of joint rates on through routes among the participating railroads. Instead of resolving this problem directly and rationally, this section would resolve the issue by the stratagems of either loading additional charges on shippers where they have no competitive alternatives or by eliminating competitive routes with selected connecting railroads. Either way, this section as written into this bill would sanction the exploitation of monopoly traffic by large railroads among shippers and among connection railroads, and a "big stick" approach to resolving of equities as between large and small railroads.

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*Surcharges.*—The present pattern of regulated joint rates in a nation embodies two concepts, *viz.*, reasonableness and non-discrimination. With these safeguards in place, the existing rate structure has been constructed so as to guarantee all shippers relatively reasonable rates, in the sense that the same amount of money buys an equivalent amount of transportation for the same product throughout the country. And it has also protected one railroad customer from another who might otherwise be given preferential rates and the consequent competitive advantage in a given marketplace.

The surcharge provision of this section would change all that. If one railroad is accorded inequitably low divisions by its connections, that can be "rectified" by the imposition of surcharges on its shippers by that railroad. Even if the total charges then collected from the surcharged shipper are thus raised to an unreasonable level, he is remediless to obtain protection under the law. This is because Section 301 specifies that in the case of a surcharge the Commission will be precluded from even examining whether the total freight charges incurred are unreasonable. Thus, Section 301 is a curious solution indeed. It provides that a carrier who is treated inequitably by its railroad brother may remedy that injustice by imposing an unreasonable rate upon its shipper customer. This would be like passing a law to license anyone who is swindled out of a sum of money to go out and swindle someone else out of an equivalent amount with impunity. Even the frequently maligned concept of "an eye for an eye" conceives that the eye taken should be that of the protagonist and not that of an innocent bystander.

And this is not even the worst feature of the surcharge provision as written into Section 301. It provides rather clearly that a shipper may object to a surcharge if the surcharging carrier's present revenue

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division is 110 percent or more of its variable cost. This conjures up an image of rationality, because when the carrier is receiving less than the 110 percent "trigger" it is obviously not being overcompensated for its services. But what has been missed by a quick reading of this provision is that there is no "cap" on the surcharge. For example, if the putative surcharging carrier's cost is \$100 and its present revenue division is \$100, then it falls within the trigger provision in Section 301. But what if that railroad publishes a surcharge of \$100, bringing its share of the revenue up to \$210, *i.e.*, \$100 above 110 percent of its variable cost? Section 301, purposefully or not, would leave the shipper with no protection whatsoever against such unlimited exploitation. So long as the "trigger" of 109 percent of costs is met by the existing division of revenue, the surcharging carrier is given an unlimited carte blanche to make an excessive surcharge, and the shipper is bereft of even a right to complain about it under Section 301. This is a clear loophole in the bill which can and will be abused by the larger railroads.

Two other discrepancies as to surcharges in Section 301 are also worth noting. The limited right to protest surcharges is given only to "shippers". Many of those most injured by Conrail's recent round of illegal surcharges were receivers and not shippers. Nor are communities, associations, ports, *etc.*, accorded any right to object to

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excessive surcharges. Also, the protection accorded shippers under Section 301 is stated to be that the "shipper . . . may cancel the application of such surcharge". The publication and cancellation of railroad tariffs, including surcharges, is in the hands of railroads, not shippers. There is no practical way that a shipper can "cancel" a surcharge. It is not his tariff and the publishing agent works for the railroads, not the shippers.

Section 301 would also create a whole new category of second class citizens, shippers and receivers located on branch lines. Those shippers have already been subjected to poorer car supply and more sporadic service than shippers on main lines. Now the machinery for the *coup de grace* would be handed to the railroads whereby they could surcharge branch lines where their divisions do not equal 110 percent of variable cost plus "100 percent of such carrier's reasonably expected costs of continuing to operate such line." Note that this is a much higher standard which branch lines must meet to avoid surcharges than would be applicable to main lines. There is no reason for this. It has been hard enough for shippers on branch lines to stay alive without putting up a new and inequitable obstacle for them to meet.

*Cancellation of routes with connections.*—Section 301 would remove the present test which the cancelling carrier must meet, *i.e.*, that it is in the public interest, and instead place a burden on the injured connecting carrier to show that the cancelling carrier's revenue division equals or exceeds 110 percent of its own costs or that the cancelling carrier earns a lower division/cost ratio over another route not being cancelled. The cancelling carrier is proposing to take an anticompetitive action by cancelling its route with a targeted connecting carrier. Yet it is the victim who would be saddled with the burden of proof in order to avert the anticompetitive action. And the proof which it is mandated that the victimized carrier must produce is the cost of

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the cancelling carrier, a matter peculiarly within the control of the cancelling carrier to produce.

Thus, while Section 301 purports to provide a semblance of protection for the connecting carriers, in reality it is so contrived as to leave them virtually helpless. To add to the anticompetitive potential of Section 301, the Bill would also cripple the anti-discrimination provision of the Interstate Commerce Act by providing in Section 208 that any discrimination practiced through cancellation of joint routes shall not be subject to the protection of the Interstate Commerce Act.

Typically, it is anticipated that this new "right" to selectively cancel joint routes with connections would be used by a large railroad, such as Conrail, against certain smaller railroads. Section 301 even facilitates this by turning the relative inefficiency of a particular large carrier against its more efficient connections. For subsection (i), Section 301, provides that the costs against which the 110 percent test shall be measured is the system average cost of the cancelling carrier and not the average cost of all carriers operating in the same railroad region. This means that even though when measured against the regional average cost the cancelling carrier's present division is 125 percent of such cost, such carrier can still cancel the joint route if its

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own costs are so inefficient as to produce a revenue/cost ratio of 109 percent. It would canonize inefficiency and reward it at the expense of the more efficient connecting railroad.

The bias in Section 301 against smaller railroads is also obvious from the nature of the limited protection it offers to connecting railroads when faced with a prospective route cancellation. It would allow a connecting railroad to preclude the cancellation if it could increase the cancelling carrier's revenue division to 110 percent. But, in the case of a relatively small railroad with a haul of 200 miles or less (such as the Green Bay and Western and the Detroit and Toledo Shore) out of a transcontinental movement of 3,000 miles, there is no way that they could make up the full slack in Conrail's transcontinental divisions, even if they gave up their entire division and took nothing. On the other hand, a major railroad with a long haul of 1,500 or 2,000 miles could readily give up some of its division and frustrate the cancellation.

During consideration of the bill, the Committee adopted an amendment offered by Mr. Lee which would allow Class III short line railroads the right to bring a complaint to the Commission provided that the surcharge or rate cancellation has an adverse effect on competition or where a surcharge or rate cancellation affects the sole remaining route available to the Class III carrier and either alternative transportation is available or a shipper dependent upon the Class III carrier will suffer significant market loss or the surcharge is likely to impair a carrier's ability to earn an adequate rate of return.

The Lee Amendment provides inadequate protection to Class III short line railroads and completely fails to extend its very limited protections to medium sized Class II short line carriers. There are only 18 Class II railroads in the nation and none of them are large enough to be a serious threat to the viability of any major railroad. Yet they typically are important as regional railroads, such as the Maine Central, Green Bay and Western, and the Detroit and Toledo Shore, and

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as such are vital to their areas of the nation. To the extent that they handle a substantial amount of business in long haul services, they provide significant options to accommodate the nation's freight and their earnings therefrom are vital to the support of these regional roads. The vital importance of these essential carriers must be considered as a framework for stronger protection for Class III short line carriers is constructed. The failure to adequately protect the economic viability of all short line railroads is a serious flaw in the bill.

JOHN D. DISABELL,  
BOB FERNANDEZ.

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## SEPARATE VIEWS TO THE REPORT OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H.R. 7235, THE RAIL ACT OF 1980

Some of us dissented from the majority of the committee on the vote to report this bill. Others felt that the bill, having a number of desir-

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able features, should be reported within the May 15 deadline and that it could be perfected on the floor. But all of us felt that the oppressive rate treatment of captive shippers by a dominant carrier allowed by Section 202 of the bill permits abuse of monopoly power.

We are filing our views in disagreement with the rate-making provisions of this legislation because we believe that they create many more problems than they solve. We certainly share the Committee majority's concern about reforming federal railroad regulation to assist ailing rail carriers. However, the formulation embraced by this legislation will, we believe, not accomplish that purpose. Instead, the bill deregulates rates in many cases where competition is not available to protect shippers and consumers from excessive rate increases. This easy access to higher rates removes the carriers' incentives to increase the efficiency of their operations.

Moreover, the Rail Act will allow shipping rates to rise indiscriminately for both those railroads who need additional revenues and for those who do not. The legislation will impose dramatic rate increases on shippers who have no alternative means of transporting their goods, thereby placing an enormous inflationary load on American consumers who are already overburdened by an annual inflation rate of 38 percent. The adverse effects of this legislation will be felt in all regions of the country and by consumers of all types of commodities, particularly bulk commodities such as grain, coal, steel, automobile parts, and chemicals which are particularly suited for rail transport.

In addition, the Rail Act will significantly add to the current rate of energy inflation. Domestic coal supplies present one of the most important alternatives available to reduce the economy's dependence on imported energy and to check the inflationary spiral threatening our nation. Yet this bill will allow coal-hauling railroads to exploit their market power almost unchecked, converting potential consumer savings from our domestic energy supply into monopoly profits.

The legislation reported by the Committee will result in severe economic consequences because it will virtually eliminate rate regulation in markets controlled by a railroad monopoly or cartel. In 1976, Congress deregulated rates in competitive markets, overturning more than half a century of regulatory policies. The Congress, however, retained rate regulation in noncompetitive markets on the ground that "where effective competition does not exist, regulation to protect against abuse of market power must be and is retained." The Rail Act of 1980, however, proceeds to deregulate rates in most of these areas where market-place forces are inadequate to protect shippers from excessive rates.

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It is argued that this second deregulation effort will result in consumer benefits in the same manner as is presumed to flow from truck and airline deregulation. But the proponents of this argument fail to note that deregulation of competitive railroad markets was already accomplished in 1976 and that they are now proposing deregulation in many monopoly markets. Moreover, the railroad, trucking, and airline industries are far from parallel because of physical differences. The fact that rail and cars can run only on expensive tracks owned by individual railroads means that barriers to entry are formidable

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and that the railroads, unlike motor and air carriers, frequently do not face effective competition. Further, because rail is the only feasible means for many commodities to travel, there is often no truck, barge or pipeline alternative to noncompetitive rail transport.

Supporters of this provision have sought to justify it on the basis of the weak financial condition of certain rail carriers. But we believe this bill does not address the railroads' admitted difficulties in a way that is likely to be productive either for the railroads or for the shippers and consumers of the goods moved by rail.

The legislation does not differentiate between those railroads which are financially healthy and those in need of assistance. By failing to direct the added revenues to marginal carriers, windfall profits will accrue to many carriers that are and have been generating handsome profits under the current regulatory system. This approach will impose unnecessary burdens on many domestic industries shipping by rail which are already in serious financial distress. It is wholly unwise and unfair to place needless costs on severely troubled industries, such as automobiles and steel, and to cause great increases in food prices, utility rates, housing costs and costs of other goods and services essential to our domestic economy while providing ever increasing profits to the wealthy railroads.

Moreover, the bill encourages railroads to raise rates on captive traffic rather than to minimize unnecessary costs or to increase freight traffic through more effective pricing and marketing strategies. As a result, the inefficiencies inherent in the present rail transportation system will continue well into the future and the costs of those inefficiencies will become added deadweight in the national economy.

### *Obstacles to ICC rate review in noncompetitive markets*

The heart of our objections lies in Section 202 of the proposed legislation, which repeals the "market dominance" test of existing law and establishes a new jurisdictional test. The "market dominance" test was established under the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), and this test limits rate review to circumstances where there is "an absence of effective competition from other carriers or modes . . . for the transportation to which a rate applies." (49 U.S.C.A. § 10709).

Thus, under current law, before the Interstate Commerce Commission may find that a proposed rate is unjust or unreasonable, it must first determine that the proponent railroad has "market dominance" over the service to which the rate applies. If market dominance is found, the ICC applies its "just and reasonable" standard to the challenged rate. If market dominance is not found, the Commission lacks jurisdiction to scrutinize the reasonableness of the proposed rate.

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The Rail Act of 1980 goes farther than the 4-R Act, unwisely we believe. It removes ICC rate protection against exorbitant rate increases in noncompetitive markets by substituting a new jurisdictional test for the "market dominance" criterion. Under the Committee bill, two onerous requirements must be met before the ICC can exercise any review over a rate or rate increase.

The first test is based on the revenue-to-variable cost<sup>1</sup> (rate-to-variable cost) ratio of the traffic. If a rate yields a ratio less than the

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"cost recovery percentage" defined by the bill, then the ICC may not review it. During Committee discussion, the proponents of this provision stated that the "cost recovery percentage" would be approximately 200 percent. Hence, any rate which yields revenues of less than two times the variable cost of providing the transportation could not be reviewed.

To understand how onerous this test is for shippers and consumers, one must understand that although the 4-R Act did not set any particular rate level as a jurisdictional threshold, the ICC in applying the law has established a threshold of 160 percent of variable cost as one of its presumptions of "market dominance." In short, Section 202 raises by 40 percentage points the level established by the ICC as an appropriate standard for providing rate review.

The economic result of this change is staggering. Under the 160 percent ICC-determined level of presumed "market dominance, a carrier is already 10 percent to 15 percent above the level at which it is receiving a reasonable profit on the haulage in question. That is, the rate for that haul is already substantially subsidizing its other (competitive) traffic. This represents, on average, a return on equity after taxes of 21.96 percent (40.67 percent before taxes), and an after-tax return on net investment of 16.08 percent. In comparison, using the bill's threshold level of 200 percent, a carrier would earn after-tax returns on equity of 45.35 percent (83.39 percent before taxes), and an after-tax return on net investment of 30.1 percent. (See Appendix A.)

It should be emphasized that the 200 percent level is a threshold. It is the lowest level at which ICC review can even be had. Thus, many rates could be expected to rise significantly above the 200 percent level before they would be found "unreasonable."

This "cost recovery percentage," however, is only the first barrier to rate review. Even if a rate exceeds this extremely high level, a shipper is denied the protection of ICC rate review unless an "actual or present potential transportation alternative" does not exist.

In contrast to the 4-R Act, the proposed legislation bars ICC rate review if so-called "geographic competition" is found to exist. Thus, the Commission cannot scrutinize the reasonableness of a rate if a shipper is able to obtain the commodity from another source at a delivered cost which is not substantially greater than the cost of the rail transported commodity. This test is extremely complicated to administer, thereby undercutting regulatory reform objectives. Moreover, this test imposes severe obstacles to review of rate increases, even for rates which yield more than two times the variable cost of providing the transportation. Under this criterion, it is possible that importation for-

<sup>1</sup> Variable costs are expenses, such as fuel costs, which fluctuate with the volume of traffic handled.

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origin goods could be a viable transportation alternative—precluding ICC review.

As an illustration of this potential, we cite the case of Central Power & Light of Corpus Christi, which is actively considering the purchase of coal from South Africa for future coal-fired powerplants rather than buying domestic coal. In this instance, rail rates on coal shipments from Colorado have been allowed to increase to such an extent that the delivered price of South African coal is lower than the delivered price of Colorado coal.<sup>2</sup>

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### *Conflicts with other railroad policies*

It is clear from the discussion above that the rate provisions do not provide adequate protection to the captive shipper. Moreover, they undercut effective implementation of other rail policies, such as increased rail-to-rail competition and long-term contracts, which have been described as providing additional protection in noncompetitive market situations.

Ironically, the Committee voted to report this bill and remove review of rates subject to monopoly abuse on the very day that two of the largest competing western railroads announced their intention to merge. The merger announcement on May 15 by the Santa Fe and the Southern Pacific, which serve essentially the same markets from Southern California through Louisiana, coupled with proposed and consummated mergers of other major eastern and western rail carriers, greatly diminish the potential for competitive restraints on rates.

Proponents of the rate-making provisions also argue that adequate protection will be afforded to captive shippers by section 201, the contract rate provision. Section 201 would provide, for the first time, clear statutory authority for shippers and carriers to enter into long-term rail rate and service agreements. Such contracts would be of immense value to the railroads, of course, for they would be assured of long-term sources of revenues. In addition, these contracts could be used to secure future financing. Shippers, for their part, would know over the long term the cost and quality of their rail service. For these reasons, both carriers and shippers have long emphasized the value of a contract provision such as Section 201.

Unfortunately, the maximum rate provisions will most probably render the contract provision a nullity as a protection to the captive shipper. With respect to such traffic, there are few incentives for a carrier with monopoly power to enter into a contract that might restrict its rate when it knows it can raise rates by 10% per year in addition to inflation.

### *Adverse impacts on national economic and energy policies*

During the Committee's deliberations and the extensive study of coal rates by the Subcommittee on Oversight and Investigations,<sup>3</sup> there has been considerable discussion about the definition of captive (noncompetitive) traffic. The Committee's bill, H.R. 7235, concludes that most

<sup>3</sup> See ch. V and VI, "Railroad Coal Rates and Public Participation: Oversight of ICC Decisionmaking," Report by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 96th Congress, 2d session, Committee Print 96-117 (40 pp. 90-101).

<sup>4</sup> See "Railroad Coal Rates and Public Participation: Oversight of ICC Decisionmaking," Report by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 96th Congress, 2d session, Committee Print 96-117 (40 pp. 80-91).

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rail transportation is competitive, and its rate regulation provisions are based on this finding.

We strongly disagree with this premise. Bulk commodities such as steel, grain, coal, lumber and building materials and automobile parts are almost totally dependent on the rail transportation system. Most chemicals and hazardous materials are captive to rail because safety considerations preclude transport by trucks.<sup>4</sup>

The question of appropriate rates for the transportation of coal has received particular attention in the last several years. In a number of

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recent cases, the ICC has set the maximum reasonable level for coal rates at between 165 percent and 175 percent of variable cost. The Subcommittee on Oversight and Investigations has found that the current treatment of those rates by the ICC places an unreasonable share of the subsidy to meet carrier revenue needs on coal. Moreover, the Department of Energy has urged that the high rate levels involved in these cases jeopardize attainment of national energy goals.

While there is good reason to believe that the ICC-established coal transportation rates are too high, H.R. 7235 would result in staggering increases in these already highly profitable rates by prohibiting ICC review until after such rates exceed 200 percent of variable cost. The increased cost of coal transportation to public utilities and other major coal consumers such as the steel industry will approximate \$385 million per year or more than \$3 billion by 1990 at a minimum (at 1977 traffic levels.) It is little comfort that the bill would phase this mammoth increase in by limiting increases in the first few years to 10 percent plus inflation—that could still come to a 4 percent per year.

The impact on consumers from these rate increases will be drastic. In essence, there will be an unjustified transfer of money from the electric consumers and purchasers of manufactured goods to the railroads—including many wealthy carriers. Given the rapidly escalating prices for energy and the central role that energy plays in overall inflation, the deregulation of coal freight rates under H.R. 7235 will be particularly harmful to the consumer. The Consumer Energy Council has stated, "The impact on the consumer of an unregulated railroad industry trying to solve all of its financial problems by extracting maximum advantage from its monopoly control over coal hauling would be staggering."

Captive rail shippers of many other vital commodities would also be adversely affected. For example, while the President just last week expressed "deep concern" about the automobile industry's "serious problems" and pledged a "new cooperative spirit" to assist that industry, this bill will cause the auto industry to pay additional rail transportation costs of \$225 million per year. The cost to the steel industry, which faces tremendous competition from abroad, could exceed \$230 million per year. And grain shippers can expect an additional rail transportation cost in excess of \$110 million per year.

Thus, a conservative estimate demonstrates that the rate-making provisions of the Rail Act will impose an inflationary burden on the American economy of one billion nine hundred and forty-three thousand dollars per year.

\* Thus, according to the ranking minority member of the Interstate and Foreign Commerce Committee, the ranking minority member of the Subcommittee on Oversight and Investigations, and ten other minority members of the full committee, "chemicals have no feasible alternative." Separate Views to Report of the Subcommittee on Oversight and Investigations referred to in note 2.

## STAGGERS RAIL ACT OF 1980

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### Effect of House bill on captive traffic by major industry groups\*

Industry:	(Added Yearly Freight Charges)	In millions
Coal	.....	\$383
Steel	.....	233
Automobiles	.....	225
Lumber	.....	190
Chemicals	.....	170
Paper	.....	150
Grains	.....	142
Fertilizers	.....	111
Others	.....	321
Total	.....	1,943

\* Figures were derived by extracting traffic by industry category from the underlying data in the T. A. Kearney Report prepared for the U.S. CEA Study in Performance in Depth Analysis of Market Inefficiency and Its Relationship to Other Provisions of the R.R. Act. This was further categorized by selecting rates with a revenue to variable cost ratio of 140 percent to 200 percent. Then a calculation was made of the revenues necessary to bring all rates up to the 200 percent "cost recovery percentage" level.

### Conclusions

The economic and energy consequences of this legislation make it imperative that H.R. 7235 be amended to continue rate review where competition is lacking.

To achieve the goals we all seek and to do so in a manner equitable to all parties, we prefer the Senate bill's approach to maximum rate regulation. The Senate system sets a threshold equal to the average rate level which the rail industry must earn in order to enjoy adequate revenues. Rates below this level would not be subject to rate regulation. Above that threshold, carriers would be entitled to recover their inflation costs without any possibility of shipper challenge and to implement additional rate increases without the possibility of a pension. Depending on the amount of the increase, the carrier or the shipper would have the burden of showing the reasonableness or unreasonableness of a rate or rate increases.

We believe that the House of Representatives should carefully review the momentous and dangerous decision made by the Committee to move deregulation beyond the area covered in the R.R. Act (the area where there is competition) into the area where railroads enjoy a virtual monopoly position. This is an invitation to the railroads to abuse their market power. The impact on shippers and receivers of major commodities and the inflationary impact on consumers, as well as the implications for our coal utilization efforts, will be staggering unless H.R. 7235 is corrected.

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APPENDIX A

Revenue/variable cost ratios <sup>1</sup>	Return on net investment <sup>2</sup> after taxes <sup>3</sup>	Return on equity after taxes <sup>4</sup>	Return on net investment before taxes	Return equity before taxes
140 percent.....	9.06	18.26	14.3	19.00
150 percent.....	12.57	18.11	20.8	29.33
160 percent.....	16.08	21.96	27.3	40.67
170 percent.....	19.59	27.81	33.8	52.01
180 percent.....	23.1	33.66	40.3	63.35
190 percent.....	26.6	39.51	46.8	74.69
200 percent.....	30.11	45.36	53.3	86.03
205 percent.....	31.87	48.28	56.55	89.4
210 percent.....	33.62	51.21	59.8	92.77
220 percent.....	37.13	57.06	66.3	105.66

<sup>1</sup> Variable costs including cost of capital based on embedded interest rates.

<sup>2</sup> Based on statutory tax rate.

<sup>3</sup> Computed on basis of 40.50 percent debt/equity ratio and embedded debt rate of 7.75 percent (to parts No. 363 Hearing) before tax return times 0.54

Source: Underlying work papers ICC Statement IC1-77.

HON. ECKHART.  
 TONY MOFFETT.  
 ALBERT GORE, JR.  
 TOM LOEFFLER.  
 JOHN DINGELL.  
 JAMES M. COLLINS.  
 JOHN M. MURPHY.  
 MICKY LELAND.

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SEPARATE VIEWS OF HON. JOHN M. MURPHY

This bill, popularly known as the rail de-regulation bill, represents an effort to improve the condition of our nation's railroads, but Section 301 of the bill dealing with joint rates is self-defeating, in my view, and threatens irretrievable harm to small and medium-sized railroads and the shippers, receivers, States, communities and ports they serve. I propose to offer amendments which I believe are better calculated to achieve the stated goals of this bill while protecting against the mischief I foresee if it should become law in its present form.

De-regulation is no panacea for the transportation industry, and de-regulation which may be appropriate elsewhere can be devastating in the case of railroads. Unlike aircraft, trucks and ships which can move when and where they will, rail cars can move only where there are tracks to carry them. Since 70 percent of all rail traffic is interlined, according to the testimony of the Chairman of the Interstate Commerce Commission at the hearings on this legislation, railroads are uniquely interdependent and must cooperate if we are to have an efficient national rail network in the private sector which it is the stated purpose of this bill to foster.

1

Historically, connecting carriers on a through route have published tariffs prescribing joint rates for particular movements, and have di-

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vided the revenues on the basis of various factors, such as cost, length of haul and so forth, by agreement, or where they fail to agree, as prescribed by the I.C.C.

Section 301 of this bill, however, for the first time would permit a carrier unilaterally to impose a surcharge on a joint rate or to cancel a joint rate on a through route, free of the prohibitions against unreasonable discrimination which it has from the beginning been a principal purpose of the original Interstate Commerce Act to prevent. Section 301 provides only limited recourse to the I.C.C. by other participating carriers and shippers and no recourse at all for receivers, States, communities or ports which may be adversely affected.

The stated purpose of this drastic departure is to improve the depressed earnings of the rail industry in general and Conrail in particular, and to obviate the need for further federal subsidies—an objective which every member of this House will applaud.

But the unilateral surcharges and joint rate cancellations which Section 301 proposes are the wrong remedy, in my view. As Mr. Fishwick, the President of the Norfolk and Western, pointed out at the hearings on this bill, the effect will be to foist Conrail's inflated costs on the rest of the already depressed rail industry and on captive customers and communities who have no transportation alternative.

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Conrail is not necessarily to blame for its excessive costs. It inherited dilapidated track, deteriorated equipment and high labor costs from its bankrupt predecessors.

But Section 301 provides no incentive for Conrail to cut its inflated costs which are the crux of the problem. So long as Conrail can show that under its existing division of a joint rate, it is not receiving 110 percent of its variable costs, unilateral surcharges and joint rate cancellations cannot be disturbed, even if they result in unreasonable discrimination against its connecting carriers or the shippers, receivers, States, communities or ports affected. There should be some incentive for efficiency if the massive public investment in Conrail is ever to be recouped.

It is said that a railroad should not be required to carry traffic at rates below its break-even point. Section 301 would authorize surcharges far beyond that point; 110 percent of variable cost is a floor, but not a ceiling. In any case, I cannot agree to a proposed solution which fails to provide any incentive to reduce costs and instead permits a carrier to resort to unilateral self-help to increase its share of limited revenues at the expense of its connections.

Conrail's large line-haul connections, many of which recently reported large profits last year, may be able to absorb some of Conrail's inflated costs through reduced divisions or through higher joint rates when the traffic will not be driven away. But small or mid-sized railroads will not be able to absorb Conrail's excessive costs. Conrail's extra-territorial connections, therefore, would have the power, by absorbing Conrail's surcharge and rate cancellations selectively, to determine which traffic would be retained and which would be driven away, and therefore which of the small and mid-sized carriers would survive.

Moreover, Conrail has had a solution to its problem of excessive costs via divisions cases under existing law for the four years last past, since it came into being. Last year, I am informed Conrail reported a loss

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of \$192 million and it handled 5 million cars. It would have had a modest profit with additional revenue of \$10 per car. I am further informed, moreover, that Conrail originated and terminated 60 percent of the traffic on its own lines where rate increases would not require the concurrence of connecting carriers.

As to the remaining 40 percent of Conrail's traffic which is interlined, the amendment which I propose to offer would substitute for the unilateral surcharges and joint rate cancellations which section 301 of this House bill would authorize, the provisions for "Expeditions Divisions of Revenue" contained in section 107 of the Senate bill, S. 1016. Under my amendment, the Interstate Commerce Commission must complete evidentiary proceedings to adjust the division of joint rates between the participating carriers within 9 months after a complaint is filed, and when the proceeding involves a railroad in reorganization or a contention that the divisions at issue do not cover the variable costs of handling the traffic involved, the Commission must give the proceeding preference over all other proceedings and take final action within 100 days after the evidentiary proceedings have been completed.

Conrail could thus obtain compensatory joint rate relief within 1 year, under my amendment, for the 40 percent of its traffic which is

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interlined where an impartial public tribunal, the I.C.C., finds the relief is justified. The same would be true of any other carrier. I believe this approach is far preferable to the unprecedented, unilateral self-help which section 301 would authorize in its present form.

The text of my amendment is attached, together with a list of the carriers, organizations, corporations and trade unions which have expressed their support.

In a divisions case, under 40 U.S.C. § 10705(b), "the Commission shall consider—

- (1) the efficiency with which the carriers concerned are operated;
- (2) the amount of revenue required by the carriers to pay their operating expenses and taxes and receive a fair return on the property held and used for transportation;
- (3) the importance of the transportation to the public;
- (4) whether a particular participating carrier is an originating, intermediate, or delivering line; and
- (5) other circumstances that ordinarily, without regard to the mileage traveled, entitle one carrier to a different proportion of a rate than another carrier".

If Conrail's difficulties still persist after expeditious division proceedings, its problems will have been defined on the record made before the Commission and the Congress can then tailor a remedy to fit the actual facts. This seems a wiser course than giving carte blanche, not only to Conrail, but also the big line-haul railroads.

I should add that the record shows an immediate increase in rates available to the rail industry of \$1.5 billion resulting from surcharges under section 301. The ripple effect throughout the economy will be many times greater. The House should realize that it is being asked to approve a highly inflationary piece of legislation.

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Finally, the rail industry is characterized by high fixed costs which can only be amortized by handling a large volume of the traffic. The surcharges and higher joint rates envisioned by section 301 of this bill will inevitably tend to drive away some traffic. The big line-haul carriers may be able in many cases to absorb such a loss of business, but the small and mid-sized carriers often may not survive such a loss of volume. In those cases, the shippers, receivers and communities they serve will become victims as well.

A copy of my amendment is attached together with a list of the carriers, shipper organizations, ports and labor unions which have expressed their support.

### II

In a commendable effort to afford a measure of protection to short line and terminal railroads, the Committee adopted an amendment to section 301 offered by the gentleman from New York (Mr. Lee) to give Class III short line and terminal carriers access to the Commission on a showing that a surcharge or rate cancellation "will have an adverse effect on competition" or where a surcharge or cancellation affects the sole remaining route available to the Class III carrier for that traffic and either alternative transportation is available, or a shipper dependent upon the Class III carrier will suffer significant market loss, or the surcharge is likely to unduly impair a carrier's ability to earn an adequate rate of return.

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While welcome indeed, so far as it goes, the Committee amendment would not protect mid-sized Class II and small Class I carriers similarly situated. Moreover, I am not at all sure what is meant by "an adverse effect on competition" or "anti-competitive."

Accordingly, I plan to support an antitrust amendment to section 301, borrowing from the familiar language of the Clayton Act, to provide that it shall be unlawful for any carrier to apply a surcharge or to cancel the application of a joint rate to a through route where the purpose or effect of such surcharge or cancellation may be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country or to injure, destroy or prevent competition with any person. This antitrust amendment should further prescribe the traditional antitrust remedies of treble damages and injunctive relief.

If rail rates are to be deregulated, then the discipline of competition is needed to protect the public interests. Accordingly, the usual applicability of the antitrust laws should be reaffirmed to preserve a free market and to prevent restraint of trade and abuse of monopoly power.

### III

As I have already noted, it has long been a principal purpose of the Interstate Commerce Act to prevent unreasonable discrimination in rail rates and predatory competitive practices—a purpose restated only 4 years ago in section 202(f) of the IR Act of 1976 which brought Conrail into being.

This provision is rooted in the Constitution, for the framers plainly believed that "in order to form a more perfect union", there should be no impediment to the free flow of commerce among the original

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thirteen States on the Atlantic Coast, or the new States they envisioned in the hinterlands. Accordingly, Congress was given power "to regulate commerce . . . among the several States." Further the framers imposed certain prohibitions on the exercise of Federal and State power to assure the free flow of commerce among the States, including the provision that "No Tax or Duty shall be laid on articles exported among the several States"; "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another;" and the Export-Import Clause: "No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the Net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress".<sup>1</sup> Congress followed these provisions of the Constitution in forbidding unreasonable discrimination in interstate rail rates. Indeed, this bill would eliminate State regulation of intrastate rail rates in the interest of uniformity.

<sup>1</sup> Art. I, § 8, cl. 3.  
<sup>2</sup> Art. I, § 9, cl. 6.  
<sup>3</sup> Art. I, § 10, cl. 2.  
<sup>4</sup> Art. I, § 9, cl. 5.

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Section 208(f) of this bill, however, would exempt from this long-standing prohibition against unreasonable rate discrimination, the unilateral surcharges which Section 301 would authorize for at least 3 years. The primary purpose of that portion of Section 301, as I have said, is to enable Conrail to recoup its excessive costs at the expense of its connections or to drive away the business if its connections cannot afford to absorb Conrail's excessive costs.

I do not believe however that Conrail's difficulties can or should be alleviated by authorizing surcharges which are unreasonably discriminatory, in other disregard of the long-standing ban on unreasonable discrimination which was reaffirmed by the Congress only four short years ago.

At the appropriate time, therefore, I propose to offer an amendment which would simply preserve the long-standing prohibition against unreasonable discrimination to the extraordinary surcharges proposed by this bill. I do not believe that this House seriously intends to legalize unreasonable discrimination.

IV

Finally, I plan to offer an amendment to give full force and effect to the amendment requiring the Commission to guarantee the equalization of rates within the same port which I proposed and Congress adopted as Section 202(f)(4) of the 4R Act of 1976, now recodified at 49 U.S.C. § 10711.

As I have just noted, Article I, Section 9, Clause 6 of the Constitution provides that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another", and my amendment to the 4R Act was designed to require continued conformity to that Constitutional command.

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As Chairman of the Committee on Merchant Marine and Fisheries, I have held hearings on port problems—including rail service—at ports all around the continental United States. At every port except the Port of New York which I represent, rail rates are equalized because there is competitive rail service. In the Port of New York, however, where Conrail has a virtual monopoly, rail rates are not uniform and surcharges prevail to New York points in the Port, particularly to the new container port at Howland Hook in my district, where ironically, the rail facilities were constructed with a \$2,000,000 grant from the Federal Government. The result is to discriminate against the U.S.-flag ocean carriers which are committed to Howland Hook, and in favor of their foreign-flag competitors who use the facilities on the New Jersey shore and enjoy lower rail rates.

The Commission, however, has been advised by its Rail Services Planning Office to treat my recent amendment to the 4R Act as of "questionable substantive effect". This too is ironic, since the Commission, as recently as 1978 in the *S&K Farms* case, 357 I.C.C. 562, 570-571, recognized that "The tradition of rate uniformity began shortly after the first rail lines into New York were constructed."

My amendment would simply place on the Commission the affirmative duty to see to it that existing law is enforced and port parity is ensured.

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AMENDMENT OFFERED BY MR. MURPHY

On page 26 strike line 3 and all that follows through page 32 line 16 and insert in lieu thereof the following:

Sec. 301. Section 10705(e)(1) of title 49, United States Code, is amended to read as follows:

"(e)(1) the Commission may begin a proceeding under subsection (a) or (b) of this section on its own initiative or on complaint. The Commission must complete all evidentiary proceedings to adjust the division of joint rates for the transportation by a rail carrier within 9 months after the complaint is filed if the proceeding is brought on complaint or within 18 months after the commencement of a proceeding on the initiative of the Commission. The Commission must take final action by the 180th day after completion of the evidentiary proceedings, except that—

"(A) when the proceeding involves a railroad in reorganization or a contention that the divisions at issue do not cover the variable costs of handling the traffic, the Commission shall give the proceeding preference over all other proceedings and shall take final action at the earliest practicable time, which in no event may exceed 100 days after the completion of the evidentiary proceedings; and

"(B) in all cases other than those specified in subparagraph (A) of this paragraph, the Commission may decide to extend such a proceeding to permit its fair and expeditious completion, but whenever the Commission decides to extend a proceeding pursuant to this subparagraph, it must report its reasons to Congress."

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LIST OF SUPPORTERS OF AMENDMENT TO SUBSTITUTE SECTION 101 OF  
SENATE BILL FOR SECTION 301 OF THE HOUSE BILL

National Industrial Traffic League  
American Farm Bureau Federation  
Soo Line Railroad Co.  
National Coal Association  
Edison Electrical Institute  
Gulf Ports Association (15 ports from Florida to Texas)  
Delaware and Hudson Railway Co.  
Chemical Manufacturers Association  
Florida East Coast Railway Co.  
Grain and Feed Association of Illinois (1101 grain elevator operators)  
Southern Hardwood Traffic Association  
National Small Shipments Traffic Conference  
Greenbay and Western Railroad  
SCM Corporation, Cleveland, Ohio  
Western Coal Traffic League  
Packaging Corporation of America  
Sandersville Railroad Co.  
Trans-Kentucky Transportation Systems, Inc.  
Drug and Toilet Preparation Traffic Conference  
New York Dock Railway  
Corinth and Counce Railroad  
Hartford and Slocum Railroad  
McCloud River Railway  
Ahnapee and Western Railway  
Alden Corrugated Container Corp.

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J. & J. Corrugated Box Corp.  
Farm and Industrial Equipment Institute  
Apalachicola Northern Railroad  
Winifrede Railroad  
Middletown and Hummeltown Railroad  
Association of Independent Corrugated Converters  
Wilamina and Grande Ronde Railroad Co.  
Oclararo Railroad Co.  
Eastern Industrial Traffic League  
International Longshoremen's Association  
Port of New York, New York  
Port of Boston, Massachusetts  
Port of Philadelphia, Pa.  
Port of Norfolk, Va.  
Port of Wilmington, N.C.  
Port of Charleston, S.C.  
Port of Savannah, Ga.  
Port of Jacksonville, Fla.  
Gulf Ports Association  
Port of Brownsville, Tex.  
Port of Corpus Christi, Tex.  
Port of Freeport, Tex.  
Port of Houston, Tex.

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Port of Point Comfort, Tex.  
Port of Galveston, Tex.  
Port of Port Arthur, Tex.  
Port of Beaumont, Tex.  
Port of Orange, Tex.  
Port of Lake Charles, Tex.  
Port of New Orleans, La.  
Port of Gulfport, Miss.  
Port of Biloxi, Miss.  
Port of Pascagoula, Miss.  
Port of Mobile, Ala.  
Port of Pensacola, Fla.  
Port of Panama City, Fla.  
Port of Port Manatee, Fla.  
Port of Tampa, Fla.

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., May 20, 1980.

HON. HARLEY O. STAGGERS,  
Chairman, Interstate and Foreign Commerce Committee, Wash-  
ington, D.C.

DEAR MR. CHAIRMAN, Enclosed please find separate views we wish  
to submit to accompany the Committee Report on the Rail Act of 1980.  
Thank you for your consideration in this matter and with kind  
regards, we are  
Sincerely,

JOHN M. MURPHY.  
ANDREW MAQUIRE.  
BOB ECKHARDT.  
RICHARD SHELBY.  
NORMAN F. LENT.  
JAMES H. SCHEUER.

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SEPARATE VIEWS, EXCLUSIVE FEDERAL JURISDIC-  
TION OVER INTRASTATE RATES

Section 210 of H.R. 7235 would give the ICC exclusive jurisdiction  
to prescribe intrastate rates for rail carriers which are otherwise sub-  
ject to the ICC's interstate jurisdiction. In one stroke, the majority of  
the Committee would sweep aside established principles of Federal-  
State relationships and would mandate an unprecedented degree of in-  
trusion of Federal authority into the primary jurisdiction of the  
States.

The States have exercised jurisdiction over intrastate railroad rates  
for over 100 years and have provided a forum for addressing the con-  
cerns of small shippers and all consumers. The State agencies are more  
accessible and convenient to consumers than is the ICC.

The Interstate Commerce Act presently provides a rational and  
practical system for accommodating the interests of shippers, rail car-  
riers, the States and the Federal Government. First of all, the ICC  
can nullify State regulation of a rail carrier (including a rate) if the

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Commission finds that the State's action unreasonably discriminates against or burdens interstate commerce. Secondly, the ICC is given exclusive jurisdiction over an intrastate rate which has been filed with a State agency for the purpose of adjusting the rate to the level of the interstate rate on similar traffic, if the State agency does not act within 120 days.

The basic argument given by the majority in favor of ousting the States from their traditional jurisdiction is that States are likely to hold down intrastate rates as opposed to interstate rates, thereby requiring interstate shippers to foot the bill for the railroads. Putting aside the question whether State regulatory agencies are in fact likely to do this—and the related issue of whether this means simply that State agencies are more sensitive than the ICC to the real balance of equities in rate-making—there is a fundamental fallacy in this argument. The fallacy is that there is a perfectly adequate remedy for this potential problem under current law.

Moreover, if State regulatory agencies were in fact doing what the proponents of exclusive Federal jurisdiction allege, there would be a flood of ICC cases filed by the railroads seeking to raise intrastate rates to interstate levels. In fact, during 1970, only 12 such cases were filed and the ICC granted the relief requested in 11 of these.

One of the basic purposes of H.R. 7235 is to assist in the rehabilitation and financing of the Nation's rail systems. If there were clear evidence that continued primary State jurisdiction over intrastate rail rates were having a seriously deleterious effect on the financial stability of the Nation's railroads there might be some justification for the action of the Committee's Majority. Evidence presented to the Committee by the National Association of Regulatory Utility Commissioners, composed of State agencies engaged in regulation of rail rates

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and safety, demonstrates that continued State jurisdiction over intrastate rail rates is of no major economic significance to the railroad industry. The intrastate increases from the 11 cases decided by the ICC in 1970 generated less than \$10 million in additional carrier revenues, which is negligible compared to the over \$3 billion in general rail rate increases granted by the ICC in 1970.

The majority's recommendation is an ill-conceived attempt to sweep aside a Federal-State relationship which is functioning effectively in the public interest. There has been no showing of the need for exclusive Federal jurisdiction over intrastate rail rates. The majority's recommendation fails to comply with constitutional principles of our Federal system, and indeed there is a serious question as to the authority of Congress to enact Section 210.

The National Association of Regulatory Utility Commissioners urged the Committee to delete Section 210 from the bill and a motion to do was narrowly defeated by a vote of 20 to 17. We urge the House to delete this section from the bill.

PHIL GRAMM,  
DAVE STICKMAN,  
RICHARD SCHERRY,  
JIM SANTINI,  
BOB ECKHARDT,  
DAVID E. SATTERFIELD.

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### SEPARATE VIEWS OF TOM LOEFFLER

The separate views set forth above which I join in with my colleagues describe in general terms the critical defects in the provisions in the bill reported by the Committee dealing with rate regulation by the Interstate Commerce Commission. As the representative of a district whose citizens have already been sorely, and I believe unjustly, burdened by excessive increases in freight rates for the rail transportation of coal, I would like to stress the inequities which would result under the Committee's bill with a very concrete example.

Several years ago, our municipally-owned utility in San Antonio constructed its first coal fired electric generating station which now supplies approximately 50 percent of the city's electrical power requirements. Since the city began moving coal to this new facility in 1976, the railroads have sought and obtained from the Interstate Commerce Commission increases in the applicable freight rates totalling over 81 percent. As a result of these increases, the annual transportation bill has risen from roughly \$32 million to roughly \$60 million.

The rates which the city is currently paying for the transportation of its coal are extremely profitable to the railroads involved. These rates cover not only all the costs to the carriers of providing the service plus a full return on all their involved investments equal to the current cost of capital, but also contain a further increment which the I.C.C. has allowed to cross-subsidize the movement of less profitable commodities.

Under the jurisdictional standard established in the Committee's bill, San Antonio would be exposed to huge additional rate increases on its coal traffic. The cost recovery percentage standard, which is projected to be approximately 200 percent of variable costs, far exceeds the ratio for the railroads' current and extremely profitable rate of roughly 174 percent. As a result, the annual transportation costs to San Antonio could be increased by roughly \$14 million per year. It must be emphasized that every dollar of this increase would be additional profit on coal movement which already earns the carriers approximately \$21 million per year over and above their variable costs of service.

The additional transportation costs to San Antonio over the life of its plant could exceed \$380 million. The carrier primarily involved, the Burlington Northern, is recognized to be a financially solid and profitable railroad at the present time. Equally important, however, the BN will reap tremendous profits from the additional volumes of coal which it will be hauling in the coming years.

Even after the San Antonio rate exceeded the cost recovery percentage, the second prong of the bill's dual jurisdictional test might well preclude it from obtaining I.C.C. rate review. This second requirement, that there be no actual or "prevent potential" transportation

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alternative is very vague and could result in rate review being denied on the basis of such circumstances as the possible future construction of coal slurry lines or the availability of foreign coals.

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San Antonio is, of course, only one of thousands of shippers who are captive to the railroads and who are essentially defenseless to predatory rate demands by the railroads in the absence of I.C.C. rate regulations. I am firmly opposed to the bill reported by the Committee because of its failure to afford any meaningful protection to such shippers, and I urge each of my colleagues in the House of Representatives to consider carefully the impact the bill would have on captive shippers and to vote against the measure unless it is amended in a manner which would offer such shippers adequate rate protection.

**TOM LOEFFLER.**

**HOUSE CONFERENCE REPORT NO. 96-1430**

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**JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE**

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the amendment of the House to the text of the bill (S. 1946) to reform the economic regulation of railroads, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate amendment to the House amendment struck out all of the House amendment and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the Senate amendment and the House amendment. The differences between the Senate amendment, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

**SUMMARY AND DESCRIPTION**

**SECTION I—SHORT TITLE**

Section 1 states that this bill may be cited as the "Staggers Rail Act of 1980".

**SECTION II—FINDINGS**

The Conferees find that historically the enactment of the Interstate Commerce Act was essential to prevent an abuse of monopoly

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power by railroads and to maintain a national railroad network as an essential part of the national transportation system. However, today, most transportation is competitive and many of the Government regulations affecting railroads have become unnecessary and inefficient. Nearly two-thirds of intercity freight is transported by modes of transportation other than railroads. Earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements. By 1985, the railroad industry will experience a capital shortfall of between \$16 billion and \$20 billion. The industry's failure to achieve increased earnings will result in either further deterioration of the rail system or the need for additional Federal subsidy. Modernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to achieve maximum utilization of railroads, to save energy and to combat inflation.

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**SECTION III—GOALS**

The specific goals of this Act are to assist the industry in the rehabilitation and financing of the rail system; to reform Federal Regulation to preserve a safe, adequate, economical, efficient and financially stable rail system; to assist the rail system to remain viable in the private sector of the economy; and to provide a regulatory process that balances the needs of carriers, shippers, and the public. The overall purpose of the Act is to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system.

**Title I—Rail Transportation Policy**

Title I of the Conference substitute sets forth the congressional declaration of policy for railroads by adding a new section 1016.(a) to the Interstate Commerce Act. The new section establishes a specific rail transportation policy to guide the Commission in its duties in regulation of the railroad industry. The Conferees intend that this policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.

**Title II—Railroad Rates and Inter-Carrier Practices**

Title II is related to the key areas of the Interstate Commerce Act which involve railroad rates and inter-carrier practices. In general, the title assures railroads substantially more rate freedom than is afforded them under existing law. It continues the policy started under the Railroad Revitalization and Regulatory Reform Act of 1976 of substantially eliminating rate regulation of railroads where there is effective competition. The title also affirmatively encourages railroads to use new marketing practices by permitting contracts between carriers and shippers; permissive limited liability rates; business entertainment expenses; efficient marketing

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through faster implementation of rates, and premium charges to encourage better car utilization.

A number of provisions are included to foster greater competition by simplifying coordination, minor mergers procedures, entry and reciprocal switching agreements. Moreover, the Commission is given the mandate to place greater emphasis on the need for carriers to have adequate revenue levels. Among other tools given the Commission for this purpose is the ability to determine the effects of inflation and to assure carriers the opportunity to recover inflation.

Specifically, Title II provides the Interstate Commerce Commission with jurisdiction to determine rate reasonableness only when a rail carrier has market dominance and the rate exceeds the applicable revenue-variable cost percentage threshold. The revenue-variable cost percentage is a level below which the Commission has no jurisdiction over the reasonableness of maximum rates. This codifies and refines the practice followed by the Commission for determining market dominance on, among other matters, the relationship of revenue to variable cost.

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For four years beginning October 1, 1980 and until October 1, 1984, there is a rate flexibility zone of 6 percent, subject to a cumulative total of 18 percent, in addition to inflation. If a portion of the 6 percent rate increase is not implemented in a year in which it is authorized, it may be carried over to the succeeding year. However, within the four year period no carrier can take an increase within the flexibility zone in excess of 12 percent in any one year except that in the first year the zone is limited to 6 percent. If any portion of the 18 percent cumulative rate increase is not taken by October 1, 1984, it may be carried over to the next two succeeding years, with the limitation of an annual increase of 10 percent between October 1, 1984 and October 1, 1986.

Effective October 1, 1984, and in succeeding years thereafter, a carrier may annually implement a 4 percent increase, which may not be carried over in subsequent years.

The 4 percent zone is not available to increase single-line rates of carriers with adequate revenues. The Commission is to promulgate regulations in connection with joint-line movements involving both carriers with adequate revenues and carriers with inadequate revenues.

When determining the reasonableness of rates, the Commission is to recognize the policy that rail carriers shall earn adequate revenues. This title also authorizes carriers to increase a rate to cover cost increases due to inflation.

The rate of a carrier in effect upon enactment of this Act may be challenged before the Commission during the 180-day period following enactment on the basis that the carrier has market dominance over the transportation to which the rate applies. If the rate is not challenged during the 180-day period, or is found to be lawful, the rate may not be challenged thereafter. This provision does not apply to rates for volumes of traffic in the past year of under 500 net tons and which has increased tenfold in the three years prior to the challenge. The burden of proof under this section is with the complainant.

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In order to encourage more effective marketing by railroads the notice period for rate increases is lowered from 30 days to 20 days and from 30 days to 10 days for rate decreases.

The Commission is required to maintain, and revise as necessary, standards and procedures for determining revenue adequacy. On the basis of the standards, the Commission is to determine within 180 days of the effective date of this Act and annually, thereafter, which carriers are earning adequate revenues.

The Commission may prescribe, on a quarterly basis, a percentage rate increase or rate index for rail carriers to compensate for inflationary cost increases. Within 60 days after the Commission prescribes such percentage rate increase or index, rail carriers intending to be excluded from such percentage rate increase or index, shall notify the Commission, and all carriers participating in a particular route must agree to be excluded for the exclusion to be effective. The percentage rate index may include percentage increases within a specified range to allow carriers to recover a total increase specified by the Commission as necessary to compensate for inflationary cost increases.

The Commission must complete an investigation or suspension proceeding concerning a rate, classification, rule or practice within

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5 months, or 8 months if it reports to Congress. The Commission may not suspend a proposed rate, classification, rule or practice if a protestant is likely to prevail on the merits, substantial injury will result without the suspension, and because of the peculiar economic circumstances of the protestant precluded protection of the protestant by means of a refund if the rate is later found unreasonable by the Commission.

This title authorizes one or more carriers to enter into contracts with one or more shippers unless the Commission finds that the proposed contract unduly impairs the ability of the contract carrier(s) to meet their common carrier obligation or unreasonable discriminates against a port. In the case of agricultural commodities (including forest products and paper), a complaint may be filed on the grounds that a carrier has unreasonably discriminated by refusing to provide the complainant a similar contract under similar conditions or that the proposed contract constitutes a destructive competitive practice.

Once a contract has been approved, the Commission cannot require a carrier to violate its terms except under the Commission's emergency powers. The exclusive remedy for a breach of contract is an action in a State or U.S. district court unless the parties otherwise agree.

Demand sensitive rates under Section 10724 of title 49 U.S.C. are repealed.

Capital incentive rates under Section 10729 of title 49 U.S.C. are repealed except that capital incentive rates prior to enactment of this Act shall remain in effect no longer than five years, unless the parties otherwise agree.

To provide both shippers and railroads with greater rate-service options the Act permits the establishment of lesser liability requirements than presently assured by law. Such liability limitations are available only if the shipper agrees to them.

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To permit use of the new provisions available to both shippers and railroads, Section 10741 of title 49 U.S.C. is amended by exempting certain services from the rate discrimination provision in current law. Exempted are certain contracts, surcharges and cancellations, separate rates for distinct services, rail rates applicable to different routes or business expenses authorized under section 10751 of this title. These exemptions do not affect existing prohibitions against discrimination between ports or within the same port.

The bill authorizes a carrier to surcharge or cancel a joint rate when the existing joint rate does not provide the carrier with 110 percent of its variable cost. Other carriers may prevent the surcharge or cancellation from becoming effective, however, by adjusting the division of revenues of proposing a new rate which brings the surcharging or cancelling carrier's revenues up to 110 percent. Alternatively, a shipper or carrier can reduce to the 110 percent level a surcharge which would provide the surcharging carrier with revenues greater than 110 percent of variable cost, and can prevent a joint rate from being cancelled by providing a surcharge in lieu of cancellation which would bring the revenues of the cancelling carrier to 110 percent of its variable cost. Such a reduced surcharge or surcharge in lieu of cancellation of a joint rate is to be imposed

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by the Commission in conformity with the petition of the protesting shipper or carrier.

In addition a class III railroad may obtain review by the Commission of either a surcharge or cancellation if the surcharge or cancellation will have an adverse effect on the ability of a class III railroad to compete effectively, or if it will affect the class III railroad's last available route for a particular movement and produce certain adverse results for the class III railroad, or if it will adversely affect the competitive position of a shipper or receiver located on the class III railroad. In making its review, the Commission shall act to prevent anticompetitive surcharges or cancellations which affect class III railroads, and the Commission is given authority to preserve service on the route participated in by the class III railroad. The Commission may rescind the surcharge or cancellation and may require the surcharging or cancelling carrier to carry the traffic at less than 110 percent of its variable costs if necessary to preserve competition or service by the class III railroad which is required by the public interest.

The conferees note that nothing in the bill's protections reduces the availability of the Federal antitrust laws to protect against improper use of the surcharge or cancellation provisions. A rail rate to which a surcharge is applied shall constitute a rate increase for the purpose of section 10701a and 10709 of title 49, United States Code. An expedited division of revenue procedure is also established.

A similar below cost service problem occurs with respect to light density lines. That problem, however, relates more to shippers on a particular line than to inter-carrier relationships. The bill institutes the use of branchline surcharges on any lines carrying less than 3 million gross tons per year. (1 million gross tons for carriers with adequate revenues).

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State authority over intrastate transportation is limited to administering the provisions of the Interstate Commerce Act. Within 120 days of the effective date of this Act, State authorities must submit to the Commission standards and procedures to be used in exercising such jurisdiction. With 90 days of the receipt of the State's filing, the Commission shall certify the State's compliance with the regulations and procedures of this Act. States are precluded from authority over general rate increases, inflation-based rate increases and fuel adjustment surcharges.

In order to encourage competitive pricing, no rail carrier is permitted to discuss single line rates proposed by another carrier, except for the purposes of general rate increases and broad tariff changes. No rail carrier may discuss a joint line rate unless it practically participates in that movement. After January 1, 1984 (or earlier if the Commission decides), no carrier may discuss a joint line rate where there are two or more routes between the same end points, except with a carrier that forms part of a particular single route. If the Commission finds that implementation of the section is not feasible, it may delay or suspend implementation in whole or in part.

Transcripts or sound recordings and records of votes are to be available to the Commission and other Federal agencies.

The Commission shall require protective conditions for rate bureau employees.

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Competition is encouraged by permitting entry by a rail carrier, through new construction, if public convenience and necessity permit or require it. Where the Commission has authorized construction or extension of a line, no other railroad may refuse to permit the carrier to cross its property if the construction or operation does not interfere with the operation of the crossed line and the owner of the crossing line compensates the owner of the crossed line. The Commission may require protective conditions for the employees affected by new construction.

The Commission may require reciprocal switching where practicable and in the public interest or where such agreements are necessary to provide competitive rail service. The Commission may establish conditions and compensation where carriers are unable to agree within a reasonable time. The Commission may require that reciprocal switching agreements include labor protection provisions.

This title repeals existing incentive per diem provisions. The Commission is authorized to grant shippers antitrust immunity to conduct negotiations with carriers regarding charges for rolling stock owned or leased by such shippers. The participants have the right to petition the Commission to set compensation at a reasonable level, if the parties cannot agree.

In order to encourage more efficient car utilization, carriers are permitted to charge for special services or special levels of service not otherwise included in any tariff applicable to the movement.

For transactions that do not involve the merger or control of at least two Class I railroads, the Commission is required to approve an application unless it finds there is a likelihood of substantially lessening competition, creation of a monopoly or restraint of trade

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and the anticompetitive effects of the transaction outweigh the public interest.

The application of the Elkins Act to business expenses by rail carriers and motor carriers is clarified by treating these businesses as all other businesses.

Finally the Commission is given exemption authority if regulation is not necessary to carry out the Railroad Transportation Policy and protect shippers from market abuse.

### *Title III—Railroad Cost Determinations*

Previous accounting and reporting systems developed by the Commission for rail carriers are to be replaced by the accounting and reporting requirements of Title III of this bill. There is established a Railroad Accounting Principles Board for the purpose of developing cost accounting principles which identify variable costs which accurately represent the most accurate costs of rail movements.

The Board shall exist for three years. Within two years, it shall issue cost determination principles necessary for regulatory purposes which shall identify accurate costs. The principles are to apply to the entire railroad industry to ensure consistency in railroad cost accounting practices.

Each rail carrier is to maintain a system that is in compliance with the rules promulgated under Section 11163 of this title and are required to make cost data available to shippers, states, ports,

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communities and other interested parties that are party to a Commission proceeding.

### *Title IV—Railroad Modernization Assistance*

This title continues the existing redeemable preference share financing program.

The Secretary must report to Congress within 90 days after the end of each fiscal year specifying how each grant or loan contributes to the goal of providing a safe and efficient rail system.

A new feeder railroad development program is established which gives shippers the opportunity to acquire a rail line carrying less than 3,000,000 gross tons a year if the railroad is not providing adequate service. After the third year any rail line may be acquired under this provision. The Commission must make certain findings before any acquisition can take place and the rail carrier must be given compensation for selling the line.

New time limits are established for considering abandonment applications. Applications for abandonment which are not opposed would be granted within 45 days, and the abandonment would occur within 75 days. With respect to unopposed applications, this would basically codify existing ICC practice. For applications which are opposed, ICC decisions would be reached much more quickly than under present law, and the ICC would be required to process and decide such cases within 9 months. No changes are made in the substantive abandonment standards.

The low interest redeemable preference share program under section 505 of the 4R Act is extended for two years. An additional \$700 million is authorized for the program, and of that amount

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\$200 million shall be transferred to the United States Railway Association for use by Conrail in reducing the size of its workforce.

Section 211(i) the Regional Rail Reorganization Act is also amended to make available to railroads in addition to Conrail loan guarantees for the purpose of electrifying high density mainlines or for other capital improvements to achieve the goals to the national energy policy.

Finally, section 211(d) the Regional Rail Reorganization Act of 1973 is amended to extend the time period from December 31, 1980 to December 31, 1981 to permit the United States Railway Association to continue to act on loan modifications this provision and increases the principal amount of a loan made under Section 211(d) from \$4 million to \$7.5 million.

### *Title V—Conrail Title V Labor Protection*

Section 501 changes the formula for calculating monthly guarantees for non-operating employees, maintenance-of-way employees and operating employees. No change is proposed in the guarantee formula currently applicable to non-contract employees and employees who have been transferred.

Section 502 would restrict the payment of the MDA in two situations. First, a protected employee's entitlement to an MDA would be suspended for the period that the employee fails to work for reasons beyond the control of his or her current employer due to strikes, floods, snowstorms, and similar occurrences. Second, the legislation would require a protected employee to claim an MDA within three months of entitlement and would require that entitle-

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ment to claims be resolved within 150 days after a claim is filed for the first year and 90 days thereafter. This provision will eliminate bookkeeping problems caused by procrastination in filing a claim for an MDA, and enable the Corporation to assess more accurately expected payments for labor protection.

In addition, this legislation would clarify that the period of protection for a protected employee with less than 5 years of service begins to run from the beginning of the first month for which the employee receives an MDA.

Subsection 505(d) of the current law sets out transfer procedures by which the Corporation may require a protected employee deprived of employment to transfer to a bona fide vacancy within the employee's class or craft.

Section 503 addresses restrictions on manpower utilization by including employees in the marine crafts and unemployed Penn Truck Lines, Inc. truck drivers in the provisions permitting transfer of adversely affected employees to another class, and by offering retraining programs to make the interclass transfer provision meaningful. In addition, the Corporation can make use of an expedited multiple offer procedure to Penn Truck Line and marine craft employees.

Section 504 would redesignate section 509 of the 3-R Act as section 509(n) and increase the amount of funds authorized to be appropriated under title V by \$235 million to a new authorization level of \$485 million make training and retraining costs incurred

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by the Corporation under revised section 505(d)(4)(D) reimbursable costs, and confirm existing practice whereby title V funds are used to reimburse the Railroad Retirement Board's unemployment compensation paid to protected employees.

An additional \$235 million is authorized to fund the substantially reduced level of benefits afforded by these amendments. This sum would fund the program during a transition period, after which the carriers employing protected employees would be responsible for the payment of benefits without reimbursement.

In addition, this section would add two new subsections to section 509 that impose auditing and reporting responsibilities upon the Association. Section 509(b) would direct the Association to conduct a program audit of the payment of benefits under title V and evaluate the effectiveness of the provisions of title V in providing a reasonable level of protection to protected employees and enabling the Corporation to improve management of the protected employees in the workforce. The Association would be afforded access to pertinent documents for the purpose of facilitating its audit and evaluation functions. Section 509(c) would require the Association to transmit an annual detailed and comprehensive report of its periodic audit and evaluation to the Congress and the President within 90 days after the end of each fiscal year.

Section 505 gives Conrail employees the right of first hire on other railroads.

Section 506 requires the single collective bargaining agreements be negotiated with each class and craft and that such negotiations be conducted on a system wide basis.

Section 507 would make the new formulas provided by this title effective August 1, 1980, as already required by a recent Supplemental Appropriations bill, Public Law 96-304.

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Section 508 makes certain technical amendments.

### Title VI—Expedited Supplemental Transaction Proposals

Section 305 of the Regional Rail Reorganization Act of 1973 is changed by requiring that within the 240 days after the effective date of this Act the Secretary shall determine whether to initiate a proposal for the transfer of all Conrail properties in Connecticut and Rhode Island to another rail carrier in the region. The Secretary shall develop such proposal if the proposed transferee railroad is financially and operationally capable of assuming freight obligations on a financially self-sustaining basis and the transfer would promote a financially self-sustaining rail system in Connecticut and Rhode Island.

The Secretary shall establish a fair and equitable price for proposed transfers. If the special court determines that the proposal is fair and equitable and meets the other requirements of this section, it shall issue order to carry out the proposal.

The parties to a supplemental transaction under this section and the representatives of the affected employees are to enter into a new agreement.

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### Title VII—Miscellaneous Provisions

Title VII of the Conference substitute includes provisions related to effective dates, status of pending matters and construction of amendments. In addition, the title provides the annual authorization for the United States Railway Association and funds for Conrail.

Specific provisions are also included to clarify or remedy legislation enacted early this year related to the Rock Island and Milwaukee Railroads.

#### SHORT TITLE

*Senate bill.*—The Senate bill has as a short title "Railroad Transportation Policy Act of 1979".

*House amendment.*—The House amendment has as a short title "Harley O. Staggers Rail Act of 1980".

*Conference substitute.*—adopts the "Staggers Rail Act of 1980" as the short title of the Act.

#### FINDINGS

*Senate bill.*—The Senate bill has no findings.

*House amendment.*—The house amendment has findings which provide an overview of the need for legislation. Among other considerations stated are findings that today, most transportation within the United States is competitive, nearly two-thirds of inter-city freight is transported by modes other than railroads, earnings of railroads are insufficient to generate funds for necessary capital improvements, by 1985 there will be a capital shortfall of between \$16 billion and \$20 billion and that modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization or railroads to save energy and combat inflation.

*Conference substitute.*—The House amendment.

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*Senate bill.*—The Senate bill has no statement of goals except as included in the railroad transportation.

*House amendment.*—The House amendment sets forth specific overall goals to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States.

*Conference substitute.*—The House amendment.

#### TITLE I

##### RAILROAD TRANSPORTATION POLICY

*Senate bill.*—The Senate bill adds an independent railroad transportation policy to the Interstate Commerce Act to guide the Commission in formulating its rules, regulation, and divisions arising from its administration of the Act.

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*House amendment.*—The House amendment is similar to the Senate provision but puts a greater emphasis on the need to minimize Federal regulatory control over railroads.

*Conference substitute.*—Adopts the House amendment with additional policy considerations taken from the Senate bill.

### TITLE II—RAILROAD RATES AND INTER-CARRIER PRACTICES

#### SECTION 201—REGULATION OF RAILROAD RATES

*Senate bill.*—The Senate bill provides that a rail carrier may establish any rate which yields a revenue to variable cost ratio that is equal to or less than the average ratio of revenue to variable costs established by the Commission. It sets out standards to be used by the Commission in establishing the average ratio and establishes timeframes for action under this section.

*House amendment.*—Section 203 of the House amendment provides that rail carriers may establish any rate for transportation or other services provided by rail carriers unless a rail carrier has market dominance over the traffic. It establishes which parties shall have the burden of proof in complaint and investigation proceedings to challenge the lawfulness of rates or rate increases. The House amendment requires the Commission in determining the reasonableness of rates, to recognize the policy that rail carriers must earn adequate revenues.

*Conference substitute.*—The Conference substitute adopts the House amendment with various changes to conform it to the Senate bill. It allows a rail carrier to establish any rate for transportation unless a rail carrier has market dominance over the transportation, in which case the rate must be reasonable. The definition of market dominance under existing law has not been altered by the substitute, and it is not intended that there be any change in the meaning of the term, nor is any change intended in the Commission's authority to determine market dominance and reasonableness concurrently. However, since other parts of the Conference substitute provide additional rate freedom for rail carriers beyond those found in present law or under existing or proposed Commission regulations, the Commission must revise its market dominance regulations.

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In maintaining the term market dominance, in addition to statutory changes designed to provide more rate freedom to rail carriers, the Conferees intend that whenever there is effective competition which will restrain rate increases by the railroads, such competition should continue to function as the regulator of the rate rather than the Commission. Maintenance of the "market dominance" standard is not intended in any way to restrict the ability of the Commission to apply this concept, both in its regulations and individual cases.

Consistent with the new rail transportation policy of this Act, the Conferees intend that competition be recognized as the best control on the ability of railroads to raise rates. The purpose of this legislation is to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation. The

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Conferees believe that by allowing the forces of the marketplace to regulate railroad rates wherever possible the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers, and rail employees.

The Conference substitute establishes which party shall have the burden of proof in establishing that a rate is not reasonable and has the effect of maintaining the existing burden of proof in determining reasonableness, i.e. the carrier has the burden of proof in investigation and suspension proceedings and the shipper in complaint cases. The railroad bears the burden of proof when a rate increase is greater than the 6 percent zone for the first four years, or the 4 percent zone after the first four years. If the rate increase is within the 6 percent or 4 percent zones, but is more than 20 percentage points above the jurisdictional threshold or 190 percent of revenue to variable cost, whichever is lesser, the railroad will also bear the burden of proof if the Commission decides to investigate.

In complaint cases, i.e., where the shipper is complaining about an existing rate, the burden remains on the shipper to prove that the rate is unreasonable, no matter what level the rate is. The Conference substitute does not alter the existing procedure which places such a burden on the shipper.

The shipper must bear the burden of proof when the rate increase is within the 6 percent or 4 percent zones, and the rate is not more than 20 percentage points above the jurisdictional threshold or 190 percent of revenue to variable cost whichever is lower. The shipper also bears the burden whenever a rate increase is within the 6 percent or 4 percent zone, but the rate increase brings the rate more than 20 percentage points above the jurisdictional threshold or 190 percent of revenue to variable cost whichever is lower, and the Commission decides not to investigate.

The Conference substitute adopts the language from the House bill that in determining rate reasonableness the Commission must recognize the policy of this Act that carriers must earn adequate revenues. The difficult economic situation of much of the railroad industry is one of the reasons for this legislation, and the Commission is required to make efforts to ensure that rail carriers earn adequate revenues.

The Conference substitute maintains language similar to existing law which states that variable costs shall be determined by formulas or procedures prescribed or certified by the Commission.

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The Conference substitute maintains the requirement that joint rates must be reasonable. The conferees intend that the rate standard for the reasonableness of joint rates shall be the same as for all rates. The establishment of the minimum compensatory joint rate relief in Section 217 of this Act is not intended to mean that such minimum levels relate to the maximum reasonable level for joint rates. A joint rate must be reasonable, as must the divisions of such a joint rate between carriers, and the Commission should not interfere to require joint rates or any carrier's division of a joint rate to be maintained below the rate levels permitted by this Act.

Rates may not be established below a reasonable minimum. Rates which contribute to going concern value shall be reasonable and rates which do not contribute to going concern value shall be

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presumed to be unreasonable. In essence, these provisions strengthen the minimum rate policies of the 4R Act by placing the burden of proof on the party challenging a rate as too low and by expediting the procedures whereby rates which are too low can be raised.

These modifications will ensure that carriers pricing in a manner that meets rational economic standards will not be prevented from improving their economic position by reducing rates. While the Conferees believe there may be circumstances in which rates which do not contribute to going concern value are reasonable, those circumstances are likely to be unusual and once a complainant has shown a rate does not contribute to going concern value, that rate shall be presumed to be unreasonable until the carrier charging the rate bears the burden of showing that the rate is reasonable.

These provisions will ensure that those shippers can protest that a rate is too low and that a carrier is worse off than it would be if the rate were raised. Upon finding this to be the case, the Commission may raise the rate to the minimum level at which the rate benefits the carrier. All shippers as well as the carrier are better off if traffic which makes a contribution moves than if it does not, because the carrier is made financially stronger and need not rely as much on revenue from other shippers.

The Conferees do not intend, however, that rates which are contributing to the going concern value of a carrier should be forced to be raised. The Commission should not restrict the carriage of this beneficial traffic, placing a greater burden on other shippers. This is a decision that is best made by the carrier as it judges the

market. Since a carrier has no reason to keep a rate below the most beneficial level, the Conferees have no reason to believe rates will be held below the most beneficial level except by oversight. Accordingly, rates that contribute to going concern value shall be reasonable and the Commission may not require that those rates be raised.

SECTION 202—DETERMINATION OF MARKET DOMINANCE

*Senate bill.*—The Senate bill establishes a level below which the Commission will have no jurisdiction over railroad rates. The jurisdictional level is equal to the average ratio of revenue to variable costs for all transportation. Until such level is determined by the Commission the jurisdictional level is set at 150 percent of revenue to variable cost. The Senate bill also repeals 49 U.S.C. 10709, which

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is the section establishing "market dominance" as a test for Commission jurisdiction over railroad rates.

*House amendment.*—Section 204 of the House amendment retains 49 U.S.C. 10709 and adds a new subsection. The new subsection requires the Commission to find that a rail carrier does not have market dominance over the transportation to which a rate applies if that rate is below a revenue to variable cost ratio of:

- 160 percent from the effective date of the Act to September 30, 1981;
- 165 percent from September 30, 1981, to September 30, 1982;
- 170 percent from September 30, 1982, to September 30, 1983;

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175 percent or the "cost recovery percentage", whichever is lower, from September 1, 1983 to September 30, 1984; and the "cost recovery percentage" thereafter, except that the "CRP" may not exceed 180 percent nor be lower than 170 percent.

The House amendment establishes a "cost recovery percentage" which is the revenue to variable level at which the industry is covering its costs as defined in the House amendment. The Commission is required to establish the "cost recovery percentage" annually.

*Conference substitute.*—The Conference substitute adopts the House provision establishing and defining the "cost recovery percentage". It also adopts the House language establishing a jurisdictional threshold of 160 percent increasing 5 percent each year through 1984, when the jurisdictional threshold is 175 percent or the cost recovery percentage, whichever is lower. After September 30, 1984, the jurisdictional threshold is the cost recovery percentage, but it may not be lower than 170 percent or higher than 180 percent.

The Conferees have adopted the concept of a jurisdictional level that varies according to the performance of the railroad industry. When the industry is earning revenues which are adequate, it is appropriate for the Commission to have the authority to review rate increases more carefully.

The Conference substitute incorporates a provision which allows a carrier to use present Rail Form A, with adjustments specified by the Commission as appropriate for the type of traffic involved, or its successor as the basis for determining the revenue to variable cost ratio of a rate. The burden is on the carrier to establish on such a basis that the rate is below the jurisdictional level, and the complainant may rebut the showing of the revenue to variable cost ratio according to the Commission formula by evidence of such type and under such burden of proof as the Commission shall prescribe. By such a showing the complainant or the railway may demonstrate that the revenue to variable cost ratio is different than the one established under adjusted Rail Form A or its successor.

The Conferees do not intend that the Commission alter the jurisdictional threshold by reducing the items which will be considered as part of the variable cost.

The Conferees have adopted a jurisdictional threshold which will deny the Commission jurisdiction over rates which the Commission reviews under present law. The reduction in Commission jurisdiction is adopted because the conferees believe that competition

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should be the determining factor in railroad rates wherever possible. The railroads' share of intercity freight traffic has decreased dramatically in the past three decades, to the point where most freight traffic can be transported by another mode and is subject to competition.

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SECTION 203—ZONE OF RATE FLEXIBILITY

*Senate bill.*—The Senate bill establishes procedures and standards for determining a "base rate" and an "adjusted base rate" for purposes of computing rate increases. Carriers are allowed to recover inflation quarterly on individual rates up to the level of the adjusted base rate without challenge.

To determine the adjusted base rate the Commission must publish quarterly a rail cost adjustment factor, which uses an Index of Railroad Costs to keep rates equal with inflation.

The Senate bill allows a rail carrier to increase a rate by an amount not exceeding 5 percent of the adjusted base rate, subject to the restriction that the increase over 5 years under this section not exceed 14 percent. The Commission is not allowed to suspend any rate increase within this 5 percent zone, and it may investigate such increase only if it exceeds a revenue to variable cost ratio established by the Commission or if the carrier or carriers proposing the rate increase have achieved an adequate revenue level. Even a rate increase within the 5 percent zone is subject to challenge on complaint, with the burden of proof on the shipper.

If the Commission decides not to investigate a rate within the 5 percent zone, it must set forth its reasons for not doing so, after giving consideration to three factors—the amount of traffic transported below variable cost, the amount of traffic which contributes only marginally to fixed cost and the extent to which such rates can be changed, and the impact of the proposed rate increase on national energy goals, taking into account the railroads' role as a primary source of transportation and the need for a sound rail transportation system.

The Commission shall consider, among other factors, when determining the reasonableness of a rate, the amount of traffic which is transported below variable costs, the amount of traffic which contributes only marginally to fixed costs and the extent to which such rates can be changed, and the carrier's mix of rail traffic to determine whether one commodity is paying a disproportionate share of the carrier's overall revenues.

The Senate bill allows the Commission to investigate a rate even if it is within the 5 percent zone if such a rate is proposed by a carrier or carriers with adequate revenues.

*House amendment.*—The House amendment establishes a base rate for purposes of rate increases, and an adjusted base rate to account for inflation. It also provides for a 6 percent zone for each of the four years after the date of enactment, and a 4 percent zone for carriers without adequate revenue for each succeeding year.

The House amendment does not permit a suspension or investigation of rate increases within the 6 percent or 4 percent zones, if the resulting rate is less than 190 percent or revenue to variable cost or 20 percentage points above the jurisdictional threshold, whichever is lower. It also prohibits the Commission from using

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rules, classifications, or practice changes to limit rates. It includes a provision that limits the allowable rate on coal movements fitting a particular description.

*Conference substitute.*—The conference substitute adopts parts of the Senate bill and parts of the House amendment. It establishes the base rate as the rate in effect on the effective date of the Act. The "adjusted base rate" is computed quarterly by means of a "rail cost adjustment factor", as contained in the Senate bill.

A carrier is allowed to change a rate to conform to the "adjusted base rate" at any time without challenge. A carrier may not receive a rate increase under the adjusted base rate method if the carrier has received an inflation increase through general rate increases or the inflation index thereby already assuring that the rate reflects inflation.

The language of subsection (b) makes it clear that rate increases which do not exceed the adjusted base rate may not be found by the Commission to exceed a maximum reasonable level. The reference to rate increases under subsections (c) and (d) of this section is not intended to suggest that increases under those subsections are presumed to be reasonable. The reasonableness of such rate increases shall be determined under the same standards of maximum reasonableness applicable to any other rate or rate increase.

The conference substitute adopts the 6 percent zone contained in the House amendment. A carrier is free to increase any rate by 6 percent of the adjusted base rate.

During the four year period after the effective date of the Act, the total increase allowed under this section is limited to 118 percent of the adjusted base rate. If a carrier does not take all or a portion of a rate increase in a year, the carrier may take that portion in the next succeeding year.

If a carrier chooses not to take some portion of the maximum 14 percent increase during the first four years, the carrier may take that portion in the next 2 succeeding years, except that the rate increase allowed under this section is limited to 10 percent for each of those years.

The 6 percent zone does not establish a limit for allowable rate increases by the Commission. If the Commission finds further rate increases do not exceed a reasonable maximum, it may allow such rate increases under the normal standards and procedures of the Act. The 6 percent zone is established as a procedural mechanism for carriers to change rates without undue regulatory interference. The Conferees believe that the best regulator is the marketplace, and the forces of competition will restrain railroad rates more effectively than federal regulation.

The Conference substitute requires the Commission, when considering a rate increase within the 6 percent zone and below the point 20 percentage points higher than the jurisdictional level or 190 percent of revenue to variable cost, whichever is lower, to give due consideration to whether a carrier proposing a rate increase has attained adequate revenues, giving regard to preventing a carrier with adequate revenues from realizing excessive profits on the traffic involved and also the policy of bringing to an adequate level the revenues of carriers not having an adequate revenue level. This provision is intended to apply only for the four years that the 6 percent zone applies, and only to those rate increases which are

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within the 6 percent zone and below the point 20 points higher than the jurisdictional level or 190 percent of revenue to variable cost, whichever is lower.

The Conferees intend that the Commission give regard to two things, whether a rate increase would mean excessive profits, and the need for a rate increase in light of the carrier's revenue position taking into account the policy of this Act that inadequate revenue carriers make adequate revenues. This language is not intended to imply that excessive profits for inadequate revenue carriers are reasonable.

The Conferees understand that the Commission presently considers the adequacy of revenues in its determination of reasonableness, and the Conferees intend that the Commission continue to consider the adequacy of revenues in its determination of reasonableness. The Conferees intend that the Commission continue to look carefully at the adequacy of a rail carrier's revenues when considering whether a rate is reasonable and to consider all the other factors which it presently considers in determining reasonableness.

The Conference substitute adopts the 4 percent zone from the House amendment. A 4 percent zone is established free from suspension, and free from investigation if the resulting rate is below 190 percent or 20 percentage points above the jurisdictional threshold, whichever is lower. A carrier is allowed 4 percent of the existing rate as an increase without undue regulatory interference.

This zone is limited to carriers without adequate revenues. Carriers with adequate revenues are not allowed this 4 percent zone on single line rates, and are not allowed the zone on joint line rates unless the Commission determines in its rulemaking under this provision that it cannot establish rules preventing rail carriers with adequate revenues from taking advantage of the 4 percent zone without denying the zone to carriers without adequate revenues. The conferees expect the Commission to establish the rules for determining how the 4 percent zone is to be applied in conformity with the policy of this Act, which is designed to provide increased regulatory freedom and to allow carriers to earn adequate revenues.

Neither the 4 percent or the 6 percent zone is intended to create any presumption about the rate increases beyond the zone. The Conference substitute states unequivocally that a rate increase beyond the zone establishes no presumption of market dominance or reasonableness.

The Conference substitute adopts the House amendment which establishes the point at which the Commission may investigate a rate increase within the 6 percent or 4 percent zones. The point is 20 percentage points above the jurisdictional threshold or 190 percent of revenue to variable cost, whichever is lower. For example in the first year the jurisdictional threshold is 160 percent, and the point at which the Commission may investigate is 180 percent.

The Conference substitute adopts the Senate provision which requires the commission to set forth its reason for not reviewing a rate increase or new rate. The Commission shall give due consideration, in its decision whether or not to investigate, to the following factors:

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1. the amount of traffic which is transported below going concern value, and efforts made to minimize such traffic;
2. the amount of traffic which contributes only marginally to fixed costs; and
3. the impact of the proposed rate increase on the attainment of the national energy goals and the rail transportation policy of this Act, taking into account the railroads' role as a primary source of energy transportation and the need for adequate revenues to achieve a sound rail system.

The Conferees have used the term "going concern value" in the first consideration in place of "variable cost" to eliminate any confusion about what is intended. Railroads should not be carrying traffic which is losing money but in a competitive environment railroads should be attracting whatever traffic they can at the lowest rates that will attract the traffic. There should be no incentive to prevent such pricing, which is to the advantage of the shipper and the consumer.

The Conferees have added to the third consideration the rail transportation policy of this Act. The national energy goals, which include a reduction of dependence on foreign energy sources and the encouragement of fuel efficient forms of transportation within the United States, are compatible with the transportation policy of this Act. To reduce dependence on foreign energy sources this country must stimulate utilization of its abundant, indigenous coal reserves. For coal to be a viable alternative, we must have a sound rail transportation system capable of handling such coal efficiently and economically. At a minimum the rail system will need to invest over \$5 billion over the next 4 years to maintain a system adequate for increased coal use. Without such an investment the national energy policy of decreasing reliance on foreign energy sources will never be achieved.

Decisions whether to investigate a rate are not presently reviewable in court. The conferees intend, and the Act specifically states, that a decision whether or not to investigate remains not reviewable.

The Conference substitute adopts the language of the Senate bill specifying three factors among those already considered by the Commission which the Commission must consider in determining the reasonableness of a rate, with changes. As in the previous section the term "going concern value" is substituted for "variable costs". In the third consideration, the word "disproportionate" is changed to "unreasonable". It requires the Commission to consider evidence of the factors listed.

The Conference substitute adopts the House provision limiting coal rates which meet a specific description. This provision deals with the celebrated and extended dispute over the freight rate for rail transportation of coal to a municipally owned utility in San Antonio, Texas. This utility decided voluntarily in 1973, prior to the oil embargo, and prior to any legislative requirements concerning use of alternate fuels, to convert an oil/gas unit when on order to coal and to build this and an additional unit on an accelerated basis, resulting in the displacement of oil and gas equivalent to more than 50 billion cubic feet of gas on an annual basis. Unfortunately the appropriate rate for the transportation of coal to these new plants has been the subject of dispute and protracted litigation.

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tion. Due to the unique circumstances of the San Antonio situation, this provision imposes certain short term limitations on the rate level for the San Antonio coal movement. The purpose of this provision is not punitive and the rate specified for such a coal movement shall have no effect on any decision of the Commission or a court, and evidence of the rate or this section shall be inadmissible in any proceeding.

The Conference substitute adopts the House provision. New section 10709(h) makes it clear that the Commission may not use any of its residual powers to regulate rates, rules, classifications, and practices as tools to interfere with the rate freedom provided by the Staggers Rail Act. The Conferees intend that a practical rule or classification which has the effect of resulting in an increased rate for transportation shall not be found unreasonable unless, in the absence of its effect on rate levels, it would itself be unreasonable.

### SECTION 204—TRANSPORTATION OF RECYCLABLE MATERIALS

*Senate bill.*—The Senate bill requires that rates for recyclable or recycled materials be no higher than the average revenue to variable cost ratio of all rates for railroad transportation. Any rate which exceeds that threshold shall not be subject to bear further rate increases.

*House amendment.*—No provision.

*Conference substitute.*—The Conference substitute adopts the Senate bill with certain changes. The substitute excludes recyclable or recycled iron and steel from this provision. Rates which are currently above the threshold would be prohibited from increases until such time as the rate falls below the average revenue to variable cost threshold. The standard for establishing the average revenue to variable cost threshold is the standard used in the Senate bill.

### SECTION 205—RATE REGULATION PROCEEDINGS; ADEQUATE REVENUES

*Senate bill.*—The Senate bill required the Commission to submit to Congress, within one year after the enactment of the act, a study on the desirability of using return-on-investment as a threshold standard for jurisdiction over the reasonableness of rail carrier rates. The Commission was also required to submit a report to the Congress every three years which analyzed the revenue needs of carriers and made appropriate recommendations.

*House amendment.*—The House amendment requires the Commission to commence and conclude within 230 days of enactment a proceeding to determine whether, and to what extent, product competition should be considered in determining the reasonableness of rail carrier rates. For purposes of only this proceeding, product competition is defined in the amendment. This definition is not intended to be taken into account in any other Commission or court proceeding dealing with competition from alternative sources or types of commodities. The amendment provides that on the basis of the study the Commission may find that in determining the reasonableness of a rate, product competition should be given the same or greater weight than in current proceedings or proof of product competition should be given greater or conclusive weight.

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The section is not to be construed as requiring any change in the Commission's present standards concerning reasonableness and is not to influence in any way the meaning of market dominance.

The House amendment also requires the Commission to submit to Congress within three years of the effective date of the Act recommendations as to the threshold level for Commission jurisdiction over the reasonableness of a proposed rail carrier rate.

The House amendment also requires the Commission within 180 days after the effective date of the Act to establish standards for determining what constitutes adequate revenues under section 10704 of the Act and to report to the Congress, within 180 days after the effective date and annually thereafter, which carriers were earning adequate revenues.

The House amendment makes the rail carrier rate level resulting from any case pending in any Federal court on July 22, 1980, the base rate for purposes of determining permissible rate increases.

*Conference substitute.*—The Conference substitute adopts the provision from the House amendment requiring the Commission to initiate a proceeding within 230 days of the effective date of the Act to determine whether and to what extent, product competition should be considered in determining the reasonableness of rail carrier rates. The substitute amends the House amendment to underscore the fact that the ICC proceeding shall not be evidence in a Commission or court proceeding regarding the scope of the market dominance concept.

The Conferees intend to exclude from any rule adopted under this subsection existing supply contracts, or for two years, whichever is less. The Conferees also intend that the Commission, in its rule-making, look at the existence of long-term contracts in determining how to apply product competition. Product competition means the availability to a consignee at a competitive delivered cost and in sufficient quantities of products or commodities which are of the same type as the commodity or product to which the rate applies without regard to whether such products or commodities are available from the same or a different origin as those to which a rate applies. An example of where product competition does not exist is a situation in which a particular automobile company manufactures bumpers at Plant A and ships them to its Plant B for assembly because it cannot use another automobile company's bumpers.

The Conference substitute amends existing Section 10704(a)(2) of Title 49 clarifying that the Commission has the authority to revise its standards and procedures for determining revenue adequacy as necessary; by directing the Commission to conclude a proceeding under Section 10704(a)(2) within 180 days after the effective date of the Act; and on the basis of standards and procedures under Section 10704(a)(2) to determine which rail carriers have adequate revenues within 180 days of the effective date of the Act and on an annual basis thereafter.

### SECTION 206—INFLATION-BASED INCREASES

*Senate bill.*—The Senate bill provides a free zone for the recovery of inflationary cost increases.

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*House amendment.*—The House amendment allows the Commission to establish a percentage rate increase or rate index for rail carriers in order to compensate for inflation. Such percentage increase or index may be applied carrier by carrier or industry wide. The percentage rate index allows the Commission to establish a range within which carriers may increase rates differently for different commodities, but recovering no more than total inflation.

*Conference substitute.*—The Conference substitute provides that the Commission may establish a percentage rate increase or index to allow carriers to cover inflation. Such an index or percentage may not be necessary, since carriers will be free to recover inflation on individual rates without challenge. In the event that carriers find they are unable to keep up with inflation, and the Commission believes that it must prescribe a general mechanism to allow carriers to cover inflation, this percentage increase or index is allowed. The provision makes specific reference to the policy section of the Act which discourages the automatic pass-through of inflation through increases of general applicability.

Under this provision, the Commission is allowed to establish a range of permissible increases, and the carriers may take increases within that range. The total increase in revenue may not account for more than is necessary to cover the total of inflationary cost increases.

### SECTION 207—INVESTIGATION AND SUSPENSION OF RATES

*Senate bill.*—The Senate bill requires the Commission to complete a proceeding when a suspension has occurred within five months, unless it reports to the Congress that it is unable to do so, in which case it may take an additional three months.

*House amendment.*—The House amendment requires the Commission to act within five months if a suspension has occurred, and provides an additional 3 months if the Commission reports to the Congress that it is necessary. The House amendment also revises the standards under which the Commission may suspend a rate by adding the word "substantially" to the requirement that the Commission find that it is likely that the complainant will prevail on the merits and by adding a new standard which requires the Commission to find that because of the peculiar economic circumstances of the protestant, he is not protected by the refund provisions. The burden is on the protestant to prove that the standards are met.

The House amendment also provides for an accounting and refunds to shippers where a proposed rate increase is suspended, and to rail carriers if the proposed rate increase is suspended and later found to be reasonable.

*Conference substitute.*—The Conference substitute adopts the House amendment with a modification with respect to refunds. The substitute makes suspension more difficult.

### SECTION 208—CONTRACTS

*Senate bill.*—The Senate provision clarifies the status of contract rate and service agreements in an effort to encourage carriers and purchasers of rail service to make widespread use of such agree-

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ments. In addressing concerns of small shippers the Senate provision also limited the percentage of equipment a rail carrier could dedicate to contract service. This limitation was designed to insure that the carriers always had sufficient equipment to meet common carrier obligations. The Senate bill limits the number of cars a carrier can dedicate to contract service to 35 percent of the carriers' capacity by major car type. A further limitation was imposed on large shippers, again to protect the small shippers' ability to obtain sufficient cars, with respect to contracts between Class 1 carriers and shippers which originate an average of 1,000 cars or more per year by major car type during any preceding three-year period, nor more than 40 percent of that coverage could be used for contracts. The remainder of the shipper's car needs would be supplied by the carrier under the common carrier obligation as with all other non-contracting shippers. The smaller shippers, i.e., one who originates less than 1,000 cars per year (based on a 3 year average prior to the contracting period) could contract for 100 percent of the shipper's needs.

Further, the Commission may order a carrier to provide rates and services similar to those in any contract which it finds the carrier did not make available to a similarly situated shipper.

*House amendment.*—The House amendment permits carriers to enter into contracts with shippers. Once approved, a contract is not subject to challenge.

First, carriers may enter into contracts filed with the Commission (along with summaries to be made public) unless the Commission finds that the contract unduly impairs the ability of the carrier to fulfill its common carrier obligation to a complainant, unreasonably discriminates against a port or, in the case of agricultural commodities, the carrier has unreasonably discriminated the complainant a similar contract under similar conditions or the contract constitutes a destructive competitive practice.

Second, the Commission may begin an investigation within 30 days of the filing of a contract on its own motion or on complaint. The Commission has 30 days following the initiation of a proceeding to approve the contract. If the Commission fails to act, then the contract is approved.

Third, if the Commission determines that a carrier has refused to provide an agricultural shipper with a similar contract, the Commission may order the carrier to enter into such a contract with appropriate adjustments.

Fourth, once a contract has been approved by the Commission, the Commission may not require violation of the contract except to require compliance under the Commission or any court under the provisions of this subtitle. The exclusive remedy for breach of a contract entered into under this section is an action in a State or U.S. district court, unless the parties otherwise agree.

Fifth, during the first three years after passage of the Act, a carrier may enter into contracts for the transportation of agricultural commodities involving the utilization of carrier-owned or leased equipment not in excess of 35 percent of the capacity of such carriers' owned or leased equipment by major car type, except with respect to a contract with a shipper of over 1,000 cars or more per year for the prior three years in which case the carrier may con-

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tract for more than 40 percent of the average equipment utilized in the three year period. The Commission may raise these limits.

*Conference substitute.*—The conference substitute adopts the Senate amendment with several changes. The percentage of limitation on cars for contracts for agricultural commodities, is expanded to include forest products and paper and is not limited to three years after passage of the Act. However, the Commission, as well as any other party, may initiate a proceeding to modify this percentage limitation. Unreasonable discrimination with respect to agricultural, forest product or paper shippers is defined for purposes of this section as that term is used in section 10741 of the Interstate Commerce Act. A similar provision with respect to ports from the House amendment is retained. The conferees stress that the establishment of contract rates is a significant aspect of the new freedom allowed to carriers to market rail transportation more effectively. Therefore, the grounds for approving contracts have been intentionally limited.

The provision establishes a separate class of rail service and thereby makes carriers entering into such contracts both common carriers and contract carriers. Once a contract is approved by the Commission or goes into effect because the Commission has not acted within the specified time limits, the service provided under the contract is exempt, subject to the specific limitation of section 11128, from all regulation and all of the requirements of the Interstate Commerce Act. However, the Commission is given the specific authority to limit the right of a rail carrier to enter into future contracts if it determines that such additional contracts will impair the ability of the rail carrier to fulfill its common carrier obligations under Section 11101 of the Act. Once contracts are approved under this section, they are to be enforced in the courts and not at the Commission.

Shippers who do not elect to enter into contracts, or are unable to do so, are assured that carriers will have the same common carrier obligations as in existing law. The percentage limitation on equipment for agricultural commodities, forest products and paper result from problems experienced in providing adequate numbers of cars for the shipment of these products and are intended to ensure that a carrier can meet its common carrier obligations. These limits are to apply to any type of car which could practically be used for shipping agricultural commodities, forest products or paper. However, they are not intended in any way to imply a limit on a carrier's ability to contract with respect to other types of equipment.

While the Conferees intend to encourage shippers to contract they recognize the difficulty that small shippers may have in negotiating contracts, and therefore, the Conference substitute adopts the Senate provision establishing a railroad contract rate advisory service. The Conference substitute also includes the Senate provision which gives the Commission the ability to order a carrier to provide rates and services similar to those in any contract which it finds the carriers did not make available to similarly situated agricultural shippers. Finally, the Conference substitute includes a provision which allows agricultural shippers to challenge a contract on the grounds that the proposed contract constitutes a destructive competitive practice. It should be noted that these provisions were

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included in recognition of the fact that smaller shippers are particularly concerned about the market power of their larger competitors once the contract rate provisions are put into effect. It is the intention of the Conferees that the Commission carefully review this aspect of the competitive situation in approving contracts.

The existing Federal antitrust laws apply to this section.

### SECTION 209—DEMAND SENSITIVE RATES

*Senate bill.*—The Senate bill amends 49 U.S.C. 10727 to provide for the filing of a demand-sensitive tariff in response to explicit or anticipated fluctuations in demand for rail services. The tariff would apply to a specific commodity and would include a maximum and minimum rate, subject to maximum and minimum rate regulation. The Senate bill specifically excluded grain from this provision.

*House amendment.*—The House amendment repealed 49 U.S.C. 10727 because of the concerns raised by agriculture interest groups about the way demand-sensitive tariffs had been implemented. The provision was originally included in the Act to provide greater car utilization by encouraging rail shippers to ship in off-peak, low demand periods. The repeal of the demand-sensitive tariff authority should not be construed by the Commission as a resolution of the car utilization problems. The Commission has other ways to abate the serious problem of the declining car utilization in the rail industry.

*Conference substitute.*—The Conference substitute adopts the House provision. The conferees direct the Commission to explore alternative methods of improving car utilization and making railroad prices and services more responsive to market conditions instead of artificial regulatory restraints. However, the Commission is on specific notice not to contravene the policy set out by Congress which is clearly to prevent demand-sensitive rates by any means to apply to agricultural commodities.

A letter from Chairman Gaskins on the Commission's existing authority in this area is attached as an appendix.

### SECTION 210—PHASEOUT OF CAPITAL INCENTIVE RATES

*Senate bill.*—The Senate bill repealed 49 U.S.C. 10729, which provides that if a capital incentive rate is approved by the Commission, such rate not be found unreasonable or discriminatory for 5 years. A capital incentive rate is based on an investment by a shipper, railroad or interested third party of \$1 million or more in rail-related equipment or facilities. The intent of this provision was to encourage the negotiation of rates reflecting individualized and innovative service and to create stability which would promote large investments. Regulatory complexities and ambiguities have frustrated the intent of this section. Moreover, the explicit authorization of contracts makes this section unnecessary. Capital incentive rates filed not less than 90 days before the date of enactment would not become effective, but rates filed before that date remain effective subject to the 5-year limitation.

*House amendment.*—The House amendment repeals the capital incentive rate provision, but preserves all capital incentive rates

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from challenging as unreasonable or discriminatory if filed prior to the effective date of this Act, subject to the 5-year limitation from the date the rate became effective, unless the parties otherwise agree. The Commission may, during the period the rate is in effect, order the rate revised to a level equal to the incremental cost of providing the transportation, if the Commission finds that the rate level in effect reduces the going concern value of the rail carrier.

*Conference substitute.*—The Conference substitute adopts the House amendment.

### SECTION 211—PERMISSIVE LIMITED LIABILITY

*Senate bill.*—The Senate bill amends 49 U.S.C. 10730 with respect to released rates. Under existing law, the Commission is authorized to permit released rates in cases where rates based on a declared or released value would be just and reasonable under the circumstances surrounding the transportation. Under this section, no carrier may publish rates based on the declared or agreed value without specific authority from the Commission.

Under the Senate bill, rail carriers may establish released value rates subject to the provisions and procedures set forth in chapter 107. The effect of this change is to authorize the filing of such rates without prior Commission authorization. In many instances, shippers have the resources to obtain insurance at a reasonable price and to bear at least a portion of the risk of lost damaged cargo. Carriers and shippers should be allowed to agree on a fair rate which explicitly takes into account the risk of loss or damage.

Rail carriers should be able to negotiate for the type of service required and the rate to be paid for that service. It is with that purpose in mind that this subsection has been added to section 10730—to permit the establishment of released rates as an additional option available to shippers and rail carriers. Full value rates will of course continue in effect for the use of those shippers and receivers which choose not to utilize released rates established and filed under this provision or agree to other terms as part of a contract for services.

*House amendment.*—The House amendment provides that rail carriers may establish rates for the transportation of property under which the liability of the carrier for such property is limited to a value established by a written declaration of the shippers or by a written agreement between the shipper and carrier, and such agreement may provide for a specified deductible for any claim against the carrier for loss or damage to the property or delay in the transportation of such property. The ability to use released rates including the deductible in an agreement, gives both the shipper and carrier greater flexibility with respect to negotiation of rates without harassment and delay at the Commission.

The House amendment changes provisions of the Carmack Amendment, 49 U.S.C. 11707 concerning the availability of special damages, comparative negligence standards for liability and the time period when claims must be filed with the carrier and where actions must be instituted against a carrier under the Carmack Amendment.

*Conference substitute.*—The Conference substitute adopts the House provision with respect to released rates, including deducti-

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bles, but drops the references to the Carmack Amendment, except for venue provisions. It adds a study with respect to the need for the Carmack Amendment. At the insistence of several shipper groups, explicit statutory language prohibiting special damages was eliminated because special damages are not permitted under the Carmack Amendment.

A provision regarding the changing of the existing case law that makes the railroad almost strictly liable, unless it can establish that it was neither negligent nor not liable under certain recognized absolute defenses, was dropped and has been included in the study. While the study is being completed, carriers are not prohibited from arguing to the courts that the Carmack Amendment was intended to modify common law standards and therefore, a comparative negligence standard ought to be adopted.

The Conference substitute adopts the House amendment with respect to changes in venue for Carmack Amendment cases. Hereafter, cases may only be brought in the court having jurisdiction over the originating carrier's point of origin, against the delivering carrier in a court at the principal place of business of the person entitled to recover against the carrier or having jurisdiction over the point of destination, or against an originating, intermediate or delivering carrier in a court having jurisdiction over the point where the loss or damage is alleged to have occurred. Because existing law permits an action wherever the carrier operates, venue is virtually uncontrollable and frequently, inconvenient.

The Carmack Amendment was enacted at a different time with different factors affecting rail carriers. Among other issues, the studies should examine whether special damages are being recovered from rail carriers, and, whether a rail carrier ought to be responsible for such damages in the absence of a clear showing, by written agreement, that the carrier was made aware of certain foreseeable risks and had an opportunity to make appropriate arrangements.

Similarly, the studies should consider whether it makes sense in 1980 to hold a carrier liable for 100 percent of the damages even if the carrier was only 10 percent at fault. Current law makes a carrier totally liable unless the carrier can show that it was completely free from fault and that the shipper's negligence was the sole cause of the damages. The study should consider whether it is appropriate to follow the recent trend among the states to adopt comparative negligence standards, requiring each party to bear the costs of its own negligence. More than a majority of states have departed from prior law making liability an all or nothing alternative. The study should determine whether similar policy goals would require similar legislation with respect to common carrier obligations.

The studies should also address other issues raised by the Carmack Act, including the recovery of attorneys' fees, appropriate time limits, the feasibility of a "no-fault" system, and proper venue requirements.

### SECTION 212—RATE DISCRIMINATION

*Senate bill.*—No provision.

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*House amendment.*—The House amendment amends section 10741 to state that differences between rates, rules, or practices which result from different services do not constitute a violation of this section. The amendment specifically exempts surcharges, approved contracts, separate rates for distinct services under 10728, rail rates applicable to different routes and customer solicitation expenses from being challenged as discriminatory. The Commission retains its existing authority to regulate rate relationships between and within ports.

*Conference substitute.*—The Conference substitute adopts the House amendment. The Conference substitute will help ensure that, with the exception of the right of ports to complain of unjust discrimination between and within ports and the special remedies provided for certain unjustly discriminatory contracts in new section 10733, claims of unjust discrimination may not be used to hamper the development of sound economic rate and service relationships. The conferees also expect the Commission to exercise its remaining power under section 10741 only where it is needed to prevent abuses of market power where discrimination cannot be justified by differences in demand for services or costs.

The conferees intend that the reference to separate rates or distinct rail services in this section shall not affect the *Wichita* doctrine.

### SECTION 213—EXEMPTIONS

*Senate bill.*—The Senate bill amended section 10505 to provide that, where any provision of the Interstate Commerce Act is not needed to protect shippers from the abuse of market power, the "limited scope" restriction in the original section 10505 would not apply. The Senate bill also removed the requirement that a proceeding be held in all cases before an exemption is granted.

The Senate bill requires the Commission to provide an exemption from regulation when it finds that regulation is not necessary to carry out the transportation policy and the transportation or service is either of limited scope or regulation is not needed to protect shippers from the abuse of market power. The Commission may not issue an exemption which will substantially lessen competition and coordination between water and rail carriers. No exemption order shall operate to relieve railroads of their common carrier liability for claims under 49 U.S.C. 11707.

*House amendment.*—The House amendment amends section 10505 of the Interstate Commerce Act and provides that the Commission shall exempt a person or transaction from one or more provisions of the Act where it is not necessary to carry out the rail transportation policy and where (1) the transportation or service is of a limited scope or (2) the application of a provision is not needed to protect shippers or receivers where there is an absence of effective competition or (3) where there is effective competition. The House bill, like the Senate bill, removed the requirement that a proceeding be held in all cases. The Commission is charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the section's standards.

The amendment places certain limits on the Commission's authority to grant exemptions. First, section 10505(e) provides con-

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tractual terms for liability and claims consistent with section 11707. This limitation does not affect the ability of a carrier to offer alternative terms nor give the Commission the authority to require either any specific level of rates or services based on Section 11707, nor does it require the filing of those terms with the Commission. Second, the exemption authority may not be used to relieve a carrier of its obligation to protect the interests of employees. Third, under section 10505(f) the exemption authority may not be used to authorize intermodal ownership otherwise prohibited by this title.

*Conference substitute.*—The Conference substitute combines the Senate and House provisions. The bill permits exemptions wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition. The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemptions from remaining regulation. The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. Particularly, the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.

For these reasons we also expect that except to the extent necessary to comply with subsections (e) and (g) of section 10505 of title 49 U.S.C. as amended by the Staggers Rail Act of 1980, an exemption order issued by the Commission prior to the effective date of the Staggers Rail Act of 1980 shall remain in full force and effect unless revoked pursuant to subsection (d) of section 10505 of title 49 U.S.C. as amended.

### SECTION 214—INTRASTATE RATES

*Senate bill.*—The Senate bill amends section 11501 to reaffirm both that the Commission's power in this area is only as otherwise authorized by this title and that the States' power cannot conflict with the Federal regulatory scheme.

First, it amends section 11501 to limit the Commission's authority to prescribe a rate or effect other action which is inconsistent with its rate regulatory authority as limited by the act.

Second, it reaffirms that where the Commission has withdrawn its jurisdiction to regulate, the State could not assume such jurisdiction.

Third, it provides that to the extent States do have jurisdiction, they are to regulate in accordance with the transportation policies set forth in the act.

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Finally, it shortens the time in which a failure by the State to act on an intrastate rate allows Commission action.

*House amendment.*—The House amendment amends sections 11501, 10103, and 10501 of the Interstate Commerce Act by exempting rail carriers from the provisions of section 11501(a) and by adding provisions making the Commission's and certified States' jurisdiction over intrastate and interstate rail carrier rates, classifications, rules and practices and the remedies provided by the Act exclusive.

First, it amends section 11501(a) of the Interstate Commerce Act to exempt rail carriers from present provisions for Commission jurisdiction over intrastate carriers.

Second, it amends section 11501 by adding new provisions which provide that only State authorities whose standards and procedures have been certified by the Commission may exercise jurisdiction over intrastate rail rates, classifications, rules and practices. Intrastate rail transportation not subject to the jurisdiction of a certified State authority is subject to the jurisdiction of the Commission. In no event may a State authority exercise jurisdiction over general rate or inflation-based rate increases. Decisions of State authorities may be appealed to the Commission if not in accordance with this subtitle.

Third, it amends section 10103(a) to make explicit that where the Interstate Commerce Act provides an exclusive remedy, such remedy is not in addition to remedies under another law or at common law.

Finally, it amends section 10501 by adding a new paragraph providing that the jurisdiction of the Commission and of certified State authorities over rail transportation, as well as the remedies provided with respect to rail rates, classifications, rules and practices are exclusive.

*Conference substitute.*—The Conference substitute adopts the House amendment, except that the Commission's power to adjust intrastate rates is retained in the event that actions by certified states impose a burden on intrastate commerce. The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules and practices. States may only regulate in these areas if they are certified under the procedures of this section.

The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.

### SECTION 215—BUSINESS ENTERTAINMENT EXPENSES

*Senate bill.*—No provision.

*House amendment.*—The House amendment adds a new section 10751 to subchapter 111 of chapter 107 of title 49 U.S.C. to provide that business solicitation or entertainment expenses incurred by

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rail carriers do not constitute illegal rebates or discrimination, if these expenses would be legal when incurred by a non-Commission regulated entity. The House amendment treats rail carriers in a similar manner as other businesses.

To discourage excessive solicitation or entertainment expenses, these expenses are not to be taken into account in determining the cost of service or the rate base for rate regulation purposes.

The Commission is directed to institute a rulemaking proceeding to establish standards and guidelines for authorized expenses under this section.

*Conference substitute.*—The Conference substitute follows House amendment. It amends Section 10751 of Title 49 U.S.C., which was added by the Motor Carrier Act of 1980, by striking out "other than transportation by rail". In addition, Subsection (b) of Section 215 makes clear that Section 10751 should be construed so as to include any (permissible) business expense that was incurred prior to the effective date of this Act (other than expenses on which a penalty has been paid) or that is incurred on or after such date.

### SECTION 216—EFFICIENT MARKETING

*Senate bill.*—The Senate bill amends 49 U.S.C. 10762(c)(3) to permit new or increased rates to become effective 20 days after the notice of such rate is published and filed, but delayed the effective date of this change for 60 days. The Senate bill also leaves contracts and demand-sensitive tariffs subject to the provisions of existing law that require that tariffs shall not become effective on less than 30 days notice.

*House amendment.*—The House amendment reduced the period after which tariffs increasing rates can become effective to 10 days and the period after filing tariffs which reduce rates can become effective to 5 days after filing. The House amendment also permits the Commission to reduce the notice period if cause exists. The House amendment establishes a separate filing procedure for contracts in the contract section.

*Conference substitute.*—The Conference substitute permits tariffs increasing rates to become effective upon 20 days notice and tariffs reducing rates to become effective upon 10 days notice. The Conference substitute does not change existing law which permits the effective dates of tariffs to be reduced upon cause shown.

### SECTION 217—JOINT RATES

*Senate bill.*—The Senate bill authorizes a carrier to publish a surcharge without the concurrence of other carriers if the surcharge is applied in equal dollar amounts to all of the routes participated in by that carrier between the same points and if an increase in joint rates, to all of its competing routes between each such origin and destination. The surcharge in revenues shall accrue solely to the carrier applying the surcharge.

The proposing carrier must give 45 days' notice to other carriers party to the joint rate.

A carrier which participates in any route subject to a surcharge may by tariff cancel the application of such surcharge to any route if such carrier demonstrates that, under the applicable joint rate

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without the surcharge or under a new lawful rate or division concurred in by the carrier, the surcharging carrier's revenues for its participation over such route are less than 110 percent of its variable costs.

A carrier may not apply a surcharge unless, for 1 year prior to the surcharge, it has participated in all increases in rates of general applicability agreed to by other parties to the rates.

Only the carrier proposing a surcharge shall be required to defend the surcharge, and the lawfulness of the surcharge shall be determined without regard to the amounts received and the services performed by other carriers party to the joint tariff to which the surcharge is applied.

A rail carrier may, without the concurrence of any connecting rail carrier, publish surcharges applicable to traffic originating or terminating upon any line of railroad originating and terminating less than 3 million gross ton miles of traffic per mile in the most recent calendar year for which traffic data are available if, prior to the application of any such surcharge, the through charges applicable to traffic to and from any such line do not provide the surcharging carrier revenues adequate to cover 100 percent of the reasonably expected costs (including the cost of capital) of continuing to operate the line involved. The change in revenues resulting from any such surcharge shall accrue solely to the carrier applying the surcharge.

A carrier may cancel the application of a joint rate to any through route without the concurrence of any connecting carrier unless another carrier party to the rate over that route demonstrates that the canceling carrier's share of revenue under the canceled rate is not less than 110 percent of the canceling carrier's variable cost of providing service over that route.

The carrier would be required to provide an estimate to class III carriers or other parties upon a showing of good cause in developing necessary data to challenge surcharges. The Commission's Special Council is authorized to assist class III carriers in actions brought under this section.

*House amendment.*—Consistent with the goal of preserving a financially stable, private sector rail system set forth in section 3 of the amendment, section 301 establishes procedures by which rail carriers which do not earn adequate revenues under existing joint rates and divisions can surcharge such rates or cancel their application to particular routes without the concurrence of other carriers. The purpose of this section is to insure that no rail carrier will be compelled to carry goods unless its share of the revenues from the joint rate, including any surcharges, is at least 110 percent of the carrier's variable cost of providing the particular services involved. In addition, for light density lines owned by a single carrier which carry less than 3 million gross ton miles per mile of traffic, this section allows such a carrier to apply surcharges to recover in full its reasonably expected costs of providing services over such lines.

With respect to a particular route to which a surcharge has been applied under subsection (a) or to which the application of a joint rate has been cancelled, section 301 allows connecting carriers who participate in the route or shippers who demonstrate that they have no competitive alternative to the route to respond to provide

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revenues to the surcharging or canceling carrier in excess of 110 percent of that carrier's variable cost. Alternatively, the connecting carrier may agree to a new division or new lawful rate or the carrier or a shipper in an affected route may petition the Commission to establish a new rate which is sufficient to produce revenues equal to 110 percent of the variable cost to the carrier proposing the surcharge or cancellation. Under either alternative, the surcharge would be cancelled or the application of the joint rate continued for that particular route. A surcharge to a light density line may be challenged by a shipper who has no competitive alternative to such line on the basis that the revenues generated exceed the surcharging carrier's reasonably expected costs of providing services over the particular line or that the shipper is bearing an unreasonable proportion of the reasonably expected costs. Special provisions are also included in section 301 to protect class III carriers from unfair competition as a result of action taken by another carrier under this section.

### SECTION-BY-SECTION ANALYSIS

*Section 301.* This section amends chapter 107 of title 49 by adding a new section 10705a which provides standards and procedures for surcharging an existing joint rate or for canceling the application of a joint rate to a particular route to increase revenues for rail carriers earning inadequate revenues from existing joint rates and divisions.

Subsection (a) authorizes a carrier to apply a surcharge increasing or decreasing the joint rate for a particular movement between two points without the concurrence of other parties to the joint rate provided the surcharge is applied in equal dollar amounts to all routes for the movement under the joint rate in which the surcharging carrier participates and, if the surcharge increases the rate, to all single line routes of that carrier between the same points. A connecting carrier may cancel the application of a surcharge to a route in which it participates by demonstrating that the surcharging carrier's revenues over that route without the surcharge exceed 110 percent of the surcharging carrier's variable cost or by putting into effect a new division or a new lawful rate which provides the surcharging carrier 110 percent of its variable cost. In addition, a shipper showing that it has no competitive alternative to that route and a carrier in the affected route, may petition the Commission to cancel the application of a surcharge to a particular route by showing that the surcharging carrier's revenues with the surcharge exceed 110 percent of variable cost. The Commission must then authorize the surcharging carrier to apply a surcharge sufficient to generate revenues equal to 110 percent of the surcharging carrier's variable cost. The right of surcharge may be exercised by a particular carrier only once a year for a particular movement and only if that carrier has participated in all generally applicable rate increases to that joint rate for one year prior to the surcharge.

Subsection (b) authorizes a surcharge applicable to traffic which originates or terminates upon a light density line, owned by a single carrier, which carries less than 3 million gross ton miles of traffic per mile per year. The surcharge may be applied in differ-

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ent amounts to different traffic in order to optimize market relationships if necessary) whenever the revenues under existing rates do not cover 110 percent of the carrier's variable cost of transporting traffic to or from the line plus 100 percent of the carrier's reasonably expected costs (including the cost of capital) of operating the line. A shipper located upon a light density line to which a surcharge is applied may petition the Commission for two kinds of relief: (1) if it is established that the revenues generated by the surcharge exceed 100 percent of the variable cost of transporting traffic to and from the line plus all the reasonably expected costs of continuing to operate the line (including normalized maintenance and the replacement cost of equipment), the Commission may reduce the surcharge to the level needed to generate such revenues; and (2) if it is established that the complaining shipper would, by virtue of the surcharge, bear an unreasonable proportion of the reasonably expected costs of operating the light density line, the Commission may reallocate the surcharge among the traffic originating or terminating upon the line.

Subsection (c) authorizes a carrier to cancel the application of a joint rate to a particular through route subject to that rate. Another carrier participating in that route or the Commission, upon petition of a shipper having no competitive alternative to the route, may prevent the cancellation upon the same demonstration or by putting into effect the same type of new rate or division necessary to cancel a surcharge under subsection (a). When a cancellation is prevented in this manner, the Commission shall consider the cancelling tariff under the provisions of existing law relative to the cancellation of joint rates. If a cancellation becomes effective, the canceling carrier may establish a local or proportional rate for that movement. Any through rate of which that local or proportional rate is a part will divide as the separate factors of the through rate are made and not by prescribed divisions.

No matter when a surcharge or cancellation is challenged under this section, the issue to be decided by the Commission is whether the surcharge or cancellation met the standards of this section at the time it was filed and not at the time it is challenged.

Subsection (d) provides that revenue changes resulting from surcharges shall accrue to the surcharging carrier. Upon demonstration by an intraterritorial connecting class III carrier particularly in a surcharged route, and in the absence of any increase in the joint rate, revenues resulting from a surcharge under subsection (a) in excess of 110 percent of variable cost over that route will be divided with intraterritorial connecting class III carriers in that route on the basis of existing divisions. This section does not apply to revenues resulting from the diversions to a line but only to revenue directly accruing from the surcharge.

Subsection (e) provides that, when a carrier puts into effect a new rate or division in order to prevent a surcharge or cancellation from taking effect over a particular route, other carriers can require similar concessions on other routes under the same joint rate in which they participate, subject to the limitations set forth in this subsection.

Subsections (f) through (h) set forth ancillary provisions with respect to surcharges and cancellations regarding notice, effect upon other sections of title 49, and access to information from the Com-

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mission regarding revenues and variable cost. In particular, subsection (g) provides that, except where specifically provided in this section, the Commission may not remedy a surcharge or cancellation found to violate another section of title 49 in a way which would require a carrier to provide service at less than 110 percent of variable cost for reasonably expected costs in the case of a light density line).

Subsections (i) through (k) set forth special remedial provisions available to class III rail carriers relative to surcharges under subsection (a) or cancellations under subsection (c). These provisions allow aggrieved class III carriers to protest surcharges or cancellations which are alleged to be anticompetitive, which will unduly affect the complaining carrier's ability to earn an adequate rate of return or which create unreasonable differences in existing rates. In these limited circumstances the Commission may order relief which requires a surcharging or canceling carrier to carry traffic at less than 110 percent of variable cost if it determines that such relief is warranted by the public interest in preserving rail service or ensuring competition among rail carriers.

Subsection (l) requires the Commission, upon petition by a participating class II or III rail carrier, to prescribe a new compensatory through rate when the application of a joint rate to a through route is canceled under subsection (c).

Subsection (m) sets forth the method for determining variable cost for purposes of this section.

Subsection (n) provides that the authority to make surcharges under subsection (a) expires three years after the effective date of the Act (unless extended for one additional year by the Commission), but that surcharges made before the date will continue to be lawful.

### SENATE AMENDMENT TO HOUSE AMENDMENT—NO PROVISION

*Conference substitute.*—The Conference substitute adopts the House substitute, with modifications. Today, most of the property transported by rail moves over through routes subject to joint rates, and the revenue derived from these movements is divided among the participating carriers according to divisions generally prescribed by the Commission. The existing joint rates and divisions do not allow some rail carriers to recover even the variable cost of providing transportation services on certain through routes. Under existing law, unless all carriers participating in the joint rate concur, these rates and divisions can be changed only by protracted proceedings before the Commission.

Two of the major problems caused by the existing joint rate system are too low rate divisions and a proliferation of uneconomic routes protected by the archaic "commercial closing" doctrine.

The Conferees intend that the conference substitute will alleviate these problems in part by assuring that a carrier, with a minimum of regulatory interference will be able, by applying surcharges or directly cancelling routes, to either earn revenues over all lines equal to or exceeding 110 percent of unadjusted ICC formula variable costs or to close routes not providing this level of earnings and, in the case of railroads earning less than adequate revenues with lines carrying less than 3 million gross ton miles, to cover all

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the costs of operating those lines. The same holds for railroads earning adequate revenues, except only with respect to lines carrying less than 1 million gross ton miles.

With regard to surcharges on light density lines, the conferees intend that such surcharges may not be imposed in a manner which would require shippers to pay for extraordinary occurrences (i.e. bridge washouts, landslides) in a short period of time. The Commission's proceeding should address this issue.

These provisions are intended to insure these results but they in no way imply an intent on the part of Conferees that a carrier's existing rights under the Act to secure improved earnings over specific routes should be limited. The Conferees recognize that a carrier cannot remain healthy only earning revenues at these levels, but believe that at this time the extraordinary provisions of this section are only needed to attain the revenue levels specified in this section and that existing remedies, assuming the Commission chooses to administer them in order to realize the revenue adequacy goals of the Act, should be adequate to remedy other joint route and division problems.

The key to the success of these provisions will be the ease with which they may be implemented by a surcharging or cancelling carrier. The Conferees intend that the revenue levels guaranteed by this section take precedence wherever possible to competing claims and that only where action is essential to protect vital public interests should the Commission or the Court act to frustrate the implementation of these provisions.

Administrative feasibility is also the reason the conferees have selected formula costs for use under all provisions except where otherwise specified; and the conferees encourage the Commission not to permit cost debates to delay the policy of this Act that carriers earn the full and reasonably expected costs of providing service on lines carrying less than 3 million gross ton miles for revenue inadequate carriers and 1 million gross ton miles for revenue adequate carriers. Only if carriers are able to cover all these costs can they expect to begin to invest to provide the service on which our nation's commerce depends.

In determining which carriers qualify as class III carriers, the Commission shall exclude any revenues not earned from freight operations, specifically excluding revenues from passenger service.

All of the provisions as described in the House amendment are available for class III rail carriers.

### SECTION 218—EXPEDITED DIVISION OF REVENUES PROCEEDINGS

*Senate bill.*—The Senate bill amended section 10705(e)(1) of the Interstate Commerce Act by requiring the Commission to complete all evidentiary proceedings to adjust the division of joint rail rates within nine months if the proceeding is brought on complaint or within 18 months if the proceeding is initiated by the Commission. The Commission is required to take final action by the 180th day after the completion of evidentiary proceedings unless the Commission requires more time in which case it must report its reasons to Congress.

However, when the divisions proceeding involves a railroad re-organization or a contention that the divisions at issue do not cover

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the variable costs of handling the traffic, the Commission must give the proceeding preference over all other proceedings and must take action within the earliest practicable time. In no event may the Commission fail to act more than 100 days after the completion of the evidentiary proceedings.

*House amendment.*—The House amendment is the same as the Senate bill except it exempts division proceedings involving joint rates participated in by class III carriers.

*Conference substitute.*—The Conference substitute adopts the Senate provision, except that for a three-year period the expedited divisions provision shall not apply to class III carriers. The conferees intend that the Commission will modify its regulations governing divisions proceedings to insure that profiling requirements do not frustrate the purpose of the Congress to expedite divisions proceedings as much as possible. The conferees also expect the Commission to examine closely alternative means of dividing revenues among carriers in a manner which might better reflect market conditions than the crude, across the board divisions which now apply regardless of the specific economic conditions of the carriers involved and the markets they serve.

### SECTION 219—RATE BUREAUS

*Senate bill.*—The Senate bill modified some of the activities which a rate bureau may permit its members to engage in if it is to be approved by the Commission.

First, intrastate rates affecting interstate commerce may be set collectively in the same manner as interstate rates.

Second, the extent of carrier discussion of single line rates and interline rates related to a particular interline movement is defined and limited.

Third, sound recordings or transcripts must be kept of bureau proceedings, submitted to the ICC and made available to any other federal agency with jurisdiction.

*House amendment.*—The House amendment modified the activities which a rate bureau may permit its members to engage in if it is to be approved by the Commission and its members are to be immune from the application of the antitrust laws.

First, no carrier may discuss, vote or agree on single line rates proposed by another carrier. The Commission may allow such discussions for general rate increases only if it finds that the implementation of the limitation is not feasible.

Second, no carrier may discuss a joint line rate unless it practically participates in the movement. The term "practically participates" is to be defined by the Commission.

Third, after January 1, 1984, or earlier, if the Commission decides, unless the Commission finds it is not feasible, no carrier may discuss a joint line rate where there are two routes between the same end points, except with a carrier that forms part of a particular single route.

Until January 1, 1983, such carriers may discuss general increases for joint rates and broad tariff charges, if the rate bureau has a special procedure allowing shippers to comment prior to the filing of the tariff with the Commission.

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Fourth, employee protective provisions are provided for rate bureau employees affected by this section.

Fifth, in any proceeding in which an antitrust violation is alleged concerning a rail carrier the party making the allegation shall have the burden of proving the violation by clear and convincing evidence. Proof of the violation may not rest on or be inferred from evidence that two or more carriers acted together with respect to an interline movement and that one of the parties took similar action with respect to a competitive route.

Sixth, transcripts or sound recordings must be kept of bureau meetings and submitted to the ICC and made available to other federal agencies with jurisdiction.

*Conference substitute.*—The Conference substitute adopts the House amendment with modifications. The Commission shall define "practically participate" for determining when a carrier participates in a movement. The Conferees believe that railroads, shippers, and consumers will benefit from increased rail to rail competition, and expect that the Commission will interpret the term in a manner which encourages competition while maintaining a rail system which functions efficiently.

The Conference substitute extends the date by which the Commission must eliminate general rate increases by one year, to January 1, 1984. General rate increases are also limited to inflationary cost increases. Rate bureau discussions are limited to joint movements where carriers have an actual interline movement by January 1, 1984, unless the Commission acts sooner. Car compensation, demurrage, and car allowances are not considered single-line rates.

The Conferees wish to emphasize that nothing in the new law will prevent a carrier from publishing broad territorial rate changes in a tariff.

Because of the requirement that carriers concur in changes to joint rates, carriers must talk to competitors about interline movements in which they interchange. That requirement could falsely lead to conclusions about rate agreements that were lawfully discussed. To prevent such a conclusion the Conference substitute provides procedural protections about lawful discussions and resulting rates. The Conferees intend that these protections be construed to insure that remedies for anti-competitive activities remain under existing laws.

SECTION 220—LONG AND SHORT HAUL TRANSPORTATION

*Senate bill.*—No provision.

*House amendment.*—The House bill amended section 10726 by limiting the provisions of existing law to rates applicable to grains, soybeans, rice or cotton or to situations in which the Commission determines that competition exists between rail and water carriers and the provisions are necessary to prevent anti-competitive behavior. The House amendment also repealed 10726(c) which limited a rail carrier's ability to increase a rate which had been previously decreased to meet water carrier competition.

*Conference substitute.*—The Conference substitute repeals 10726(c). The conferees repealed this subsection in order to encourage flexible and innovative pricing by railroads. The conferees' decision to otherwise retain the existing section 10726 is not to be

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construed to indicate that the Commission is not to take steps consistent with the policy of this act to reduce barriers to market-oriented pricing without the need for prior Commission approval.

SECTION 221—RAILROAD ENTRY

*Senate bill.*—The Senate bill changes existing law to permit easier entry, consistent with the policy of this Act to encourage greater reliance on marketplace forces than on government regulation.

Under present law, the Commission may authorize the construction of a railroad only if it finds that the public convenience and necessity "require or will be enhanced" by the construction. This is a more stringent test than that applied to either the abandonment of rail lines or mergers. There does not appear to be any reason why the Commission should apply a more difficult standard for the construction of new facilities than for the abandonment of old facilities. The Senate bill changes the test applied by the Commission from "require or will be enhanced" to "require or permit".

When a railroad has been issued a certificate of public convenience and necessity by the Commission and where the construction or extension of that line would cross another carrier, it is unclear whether the second railroad could block the construction by refusing to let the first railroad cross another carrier. The Senate bill provides that when a railroad has been issued a certificate of public convenience and necessity, no other railroad may block construction by refusing to let the first railroad cross its property, provided that the construction and operation do not materially interfere with the operation of the second railroad and the owner of the crossing line compensates the owner of the crossed line. If the railroads cannot agree on the terms of compensation, the Commission may establish the compensation.

*House amendment.*—The House amendment changes the standard under 49 U.S.C. 10901 for the construction or extension of a rail line from requiring the Commission to find that the "public convenience and necessity require or will be enhanced" by the construction or acquisition (or both) and the operation of the railroad line to requiring the Commission to find that the "public convenience and necessity permit the construction or acquisition". The House amendment permits one railroad that has been issued a certificate of public convenience and necessity to cross the property of another carrier if the construction does not unreasonably interfere with the operation of the crossed line, the operation does not materially interfere with the operation of the crossed line and the owner of the crossing line compensates the owner of the crossed line. If the carriers are unable to agree to the terms of operation or compensation, either party may submit the matters in dispute to the Commission. The House amendment requires the Commission to impose employee protection under 49 U.S.C. 11347 upon any rail carrier proposing to both construct and operate a new railroad line. If a rail carrier rearranges or adjusts its work force in anticipation of a transaction with the purpose of depriving an employee of benefits under this title, the provisions of this title apply to such employee.

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*Conference substitute.*—The Conference substitute adopts the House amendment, but makes employee protection discretionary and drops the provision regarding deprivation of employee benefits in anticipation of a transaction. The Commission does not have authority over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team switching, or sidetracks, if the tracks are located, or intended to be located, entirely in one state (49 U.S.C. 10907). The Committee does not intend that new subsections added to 49 U.S.C. 10901 shall expand the Commission's jurisdiction. If the construction or extension of a line of railroad would be otherwise exempt under 49 U.S.C. 10901, there should be no reason to obtain a certificate of public convenience and necessity even if the constructing railroad reaches a voluntary agreement to cross another carrier's line. Only if a dispute is submitted to the Commission would there be a need to obtain a certificate of public convenience and necessity. This certificate could be sought at the same time as the dispute is submitted to the Commission. The Conferees wish to emphasize that if a certificate would not otherwise be required under section 10907, the certificate should be issued routinely and that its purpose is (1) to assure Commission jurisdiction under 10901(d) and (2) to assure that the crossing carrier has its right to serve a shipper sanctioned by the Commission.

### SECTION 222—SERVICE DURING PERIODS OF PEAK DEMAND

*Senate bill.*—No provision.

*House amendment.*—The House amendment provides that a rail carrier may not be found to have violated its common-carrier obligation under 49 U.S.C. 11101 to provide transportation or service on reasonable request if it fulfills its commitments under contracts for the shipment of goods before responding to reasonable requests for service.

*Conference substitute.*—The Conference substitute adopts the House amendment. However, this provision does not abrogate the power of the Commission to refuse to approve contracts on the grounds that they will impair a carrier's ability to meet its common carrier obligation.

### SECTION 223—RECIPROCAL SWITCHING

*Senate bill.*—The Senate authorized the Commission to require railroads to enter into reciprocal switching where it finds such agreements to be practicable and in the public interest. In many parts of the country, reciprocal switching agreements are in effect where carriers pick up and deliver traffic for other railroads. In areas where reciprocal switching is feasible, it provides an avenue of relief for shippers where only one railroad provides service and it is inadequate. The standard "practicable and in the public interest" is the same standard the Commission has applied in considering whether to order the joint use of terminal facilities.

*House amendment.*—The House amendment is the same as the Senate bill, but permits the Commission in its discretion to order protection for employees who are adversely affected by a grant of authority by the Commission under this section.

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*Conference substitute.*—The Conference substitute adopts the House provision. The Conferees note that the Commission should use the "practicable and in the public interest" standard even though section 11123 has been expanded to include all facilities, not just the joint use of terminals. The Conferees note that the entry and reciprocal switching provisions should not be used to allow Class I carriers to force their way into traffic originating or terminating on a Class III carrier.

### SECTION 224—CAR SERVICE COMPENSATION

*Senate bill.*—No provision.

*House amendment.*—The House amendment repeals section 11122(b)(2) which allowed the Commission to impose incentive per diem rates.

The House amendment also provides that when shippers enter into an agreement to discuss what they will propose to charge rail carriers for the use by such rail carriers of rolling stock owned or leased by such shippers, they shall apply to the Commission for approval of the agreement. The Commission shall approve the agreement only when it finds that the making and carrying out of the agreement will further the rail transportation policy in section 10101a of this title. The Commission may require compliance with conditions necessary to make the agreement further the rail transportation policy. If the Commission approves the agreement, any action by a party under its terms or the terms required by the Commission shall receive antitrust immunity under section 10706(a)(2).

The House amendment also provides that where the shippers who have entered into an agreement approved by the Commission and the rail carriers proposing to use the rolling stock owned or leased by the shippers cannot agree upon the amount of compensation to be paid for the use of such rolling stock, any party directly involved in the negotiations may settle the matter by submitting the issues in dispute to the Commission. The Commission shall render a binding decision on the issues based on a standard of reasonableness. The Commission's decision may consider any past precedents on the history of the negotiations and must be rendered within 90 days of the submission of the dispute to the Commission.

*Conference substitute.*—The Conference substitute adopts the provisions of the House amendment and adds a provision which states that the law in effect prior to the effective date of this Act with respect to the obligation of rail carriers to utilize rolling stock owned or leased by shippers shall remain in effect.

The conferees do not believe that the provision of an incentive element on freight equipment is the best means of attracting capital into the industry for the acquisition of rolling stock. Rather, the rental rate for such rolling stock should be sufficient to pay an adequate return on investment. The conferees do anticipate, however, that the Commission shall continue to examine means (such as flexible car hire) of making basic car hire more responsive to market forces where this is possible without subjecting carriers which are forced to use cars received in interchange to unreasonable rates.

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The conferees intend that marketplace decisions govern the railroad industry and its relationship with shippers. Indeed this policy is enunciated in the rail transportation policy. The conferees expect that antitrust immunity be granted under this section consistent with previous Commission decisions. The conferees are aware that shippers could have antitrust immunity to establish private car-hire when participating in a Commission proceeding and do not intend that this provision shall change existing law in that regard.

If the Commission allows per diem rates below basic per diem during periods of surplus car supply, the Commission should allow rates above basic per diem during periods of shortage.

### SECTION 225—CAR UTILIZATION

*Senate bill.*—The Senate bill created a new section 10732 of the Interstate Commerce Act. This section provides that rail carriers are free to establish a special elective tariff which contains premium freight rates for special services or levels of services that may be requested by a shipper. Throughout Senate hearings on rail regulatory reform, testimony was submitted by many shippers who advised that they were prepared to pay a higher rate for a higher level or a more expeditious service. This amendment will give those shippers that option and, in turn, allow the rail carriers to increase the utilization of their cars.

Essentially, this subsection allows carriers to provide a more specialized service to shippers who choose to pay the premium rate, but the common carrier obligation is not abrogated in any way. This will insure that the shipper is still guaranteed the same level of service that he receives today. This subsection is simply another option for the shipper and the rail carrier.

*House amendment.*—No provision.

*Conference substitute.*—The Conference substitute adopts the Senate provision, with an amendment.

### SECTION 226—CAR SERVICE ORDERS FOR EXIGENT CIRCUMSTANCES

*Senate bill.*—The Senate bill limited the Commission's authority to issue car service orders under 49 U.S.C. 11123 in two ways. First, the Commission would be restricted to emergencies "of such magnitude as to have substantial adverse effects on rail service to the nation or a substantial region of the nation". Second, the Senate bill restricted emergency orders to 30 days, but permitted the Commission to extend the order another 60 days if the Commission had a proceeding to resolve the service problems which generated the need for the emergency order on a more permanent basis. The two restrictions were adopted based on the belief that only real emergencies should trigger such orders and that in the past, the Commission has been far too willing to issue car service orders in other than emergency situations. The Senate bill removed the limitation in existing law that the Commission may order only the joint or common use of terminals, including mainline tracks for a reasonable distance outside of those terminals. The Commission would be permitted to require the joint or common use of all facilities when

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it considers that a shortage of equipment), congestion of traffic, or qualifying emergency exists.

*House amendment.*—The House amendment limited the Commission's authority to issue car service orders under 49 U.S.C. 11123 in instances where it finds a "shortage of equipment, congestion of traffic or other failure in traffic movement exists which creates an emergency situation resulting in substantial adverse effects of rail service in the United States or a substantial region of the United States". The House amendment requires the Commission to find a nationwide emergency or broad regional emergency that justifies the extraordinary remedy of the imposition of car service orders. The House amendment permits the Commission to extend such orders beyond 30 days if the Secretary of Transportation certifies that a transportation emergency exists. The House amendment permits the Commission when it makes the prerequisite findings to require the joint use of all facilities, not just terminal and mainline tracks a reasonable distance outside those terminals. This provision will permit the Commission to effectively address genuine emergency situations in an expeditious manner without restrictions regarding the use of a railroad's facilities, including mainlines and equipment by another railroad or over that railroad. This provision specifically overrules the decision in *Atchison, Topeka and Santa Fe v. ICC*, 617 F. 2d 485 (7th Cir., 1980). When the Commission does require one railroad to use or go over another railroad's facilities, the Commission shall require, to the maximum extent practicable, the use of employees who would have performed work in connection with the traffic subject to the action of the Commission.

*Conference substitute.*—The Conference substitute adopts the House provision, but authorizes the full Commission after a hearing to determine that a transportation emergency exists if the original 30-day order is to be extended. The conferees emphasize that the Commission's powers under this section are extraordinary and should be exercised only in genuine emergencies. Some shipping interests have expressed concern as to the scope of this section. An important distinction must be borne in mind. Section 11123 of title 49 is being amended as to the required regional or national type emergency before the Commission can issue car service orders, as well as the duration and the scope of the car service orders.

The Conferees want to emphasize that the provisions of section 11122 of title 49 of the United States Code as to permanent rules and regulations on railroad car service are unaffected and remain intact. The importance of insuring on a day-to-day basis the efficient functioning of our unified national rail system and network remains. The Commission still retains its power to issue permanent mandatory car service rules such as those which are now in effect and which govern the movement of railroad cars throughout the country.

### SECTION 227—EMPLOYEE PROTECTION

*Senate bill.*—No provision.

*House amendment.*—The House amendment provided for employee protection, as described in 49 U.S.C. 11347, to be imposed in transactions involving transfers or the operation of or over a debt-

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or's lines by another entity under section 1172(b) of the Bankruptcy Act of 1978. The provision puts employees of rail carriers which entered bankruptcy after the effective date of the Bankruptcy Act of 1978 in the same position as employees of rail carriers that entered bankruptcy prior to the Bankruptcy Act of 1978 with respect to employee protection. This provision is not intended to change existing law with respect to either the priority or the timing of payment of employee protection in a bankruptcy proceeding.

*Conference substitute.*—The Conference substitute follows the House provision.

### SECTION 228—MERGERS AND OTHER TRANSACTIONS

*Senate bill.*—The Senate bill would make no changes in the present law with respect to major rail mergers: the ICC would consider such proposals under existing standards and procedures, and the present time limit of about 31 months (which was established by the 4R Act) would be retained. However, this section makes two major changes in the present law under which the Commission is required to consider all other restructuring transactions among railroads (including the purchase or sale of assets, trackage rights, and the like). These changes are intended to encourage the rationalization and restructuring of the rail system through actions less than merger.

First, the Commission would have to decide on smaller transactions faster than under present law. Present law permits the Commission 15 months to decide all such cases regardless of their complexity or importance. For transactions having regional or national significance, this section would require the Commission to reach a decision within 10 months. For transactions which do not have regional or national transportation significance, this section would require the Commission to reach a decision within 6 months. These deadlines are, of course, maximum time limits and the Committee believes that many applications can and should be processed without taking the full amount of time allowed.

In order to meet the deadlines specified in this section, the number of factors the Commission must consider in ruling on transactions less than merger would be reduced. (The Commission now applies the same test to all transactions as to major mergers.) This section would require the Commission to balance the transportation benefits of the transaction against any anticompetitive effects. In addition, where the transaction is part of a restructuring project previously approved by the Secretary of Transportation under section 401 of the 4R Act, the Commission would be required to give substantial weight to the recommendations of the Secretary.

*House amendment.*—The House bill contains a provision relating to the factors the Commission is required to consider when passing on major mergers. The House provision would require the Commission to consider whether the proposed transaction would have an adverse effect on competition among rail carriers.

*Conference substitute.*—The Conference substitute includes a combination of the House and Senate provisions. The conferees note that many transactions for which Commission approval is required are minor in nature and routinely approved. The Committee believes that the Commission should focus its attention on more

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important issues and judiciously use its statutory authority to reduce the burden on all parties (including a reduction in paperwork) where approval is routinely and consistently granted.

### SECTION 229—SAVINGS PROVISIONS

*Senate bill.*—The Senate bill provided that a rail rate in existence on the date of enactment of this Act could only be challenged as being not reasonable within 270 days after enactment. Such rate would not be found not reasonable if its revenue-to-variable cost ratios did not exceed the average ratio of revenue-to-variable cost established by the Commission.

*House amendment.*—The House amendment provided that any rate for a carrier in effect on the effective date of this Act could be challenged within 180 days of that date in a complaint filed with the Commission alleging that the carrier had market dominance under section 10709 over the particular route to which the rate applied and that the rate was not reasonable under new section 10701(b). If a rate in effect upon enactment has not been challenged within 180 days or was challenged and found to be reasonable, the rate could not again be challenged before the Commission or any court.

The savings provisions would not apply to any rate under which the volume of traffic moved during the 12-month period immediately preceding the effective date did not exceed 500 net tons where such rate has increased 4-fold in the 3-year period immediately preceding the bringing of a challenge to the increase of such rate.

In all cases under this section, the burden of proof is on the complainant.

*Conference substitute.*—The Conference substitute adopts the House bill. This Conference substitute allows a 180-day period from the effective date of the bill in which existing rates may be challenged as unreasonably high under the procedures of 11701. The Conferees do not intend this right to be construed as creating any presumption as to the reasonableness of the rates subject to challenge. The purpose of this provision is to give affected parties a final opportunity to review the reasonableness of existing rates before their opportunity to challenge those rates is curtailed. Any challenges arising under this section shall be limited by the jurisdictional standards otherwise newly adopted in the Staggers Rail Act of 1980.

### SECTION 301—UNIFORM ACCOUNTING SYSTEM

*Senate bill.*—No provision.

*House amendment.*—The House amendment makes section 11142, which requires the Commission to prescribe a uniform cost and revenue accounting and reporting system applicable only to non-rail carriers. Previous accounting and reporting systems developed by the Commission for rail carriers are to be replaced by the accounting and reporting requirements of Title III of the amendment.

*Conference substitute.*—The Conference substitute is the same as the House amendment.

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SECTION 302—RAILROAD COST ACCOUNTING

*Senate bill.*—No provision.

*House amendment.*—The House amendment establishes a Railroad Accounting Standards Board, consisting of seven members and chaired by the Comptroller General of the United States. The purpose of the Board is to develop cost accounting principles which identify—variable costs which accurately represent the economic costs of rail movements.

The Board, in developing principles, is to take into account several factors concerning the regulatory purpose, the costs and benefits for rail carriers, and the least expensive way of obtaining the cost information.

The Commission is to promulgate rules to implement the principles developed by the Board.

Within 180 days after enactment, each railroad must file a request with the ICC for preliminary certification, which is to be granted if the carrier's cost accounting system is in compliance with the ICC accounting principles in effect on the date of enactment. The conferees do not envision the requirements for preliminary certification to be any more than a simple affirmation that the carrier is meeting and will continue to meet the existing requirements of the Commission.

The Commission shall grant final certification if it finds that a carrier's accounting system is in compliance with the rules promulgated by the Commission, under the principles of the Board.

Each rail carrier is to maintain a system that is in compliance with rules promulgated by the Commission, under the principles of the Board.

Rail carriers are required to make cost data available to parties to a Commission proceeding.

In order to obtain expense and revenue information for regulatory purposes, the Commission may promulgate rules which prescribe expense and revenue accounting and reporting requirements consistent with generally accepted accounting principles uniformly applied to rail carriers. The Commission in promulgating rules for expense and revenue accounting and reporting requirements, shall ensure that such requirements are cost effective and not duplicative of the managerial and responsibility accounting requirements of carriers.

The Board shall file two reports with the Congress within 2 years after the effective date of this legislation. One report is to compare the cost of implementing the accounting standards to possible benefits. A second report is to recommend changes to the regulatory system, including maximum rate regulation, to integrate the new cost accounting standards and rules.

*Conference substitute.*—The Conference adopted the House provision with the following changes: First, the Conference substitute makes it clear that the primary purpose of the Cost Accounting Principles Board is to promulgate sound principles to govern the determination of railroad costs rather than detailed standards. Second, the Conference substitute limits the availability of cost evidence to that which the Commission will allow under its discovery rules. Third, the Conference substitute authorizes the appropriation of \$1 million per year to carry out the functions of the Cost

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Accounting Principles Board. Fourth, the Conference substitute limits the number of Board members to seven. Fifth, the Conference substitute requires that the Board conduct one study, recommending legislative or administrative action that may be necessary to integrate the cost accounting principles and certification process with the regulatory system, including maximum rate regulation. Sixth, the conference substitute makes certain technical changes to stress that the principles promulgated by the Board and the rules promulgated by the Commission are to emphasize the degree of economic accuracy needed for regulatory purposes and not merely the accumulation of more detailed, but not necessarily more accurate, accounting information.

The substitute clarifies the description of the type of principles to be determined in order to eliminate redundant language contained in the House bill. The conferees intent is to provide for the most accurate possible statement of costs, both direct and indirect, associated with particular movements of goods, and the Board in developing its principles should consider the degree of reliability with which such costs can be attributed to specific movements.

The conferees expect that while the Board develops its principles, the Commission will continue its efforts to complete the uniform revenue and cost systems which it commenced after the passage of the 4R Act so that the Board, as part of its task, will be able to evaluate that system as it is developing its principles.

The conferees desire that the Board's principles will be sufficiently sound that they will be generally applicable for both regulatory and management purposes. To this end, railroads are to be afforded maximum possible freedom consistent with the commission's regulatory needs, to develop internal accounting and cost finding systems that are suited to the needs of the carriers themselves. The conferees wish to emphasize, however, that the purpose of the Board's efforts is to develop a regulatory accounting system and that this section is not intended to limit the use of cost finding systems by railroads which railroads might find useful for management purposes.

The substitute allows, but does not require, the Commission to promulgate rules prescribing expense and revenue accounting and reporting requirements. In addition to other limitations in the bill designed to minimize the burden of such rules on carriers, the bill requires that to the extent they are required solely to provide expense and revenue information necessary for determining railroad costs in regulatory proceedings, the rules must comply with the principles established by the Railroad Accounting Principles board.

The Committee recognizes that the Commission has exempted Class III railroads from the Uniform System of Accounts. The Committee shares the view that elaborate accounting systems imposed upon smaller railroads could produce a much greater burden on the railroad than could be justified by offsetting public benefits. Thus, the Committee has left with the Commission the discretion to exempt carriers from the burdens of a Cost Accounting System if that seems desirable. We encourage the Commission to continue the practice of granting exemptions as needed to relieve unnecessary paperwork burdens and costs on small businesses.

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### SECTION 303—CIVIL PENALTIES FOR VIOLATIONS OF ACCOUNTING PRINCIPLES PROVISIONS

*Senate bill.*—No provision.

*House amendment.*—A carrier failing to obtain final certification of its cost accounting system is to be fined not less than \$50,000. Any party to a proceeding who knowingly discloses confidential data made available by a railroad pursuant to this title may be fined up to \$50,000.

*Conference substitute.*—The Conference substitute is the same as the House amendment.

### SECTION 401—FEEDER RAILROAD DEVELOPMENT PROGRAM

*Senate bill.*—No provision.

*House amendment.*—To provide shipper groups and government agencies an alternative to inadequate rail service and to preserve feeder lines prior to the total downgrading of such lines, the House amendment provides for a feeder line development program which would require a rail carrier to sell a railroad line to a financially responsible person at a price not less than the constitutional minimum, if the Commission makes a finding that the present or future public convenience and necessity required or permitted the abandonment or discontinuance of a railroad line, or if the Commission makes a finding that the transportation provided over a particular line is inadequate. Inadequate transportation is defined by five criteria. The Commission must affirmatively determine the existence of the conditions set forth in all five criteria as a prerequisite to the sale of a railroad line under this section. The burden of proving inadequacy of service is on the person filing to acquire the rail line.

The Commission may require the selling carrier to provide the acquiring carrier trackage rights if the acquiring carrier compensates the selling carrier for such trackage rights. If an acquiring rail carrier petitions the Commission for a joint rate, the Commission is required to grant such acquiring carrier a reasonable compensatory joint rate.

The carrier is exempt from sections 10901 and 10903 of the Interstate Commerce Act, except if an acquiring carrier participates in a joint rate. The feeder line development program permits an acquiring carrier to set conditions which shippers must meet as a prerequisite to using the line.

*Conference substitute.*—The Conference substitute adopts the House provision with several modifications.

First, the program is limited for the first three years to lines carrying 3,000,000 gross ton miles per year or less. After the third year any line is eligible for acquisition under the program but joint rates can not be mandated for lines acquired carrying more than 3,000,000 gross tons per mile per year.

Second, the feeder railroad program is not intended to supplant the branch line program under existing law. Where an application for abandonment has been actually filed with the Commission, existing provisions of the Interstate Commerce Act and of the Local Rail Service Assistance Act will be available.

Third, an opportunity is given for the Commission to allow a rail carrier a reasonable time to make the necessary efforts to provide

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adequate service to shippers who transport traffic over a line in question.

Fourth, it is made clear that the Commission may require trackage rights to the acquiring carrier in order to allow a reasonable interchange with the selling carrier or to move power equipment or empty rolling stock between non-contiguous feeder lines operated by the acquiring carrier. The Conferees recognize that an operator may acquire a number of non-contiguous branch lines thereby requiring the allocation of trackage rights in order to permit movement of power equipment between the non-contiguous lines.

Fifth, normal labor protection is afforded employees of the selling carrier and the provision requires the acquiring carrier to hire, to the maximum extent practicable, the employees who would normally have performed work in connection with a line subject to sale under the program.

The Conferees believe that the feeder line program will give shippers and communities an opportunity to insist upon adequate rail service. Where such service is not forthcoming the provision provides, through acquisition, a viable alternative to poor service or total abandonment.

### SECTION 402—ABANDONMENT

*Senate bill.*—Section 202 of the Senate bill alters the existing provisions of the Interstate Commerce Act relating to abandonments of railroad lines. This section expedites abandonment proceedings by specifically setting forth time periods within which the Commission must act upon abandonment applications, depending on the complexity of and the opposition to the abandonment proceeding. For example, under existing law, there is no time limit within which an investigation of an abandonment application must be concluded. Section 202(c)(3) places a time limit of 135 days upon such investigations.

Section 202 repeals existing 49 U.S.C. 10905. New section 10905 creates a mechanism that requires railroads to sell a railroad line approved for abandonment to a financially responsible party if the financially responsible party has offered to pay the acquisition cost of the line or the difference between the revenues attributable to providing that service plus a reasonable return on the value of the line. Section 202 also requires rail carriers petitioning for abandonment of a railroad line to provide interested parties an estimate of the subsidy or the minimum purchase price required to keep the line in operation, calculated in accordance with the new provisions in 49 U.S.C. 10905.

The provisions in section 202 assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process.

*House amendment.*—No provision.

*Conference substitute.*—The Conference substitute adopts the Senate provision.

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### SECTION 403—CONVERSION OF ABANDONED RAILROAD RIGHTS-OF-WAY

*Senate bill.*—Section 305 of the Senate bill is an amendment to the original bill, S. 1946, the Railroad Transportation Policy Act of 1979. The section authorized \$20 million over a 3-year period for acquisition of abandoned railroad rights-of-way for future use as bicycle paths, jogging and hiking trails and related transportation, recreation and conservation uses, as stated in section 809 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act). This authorization includes matching Federal and State funds, with the Federal share being 80 percent and the State share being 20 percent.

The 4R Act authorized \$20 million for fiscal years 1977, 1978 and 1979 to the Department of Interior for acquisition of abandoned railroad rights-of-way for conversion to trails related to transportation, recreation, and conservation. Based on this initial authorization \$5 million was appropriated during the 95th Congress to Department of Interior Bureau of Recreation (now the Heritage and Recreational Services) for funding the Rail-to-Trail program.

The response to the Department of Interior's public notice of funding for the Rail-to-Trail program was very enthusiastic. The Department received 135 applications totaling \$70 million. Because of the large response to the project, DOI felt they could be selective in the application approval. Top priority was given to applications for trails based or originating in metropolitan areas as well as trails used for commuter transportation.

Ten projects received funding from the \$5 million appropriated. These 10 projects represent 111.62 miles of multiple-use trails from abandoned rail lines in 10 States. This is a small percentage of the 6,232 miles of nation-wide abandonments suitable for conversion to transportation and recreational uses.

Funding authority for this project expired as of September 30, 1979. This authorization will allow for the continuation of the Rail-to-Trail program started in the 4R Act. Evidence from State governments has shown intense interest in preserving funding for this program.

*House amendment.*—The House amendment has no provision.

*Conference substitute.*—The Conference substitute adopted the Senate provision, but reduces the authorization to \$10 million.

### SECTION 404—EXTENSION OF REDEEMABLE PREFERENCE SHARE FINANCING

*Senate bill.*—The Senate bill continues the existing redeemable preference share program for two years, until September 30, 1982, and it authorizes an additional \$400 million for this purpose. The Senate provision expands the scope of eligible participants under the program and provides a specific allocation of program funds for labor cost associated with improved manpower effectiveness.

*House amendment.*—The House amendment extends the existing redeemable preference share program for two years.

*Conference substitute.*—The Conference substitute extends the redeemable preference share program until September 30, 1982. The funding provisions are discussed in the following section.

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### SECTION 405—FINANCING

*Senate bill.*—The Senate bill contains an amendment to section 511(a) of the 4-R Act. Section 511 of the 4-R Act is one of the financial assistance programs available to railroads for the acquisition, repair, or improvement of rolling stock and facilities associated with rolling stock. This amendment opens the doors of eligibility to this loan program to computerized car management systems which carriers desire to acquire, repair, or rehabilitate. Most railroads in this Nation operate sophisticated computer systems to follow their rolling stock throughout their rail network. These computers are essential to the efficient management of a railroad's car fleet. Unfortunately, as technology improves, many of the early computer systems have become obsolete. The new technology which is available would certainly pay for itself in a short period as a result of increased utilization of the car fleet. All loans under the 511 loan program are absolutely secured.

*House amendment.*—The House amendment authorizes the Secretary to provide assistance (either alone or as a participant with other investors) to any railroad or its subsidiary to achieve significant restructuring. The assistance may be used for the purchase of securities or the rehabilitation, improvement, or acquisition of facilities (including track, maintenance, equipment and related labor protection costs) which the Secretary, based upon a restructuring plan provided to the Secretary or as part of a restructuring project supported by the Secretary under section 5(a)(4) of the Department of Transportation Act, or both, determines will contribute to significant railroad restructuring that would not likely be achieved without Federal assistance. The assistance may also be used for purchase or rehabilitation of feeder lines. States, communities, or shipper groups that intend to purchase a feeder line are to be considered railroads for the purposes of this section.

*Senate amendment.*—The Senate amendment extends the existing section 505 to September 30, 1982, and authorizes an additional \$400 million.

A new paragraph is added to section 505(b) to authorize the Secretary to provide a percentage not more than 20 percent of the total funds authorized for this program to employee or shipper groups formed pursuant to an employee and/or shipper stock ownership plan for the purchase and/or rehabilitation of rail lines or facilities. In determining the priority by which such groups should receive funding under this program, the Secretary is directed to consider the availability of other feasible alternatives for providing rail service. It is specifically intended that those projects without a viable or feasible alternative would receive a priority in the allocation of available funds under this section.

The Senate amendment adds a new section 505(A) to the current law granting the Secretary of Transportation the authority to provide Class 1 rail carriers with financial assistance to cover labor costs associated with operational improvements.

The Senate bill clarifies what specific actions would be considered a form of restructuring for the purposes of the 505 program.

*Conference substitute.*—The Conference substitute adopts the Senate provisions, but increases the authorization to \$700,000,000, in section 505 funds. Conferees do not agree with any suggestion

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that a legitimate need for rehabilitation of track cannot exist outside a restructuring. Conferees have provided for restructuring under the Milwaukee Railroad Restructuring Act and are expanding that under this bill to include purchase of rail assets as elements of an eligible project—but not necessarily priority elements. The Congressional intent in establishing the Preference Share Program under section 505 was to provide a "bank of last resort" to put money quickly into railroads to address the deferred maintenance problem while solutions to the overall financial shortfall in the industry could be developed. Much deferred maintenance remains. This Conference does not believe that now is the time to scrap the existing program, thereby forcing the marginal carrier to seek Federal assistance on terms more appropriate for healthy railroads.

The Conference substitute earmarks in the section 505 authorization \$200,000,000, originally authorized in the restructuring provisions of the House bill, for automatic transfer by the Secretary to the United States Railway Association for use by Conrail in establishing a voluntary annuity program to reduce the size of its workforce. The money is to be transferred to the account under Section 216 of the Regional Reorganization Act, notwithstanding the authorization limitation of that section.

The Conferees intend for the Finance Committee of the Association to determine if (1) any program proposed by the Corporation will in fact reduce the size of the Corporation's workforce, and (2) funding of the program will result in substantial savings to the United States as measured against the probable costs to the Government of not reducing the Corporation's workforce to the extent contemplated by the institution of a voluntary early retirement annuity program.

To facilitate the institution of such a program subsection (b)(1) of section 405 amends Section 216(b) of the Regional Rail Reorganization Act of 1973 by adding paragraph (B) which makes it clear that employees of the Corporation taking advantage of an early retirement program will be deemed to have a "current connection with the railroad industry" so as to avoid losing Railroad Retirement eligibility at the appropriate age.

### SECTION 406—TRANSACTION ASSISTANCE

*Senate bill.*—No provision.

*House amendment.*—The House amendment creates a new category for financial assistance under section 505(h) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210). Specifically, financial assistance would be available to purchase properties of the Milwaukee Railroad located in the State of Montana for rail banking.

*Conference substitute.*—The Conference substitute adopts the House amendment.

### SECTION 407—ELECTRIFICATION LOAN GUARANTEES

*Senate bill.*—No provision.

*House amendment.*—The House amendment amends 211(f) of the Regional Rail Reorganization Act to make available to railroads in

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addition to Conrail loan guarantees for the purpose of electrifying high density mainlines. Loan guarantees for capital improvements for coal export facilities are provided for Corporation and other railroads in the region receiving assistance under the 3-R Act.

*Conference substitute.*—The Conference substitute is the same as the House amendment, but the Secretary's authority to waive findings in 511(g) has been deleted. The Conferees expect that the loan guarantees for capital improvements for coal export facilities available under this section will be used to construct coal export facilities such as the proposed coal facility at the Port of Philadelphia.

### SECTION 408—AMENDMENT TO THE REGIONAL RAIL REORGANIZATION ACT OF 1973

*Senate bill.*—No provision.

*House amendment.*—The House amendment raises the amount authorized to be loaned to any railroad in the region receiving assistance under section 211(d)(2) of the Regional Rail Reorganization Act of 1973, notwithstanding sections 211 (e)(3) and (f).

*Conference substitute.*—The Conference substitute adopts the House provision.

### SECTION 409—FEDERAL ASSISTANCE REPORT

*Senate bill.*—No provision.

*House amendment.*—The House amendment provides direction to the Secretary of Transportation on the coordination of federal assistance and also requires the Secretary to file an annual report on federal assistance provided to the rail industry, the reasons for each loan or grant, and the results to be expected.

*Conference substitute.*—The Conference substitute requires the study described above but does not include the directions for coordination to the Secretary.

### SECTION 501—MONTHLY DISPLACEMENT ALLOWANCE

*Senate bill.*—No provision.

*House amendment.*—The House amendment proposed four new formulas for monthly displacement allowance as follows:

1. *Non-operating employees.*—Except for maintenance-of-way employees, non-operating employees (i.e., other than train and engine service employees) will receive an hourly guarantee, based upon the rate of pay of the position they held on September 1, 1979. This guarantee will be increased to reflect subsequent general wage increases, and will be increased whenever the employee, through the exercise of his or her seniority, becomes the qualified incumbent of a higher rated position. If, as a result of a reduction in the number of positions available, a protected employee is required to exercise seniority to a position with an hourly rate less than the guarantee, the employee will receive a monthly guarantee payment representing the hourly differential multiplied by the number of hours in the new position's straight-time work schedule for the claim month. If a protected employee is unable to retain any position, the employee will receive the guaranteed hourly rate for the number of hours the employee would have worked on a straight time basis if he or she had retained his or her previous position.

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2. *Maintenance-of-way employees.*—The maintenance-of-way guarantee is based on average monthly compensation, which is total compensation received by an employee during 1974, divided by total time paid for, and multiplied by 174 or by average monthly time paid for, whichever is less, and adjusted to reflect subsequent general wage increases. The protected employee's monthly displacement allowance is the difference between the straight-time earnings and 80 percent of the average monthly compensation, less time lost due to voluntary absences other than vacations.

If, at the close of a calendar year, the sum of the employee's annual straight-time compensation, monthly displacement allowance payments, and offsets under this title are less than the employee's average monthly compensation divided by 12, the employee would receive an additional payment for the difference. If, in the previous calendar year, an employee has received displacement allowances payments greater than his annual guarantee, the excess benefits would be recovered from current or future entitlements, exclusive of moving expense benefits.

The House amendment also conforms the guarantee formulas for employees affected by a supplemental transaction to the revised guarantee formulas for other protected employees.

3. *Operating employees.*—It is proposed that operating employees (i.e., train and engine service employees) retain their current monthly guarantee subject to two important modifications. Average 1977 Conrail earnings will be calculated for each Commission classification of operating employees. These values will be upgraded by subsequent general wage increases, and will constitute maxima. These protected employees whose current monthly guarantees exceed the applicable maximum will have their guarantees reduced to the maximum. The second modification is an annual calculation in accordance with the maintenance-of-way formula described above. If a protected employee's earnings are less than the guarantee in any month, 75 percent of the difference will be paid. At the end of the calendar year, a comparison of guarantee and earnings on the annual basis will determine whether an additional payment will be made or whether future payments will be withheld pending recovery.

4. *Non-contract employees and employees who have been transferred.*—No change is proposed in the guarantee formula currently applicable to these employees. Non-contract employees receive salaries which do not include overtime compensation. Additionally, they receive merit increases rather than general wage increases, so that their guarantees have not changed since the formation of Conrail. Consequently, they have not been the recipients of "windfall" payments as is the case with contract employees.

Transferred employees retain their current guarantee. They have frequently purchased new homes at a price reflecting the standard of living they were assured of on the basis of the current guarantee formula. A sudden reduction in their monthly income might place them in an unteachable financial position. There are approximately 350 employees who have transferred.

There are two other changes made in this section. Under subsection (b)(7), in addition to all unemployment compensation benefits and railroad earnings being set off against the employee's monthly displacement allowance (as under existing law), all outside earn-

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ings of a protected employee deprived of employment must be setoff against the employee's MDA. This change will ensure that the monthly displacement allowance of such protected employees are fully offset by other compensation.

An additional change is made by this section in proposed subsection (b)(10). It calls for employees deprived of employment, or the employees' class or craft representative, and the employer to agree on a procedure by which such employees will report their non-railroad earnings in order that they may be setoff against monthly displacement allowances. It also calls for an agreed upon procedure by which the employer is kept apprised of the unemployment benefits currently paid to employees deprived of employment, also for the purpose of off-setting their monthly displacement allowances. These procedures are necessary to ensure that the reporting/investigative burdens are shared by the employer and the employees, rather than having the burden of investigation fall solely on the employer, as now exists.

*Senate amendment.*—The Senate amendment is similar to the House amendment except for maintenance-of-way employee payments. Maintenance-of-way employees often work as portable equipment operators in the summer when extensive track rehabilitation is undertaken, and as trackmen in the winter when only routine maintenance can be performed. As a result of this circumstance, maintenance-of-way employees frequently earn less than their average monthly compensation in the winter and more than their average monthly compensation in the summer. When monthly displacement allowances during the winter months are added to these earnings, the employee's actual annual compensation can well exceed his or her annual compensation guarantee.

In order to correct this situation, a separate calculation is proposed for maintenance-of-way employees. Each protected employee will be assigned a monthly guarantee equal to the employee's 1974 average hourly earnings on a straight-time basis, upgraded by subsequent general wage increases, and multiplied by 174 (i.e., the number of hours in a straight-time work schedule in the average month). If a protected employee's current monthly guarantee is less than this value, the current guarantee will be retained. If, in any month, a protected employee's earnings are less than the guarantee, a payment will be due equal to 75 percent of the difference. At the end of the calendar year the employee's annual guarantee will be compared to his or her annual earnings plus monthly guarantee payments and any offsets. If the annual guarantee is larger, the full difference will be paid. If the annual calculation demonstrates that all or a portion of the monthly guarantee payments represent an overpayment, the employee will be entitled to no further guarantee payments until the overpayment is recovered. In the calculation of guarantee payments on the monthly and the annual basis earnings include overtime rate on any given day.

*Conference substitute.*—This follows the House provision. The conferees note that changes in the monthly displacement allowance formulas were necessary to eliminate expensive inequities in the current formulas. The conferees note that different formulas were provided for different classes and crafts of employees because of different procedures used to determine the basic wages of different classes and crafts of railroad employees and because the work

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schedules of certain employees (such as maintenance-of-way employees) are subject to irregular and seasonal fluctuations. The conferees believe the use of these different formulas is rationally related to such differences among the classes and crafts and to the need to conserve scarce government resources.

### SECTION 502—DURATION OF MONTHLY DISPLACEMENT ALLOWANCE

*Senate bill.*—No provision.

*House amendment.*—The House amendment would restrict the payment of the monthly displacement allowance in two situations. First, a protected employee's entitlement to a monthly displacement allowance would be suspended for the period that the employee fails to work for reasons beyond the control of his or her current employer due to strikes, flood, snowstorms, and similar natural occurrences. Second, the legislation would require a protected employee to claim a monthly displacement allowance within three months of entitlement unless the claim is the subject of or based upon an arbitration decision. It also would require that entitlement to claims be approved or denied within 150 days after a claim is filed for the first year following enactment and within 90 days thereafter, unless the employee and the employer agree upon other timeframes for filing and determining claims. This provision will eliminate bookkeeping problems caused by delay in filing a claim for a monthly displacement allowance, and enable the Corporation to assess more accurately expected payments for labor protection. The legislation further provides that unless denied within the timeframes by the carrier, the claim would be deemed approved.

*Senate amendment.*—The Senate amendment contains a similar provision.

*Conference substitute.*—The Conference substitute contains the provision in the House and Senate amendments.

### SECTION 503—TRAINING AND TRANSFER

*Senate bill.*—No provision.

*House amendment.*—The amendment addresses restrictions on manpower utilization by permitting the Corporation and other employers with protected employees to transfer such employees in the marine crafts and unemployed Penn Truck Lines, Inc. workers to another class, and by offering retraining programs to make the inter-class transfer provisions meaningful.

The new training and transfer provisions would apply to unemployed protected employees in the marine crafts and unemployed Penn Truck Lines, Inc. employees. No bona fide vacancies exist for these employees in their class or craft. Consequently, their guarantee payments represent a considerable ongoing liability.

Training expenses would be paid for by the Corporation or other employer, which could then be reimbursed from the Regional Rail Transportation Protective Account. Moving expenses incident to transfers would be reimbursable under the provisions of section 505(g), as is the case under existing law.

*Senate amendment.*—The Senate amendment is similar, with two exceptions. The power to transfer unemployed protected employees

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is extended to employers besides the Corporation, and the multiple offer provision was not adopted.

The "multiple offer" provision establishes procedures that permit the Corporation and other employers to expedite reassignments by making simultaneous offers of a vacancy to no more than four employees at a time (those contacted employees junior to the least senior employee who accepts the vacancy will be furloughed or severed).

*Conference substitute.*—The Conference substitute follows the Senate bill, but retains the restriction in the House bill which allows only Conrail to transfer protected employees. However, the substitute permits Amtrak to transfer employees within their seniority districts unless Amtrak and the affected unions agree to negotiate an appropriate collective-bargaining agreement in this area.

The substitute also restricts use of the multiple offer provision to unemployed protected employees of the marine crafts and protected employees of Penn Truck Lines. Other employees would not be subject to the multiple offer provision.

### SECTION 504—PAYMENT, AUDIT AND REPORT

*Senate bill.*—No provision.

*House amendment.*—The House amendment would redesignate section 509 of the RR Act as section 509(a) and increase the amount of funds authorized to be appropriated under Title V by \$235 million (of which up to \$180 million could be spent on monthly displacement allowances) to a new authorization level of \$485 million making training costs incurred by the Corporation under revised section 505(d)(4)(D) reimbursable costs, direct the Secretary of Transportation to be responsible for requesting needed appropriations for expenditure by the Railroad Retirement Board, and additionally authorize the appropriation of funds for administrative expenses incurred by the Railroad Retirement Board in performing their functions under section 509. The appropriations may be allocated by the Secretary to the Board and the Association.

It is proposed that an additional \$235 million be authorized to fund the revised level of benefits afforded by these amendments. Conrail projects that this sum will fund the program. If in fact the cost of the program exceeds an additional \$235 million, the carriers employing protected employees would be responsible for the payment of benefits without reimbursement.

In addition, this section would add two new subsections to section 509 that improve program auditing and reporting responsibilities upon the Association. Section 509(b) would direct the Association to conduct a program audit of the payment of benefits under Title V and evaluate the effectiveness of the provisions of Title V in providing a reasonable level of protection to protected employees and enabling the Corporation to improve management of the protected employees in its workforce. In conducting the program audit, the Association should be particularly sensitive to the impact of Title V provisions upon management policies, so that the Association will be able to suggest corrective legislation quickly in the event inequities are uncovered in the program or the way that the Corporation administers the program.

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The Association would be afforded access to pertinent documents for the purpose of facilitating its program audit and evaluation functions. Section 504(c) would require the Association to transmit an annual detailed and comprehensive report of its periodic program audit and evaluation to the Congress and the President within 90 days after the end of each fiscal year.

*Senate amendment.*—The Senate amendment contains an identical provision to the House amendment.

*Conference substitute.*—This provision is contained in the substitute.

### SECTION 505—RAILROAD HIRING

*Senate bill.*—No provision.

*House amendment.*—The House amendment provides for a right of first hire on other rail carriers for protected separated, or furloughed employees of Conrail. This right would not apply if an employee was separated for cause, or found to be less qualified than other applicants. The right would not apply to any vacancy covered by a required or permitted voluntary affirmative action plan. This right is similar to that granted Milwaukee and Rock Island employees by recent legislation.

*Conference substitute.*—This follows the House provision.

### SECTION 506—SINGLE COLLECTIVE-BARGAINING AGREEMENT

*Senate bill.*—No provision.

*House amendment.*—No provision.

*Senate amendment.*—The Regional Rail Reorganization Act of 1973, as amended, was based on a recognition that Conrail could succeed only if the predecessor bankrupt roads' operations were combined into a unified system.

A major component of that integration was addressed by section 504(d) of the RR Act which required representatives of the various classes or crafts of the bankrupt carriers and representatives of Conrail to enter into negotiations for a single collective bargaining agreement for each class and craft of employees. This section was motivated by a recognition that the near countless existing labor agreements had to be replaced by negotiated collective-bargaining agreements for each class and craft.

Such negotiations were commenced and substantial progress has been made toward the goals of the Act. As a significant example, the United Transportation Union and Conrail, after extensive bargaining, concluded an agreement having far-reaching effects on labor costs of train movements while allowing the United Transportation Union members to share in the resulting savings. However, continued implementation of this collectively bargained agreement is imperiled by the findings of a U.S. Magistrate in the case of *Malsaf v. United Transportation Union and Conrail*, issued March 27, 1980.

As the result of a suit brought by minority members of the union who wish to block the agreement, the U.S. Magistrate has concluded, among other things, that section 504(d) of the RR Act does not require the negotiation of a single agreement for each class or craft. As a finding of fact, this conclusion must be considered to

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have a substantial likelihood of adoption by the Federal District Court. Such an adoption would, in all likelihood, be accompanied by an order effectively terminating the United Transportation Union-Conrail agreement and allowing the continuation of regional distinctions in treatment among members of the same class or craft in opposition to the conclusions of the Final System Plan, and the clearly stated policy of Congress. Revocation of the detailed and comprehensive Crew Consist Agreement, on the strength of findings by a Magistrate, not only denies its benefits to a large number of United Transportation Union members but wipes out needed savings for Conrail.

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

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

### SECTION 507—EMPLOYEE PROTECTION PAYMENTS

*Senate bill.*—No provision.

*House amendment.*—The House amendment provided an effective date for the new formulas of the first day of the month following enactment.

*Senate amendment.*—The Senate bill provides that the new formulas are to be effective on the first day of the month following enactment. The Corporation and other employers with protected employees were to be reimbursed effective October 1 for any protective payments not previously reimbursed.

*Conference substitute.*—The Conference substitute adopts October 1, 1980 as the effective date.

### SECTION 508—TECHNICAL AMENDMENTS

*Senate bill.*—No provision.

*House amendment.*—The House amendment makes technical changes to the Regional Rail Reorganization Act of 1973 and adds the Attorney General to the Board of Directors of the United States Railway Association.

The Secretary of Transportation and the Secretary of the Treasury are authorized to delegate their responsibilities under the RR Act, including membership on the Board of Directors of the USRA and its committees, to the following designated representatives. The Secretary of Treasury may designate any officer of the Department whose position is confirmed by the Senate. The Secretary of Transportation is authorized to designate as his representative the

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Deputy Secretary, the General Counsel, the Federal Railroad Administrator, or the Deputy Federal Railroad Administrator.

Subsection (d) amends the definition of "deprived of employment" in subsection 501(6) to exclude from the definition, and thereby excludes from coverage under the protection program consistent with changes made in section 4 of this legislation, failure to work due to Acts of God. Subsection (d) also adds a definition of "compensation" to section 501 so that it is clear the word means only earnings in employment subject to the Railroad Retirement Act rather than such earnings plus earnings from non-railroad employment and compensation for persons. injury claims against the employer.

Finally, subsection (e) clarifies that the arbitration provisions that apply to disputes between the Corporation and its employees regarding the interpretation of Title V provisions do not restrict the newly-created audit and reporting responsibilities of the USRA.

*Senate amendment.*—The Senate amendment is similar to the House amendment but does not add the Attorney General to the Association's Board of Directors.

*Conference substitute.*—The Conference substitute follows the House amendment, but deletes the provision to include the Attorney General on the USRA Board of Directors.

Section 508(d) of the House amendment alters section 402(d) of the Rail Passenger Service Act to enable Amtrak greater flexibility in contracting for compensation for providing commuter services with the states. At present, the level of compensation is fixed at the "avoidable cost" level. Conferees expect that this provision will enable Amtrak to have the flexibility to contract for the value of services rendered and not result in commuter revenues below avoidable cost.

### SECTION 601—EXPEDITED SUPPLEMENTAL TRANSACTION PROPOSALS

*Senate bill.*—No provision.

*House amendment.*—The House bill amends section 305 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 745) by providing that the Secretary of Transportation shall determine, after comments from interested parties, whether to propose a supplemental transaction under this section for the transfer of all rail properties of Conrail in Connecticut and Rhode Island to another railroad in the region. If the Secretary determines that another rail carrier is financially and operationally capable of assuming Conrail's freight operations and freight service obligations in the area, that the transfer would promote the establishment and retention of a financially self-sustaining rail system in Connecticut and Rhode Island adequate to meet the needs of those states, and that the transfer would minimize job losses and associated increases in unemployment, should the Secretary develop such a proposal. After providing USRA and the ICC with an opportunity to review and comment on the proposal, the Secretary may petition the special court for an order to carry out the proposed transfer.

Notwithstanding any existing 508 agreements, a new employment agreement would be entered into between the parties to the transfer and affected employees pursuant to section 508. These agreements would involve the Corporation, but would not impose

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additional obligations on the Corporation, which is neither an acquiring nor a selling carrier for the purposes of section 508.

The bill would also allow further supplemental transactions under the normal procedures of section 305 to occur by deleting the six year time limit provided in section 102(19) of the Act.

*Conference substitute.*—The Conference substitute adopts the House provision, but allows the States of Connecticut and Rhode Island to comment formally. The time period is also extended to 240 days.

If a proposal is sent to the Special Court, the Special Court shall use the procedures of existing section 305. If a transferee railroad is unwilling to accept the fair and equitable price established by the Secretary, the Secretary need not petition the Special Court. The Special Court may review the proposal to determine if it is in the public interest.

### SECTION 701—ROCK ISLAND AND MILWAUKEE RAILROADS AMENDMENTS

*Senate bill.*—No provision.

*House amendment.*—The House amends the Rock Island Transition and Employee Assistance and the Milwaukee Railroad Restructuring Act in several instances. The amendment provides that any decision with respect to constitutionality of the Rock Island Transition Act or the Milwaukee Railroad Restructuring Act from the respective courts having jurisdiction over the respective railroads in bankruptcy shall be taken to the United States Court of Appeals for the Seventh Circuit. If a constitutional challenge is made to the procedure under this provision, the challenge shall be heard by the United States Court of Appeals for the Seventh Circuit because the procedure is part of the Rock Island Transition Act. Should the appeals on constitutionality involve section 106 or section 110 of the Rock Island Transition Act or sections 9 or 15 of the Milwaukee Railroad Restructuring Act, regarding the claim of administration for employee protection claims, the court shall determine the appeals in a consolidated proceeding and render a final decision no later than 60 days after the last such appeal is filed.

The House amendment clarifies the Rock Island Transition and Milwaukee Railroad Restructuring Act to state affirmatively that nothing in these Acts shall limit the right of any person to bring an action under the Tucker Act. This provision was not in the original Acts on the grounds that there continued to exist a Tucker Act remedy where Congress has not explicitly waived such a remedy. See *Regional Rail Reorganization Cases*, 419 U.S. 102, 125 (1974). However, in reviewing Judge Garr's injunction of the Rock Island Transition Act, Justice Stevens expressed concern about the availability of such a remedy where the injunction to be lifted and were the Act subsequently to be held unconstitutional. — U.S. — (1980). This specific provision clearly establishes that the Tucker Act is available and nothing in these Acts limits the right of any person to seek redress under the Tucker Act.

The House amendment provides for a new schedule for the negotiation of an employee protection agreement between the Rock Island Railroad and the Labor organizations. If these parties are not able to come to an agreement within 5 days, the Commission is

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to impose a fair and equitable arrangement no less protective of the interests of employees than the protection established under section 9 of the Milwaukee Railroad Restructuring Act within 15 days after the enactment of the Staggers Rail Act. The bankruptcy court shall order the Rock Island Trustee and the Rock Island employee organizations to implement such arrangement immediately. Any order of the Commission or the bankruptcy court with respect to implementing such order shall be appealed only to the United States Court of Appeals for the Seventh Circuit within 5 days after the order of the Commission or the bankruptcy court, whichever is later, and shall be determined within 60 days after the appeal is filed. Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

Under Section 7(d), (e), and (f) of the Milwaukee Railroad Restructuring Act, certain obligations to the United States were subordinated to the creditors, but not the stockholders. Hence, there is a gap between these two classes of interests. The House amendment eliminates this gap, by forgiving such subordinated obligations to the United States when the Milwaukee Railroad is either successfully reorganized as a rail carrier or when more than 50% of the railroad as it exists on the effective date of the Staggers Rail Act is purchased and 50% of its employees on that date have obtained employment with other carriers. By eliminating this gap in this way, the House amendment will encourage the Milwaukee Railroad's stockholders to seek a successful reorganization or purchase and not feel it necessary to seek liquidation at this time.

Additional funds for Transition Assistance under the Rock Island Transition Act for the purchase of abandoned lines by non-rail carrier entities of the Rock Island Railroad and Milwaukee Railroad and for rail banking of lines of the Milwaukee Railroad in Montana are made available. The Secretary may determine if applications for purchase filed after September 15, 1980, are appropriate. Other than the funds specifically reserved for Montana, Transition assistance funds should be equitably distributed without State preference to non-carrier entities which have applied for funds.

*Conference substitute.*—The Conference substitute adopts the House provision, with minor modifications and deletion of the new findings for the Rock Island Transition Act. The conferees believe that there is an obligation upon the Rock Island estate to provide employee protection as a claim of administration to its employees who were not covered by the March 4, 1980, agreement. Further, the conferees believe the Rock Island estate has benefitted from the Rock Island Transition Act by the reduction in its employee protection liability and through the Congressionally-supported March 4, 1980, agreement, the ability to lease its facilities and the use of funds to purchase its facilities, thus preserving its value as a going concern, and the expeditious consideration of Rock Island transactions at the Commission. The conferees reiterate that it is the intention of Congress that employee protection be imposed in

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bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest.

#### SECTION 702—LOAN GUARANTEES

*Senate bill.*—No provision.

*House amendment.*—The House amendment provides that the Secretary of Transportation shall not later than 45 days after the effective date of this Act, take final action on any application for a section 511 loan guarantee under the Railroad Revitalization and Regulatory Reform Act to be used in connection with joint ownership, construction or rehabilitation of any facilities for a second rail carrier to serve the Powder River Basin in Wyoming and Montana. This provision is included to promote needed competition for transportation of the low-sulfur coal from the Powder River Basin that is used by a great number of utilities in many states.

The Secretary is authorized to waive findings under 511(g) with respect to such loan guarantees, and section 4 (f) of the Department of Transportation Act is not applicable to such loan guarantees. However, the Secretary shall review the proposed Chicago and North Western connector and shall not approve any route which requires the use of agricultural land unless there is no feasible and prudent alternative to the use of such land and the proposed route construction plan requires all possible planning to minimize loss to such agricultural land. The Secretary shall review the use of any agricultural land in any new constructed line and shall require private land crossings for agricultural land owners whose land is divided by such line. When the Secretary requires the construction of a grade crossing, the Secretary shall require the land owner and the railroad to enter into agreements limiting the railroad's liability at such crossings.

*Conference substitute.*—The Conference substitute adopts the House amendment, but substitutes provisions regarding standards and deadlines for judicial review instead of the Secretary's discretion to waive findings under section 511(g) of the Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210). It also makes clear that actions can be taken without prior approval of any Committee of Congress.

The standards and deadlines are borrowed from the Alaska Natural Gas Transportation Act, 15 U.S.C. 719h, and the Administrative Procedure Act, 5 U.S.C. 706. The reference to the phrase, "arbitrary, capricious, or an abuse of discretion" is an adaptation of 5 U.S.C. 706(2)(A). The reference to "in excess of statutory jurisdiction, authority or limitations, or short of statutory right" is an incorporation of the grounds for review provided in section 706(2)(C). The conferees wish to emphasize that the other grounds for review set forth in section 5 U.S.C. 706(2) not in this section are intentionally excluded. Judicial review is to be confined to considerations of whether the agency complied with the Constitution and acted within its authority.

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### SECTION 703—CONRAIL STUDIES AND EMERGENCY FUNDING & USRA AUTHORIZATION

*Senate bill.*—The Senate bill requires USRA to submit preliminary recommendations by November 15, 1980, with regard to Conrail's future structure, activities and funding. Following review by the Department of Transportation and the Commission, and comment by interested parties, USRA is required to submit to Congress by March 1, 1981 specific final recommendations with respect to (1) future projected funding requirements of Conrail; (2) future structure and activities of Conrail in the region; and (3) legislative proposals, if necessary, to implement such recommendations. The Senate provisions also require specific studies to be completed in developing preliminary and final recommendations. Conrail is required to submit recommendations to USRA by October 1, 1980; it is also free to comment on the Association's preliminary and final recommendations. The provision includes an USRA authorization of \$31.5 million for fiscal year 1981 and \$27.5 million for fiscal year 1982.

A separate title of the Senate bill provides emergency funding for Conrail of \$329 million for fiscal year 1981. This provision is included to provide interim Federal funding for Conrail while Congress identifies alternative measures, including structural changes, based on the various studies and recommendations discussed above. The funding is conditioned upon a finding by the Finance Committee under section 216(b) of the Regional Rail Reorganization Act of 1983, as amended, that Conrail has taken appropriate action to eliminate losses on light density and unprofitable lines through negotiation of subsidy or trackage rights agreements, sale or lease, imposition of surcharges or abandonment of such lines. Expedited surcharge and abandonment procedures are provided for these light density and unprofitable lines. In addition, the Senate bill requires an economic analysis that will forecast the full effects upon Conrail and rail labor of alternative changes in labor agreements and related operational changes.

*House amendment.*—The House amendment does not contain any provision on Conrail studies or emergency funding. It provides an authorization for USRA of \$28.5 million for fiscal year 1981.

*Conference substitute.*—The Conference substitute generally adopts the Senate provision with regard to Conrail studies. However, Conrail is given a larger role and will be required to submit a separate report and recommendations at the same time as USRA on the carrier's future funding requirements, future structure and activities, and legislative action which might be required. Conrail is to submit preliminary projections and recommendations to USRA by January 1, 1981. The report and recommendations of USRA and Conrail are to be submitted to Congress no later than April 1, 1981.

The Department of Transportation is to submit its recommendations by that same date, and there is a provision for comment by the Commission.

The Conference substitute adopts the Conrail emergency funding authorization of \$329 million for fiscal year 1981. It retains the Senate provision for an affirmative finding by the Finance Committee that Conrail has taken appropriate action to eliminate losses on light density lines and other lines which are unprofitable. However,

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er, since the rail bill contains separate surcharge and abandonment provisions, the expedited Conrail surcharge and abandonment procedures have been deleted. The Conferees stress, however, that Congress intends, as a condition of the emergency funding, that Conrail proceed to eliminate or reduce its losses on unprofitable lines and implement such cost conservation measures as are feasible to minimize the needs for additional Federal funds.

Earlier this year, in the Passenger Railroad Rebuilding Act, Congress established the goal of eliminating congestion of rail freight and rail passenger traffic along the Northeast Corridor. At that time, Congress also authorized funds to begin the diversion of freight around Baltimore. It now appears that still more freight may be diverted off the corridor by cooperation between Conrail and the Delaware and Hudson Railroad and that no authorization of appropriations is required to divert additional traffic off the corridor by the negotiations of trackage rights between Conrail and the Delaware and Hudson. Accordingly, the Conferees express their hope that these negotiations will successfully divert additional freight off the corridor and direct the United States Railway Association to monitor these negotiations and to report on their progress to the respective committees.

### SECTION 704—USRA AUTHORIZATION OF APPROPRIATIONS

*Senate bill.*—The Senate bill contained a 2 year authorization of \$31.5 million in fiscal year 1981 and \$25.5 million in 1982.

*House amendment.*—The House amendment contained a 1 year authorization for \$28.5 million.

*Conference substitute.*—The conference substitute provides a 1 year authorization of \$30 million for fiscal year 1981.

### SECTION 705—FEEDER LINE REHABILITATION STUDY

*Senate bill.*—No provision.

*House bill.*—Section 231 of the House bill created a Rail Technology and Shippers Needs Board. This Board is to consist of the Secretary of Transportation, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Secretary of Labor, the Chairman of the Interstate Commerce Commission, and two shipper representatives from national agricultural organizations appointed by the President. The Board is given authority to conduct studies of technological means to improve rail productivity and the continuing transportation needs of urban and rural shippers.

Section 231 of the House bill also provides for a study of the revenue impact and public benefits of exempting from taxation State or local government obligations incurred in connection with the rehabilitation of railroad feeder lines. The report must include criteria as may be necessary to prevent the abuse of the special tax status given under this section.

*Conference substitute.*—The Conference Substitute deleted the Rail Technology and Shippers Needs Board but retained the study of the impact of exempting State or local government obligations incurred in connection with the railroad feeder lines. It is anticipated that this report will include recommendations regarding the

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types of railroad properties and services which ought to be eligible for State or local government obligations which are exempt from taxation; ways to narrow the applicability of this special issue to ensure that such obligations will be issued only for productive rail rehabilitation or acquisition projects; and ways to ensure coordination with Federal, State and local rail programs.

### SECTION 706—EFFECT ON PENDING MATTERS

*Senate bill.*—No provision.

*House amendment.*—The House bill contains a provision which states that all applications or proceedings pending before the Commission or other agencies, or any court, shall be determined as if this law had not been enacted.

*Conference substitute.*—The conference substitute deletes the House provision, but clarifies that existing rate bureau proceedings shall be conducted under the law prior to the enactment of this Act. The House bill, as passed, contains a section determining the effect of this legislation on pending matters. The fact that the Conference substitute does not contain a similar provision is not intended to create any implication that other cases now pending at the Commission, other affected agencies, or pending in the Federal courts are not to be adjudicated or determined under existing law or the new legislation in accordance with controlling case law. The deletion of these provisions means that existing cases at the Commission, other affected agencies, or pending in the Federal courts, shall be determined as present case law requires that they be determined.

If a case is pending in Federal Court or has been remanded to the Commission, the Conferees intend that the rate ultimately determined by the Commission shall be considered the rate in effect on the date of enactment for the purposes of this Act.

### SECTION 707—CONSTRUCTION OF AMENDMENTS

*Senate bill.*—Same as the House bill.

*House amendment.*—The House amendment provided that the amendments made by this Act should not be construed to modify the existing law with respect to competition and coordination as it affected the relationship between water carriers and rail carriers.

*Conference substitute.*—The provision contained in this section, which qualifies each provision of each section of this Act, is designed to make clear that none of the provisions of the Act modifies existing law to make lawful a rate or practice that was unlawful on the day prior to enactment. Also the Conferees intend that this section allow water carriers to challenge practices that were unlawful as unfair, destructive, predatory, or otherwise undermined competition prior to enactment of this Act. In addition, of course, the Conferees do not intend to limit the rights of water carriers to exercise their rights and remedies under the provision of the Interstate Commerce Act as amended by the Staggers Act of 1980 regardless of whether those rights and remedies are related to practices which are unfair, destructive, predatory or otherwise undermine competition.

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The intent is that none of the amendments made by this Act is to be used to legitimize the undermining of rail-water competition. Railroad rates and practices that affect rail-water competition that are unfair, destructive, predatory, or otherwise undermine competition, and that were unlawful immediately prior to enactment of this Act shall continue to be prohibited. Similarly, no change made by this Act makes lawful any other railroad rate or competitive practice that is unfair, destructive, predatory or otherwise undermines competition.

### SECTION 708—SURPLUS EQUIPMENT

*Senate bill.*—No provision.

*House amendment.*—The House amendment makes Conrail eligible to borrow excess equipment from the Department of the Army. Now, the affected community must pay a rental fee of the fair market value, which is too high for most local communities. The amendment would set up a two-step process for obtaining the needed equipment (bridge for example). The first would be an application by Conrail to the Army for a contract to borrow the bridge; this would occur only after Conrail has determined that public safety required such action. After Conrail and the Army have concluded negotiations, Conrail would enter into a contract with the local community to pay for the transportation of the bridge to the site and for routine maintenance.

While the language of the amendment is general, it is specifically aimed at solving a problem in the city of Niles, Ohio, where the West Park Avenue Bridge going over Conrail tracks was damaged and traffic is now being rerouted through a public park. This creates a hazardous and dangerous condition for the many children in the area.

*Conference substitute.*—Conference substitute adopts the House provision.

### SECTION 709—STUDY OF ALASKA RAILROAD RATES

*Senate bill.*—No provision.

*House amendment.*—The House amendment requires, within 6 months after the effective date of the legislation, the Commission to complete a study to determine whether certain rates charged by the Alaska Railroad would, if such rates were entered into after the enactment of the legislation, have violated Section 10701 (a)(1) of Title 49 U.S.C. as amended by the House amendment.

*Conference substitute.*—The Conference substitute follows the House amendment. Allegations have been made that the Alaska Railroad has been engaged in predatory pricing to the injury of its privately-owned competitors. It has also been alleged that the Alaska Railroad has the capacity to engage in such activity because it is federally owned and subsidized, while its competitors are totally unsubsidized. Clearly, such conduct would be contrary to sound public policy.

Accordingly, an investigation by the Commission is ordered by this Act. It is expected that the Commission will conduct a careful, impartial analysis of the controversy, weighing all the facts and arguments of the interested parties, and making available its analy-

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sis and supporting data for public comment prior to rendering a final report to Congress. The Department of Transportation and other Federal agencies are expected to cooperate fully with the Commission in the conduct of the investigation.

The Commission's study is to be coordinated with a study by the State of Alaska.

SECTION 710—EFFECTIVE DATES

*Senate bill.*—No provision.

*House amendment.*—The House amendment provides that the provisions of this Act and the amendments made by this Act shall take effect October 1, 1980, except certain sections dealing with the Conrail employee protection.

*Conference substitute.*—The Conference substitute adopts the House amendment, but clarifies that the amendments to the Rock Island Transition and Employee Assistance Act in section 227 are effective upon enactment.

APPENDIX A

INTERSTATE COMMERCE COMMISSION,  
Washington, D.C., September 16, 1980.

Hon. J. JAMES EXON,  
U.S. Senate, Washington, D.C.

DEAR SENATOR EXON: This is in reply to your letter of September 11 asking for my interpretation of the Commission's authority regarding demand-sensitive rates if Section 210 of H.R. 7235 (The Rail Act of 1980) were enacted. As your letter points out, Section 210 repeals the existing section of the Interstate Commerce Act which requires the Commission to maintain standards and procedures to permit the establishment of demand-sensitive rates. In my view, repeal of this section will lead the Commission to repeal its existing regulations regarding demand-sensitive rates and to refuse to initiate new rulemakings on this subject.

I hope this addresses your concerns about the Commission's interpretation of existing and pending legislation. I would, of course, be pleased to discuss this with you at any time. If legislation is enacted, I look forward to working closely with you and other members of Congress who have devoted so much effort to bringing a rail bill to fruition.

Sincerely yours,

DARIUS W. GASKINS, Jr., *Chairman.*

APPENDIX B

CHICAGO AND NORTHWESTERN TRANSPORTATION CO.,  
September 26, 1980

Hon. J. J. EXON,  
U.S. Senate, Washington, D.C.

DEAR SENATOR EXON: We know you are concerned with our plans for the future of our east-west line between the Wyoming State line and the Mississippi River. Please be advised we have no intention of abandoning this line.

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The construction of, and successful operation of, our proposed connector line to the Union Pacific near Joyce, Nebraska, not only will not endanger the east-west line, but will enhance its future. Revenues derived from the coal project will make this railroad stronger and better able to maintain this line, which performs a useful service for the citizens of Nebraska.

It is our purpose to maintain this line in condition to respond to service needed by your citizens. As we become stronger, we are better able to increase the quality of this line and our other lines in Nebraska. However, I would like to emphasize that we do have an ongoing program which has resulted in substantial investment. For the period from 1974 to 1979 we have invested \$35,456,000 in maintenance and capital in this line. Obviously, it is our intention to continue maintenance and investment at this level or, hopefully, greater.

Sincerely,

JEROME CONLON, *Senior Vice President.*

HARLEY O. STAGGERS,  
JAMES J. FLORIO,  
JOHN M. MURPHY,  
BOB ECKHARDT,  
JIM SARTINI,  
BARBARA A. MIRULSKI,  
ROBERT T. MATSUI,  
JAMES T. BROYHILL,  
EDWARD R. MAHIGAN,  
TOM LOEFFLER,  
GARY A. LEE,

*Managers on the Part of the House.*

HOWARD W. CANNON,  
RUSSELL B. LONG,  
J. JAMES EXON,  
BOB PACKWOOD,  
NANCY LANIKIN KASSERBAUM,

*Managers on the Part of the Senate.*

# STAGGERS RAIL ACT OF 1980

Public Law 96-448; 96th Congress

AN ACT To reform the economic regulation of railroads, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SHORT TITLE

SECTION 1. This Act may be cited as the "Staggers Rail Act of 1980".

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## TITLE II—RAILROAD RATES AND INTER-CARRIER PRACTICES

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## FINDINGS

### SEC. 2. The Congress hereby finds that—

- (1) historically, railroads were the essential factor in the national transportation system;
- (2) the enactment of the Interstate Commerce Act was essential to prevent an abuse of monopoly power by railroads and to establish and maintain a national railroad network;
- (3) today, most transportation within the United States is competitive;
- (4) many of the Government regulations affecting railroads have become unnecessary and inefficient;
- (5) nearly two-thirds of the Nation's intercity freight is transported by modes of transportation other than railroads;
- (6) earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements;
- (7) by 1985, there will be a capital shortfall within the railroad industry of between \$16,000,000,000 and \$20,000,000,000;
- (8) failure to achieve increased earnings within the railroad industry will result in either further deterioration of the rail system or the necessity for additional Federal subsidy; and
- (9) modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential

in order to achieve maximum utilization of railroads to save energy and combat inflation.

## GOALS

SEC. 3. The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States. In order to achieve this purpose, it is hereby declared that the goals of this Act are—

- (1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;
- (2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;
- (3) to assist the rail system to remain viable in the private sector of the economy;
- (4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and
- (5) to assist in the rehabilitation and financing of the rail system.

## TITLE I—RAIL TRANSPORTATION POLICY

### RAIL TRANSPORTATION POLICY

SEC. 101. (a) Chapter 101 of title 49, United States Code, is amended by inserting after section 10101 the following new section:

#### “§ 10101a. Rail transportation policy

“In regulating the railroad industry, it is the policy of the United States Government—

- “(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
- “(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
- “(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;
- “(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- “(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
- “(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
- “(7) to reduce regulatory barriers to entry into and exit from the industry;

"(8) to operate transportation facilities and equipment without detriment to the public health and safety;

"(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

"(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

"(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

"(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

"(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

"(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

"(15) to encourage and promote energy conservation."

(b) Section 10101(a) of title 49, United States Code, is amended by striking out "To ensure" and inserting in lieu thereof "Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure".

(c) The section analysis of chapter 101 of title 49, United States Code, is amended by inserting after the item relating to section 10101 the following new item:

"10101a. Rail transportation policy."

## TITLE II--RAILROAD RATES AND INTER-CARRIER PRACTICES

### REGULATION OF RAILROAD RATES

SEC. 201. (a) Subchapter I of chapter 107 of title 49, United States Code, is amended by inserting after section 10701 the following new section:

#### "§ 10701a. Standards for rates for rail carriers

"(a) Except as provided in subsection (b) or (c) of this section and unless a rate is prohibited by a provision of this title, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may establish any rate for transportation or other service provided by the carrier.

"(b)(1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

"(2) In any proceeding to determine the reasonableness of a rate described in paragraph (1) of this subsection—

"(A) the shipper challenging such rate shall have the burden of proving that such rate is not reasonable if—

"(i) such rate (I) is authorized under section 10707a of this title, and (II) results in a revenue-variable cost percentage for the transportation to which the rate applies that is less than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; or

"(ii) such rate does not meet the description set forth in clause (i) of this subparagraph, but the Commission does not begin an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable; and

"(B) the rail carrier establishing the challenged rate shall have the burden of proving that such rate is reasonable if—

"(i) such rate (I) is greater than that authorized under section 10707a of this title, or (II) results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; and

"(ii) the Commission begins an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable.

"(3) In determining whether a rate established by a rail carrier is reasonable for purposes of this section, the Commission shall recognize the policy of this title that rail carriers shall earn adequate revenues, as established by the Commission under section 10704(a)(2) of this title.

"(c)(1) A rate for transportation or other service provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may not be established below a reasonable minimum. Any rate for transportation by such a rail carrier that does not contribute to the going concern value of such carrier is presumed to be not reasonable. A rate that contributes to the going concern value of such carrier is conclusively presumed not to be below a reasonable minimum.

"(2) A rate for transportation by a rail carrier that equals or exceeds the variable cost of providing the transportation is conclusively presumed to contribute to the going concern value of such rail carrier.

"(3)(A) Upon the filing of a complaint alleging that a rate is in violation of this subsection, the Commission shall take final action thereon by the 90th day after the date such complaint is filed.

"(B) If the Commission determines, based on the record after opportunity for a hearing, that a rate is in violation of this subsection, the Commission shall order such rate to be raised, but only to the minimum level required by this subsection. The complainant shall have the burden of proving that such rate is in violation of this subsection.

"(4)(A) For purposes of this subsection, variable costs shall be determined under formulas or procedures prescribed or certified by the Commission.

"(B) In the determination of variable costs for purposes of minimum rate regulation, the Commission shall, on application of the rail carrier proposing the rate, determine only the costs of such carrier and only those costs of the specific service in question unless the specific information is not available. The Commission

may not include in such variable costs an expense that does not vary directly with the level of transportation provided under the proposed rate."

(b)(1) Section 10701(a) of title 49, United States Code, is amended—

(A) by inserting "(other than a rail rate)" immediately after "A rate" in the first sentence;

(B) by inserting "(including a rail carrier)" immediately after "such a carrier" in the second sentence thereof; and

(C) by inserting "(including rail carriers)" immediately after "those carriers" in the third sentence thereof.

(2) Section 10701(b) of title 49, United States Code, is repealed.

(3) The section analysis of chapter 107 of title 49, United States Code, is amended by inserting immediately below the item relating to section 10701 the following new item:

"10701a. Standards for rates for rail carriers."

#### DETERMINATION OF MARKET DOMINANCE

SEC. 202. Section 10709 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(d)(1) In this subsection—

"(A) 'fixed and variable cost' means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.

"(B)(i) 'cost recovery percentage' means the lowest revenue-variable cost percentage which, if all movements that produced revenues resulting in revenue-variable cost percentages in excess of the cost recovery percentage are deemed to have produced only revenues resulting in the cost recovery percentage, would produce revenues which would be equal, when combined with total revenues produced by all other traffic transported by rail carrier, to the total fixed and variable cost of the transportation of all traffic by rail carrier.

"(ii) for purposes of determining the cost recovery percentage only, 'revenue-variable cost percentage' means the quotient, expressed as a percentage figure, obtained by dividing the total revenues produced by the transportation of all traffic received by rail carriers for rail transportation by the total variable cost of such transportation.

"(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—

"(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981;

"(B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;

"(C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;

"(D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

"(E) the cost recovery percentage, during each 12-month period beginning on or after October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

"(3) For purposes of determining the revenue-variable cost percentage for a particular transportation, variable costs shall be determined pursuant to section 10705a(m)(1) of this title, with adjustments specified by the Commission. A rail carrier may meet its burden of proof under this subsection by establishing its variable costs in accordance with such section 10705a(m)(1), but a shipper may rebut that showing by evidence of such type, and in accordance with such burden of proof, as the Commission shall prescribe.

"(4) A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation, or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

"(5)(A) Within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, the Commission shall determine the cost recovery percentage for the transportation of all traffic received by rail carriers. The Commission shall make such determination after considering each individual revenue-variable cost percentage resulting from the revenues and costs of a valid and reliable statistical sample of all movements of commodities transported by class I rail carriers during the most recent calendar year for which such information is available.

"(B) If, on the basis of calculations under subparagraph (A) of this paragraph, the Commission determines that revenues earned by all class I rail carriers during the previous calendar year do not exceed the fixed and variable costs of such carriers, then the cost recovery percentage for purposes of this section shall be deemed to be equal to the cost recovery percentage last determined by the Commission.

"(C) The Commission shall, in its annual report submitted to the Congress under section 10311 of this title, set forth the cost recovery percentage determined for that year under subparagraph (A) of this paragraph."

#### ZONE OF RATE FLEXIBILITY

SEC. 203. (a) Subchapter I of chapter 107 of title 49, United States Code, is amended by inserting after section 10707 the following new section:

"§ 10707a. Zone of rail carrier rate flexibility

"(a) In this section—

"(1)(A) 'base rate' means, with respect to the transportation of a particular commodity (i) for the 24-month period beginning on October 1, 1980, the rate in effect on October 1, 1980, (ii) for the 24-month period beginning on October 1, 1982, the rate in effect on October 1, 1982, and (iii) for the 5-year period beginning on October 1, 1984, and for each subsequent 5-year period, the rate in effect on the first day of the applicable 5-year period.

"(B) If no rate exists for the transportation of a particular commodity on October 1, 1980, the base rate for the transportation of such commodity shall be the rate established by the rail carrier (divided by the latest rail cost adjustment factor published by the Commission), unless such rate is found to be unreasonable by the Commission, in which case the base rate shall be the rate authorized by the Commission (divided by the latest rail cost adjustment factor published by the Commission).

"(2)(A) 'adjusted base rate' means the base rate for the transportation of a particular commodity multiplied by the latest rail cost adjustment factor published by the Commission pursuant to this paragraph.

"(B) Commencing with the fourth quarter of 1980, the Commission shall, as often as practicable but in no event less often than quarterly, publish a rail cost adjustment factor which shall be a fraction, the numerator of which is the latest published Index of Railroad Costs (which index shall be compiled or verified by the Commission, with appropriate adjustments to reflect the changing composition of railroad costs, including the quality and mix of material and labor), and the denominator of which is the same index for the fourth quarter of 1980, or for the fourth quarter of 1982 or for the fourth quarter of every fifth year thereafter, as appropriate.

"(b)(1) Except as provided in paragraph (2) of this subsection, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may increase any rate over which the Commission has jurisdiction under section 10709 of this title so long as the increased rate is not greater than the adjusted base rate for the transportation involved, plus any rate increases implemented under subsection (c) or (d) of this section.

"(2) A rate increase authorized under this subsection may not be found to exceed a reasonable maximum for the transportation involved.

"(3) A rail carrier may not increase a rate under this subsection to the extent that the cost increases to such carrier due to inflation are recovered through (A) general rate increases pursuant to section 10706 of this title, or (B) inflation-based rate increases under section 10712 of this title applicable to that rate.

"(c)(1) During the 12-month period beginning on the effective date of the Staggers Rail Act of 1980 and during each of the 3 succeeding 12-month periods, a rail carrier may, in addition to rate increases authorized under subsection (b) of this section, increase any rate over which the Commission has jurisdiction under section 10709 of this title by an annual amount of not more than 6 percent of the adjusted base rate, except that in no event shall the total

increase under this subsection result in a rate which is more than 118 percent of the adjusted base rate.

"(2)(A) If any portion of a rate increase under this subsection is not implemented in the year in which it is authorized, such portion may, except as provided in subparagraph (B) of this paragraph, be implemented only in the next succeeding year.

"(B) If any portion of the total rate increase authorized under this subsection is not implemented by the end of the 4-year period beginning on the effective date of the Staggers Rail Act of 1980, such portion may be implemented in the next 2 succeeding years, except that in no event may a rail carrier increase a rate under this subsection or under subsection (d) of this section in either of such 2 succeeding years by an annual amount of more than 10 percent of the adjusted base rate.

"(d)(1) Except as provided in paragraph (3) of this subsection, during the 12-month period beginning on October 1, 1984, and during each succeeding 12-month period, a rail carrier may, in addition to rate increases under subsection (b) of this section, increase any rate over which the Commission has jurisdiction under section 10709 of this title by an annual amount of not more than 4 percent of the adjusted base rate.

"(2) No portion of any rate increase under this subsection which is not implemented in the year in which it is authorized may be implemented in any other year.

"(3)(A) The provisions of this subsection shall not apply to a rail carrier proposing to increase a single line rate if such carrier earns adequate revenues, as determined by the Commission under section 10704(a)(2) of this title.

"(B) The Commission shall, after a hearing on the record, prescribe such rules with respect to joint rates as necessary to ensure that rail carriers which earn adequate revenues, as determined under section 10704(a)(2) of this title, do not receive the rate increases authorized by this subsection unless the Commission determines that it is unable to prescribe such rules without precluding rail carriers not earning adequate revenues from receiving the rate increases authorized under this subsection.

"(e)(1) Notwithstanding the provisions of section 10707 of this title, in the case of any rate increase by a rail carrier that is authorized under subsection (c) or (d) of this section—

"(A)(i) the Commission may not suspend such rate increase pending final Commission action; and

"(ii) except as provided in paragraph (2) of this subsection, the Commission may not begin an investigation proceeding under section 10707 of this title with respect to the reasonableness of such rate increase; but

"(B) an interested party may file a complaint under section 11701(b) of this title alleging that such rate increase violates the provisions of this subtitle.

In considering any complaint challenging a rate increase that is authorized under subsection (c) of this section and that results in a revenue-variable cost percentage that is less than the lesser of the percentages described in clauses (i) and (ii) of paragraph (2)(A), the Commission shall, in determining the reasonableness of such rate increase, give due consideration to whether the carrier proposing the rate increase has attained adequate revenues, as determined by

the Commission under section 10704(a)(2) of this title, giving regard to preventing a carrier with adequate revenues from realizing excessive profits on the traffic involved and also the policy of bringing to an adequate level the revenues of carriers not having an adequate revenue level.

"(2)(A) If a rate increase authorized under this section in any year results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than—

"(i) 20 percentage points above the revenue-variable cost percentage applicable in that year under section 10709(d) of this title; or

"(ii) a revenue-variable cost percentage of 190 percent, whichever is less, the Commission may, on its own initiative, or on complaint of an interested party, begin an investigation proceeding to determine whether the proposed rate increase violates this subtitle.

"(B) In determining whether to investigate or not to investigate any proposed rate increase that results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of subparagraph (A) of this paragraph (without regard to whether such rate increase is authorized under this section), the Commission shall set forth its reasons therefor, giving due consideration to the following factors:

"(i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

"(ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

"(iii) the impact of the proposed rate or rate increase on the attainment of the national energy goals and the rail transportation policy under section 10101a of this title, taking into account the railroads' role as a primary source of energy transportation and the need for a sound rail transportation system in accordance with the revenue adequacy goals of section 10704 of this title.

This subparagraph shall not be construed to change existing law with regard to the non-reviewability of such determination.

"(C) In determining whether a rate is reasonable, the Commission shall consider, among other factors, evidence of the following:

"(i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

"(ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

"(iii) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

"(f) In any proceeding under this section, evidence of the underlying rail carrier rate is admissible.

"(g) A finding by the Commission that a rate increase exceeds the increase authorized under this section does not establish a presumption that (1) the rail carrier proposing such rate increase has or does not have market dominance over the transportation to which the rate applies, or (2) the proposed rate exceeds or does not exceed a reasonable maximum.

"(h) The authority of the Commission to determine and prescribe reasonable rules, classifications, and practices may not be used, directly or indirectly, to limit the rates which rail carriers are otherwise authorized to establish under this subtitle."

(b) The section analysis of chapter 107 of title 49, United States Code, is amended by inserting immediately after the item relating to section 10707 the following new item:

"10707n. Zone of rail carrier rate flexibility."

(c)(1) Any rail carrier rate which increased over 70 percent between 1976 and 1979 inclusive for the transportation, in shipper owned equipment over a distance exceeding 1,550 miles between points within the United States, of coal pursuant to a tariff calling for an annual volume of more than 2,000,000 tons per year purchased by a municipally owned utility for the generation of electric power under a 20-year purchase agreement entered into by such utility in the year 1974 shall not be increased so long as coal is purchased under such original agreement, except that—

(A) during the period beginning October 1, 1980, and ending September 30, 1987, the Interstate Commerce Commission may permit increases in such rate which result in a revenue-variable cost percentage of not more than 162 percent; and

(B) after October 1, 1987, such rate shall be subject to section 10701a of title 49, United States Code, and related provisions of such title governing regulation of rail carrier rates, except that until such rate results in a revenue-variable cost percentage that is equal to or greater than the revenue-variable cost percentage applicable under section 10709(d) of such title, such rate may not be increased more than 4 percent, in addition to inflation, in any year.

(2) Neither the provisions of this subsection nor any rate subject to this subsection shall be admissible as evidence or considered in any way in any proceeding involving any other rail carrier rate that is commenced to determine market dominance under section 10709 of title 49, United States Code, or to determine reasonableness under section 10701a of such title.

#### TRANSPORTATION OF RECYCLABLE MATERIALS

SEC. 204. Section 10731 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than

the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection."

#### RATE REGULATION PROCEEDINGS; ADEQUATE REVENUES

SEC. 205. (a)(1) The Interstate Commerce Commission shall commence a proceeding for purposes of determining whether, and to what extent, product competition should be considered in proceedings under subtitle IV of title 49, United States Code, to determine the reasonableness of rail carrier rates. The Commission shall complete its proceeding under this subsection within 230 days after the effective date of this Act.

(2)(A) For purposes of this subsection, the term "product competition" means the availability to a consignee, at a competitive delivered cost and in sufficient quantities, of products or commodities which are of the same type as the commodity or product to which the rate in question applies, without regard to whether such products or commodities are available from the same or a different origin as those to which the rate applies.

(B) In determining the availability of alternative sources of a particular commodity for purposes of this subsection, such commodity must be capable, by reason of similar specifications, of being effectively utilized by the consignee.

(C) In determining the availability of alternative sources of coal for purposes of this subsection, such coal must be capable, by reason of similar specifications such as Btu's, sulfur content, and ash content, of being effectively utilized by the consignee.

(D) For purposes of this subsection, any coal imported in the United States for the generation of electricity by utilities shall not be taken into account in the determination of whether coal is available to a consignee from another source.

(3)(A) Nothing in this subsection shall be construed as requiring the Commission to modify its standards for the determination of the reasonableness of rail carrier rates under existing law and procedures.

(B) Nothing in this subsection shall be construed as altering the meaning, use, or interpretation by the Commission, the courts, or any party of the term "market dominance", as defined in section 10709(a) of title 49, United States Code. The enactment of this subsection shall not be considered by the Commission in any proceeding, or by any court on an appeal from that or any other proceeding, to determine the proper scope of the term "market dominance" or whether there is market dominance over the transportation to which any particular rate applies.

(b)(1) Section 10704(a)(2) of title 49, United States Code, is amended by inserting "and revise as necessary" immediately after "shall maintain".

(2) Section 10704(a) of title 49, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(3) The Commission shall conclude a proceeding under paragraph (2) of this subsection within 180 days after the effective date of the Staggers Rail Act of 1980 and thereafter as necessary.

"(4) On the basis of the standards and procedures under paragraph (2) of this subsection, the Commission shall, within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, determine which rail carriers are earning adequate revenues."

#### INFLATION-BASED RATE INCREASES

SEC. 206. (a) Subchapter I of chapter 107 of title 49, United States Code, is amended by adding at the end thereof the following new section:

##### "§ 10712. Inflation-based rate increases

"(a) The Commission may, on a quarterly basis and consistent with the rail transportation policy set forth in section 10101a of this title, prescribe a percentage rate increase or rate index for rail carriers in order to compensate for inflationary cost increases. Such percentage rate increase or rate index may be applicable on an industry-wide, territory-wide, or carrier-by-carrier basis.

"(b) Within 60 days after the date the Commission prescribes a percentage rate increase or rate index under subsection (a) of this section, each rail carrier or group of rail carriers shall notify the Commission of any rate or group of rates which such carrier or carriers intend to be excluded from the application of such percentage rate increase or rate index.

"(c) For purposes of this section, a percentage rate index may permit rate increases within a specified range to allow carriers to recover a total revenue increase specified by the Commission as necessary to compensate for inflationary cost increases."

(b) The section analysis for chapter 107 of title 49, United States Code, is amended by inserting immediately after the item relating to section 10711 the following new item:

"10712. Inflation-based rate increases."

#### INVESTIGATION AND SUSPENSION OF RATES

SEC. 207. (a) Section 10707(b)(1) of title 49, United States Code, is amended to read as follows:

"(b)(1) The Commission must complete a proceeding under this section and make its final decision by the end of the 5th month after the rate, classification, rule, or practice was to become effective, except that if the Commission reports to the Congress by the end of such 5th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

"(A) is effective at the end of that time period; or

"(B) if already in effect at the end of that time period, remains in effect."

(b) Section 10707(c) of title 49, United States Code, is amended to read as follows:

"(c)(1) The Commission may not suspend a proposed rate, classification, rule, or practice during the course of a Commission proceeding under this section unless it appears from the specific facts shown by the verified statement of a person that—

"(A) it is substantially likely that the protestant will prevail on the merits;

"(B) without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and

"(C) because of the peculiar economic circumstances of the protestant, the provisions of subsection (d) of this section do not protect the protestant.

"(2) The burden shall be on the protestant to prove the matters described in paragraph (1) (A), (B), and (C) of this subsection."

(c) Section 10707(d) of title 49, United States Code, is amended to read as follows:

"(d)(1) If the Commission does not suspend a proposed rate increase under subsection (c) of this section, the Commission shall require the rail carrier to account for all amounts received under the increase until the Commission completes its proceedings under subsection (b) of this section. The accounting shall specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unreasonable, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States Government having a duration of 90 days.

"(2) If a rate is suspended under subsection (c) of this section and any portion of such rate is later found to be reasonable under this title, the carrier shall collect from each person using the transportation to which the rate applies the difference between the original rate and the portion of the suspended rate found to be reasonable for any services performed during the period of suspension, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States Government having a duration of 90 days, except that this paragraph shall not apply to general rate increases under section 10706 of this title.

"(3) If any portion of a proposed rate decrease is suspended under subsection (c) of this section and later found to be reasonable under this title, the rail carrier may refund any part of the portion of the decrease found to comply with this title if the carrier makes the refund available to each shipper who participated in the rate, in accordance with the relative amount of such shipper's traffic transported at such rate.

"(4) Notwithstanding the provisions of section 10741 or section 10761 of this title, the Commission shall, by rule, establish standards and procedures permitting a rail carrier to waive the collection of amounts due under this subsection if such amounts are not significant."

(d) Section 10707(e) of title 49, United States Code, is repealed.

## CONTRACTS

SEC. 208. (a) Subchapter I of chapter 107 of title 49, United States Code, as amended by this Act, is further amended by adding at the end thereof the following new section:

### "§ 10713. Contracts

"(a) One or more rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions. Such a rail carrier may not enter into a contract with purchasers of rail service except as provided in this section.

"(b) Each contract entered into under this section shall be filed with the Commission, together with a summary of the contract containing such nonconfidential information as the Commission prescribes. The Commission shall publish special tariff rules for such contracts in order to assure that the essential terms of the contract are available to the general public in tariff format.

"(c) A contract filed under this section shall be approved by the Commission, as provided in subsection (e) of this section, unless the Commission determines in a proceeding under subsection (d) of this section that such contract is in violation of this section.

"(d)(1) No later than 30 days after the date of filing of a contract under this section, the Commission may, on its own initiative or on complaint, begin a proceeding to review such contract on the grounds described in this subsection.

"(2)(A) In the case of a contract other than a contract for the transportation of agricultural commodities (including forest products and paper), a complaint may be filed—

"(i) by a shipper only on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or

"(ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

"(B) In the case of a contract for the transportation of agricultural commodities (including forest products and paper), in addition to the grounds for a complaint described in subparagraph (A) of this paragraph, a complaint may be filed by a shipper on the grounds that such shipper individually will be harmed because—

"(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

"(ii) the proposed contract constitutes a destructive competitive practice under this subtitle.

In making a determination under clause (ii) of this subparagraph, the Commission shall consider the difference between contract rates and published single car rates.

"(C) For purposes of this paragraph, the term 'unreasonable discrimination' has the same meaning as such term has under section 10741 of this title.

"(3)(A) Within 30 days after the date a proceeding is commenced under paragraph (1) of this subsection, or within such shorter time period after such date as the Commission may establish, the Commission shall determine whether the contract that is the subject of such proceeding is in violation of this section.

"(B) If the Commission determines, on the basis of a complaint filed under paragraph (2)(B)(i) of this subsection, that the grounds for a complaint described in such paragraph have been established with respect to a carrier, the Commission shall, subject to the provisions of this section, order such carrier to provide rates and service substantially similar to the contract at issue with such differentials in terms and conditions as are justified by the evidence.

"(e) Approval of a contract filed under this section shall be effective—

"(1) on the date the Commission expressly approves such contract, but in no event before the end of the 30-day period beginning on the date such contract is filed or after the end of the 60-day period beginning on such date; or

"(2) if the Commission has not disapproved such contract by the end of the 60-day period beginning on the date such contract is filed, at the end of such 60-day period.

"(f) The Commission may limit the right of a rail carrier to enter into future contracts under this section following a determination that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under section 11101 of this title.

"(g) The Commission may not require a rail carrier to violate the terms of a contract that has been approved under this section, except to the extent necessary to comply with section 11128 of this title.

"(h) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

"(i)(1) A contract that is approved by the Commission under this section, and transportation under such contract, shall not be subject to this subtitle, and may not be subsequently challenged before the Commission or in any court on the grounds that such contract violates a provision of this subtitle.

"(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

"(j) The provisions of this section shall not affect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that is in effect on the effective date of the Staggers Rail Act of 1980. Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section. Nothing in this section

shall affect the rights of the parties to challenge the existence of such a contract.

"(k)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products and paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC), except that in the case of a proposed contract between a class I carrier and a shipper originating an average of 1,000 cars or more per year during the prior 3-year period by major car type on a particular carrier, not more than 40 percent of carrier owned or leased equipment utilized on the average during the prior 3-year period may be used for such contract without prior authorization by the Commission.

"(2) The Commission may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Commission considers appropriate, if it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

"(l) Service under a contract approved under this section shall be deemed to be a separate and distinct class of service, and the equipment used in the fulfillment of such a contract shall not be subject to car service decisions under section 11123 of this title.

"(m) The Commission shall establish a railroad contract rate advisory service. The advisory service shall—

"(1) compile and disseminate to interested parties nonconfidential summaries of the provisions of individual contract information relating to the provisions of contracts entered into under this section with regard to various goods, items, and commodities covered by such contracts;

"(2) provide the Commission and interested parties with advice regarding contracts; and

"(3) assess the impact on competition among shippers of variations between contract rates for various shipments and the published single car rates, and submit a report on such impact to the Congress not later than 90 days after the effective date of the Staggers Rail Act of 1980."

(b) The section analysis for chapter 107 of title 49, United States Code, is amended by inserting immediately after the item relating to section 10712, as added by this Act, the following new item:

"10713. Contracts."

#### DEMAND SENSITIVE RATES

Sec. 209. Section 10727 of title 49, United States Code, and the item relating to such section in the section analysis for chapter 107 of such title, are repealed.

## PHASEOUT OF CAPITAL INCENTIVE RATES

SEC. 210. (a) Section 10729 of title 49, United States Code, and the item relating to such section in the section analysis of chapter 107 of such title, are repealed.

(b) Notwithstanding any other provision of law, any rate established by a rail carrier under section 10729 of title 49, United States Code, prior to the effective date of this Act shall remain in effect in accordance with its terms, but for no longer than 5 years after the date it became effective, unless the parties otherwise agree. However, the Interstate Commerce Commission may, during the period such a rate is in effect, order such rate revised to a level equal to the incremental cost of providing the transportation if the Commission finds that the level then in effect reduces the going concern value of the rail carrier.

## PERMISSIVE LIMITED LIABILITY RATES

SEC. 211. (a) Section 10730(a) of title 49, United States Code, is amended by inserting "and excluding any rail carrier" immediately after "motor common carrier of property".

(b) Section 10730 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(c) A rail carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property."

(c) Section 11707(d) of title 49, United States Code, is amended—

(1) by inserting "(1)" immediately after "(d)";

(2) by inserting "(other than a rail carrier)" immediately after "delivering carrier"; and

(3) by adding at the end thereof the following new paragraph:

"(2)(A) A civil action under this section may only be brought—

"(i) against the originating rail carrier, in the judicial district in which the point of origin is located;

"(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

"(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

"(B) A civil action under this section may be brought in a United States district court or in a State court.

"(C) In this section, 'judicial district' means (i) in the case of a United States district court, a judicial district of the United States,

and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction."

(d) Within one year after the effective date of this Act, the Attorney General and the Interstate Commerce Commission shall independently investigate whether rail carriers should continue to be subject to section 11707 of title 49, United States Code, and submit a report to the Congress setting forth recommendations to Congress for appropriate legislative action. Each such investigation shall address the following issues:

(1) Whether, in the case of traffic with respect to which rail carriers do not have market dominance, such carriers should be subject to any higher level of liability for loss and damage than they are willing to agree to with the shippers of such traffic.

(2) Whether, in the case of traffic with respect to which rail carriers have market dominance, such carriers should be subject to any greater liability than would be imposed under a statutory comparative negligence standard.

(3) Whether liability for damage to rail traffic should be determined under a no-fault liability system and what shippers should bear the cost of such a system.

(4) Whether venue in cases arising from rail carrier liability for damages to traffic should be further limited.

(5) Whether rail carrier property damage cases should be subject to laws other than Federal law.

(6) Whether the right to claims should be limited to either the shipper or receiver of property.

(7) Whether maximum time limits should be imposed on the filing of claims with rail carriers and the courts.

(8) Whether the prevailing party in a claims proceeding should be awarded attorneys fees in order to limit needless litigation.

(9) Whether excessive attorneys fees are awarded in cases under section 11707 of title 49, United States Code.

(10) Whether claimants should be able to recover damages in excess of the market value of the commodity transported unless liability for special or consequential damages is agreed to by the carrier in unity.

## RATE DISCRIMINATION

SEC. 212. Section 10741 of title 49, United States Code, is amended by striking out subsection (e) and inserting in lieu thereof the following new subsections:

"(e) Differences between rates, classifications, rules, and practices of rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title do not constitute a violation of this section if such differences result from different services provided by rail carriers.

"(f) This section shall not apply to—

"(1) contracts approved under section 10713 of this title, other than as provided in subsection (d)(2)(A)(ii) and (d)(2)(B) of such section;

"(2) surcharges or cancellations under section 10705a of this title;

"(3) separate rates for distinct rail services under section 10728 of this title;

"(4) rail rates applicable to different routes; or

"(5) expenses authorized under section 10751 of this title, except that with respect to rates described in paragraphs (2), (3), and (4), nothing in this subsection shall affect the authority of the Commission under this section with respect to rate relationships between ports or within the same port."

#### EXEMPTION

SEC. 213. Section 10505 of title 49, United States Code, is amended to read as follows:

#### "§ 10505. Authority to exempt rail carrier transportation

"(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

"(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

"(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

"(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

"(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

"(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

"(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

"(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

"(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle."

#### INTRASTATE RATES

SEC. 214. (a) Section 11501(a) of title 49, United States Code, is amended—

(1) by striking out paragraph (2);

(2) by striking out "(a)(1)" and inserting in lieu thereof "(a)"; (3) by striking out "subchapter I or IV" and inserting in lieu thereof "subchapter IV"; and

(4) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively.

(b) Section 11501 of title 49, United States Code, is amended by redesignating subsections (b) and (c) as subsections (d) and (e), respectively, and by inserting immediately after subsection (a) the following new subsections:

"(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

"(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

"(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

"(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

"(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

"(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

"(5)(A) Certification of a State authority under this subsection is valid for the 5-year period beginning on the date of such certifica-

tion. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

"(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

"(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

"(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice."

(c)(1) Section 11501(d)(2) of title 49, United States Code, as redesignated by subsection (b) of this section, is amended by inserting "and chapter 107 of this title" immediately before the period at the end of the first sentence.

(2) Section 10103(a) of title 49, United States Code, is amended by striking out "The" and inserting in lieu thereof "Except as otherwise provided in this subtitle, the".

(3) Section 10501(a)(2) of title 49, United States Code, is amended by inserting "such jurisdiction is not limited by subsection (b) of this section or the extent" immediately after "to the extent".

(4) Section 10501(c) of title 49, United States Code, is amended by inserting "(1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2)" immediately after "unless".

(5) Section 10501 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive."

#### BUSINESS ENTERTAINMENT EXPENSES

Sec. 215. Section 10751 of title 49, United States Code, is amended by striking out "(other than transportation by rail)" in subsections (a) and (b).

(b) The provisions of section 10751 of title 49, United States Code, as amended by subsection (a) of this section, shall apply to any ex-

pense of the type described in subsection (a) of such section 10751 that was incurred prior to the effective date of this Act (other than an expense with respect to which a penalty was paid pursuant to section 10761 of such title 49) or that is incurred on or after such effective date.

#### EFFICIENT MARKETING

SEC. 216. (a) Section 10762(c)(3) of title 49, United States Code, is amended by striking out the second sentence and inserting in lieu thereof the following: "In the case of a carrier other than a rail carrier, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section."

(b) Section 10762(d)(1) of title 49, United States Code, is amended by striking out "30-day" and inserting in lieu thereof "notice".

#### COMPENSATORY JOINT RATE RELIEF

SEC. 217. (a)(1) Chapter 107 of title 49, United States Code, is amended by inserting after section 10705 the following new section:

##### "§ 10705a. Joint rate surcharges and cancellations

"(1)(A) Except as provided in subparagraph (B) of this paragraph, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may publish and apply a surcharge increasing or decreasing the through charge applicable to any movement between points designated by the surcharging carrier subject to a joint rate. Such a surcharge may be applied without the concurrence of the other carriers that are party in such joint rate.

"(B) A carrier earning adequate revenues, as determined under section 10704(a)(2) of this title, may not apply such a surcharge to any movement on a line operated by such carrier which carried more than 3,000,000 gross ton miles of traffic per mile in the preceding calendar year.

"(C) Any surcharge applied pursuant to this subsection must be applied in equal dollar amounts to the movement subject to the surcharge over all routes between the points designated by the surcharging carrier which such carrier participates in under the joint rate involved, and when the surcharge increases the through charges, under any of such carrier's single line rates between the same points.

"(2)(A) Whenever a rail carrier applies a surcharge increasing a through charge pursuant to paragraph (1) of this subsection, any other rail carrier that participates in any movement subject to such surcharge may cancel the application of such surcharge to any route participated in by such other carrier, if such carrier

makes the demonstration described in subparagraph (B) of this paragraph.

"(B) A rail carrier may cancel the application of a surcharge under this paragraph if such carrier demonstrates to the Commission that the surcharging carrier's share of the revenues, at the time the surcharge was filed with the Commission, from its participation in the movement over the route involved would have been equal to or greater than 110 percent of its variable costs of providing service over such route, under either—

"(i) the applicable joint rate in effect at the time the surcharge was filed with the Commission, without the surcharge;

"(ii) a new rate division increasing the share of the surcharging carrier;

"(iii) a new higher lawful rate published by the canceling carrier; or

"(iv) a new, lesser surcharge which shall be prescribed by the Commission upon and in conformity with the request of the carrier proposing to cancel the surcharge. Any such prescribed surcharge shall, in conjunction with the surcharging carrier's division of the joint rate in effect on the date the original surcharge was filed with the Commission, provide the carrier proposing the original surcharge revenues equal to or greater than 110 percent of such surcharging carrier's variable cost of providing service over such route.

"(C)(i) The canceling tariff shall only become effective if the rail carrier proposing to cancel the application of the surcharge makes the demonstration described in subparagraph (B) of this paragraph.

"(ii) If the demonstration described in clause (i) of this subparagraph is made on the basis of the applicable joint rate in effect at the time the surcharge was filed with the Commission, without the surcharge, the tariff shall become effective on one day's notice after such determination is made.

"(iii) If the demonstration described in clause (i) of this subparagraph is made on the basis of a new rate, division, or surcharge prescribed pursuant to subparagraph (B)(iv) of this paragraph, the tariff shall become effective on the date such new rate, division, or surcharge becomes effective.

"(D) The remedy available to a rail carrier canceling the application of a surcharge under this paragraph shall be in addition to any other remedy available to such carrier under this chapter.

"(3)(A) The Commission may cancel the application of a surcharge to a route to which such surcharge applies if a shipper moving traffic over such route demonstrates to the Commission that—

"(i) there is no competitive alternative to such route for the movement of the traffic involved that is not subject to such surcharge; and

"(ii) the surcharging carrier's share of the revenues from its participation in the movement over the route to which such surcharge applies, under the applicable joint rate in effect at the time the surcharge was filed with the Commission, with the surcharge, would be greater than 110 percent of its variable cost of providing service over such route.

"(B) If the Commission cancels the application of a surcharge to a particular route pursuant to subparagraph (A) of this paragraph,

the Commission shall determine the level of surcharge which, in conjunction with the surcharging carrier's division of the joint rate in effect at the time the surcharge was filed with the Commission, would equal 110 percent of the surcharging carrier's variable cost of providing service over such route, and shall authorize such carrier immediately to apply such a surcharge without any further proceedings under this subsection.

"(4) A rail carrier may not apply a surcharge under this subsection unless, for the one-year period preceding the surcharge, such carrier has concurred in all rate increases of general applicability applicable to the joint rate to which such surcharge applies and agreed to by all other carriers that are party to such joint rate.

"(5) A rail carrier may not apply a surcharge under this subsection increasing a through charge applicable to a particular movement more than once each calendar year.

"(6) Notwithstanding any other provision of this subsection, a rail carrier may, by tariff, reduce the total charges applicable to a movement over any specific joint line or single line route or routes in which such carrier participates, if such reduction does not lower the total charges applicable to such movement to a level that is less than the lowest total charges applicable to the same movement over a competing route. Any such reduction may be made without the concurrence of any other rail carrier, and shall be borne solely by the carrier reducing the charge. Nothing in this paragraph shall be construed to limit the right of a carrier to reduce rates over routes not in direct competition between the same points with routes to which it has applied a surcharge.

"(b)(1) Notwithstanding subsection (a) of this section—

"(A) a rail carrier not earning adequate revenues, as determined under section 10704(a)(2) of this title, may publish and apply a surcharge applicable to traffic originating or terminating upon any of its lines that carried less than 3,000,000 gross ton miles of traffic per mile in the most recent calendar year for which traffic data is available; and

"(B) a rail carrier earning adequate revenues, as so determined, may publish and apply a surcharge applicable to traffic originating or terminating upon any of its lines that carried less than 1,000,000 gross ton miles of traffic per mile in such most recent calendar year.

Such a surcharge may be applied without the concurrence of any rail carrier. Any such surcharge may be allocated, subject to the provisions of paragraph (4) of this subsection, in different amounts among different movements between different origins and destinations, and shall accrue solely to the surcharging carrier.

"(2) A rail carrier may apply a surcharge under this subsection if, prior to the application of such surcharge, that portion of the charges applicable to traffic to and from the line to which the surcharge applies and accruing to the surcharging carrier does not provide such carrier revenues adequate to cover—

"(A) 110 percent of such carrier's variable cost of transporting the traffic involved to or from such line; plus

"(B) 100 percent of such carrier's reasonably expected costs of continuing to operate such line, which shall include all costs necessary to sustain service on the line.

The Commission shall, within 120 days after the effective date of the Staggers Rail Act of 1980, complete a proceeding to define the term 'reasonably expected costs' as used in subparagraph (B) of this paragraph. In the interim, the term shall be construed in accordance with Rail Services Planning Office subsidy standards.

"(3)(A) Upon petition of a shipper located upon a line to which a surcharge under this subsection is applied, the Commission may cancel the application of a surcharge under this subsection if such shipper demonstrates to the Commission that, after application of the surcharge, the surcharging carrier's revenues from all traffic originating or terminating upon the line to which the surcharge applies exceed 110 percent of such carrier's variable cost of transporting all traffic to or from such line plus such carrier's reasonably expected costs of continuing to operate such line.

"(B)(i) A rail carrier's revenue from all traffic originating or terminating upon a line shall be presumed to exceed 110 percent of its variable cost of transporting all traffic to or from such line plus its reasonably expected costs of continuing to operate such line if the complaining shipper demonstrates that the carrier is earning revenues from all traffic originating or terminating upon such line that result in a revenue-variable cost percentage that is equal to or greater than the revenue-variable cost percentage applicable in that year under section 10709(d) of this title.

"(ii) A surcharging carrier may rebut the presumption set forth in clause (i) of this subparagraph by demonstrating to the Commission that its reasonably expected costs for operating the line to which the surcharge applies exceed the percentage of variable cost set forth in such clause (i).

"(C) Upon a finding by the Commission that application of the surcharge will produce revenues in excess of 110 percent of the surcharging carrier's variable cost of transporting traffic to or from the line plus its reasonably expected costs for operating the line, the Commission shall determine the level of surcharge which would produce revenues equal to such figure and shall authorize such carrier immediately to apply such surcharges as will generate such revenues without any further proceedings, subject only to the right of a shipper to proceed under paragraph (4) of this subsection.

"(4)(A) A rail carrier may not apply a surcharge under this subsection that results in any shipper being required to bear more than a reasonable proportion of the reasonably expected costs of continuing to operate the line to which such surcharge applies.

"(B) Upon complaint of a shipper, the Commission shall determine whether the shipper is being required to bear more than a reasonable proportion of the costs described in subparagraph (A) of this paragraph.

"(C) If the Commission finds that a complaining shipper is being required to bear more than a reasonable proportion of the costs described in subparagraph (A) of this paragraph, the Commission may reallocate the surcharge among the traffic originating or terminating on the line to which the surcharge applies, but may not order relief which would result in the surcharging carrier earning revenues less than those which the carrier would have earned had the surcharge been applied as filed.

"(5) A shipper may, in a single complaint, seek relief under paragraphs (3) and (4) of this subsection. In any such complaint, the

Commission shall first determine the right to relief under paragraph (3) and shall grant such relief as is appropriate under such paragraph.

"(6) In any proceeding brought before the Commission challenging the application or amount of a surcharge under this subsection, whether the surcharge is claimed to violate this subsection or some other provision of this chapter, the Commission shall not suspend the application of any such surcharge unless the person filing the verified statement required by section 10707(c) of this title, in addition to the matters required by such section, also makes the demonstration required by paragraph (3)(A) of this subsection. If the demonstration required by such paragraph (3)(A) is made, the Commission may suspend the application of only so much of the surcharge as will produce revenues in excess of the amount so demonstrated.

"(c)(1) Notwithstanding any other provision of this title, any prior agreement in effect on the effective date of the Staggers Rail Act of 1980, or any requirement of the Commission, a rail carrier may cancel the application of a joint rate to a through route in which it participates, without the concurrence of any other rail carrier that is a party to such joint rate, unless another rail carrier that participates in such through route or a shipper that has no competitive alternative to such route makes the demonstration described in paragraph (2) of this subsection.

"(2) The application of a joint rate to a through route may not be canceled under this subsection if a rail carrier that participates in such through route or a shipper that has no competitive alternative to such route from an origin or destination served by such route demonstrates to the Commission that the canceling carrier's share of the revenues, under the joint rate in effect at the time the application of the joint rate is canceled, is equal to or greater than—

"(A) 110 percent of the canceling carrier's variable cost of providing service over such route; or

"(B) such lesser percent of the canceling carrier's variable cost as such carrier earns over a competing through route to which application of the joint rate has not been canceled, or over a competing single line route.

"(3) When a complaining party is unable to make the demonstration required by paragraph (2) of this subsection, the Commission may suspend the tariff canceling the joint rate only if—

"(A) a complaining carrier publishes a new rate division or a new higher lawful rate which increases the canceling carrier's share of the revenues over such route to the amount calculated under paragraph (2)(A) or (2)(B) of this subsection, whichever is less; or

"(B) a complaining carrier or shipper petitions the Commission and the Commission imposes a surcharge, in conformity with such petition, upon the joint rate which will accrue solely to the canceling carrier and which, in conjunction with the canceling carrier's division of the joint rate in effect on the date the tariff canceling the joint rate was filed, will provide the canceling carrier revenues equal to or greater than 110 percent of its variable cost of providing service over such route.

Unless a new rate, division, or surcharge described in this paragraph becomes effective within 120 days after the proposed effective date of the rate cancellation, the canceling tariff shall, nevertheless, become effective.

"(4) If the demonstration described in paragraph (2) is made or a new rate, division or surcharge described in paragraph (3) becomes effective, the tariff canceling the joint rate shall be considered by the Commission in accordance with section 10705 of this title. The existing joint rate or the new rate, division, or surcharge, shall remain in effect during the pendency of the Commission's consideration.

"(5) Whenever the application of a joint rate to a through route is canceled under this subsection and a rate other than a joint rate is or has been published by the canceling carrier to apply to such route, such rate shall thereafter apply in lieu of all other rates (except joint rates subsequently agreed to by such carrier) and any through rate of which such rate is a factor shall divide as the separate factors of such rate are made.

"(6) Nothing in this subsection shall be construed to limit the authority of the Commission under section 10705(a) of this title to prescribe joint rates which provide a rail carrier participating in such joint rate revenues equal to or greater than 110 percent of its variable cost of providing service over each route to which such rate applies.

"(d)(1) Except as provided in paragraph (2) of this subsection, any increase or decrease in revenue resulting from the application of a surcharge under subsection (a) of this section, or from the cancellation of the application of a joint rate under subsection (c) of this section, shall accrue solely to or be borne solely by the carrier applying the surcharge or canceling the application of the joint rate, as the case may be.

"(2) Whenever a class III rail carrier which participates in a through route to which a surcharge has been applied under subsection (a) of this section by a carrier operating in the same rate territory as such class III carrier demonstrates to the Commission that the application of such surcharge to such route provides, in the absence of any increase in the joint rate in effect on the date the surcharge was filed with the Commission, revenues from traffic moving over such route to such surcharging carrier in excess of 110 percent of its variable costs over such route, such surcharging carrier shall, from the date of such demonstration, share those revenues from such route, from the surcharge and the applicable joint rate in effect on the date the surcharge was filed with the Commission, in excess of 110 percent of its variable costs with all class III rail carriers in the same rate territory participating in such route, on the basis of their existing divisions of the joint rate to which the surcharge applies.

"(e)(1) Except as provided in paragraph (2) of this subsection, whenever a rail carrier proposes to apply a surcharge under subsection (a) of this section or to cancel the application of a joint rate under subsection (c) of this section and another rail carrier subsequently agrees to a new rate division or a new lawful rate that increases the surcharging or canceling carrier's share of the total through charges for a movement over a particular through route

subject to a joint rate, such other rail carrier shall also agree to any other new rate division and new lawful rate—

"(A) that is proposed within 120 days after the date of the first agreement; and

"(B) that increases the surcharging or canceling carrier's share of the total through charges for movements over a competing through route subject to such joint rate.

"(2) A rail carrier shall not be required to agree under this subsection to any proposed new division or new rate which would—

"(A) reduce such carrier's share of the total through charges for a movement over any through route to less than (i) 110 percent of its variable costs of providing service over such route, or (ii) such lesser percent of its variable costs as such carrier earns from such movement over a competing through route with respect to which such carrier has agreed to a new division or rate;

"(B) increase the surcharging or canceling carrier's share of the total through charges for a movement over any through route to an amount in excess of 110 percent of its variable costs of providing service over such route;

"(C) reduce such carrier's share of the total through charges for a movement over any through route by a dollar amount in excess of the greatest dollar reduction which such carrier has agreed to make, for purposes of increasing the surcharging or canceling carrier's share, to its share of the total through charges for a movement over any competing through route; or

"(D) reduce such carrier's share of the total through charges for a movement over any through route in an amount in excess of such carrier's pro rata share (based on established divisions for movements over such route) of the increase of the surcharging or canceling carrier's share of the total through charges for movements over such route.

"(f) A rail carrier applying a surcharge or canceling the application of a joint rate under this section shall file a tariff with the Commission in accordance with section 10762 of this title. Such a tariff may not become effective until the expiration of the 45-day period (or such longer period as the filing carrier specifies) beginning on the date such tariff is filed.

"(g)(1) Any rail rate to which a surcharge is applied under this section shall be subject to section 10701a and 10709 of this title, and any such surcharge shall constitute a rate increase for purposes of such sections.

"(2) For purposes of rate regulation under section 10701a of this title—

"(A) only the rail carrier proposing a surcharge under this section shall be required to defend such surcharge; and

"(B) the reasonableness of the surcharge and the revenues received by the rail carrier proposing the surcharge under the joint rate to which the surcharge applies shall be determined without regard to amount received and services performed by other rail carriers that are party to such joint rate.

"(3) Except as provided in subsection (i), (j), or (k) of this section, if the application of a surcharge or the cancellation of the application of a joint rate under this section is found to constitute a viola-

tion of any provision of this title, such violation shall not be ordered remedied in any manner which—

"(A) requires the carrier applying a surcharge under subsection (a) of this section or canceling the application of a joint rate under subsection (c) of this section to provide service over any rate under a rate that provides revenues to such carrier that are less than 110 percent of its variable costs of providing such service; or

"(B) which requires the carrier applying a surcharge under subsection (b) of this section to provide service over the route to which such surcharge applies in a manner that provides revenues to such carrier that are less than 110 percent of such carrier's variable cost of transporting the traffic involved to or from the line to which the surcharge applies, plus such carrier's reasonably expected costs of providing service over such line.

"(h) Within 5 days after the request of a rail carrier participating in a joint rate subject to a surcharge or cancellation under this section, a shipper moving traffic over a route to which such surcharge or cancellation applies, or an affected port, the Commission shall make available to such carrier, shipper, or port the Commission's determination of the variable costs and revenues, over the route or routes to which the surcharge or cancellation applies, of the carrier applying the surcharge or canceling the application of the joint rate.

"(i)(1) Whenever a class III rail carrier, in a protest filed with the Commission, makes a prima facie showing that the application of a surcharge under subsection (a) of this section or the cancellation of the application of a joint rate under subsection (c) of this section will have an adverse effect on competition, the Commission shall investigate such protest. If, on the basis of such investigation, the Commission finds that the protested surcharge or cancellation is or is intended to be anticompetitive, the Commission shall, within 30 days after the date such protest is filed, enter an order rescinding such surcharge or cancellation, and may, on presentation of an adequate record, prescribe new joint rates or divisions of joint rates.

"(2) No order prescribed under this subsection shall require a carrier to provide service over any route under a rate which provides revenues less than 110 percent of the variable cost of providing such service unless the Commission determines that the public interest requires a lesser revenue to variable cost ratio to avoid anticompetitive action and to preserve service on the route involved.

"(j)(1) Any class III rail carrier which originates or terminates traffic subject to the application of a surcharge under subsection (a) of this section or the cancellation of the application of a joint rate under subsection (c) of this section may protest such surcharge or cancellation whenever—

"(A) such surcharge or cancellation affects the sole remaining route available to that carrier for that traffic; and

"(B)(i) such carrier demonstrates that alternative transportation is available or that a shipper dependent on that carrier will suffer significant market loss because of such surcharge or cancellation; or

"(ii) such surcharge or cancellation, alone or when considered in conjunction with other surcharges or cancellations affecting the carrier, is likely to unduly impair a carrier's ability to earn an adequate rate of return.

"(2)(A) The Commission may, after an investigation on the basis of a protest under this subsection, prescribe a lesser surcharge or a different division of the joint rate. The Commission shall grant the surcharging or canceling carrier revenues not less than 110 percent of its variable cost of the movement involved, unless it determines that the public interest requires a lesser revenue to variable cost ratio to preserve service on the route involved. Any action by the Commission based on a protest under this subsection shall be taken within 30 days after the date such protest is filed.

"(B) If the Commission prescribes a different division of a joint rate under this paragraph, the Commission shall, upon petition of the surcharging or canceling carrier or the protesting class III rail carrier, reopen the proceeding in which such division was prescribed to reconsider whether such prescribed division is reasonable. If, on the basis of such reconsideration, the Commission determines that such division is not reasonable, it shall prescribe a new, reasonable division of the joint rate to which the surcharge or cancellation applied.

"(k)(1) Upon the complaint of a class III rail carrier which originates or terminates traffic subject to the application of a surcharge under subsection (a) of this section or the cancellation of the application of a joint rate under subsection (c) of this section that such surcharge or cancellation will result in differences or greater differences in rates, including any surcharges, for the traffic to which the surcharge or cancellation applies over different routes in which the surcharging or canceling carrier participates—

"(A) from a single origin point to destination points within a 75 mile direct radius from the destination point on such class III rail carrier; or

"(B) to a single destination point from origin points within a 75 mile direct radius from the origin point on such class III rail carrier,

the Commission shall investigate such complaint and shall, within 30 days after the date such complaint is filed, take such actions, including rescinding surcharges or cancellations or prescribing new joint rates or surcharges, as it determines are required to eliminate such differences in rates, unless it finds that such actions are not warranted by the public interest in ensuring effective competition among rail carriers or in the preservation of rail service on the route involved.

"(2) No action taken by the Commission under this subsection shall require a carrier to provide service over any route under a rate which provides a revenue to variable cost ratio over such route less than that provided under the joint rate to which the surcharge or cancellation was applied or less than 110 percent, whichever is greater, unless the Commission determines that the public interest in ensuring effective competition among rail carriers or in preserving service over such route warrants requiring the surcharging or canceling carrier to provide service at a lesser revenue to variable cost ratio.

"(3) Notwithstanding subsection (m)(1) of this section, if, in a proceeding under this subsection or under subsection (i) or (j) of this section, the Commission considers whether to require the revenues of a carrier applying a surcharge under subsection (a) of this section or canceling the application of a joint rate under subsection (c) of this section to be less than 110 percent of its variable costs (as calculated using the Commission's Rail Form A cost finding methodology), such surcharging or canceling carrier may prove its actual variable costs on the basis of evidence other than unadjusted costs calculated using such Rail Form A cost finding methodology. Such evidence shall be prepared in accordance with generally accepted accounting principles.

"(l) Whenever the application of a joint rate to a through route is canceled under subsection (c) of this section, the Commission shall, upon petition by a class II or III rail carrier participating in such route, prescribe a new compensatory through rate or rates over such route within 30 days after the date such petition is filed.

"(m) For purposes of this section—

"(1) variable costs for a class I rail carrier shall be determined only by using such carrier's unadjusted costs, calculated using the Commission's Rail Form A cost finding methodology (or an alternative methodology adopted by the Commission in lieu thereof) and indexed quarterly to account for current wage and price levels in the region in which the carrier operates;

"(2) variable costs for a rail carrier other than class I shall be presumed to be the average variable costs of all class I rail carriers in the region in which such carrier operates (as determined under paragraph (1) of this subsection) unless a rail carrier rebuts such presumption with other proof of variable costs; and

"(3) at the option of a carrier applying a surcharge or canceling the application of a joint rate under this section, revenue share may be determined by reference to past revenue settlements actually made in the most recent calendar year by connecting lines.

"(n) Surcharges applied under subsection (a) or (c) of this section and cancellations under subsection (c) of this section shall not be subject to the provisions of section 10726 (a)(1)(B) of this title.

"(o) The Special Counsel of the Commission may, consistent with the rail transportation policy in section 10101a of this title, provide assistance to class III rail carriers and small businesses in preparing actions under this section.

"(p)(1) The authority to apply a surcharge under subsection (a) of this section, and (except as provided in paragraph (2)) the authority to cancel such a surcharge, shall expire 3 years after the effective date of the Staggers Rail Act of 1980 unless extended for one additional year by the Commission upon petition of any rail carrier and for good cause shown.

"(2) Any surcharge lawfully applied under subsection (a) of this section shall remain in effect in accordance with its terms following the expiration of the provisions of this section. Any such surcharge applied during the 45-day period immediately preceding the date of the expiration of the provisions of this section shall, notwithstanding such expiration, be subject to cancellation under sub-

section (a)(2) or (a)(3) of this section during the 45-day period beginning on the date such surcharge is applied."

(2) The section analysis of chapter 107 of title 49, United States Code, is amended by inserting immediately after the item relating to section 10705 the following new item:

"10705a. Joint rate surcharges and cancellations."

(b) For purposes of section 10705a of title 49, United States Code, the Interstate Commerce Commission shall classify all rail carriers on the basis of revenues, shall from time to time review its regulations setting forth revenue-based classifications for rail carriers, and shall make appropriate changes in such regulations in order to reflect inflation. The Commission shall not reclassify switching and terminal carriers, or any other rail carriers not classified on the basis of revenues on the effective date of this Act, for any purpose other than for purposes of such section 10705a.

(c)(1) The Interstate Commerce Commission shall include in its annual report to the Congress under section 10311 of title 49, United States Code, a report with respect to the application of surcharges and the cancellation of the application of joint rates by the Consolidated Rail Corporation and other rail carriers, during the preceding year, under section 10705a of title 49, United States Code. Each such report shall include—

(A) an analysis of the effect of application of surcharges and the cancellation of the application of joint rates under such section 10705a on shippers, ports, class II and class III rail carriers, railroad employees, and other elements of the rail system;

(B)(i) the number of surcharges applied by the Consolidated Rail Corporation and all other rail carriers under such section 10705a and the amount of revenue received by the Corporation and all other rail carriers from the application of such surcharges, (ii) the number of surcharges applied by the Corporation and all other rail carriers that were canceled under the procedures of such section 10705a, and (iii) the number of cancellations of the application of a joint rate by the Corporation and all other rail carriers under such section 10705a; and

(C) an analysis of the operation of the remedies made available to class III rail carriers under subsections (i), (j), and (k) of such section 10705a and to class II and class III rail carriers under subsection (l) of such section 10705a.

(2) The Interstate Commerce Commission shall, within 2 years after the effective date of this Act, submit a report to the Congress with respect to whether the provisions of section 10705a of title 49, United States Code, have adequately addressed the joint rate problems of rail carriers. The report shall include such recommendations with respect to such joint rate problems as the Commission considers necessary and appropriate.

#### EXPEDITED DIVISION OF REVENUES PROCEEDINGS

SEC. 218. (a) Section 10705(f)(1) of title 49, United States Code, is amended to read as follows:

"(f)(1)(A) The Commission may begin a proceeding under subsection (a) or (b) of this section on its own initiative or on complaint.

The Commission must complete all evidentiary proceedings to adjust the division of joint rates for transportation by a rail carrier within 9 months after the complaint is filed if the proceeding is brought on complaint or within 18 months after the commencement of a proceeding on the initiative of the Commission. The Commission must take final action by the 180th day after completion of the evidentiary proceedings, except that—

"(i) when the proceeding involves a railroad in reorganization or a contention that the divisions at issue do not cover the variable costs of handling the traffic, the Commission shall give the proceedings preference over all other proceedings and shall take final action at the earliest practicable time, which in no event may exceed 100 days after the completion of the evidentiary proceedings; and

"(ii) in all cases other than those specified in clause (i) of this subparagraph, the Commission may decide to extend such a proceeding to permit its fair and expeditious completion, but whenever the Commission decides to extend a proceeding pursuant to this clause, it must report its reasons to Congress.

"(B) The provisions of this paragraph imposing time limitations upon Commission action shall not apply to any division proceeding involving a joint rate participated in by a class III rail carrier."

(b) Section 10705(f)(1) of title 49, United States Code, as amended by subsection (a) of this section, is further amended—

(1) by striking out subparagraph (B);

(2) by striking out "(A)" immediately before "The Commission";

(3) by striking out "(i)" and inserting in lieu thereof "(A)";

(4) by striking out "(ii)" and inserting in lieu thereof "(B)"; and

(5) by striking out "clause (i) of this subparagraph" and inserting in lieu thereof "subparagraph (A) of this paragraph".

#### RATE BUREAUS

SEC. 219. (a) Section 10706(a)(1) of title 49, United States Code, is amended by adding at the end thereof the following new subparagraph:

"(C) 'practicably participates in that movement' shall have such meaning as the Commission shall by regulation prescribe."

(b) Section 10706(a)(2)(A) of title 49, United States Code, is amended—

(1) by inserting "publication," immediately after "initiation," in the first sentence; and

(2) by striking out "section 10101" in the second sentence and inserting in lieu thereof "section 10101a".

(c)(1) Section 10706(a)(3)(A) of title 49, United States Code, is amended to read as follows:

"(3)(A) An organization established or continued under an agreement approved under this subsection shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed. Such an organization may not—

"(i) permit a rail carrier to discuss, to participate in agreements related to, or to vote on single line rates proposed by an-

other rail carrier, except that for purposes of general rate increases and broad tariff changes only, if the Commission finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part;

"(ii) permit a rail carrier to discuss, to participate in agreements related to, or to vote on rates related to a particular interline movement unless that rail carrier practicably participates in that movement; or

"(iii) if there are interline movements over two or more routes between the same end points, permit a carrier to discuss, to participate in agreements related to, or to vote on rates except with a carrier which forms part of a particular single route. This clause shall take effect on January 1, 1984, or on such earlier date as the Commission determines. If the Commission finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part."

(2) Section 10706(a)(3)(E) of title 49, United States Code, is amended to read as follows:

"(B) Until January 1, 1984, subparagraph (A)(ii) and (A)(iii) of this paragraph do not apply to—

"(i) general rate increases to cover inflationary cost increases, or general rate decreases, for joint rates if the agreement gives shippers, under specified procedures, at least 15 days notice of the proposal and an opportunity to present comments on it before a tariff containing the increases or decreases is filed with the Commission; or

"(ii) broad tariff changes that are of at least substantially general application throughout the area where the changes will apply, except single line rates where subparagraph (A)(i) of this paragraph prohibits the participation of carriers with single line rates.

If the Commission finds at any time that the implementation of this subparagraph is not feasible, it may delay or suspend such implementation in whole or in part."

(3) Section 10706(a)(3)(C) of title 49, United States Code, is amended—

(A) by inserting "(i)" immediately after "(C)"; and

(B) by adding at the end thereof the following new clause:

"(ii) In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic. In any proceeding in which such a violation is alleged, evidence of a discussion or agreement between or among such carrier and one or more other carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement—

"(1) was in accordance with an agreement approved under paragraph (2) of this subsection; or

"(II) concerned an interline movement of the carrier, and the discussion or agreement would not, considered by itself, violate the laws referred to in the first sentence of this clause.

In any proceeding before a jury, the court shall determine whether the requirements of clause (I) or (II) are satisfied before allowing the introduction of any such evidence."

(4) Section 10706(a)(3) of title 49, United States Code, is amended by adding at the end thereof the following new subparagraph:

"(D) An organization described in subparagraph (A) of this paragraph shall provide that transcripts or sound recordings be made of all meetings, that records of votes be made, and that such transcripts or recordings and voting records be submitted to the Commission and made available to other Federal agencies in connection with their statutory responsibilities over rate bureaus, except that such material shall be kept confidential and shall not be subject to disclosure under section 552 of title 5, United States Code."

(d) Section 10706(a) of title 49, United States Code, is amended by adding at the end thereof the following new paragraph:

"(4) Notwithstanding any other provision of this subsection, one or more rail carriers may enter into an agreement, without obtaining prior Commission approval, that provides solely for compilation, publication, and other distribution of rates in effect or to become effective. The Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) shall not apply to parties and other persons with respect to making or carrying out such agreement. However, the Commission may, upon application or on its own initiative, investigate whether the parties to such an agreement have exceeded its scope, and upon a finding that they have, the Commission may issue such orders as are necessary, including an order dissolving the agreement, to ensure that actions taken pursuant to the agreement are limited as provided in this paragraph."

(e) Section 10706(i)(1)(B) of title 49, United States Code, is amended by striking out "section 10101" and inserting in lieu thereof "section 10101a".

(f) The Interstate Commerce Commission may not take any action with respect to the elimination of general rate increases or decreases prior to April 1, 1982.

(g) The Interstate Commerce Commission shall require rail carrier members of a rate bureau to provide the employees of such rate bureau who are affected by the amendments made by this section with fair arrangements no less protective of the interests of such employees than those established pursuant to section 11347 of title 49, United States Code. For purposes of this subsection, the term "employees" does not include any individual serving as president, vice-president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions.

#### LONG AND SHORT HAUL TRANSPORTATION

Sec. 220. Section 10726(c) of title 49, United States Code, is repealed.

#### RAILROAD ENTRY

SEC. 221. (a) Section 10901(a) of title 49, United States Code, is amended by striking "will be enhanced by" and inserting in lieu thereof "permit".

(b) Section 10901 of title 49, United States Code, is further amended by adding at the end thereof the following new subsections:

"(d)(1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

"(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

"(c) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title."

#### SERVICE DURING PERIODS OF PEAK DEMAND

SEC. 222. Section 11101(a) of title 49, United States Code, is amended by adding at the end thereof the following new sentence: "A rail carrier shall not be found to have violated this section because it fulfills its commitments under contracts approved under section 10713 of this title before responding to reasonable requests for service."

#### RECIPROCAL SWITCHING

SEC. 223. Section 11103 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) The Commission may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service. The carriers entering into such an agreement shall establish the conditions and compensation applicable to each agreement, but, if the carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Commission may establish such conditions and compensation.

"(2) The Commission may require reciprocal switching agreements entered into by rail carriers pursuant to this subsection to contain provisions for the protection of the interests of employees affected thereby."

## CAR SERVICE COMPENSATION

SEC. 224. (a)(1) Section 11122(b)(2) of title 49, United States Code, is repealed.

(2) Section 11122(b)(1) of title 49, United States Code, is amended by striking out "(1)" immediately before "The rate".

(b) Section 10706(a) of title 49, United States Code, as amended by this Act, is further amended by adding at the end thereof the following new paragraph:

"(5)(A) Whenever two or more shippers enter into an agreement to discuss among themselves the agreement that relates to the amount of compensation such shippers propose to be paid by rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, for use by such rail carriers of rolling stock owned or leased by such shippers, the shippers shall apply to the Commission for approval of that agreement under this paragraph. The Commission shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy set forth in section 10101a of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of approval. If the Commission approves the agreement, it may be made and carried out under its terms and under the terms required by the Commission, and the antitrust laws set forth in paragraph (2) of this subsection do not apply to parties and other persons with respect to making or carrying out the agreement. The Commission shall approve or disapprove an agreement under this paragraph within one year after the date application for approval of such agreement is made.

"(B) If the Commission approves an agreement described in subparagraph (A) of this paragraph and the shippers entering into such agreement and the rail carriers proposing to use rolling stock owned or leased by such shippers, under payment by such carriers or under a published allowance, are unable to agree upon the amount of compensation to be paid for the use of such rolling stock, any party directly involved in the negotiations may require that the matter be settled by submitting the issues in dispute to the Commission. The Commission shall render a binding decision, based upon a standard of reasonableness and after taking into consideration any past precedents on the subject matter of the negotiations, no later than 96 days after the date of the submission of the dispute to the Commission.

"(C) Nothing in this paragraph shall be construed to change the law in effect prior to the effective date of the Staggers Rail Act of 1980 with respect to the obligation of rail carriers to utilize rolling stock owned or leased by shippers."

## CAR UTILIZATION

SEC. 225. (a) Subchapter II of chapter 107 of title 49, United States Code, is amended by inserting at the end thereof the following new section:

## "§ 10734. Car utilization

"In order to encourage more efficient use of freight cars, notwithstanding any other provision of this subtitle, rail carriers shall be permitted to establish tariffs containing premium charges for special services or special levels of services not provided in any tariff otherwise applicable to the movement. The Commission shall facilitate development of such tariffs so as to increase the utilization of equipment."

(b) The section analysis of chapter 107 of title 49, United States Code, is amended by inserting immediately after the item relating to section 10731 the following new item:

"10734. Car utilization."

## CAR SERVICE ORDERS FOR EXIGENT CIRCUMSTANCES

SEC. 226. Section 11122(a) of title 49, United States Code, is amended to read as follows:

"(a)(1) When the Interstate Commerce Commission finds that a shortage of equipment, congestion of traffic, or other failure in traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on rail service in the United States or a substantial region of the United States, the Commission may, for a period not to exceed thirty days—

"(A) suspend any car service rule or practice;

"(B) take action during the emergency to promote service in the interest of the public and of commerce regardless of the ownership (as between carriers) of a locomotive, car, or other vehicle on terms of compensation the carriers establish between themselves, subject to subsection (b)(2) of this section;

"(C) require joint or common use of facilities, on terms of compensation the carriers establish between themselves, subject to subsection (b)(2) of this section, when that action will best meet the emergency and serve the public interest, and

"(D) give directions for preference or priority in transportation, embargoes, or movement of traffic under permits.

"(2) The Commission may extend any action taken under paragraph (1) of this subsection beyond the thirty-day period provided in such paragraph only if the full Commission, after a hearing, certifies that a transportation emergency exists.

"(3) In carrying out the provisions of this subsection, the Commission shall require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with the traffic subject to the action of the Commission."

## EMPLOYEE PROTECTION

SEC. 227. (a) Section 1170 of title 11, United States Code, is amended by adding at the end thereof the following new subsection:

"(e)(1) In authorizing any abandonment of a railroad line under this section, the court shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347 of title 49.

"(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection."

(b) Section 1172 of title 11, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) In approving an application under subsection (b) of this section, the Commission shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347 of title 49.

"(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection."

#### MERGERS AND OTHER TRANSACTIONS

SEC. 228. (a) Section 11344(b) of title 49, United States Code, is amended—

(1) by inserting immediately after "section" the following: "which involves the merger or control of at least two class I railroads, as defined by the Commission"; and

(2) by adding at the end thereof the following new paragraph:

"(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region."

(b) Section 11344 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

"(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

"(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 5 (a)-(d) of the Department of Transportation Act (49 U.S.C. 1654 (a)-(d)), accord substantial weight to any recommendations of the Secretary of Transportation."

(c) Section 11344 of title 49, United States Code, as amended by this Act, is further amended by adding at the end thereof the following new subsection:

"(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation

schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application."

(d) Section 11345 of title 49, United States Code, is amended to read as follows:

"§ 11345. Consolidation, merger, and acquisition of control: rail carrier procedure

"(a) If a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is involved in a proposed transaction under section 11343 of this title, this section and section 11344 of this title also apply to the transaction. The Commission shall publish notice of the application in the Federal Register by the end of the 30th day after the application is filed with the Commission and after a certified copy of it is furnished to the Secretary of Transportation. However, if the application is incomplete, the Commission shall reject it by the end of that period. The order of rejection is a final action of the Commission under section 10327 of this title. The published notice shall indicate whether the application involves—

(1) the merger or control of at least two class I railroads, as defined by the Commission, to be decided within the time limits specified in subsection (b) of this section;

(2) transactions of regional or national transportation significance, to be decided within the time limits specified in subsection (c) of this section; or

(3) any other transaction covered by this section, to be decided within the time limits specified in subsection (d) of this section.

"(b) If the application involves the merger or control of two or more class I railroads, as defined by the Commission:

(1) Written comments about an application may be filed with the Commission within 45 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

(2) The Commission shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 90th day after publication of notice under that subsection.

(3) The Commission must conclude evidentiary proceedings by the end of the 24th month after the date of publication of

notice under subsection (a) of this section. The Commission must issue a final decision by the 180th day after the date on which it concludes the evidentiary proceedings.

"(c) If the application involves a transaction other than the merger or control of at least two class I railroads, as defined by the Commission, which the Commission has determined to be of regional or national transportation significance:

"(1) Written comments about an application may be filed with the Commission within 30 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

"(2) The Commission shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 60th day after publication of notice under that subsection.

"(3) The Commission must conclude any evidentiary proceedings by the 180th day after the date of publication of notice under subsection (a) of this section. The Commission must issue a final decision by the 90th day after the date on which it concludes the evidentiary proceedings.

"(d) For all applications under this section other than those specified in subsections (b) and (c) of this section:

"(1) Written comments about an application may be filed with the Commission within 30 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

"(2) The Commission must conclude any evidentiary proceedings by the 105th day after the date of publication of notice under subsection (a) of this section. The Commission must issue a final decision by the 45th day after the date on which it concludes the evidentiary proceedings.

"(c) If the Commission does not issue a decision that is a final action under section 10327 of this title, it shall send written notice to Congress that a decision was not issued and the reasons why it was not issued.

"(f) The Commission may waive the requirement that an initial decision be made under section 10327 of this title and make a final decision itself when it determines that action is required for the timely execution of its functions under this subchapter or that an

application governed by this section is of major transportation importance. The decision of the Commission under this subsection is a final action under section 10327 of this title."

(e) Any application filed or pending on the effective date of this Act under section 11343, 11344, or 11345 of title 49, United States Code, before the Secretary of Transportation, the Interstate Commerce Commission, or any court shall be adjudicated or determined as if this Act had not been enacted.

#### SAVINGS PROVISIONS

SEC. 229. (a) Any rate that is in effect on the effective date of this Act for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of title 49, United States Code, may, during the 180-day period beginning on such effective date, be challenged in a complaint filed with the Interstate Commerce Commission by any interested party alleging that the rail carrier has market dominance over the transportation to which the rate applies, as determined under section 10709 of such title, and that the rate is not reasonable under section 10701a of such title.

(b) Any rate described in subsection (a) of this section—

(1) which is not challenged in a complaint filed within the 180-day period provided in such subsection; or

(2) which is challenged in such a complaint, but (A) the rail carrier is found not to have market dominance over the transportation to which the rate applies, or (B) the rate is found to be reasonable,

shall be deemed to be lawful and may not thereafter be challenged in the Commission or in any court (other than on appeal from a decision of the Commission).

(c) The provisions of this section shall not apply to any rate under which the volume of traffic moved during the 12-month period immediately preceding the effective date of this Act did not exceed 500 net tons and has increased tenfold within the 3-year period immediately preceding the bringing of a challenge to the reasonableness of such rate.

(d) The burden of proof in any proceeding under this section shall be on the complainant.

#### TITLE III—RAILROAD COST DETERMINATIONS

##### UNIFORM ACCOUNTING SYSTEM

SEC. 301. Section 11142 of title 49, United States Code, is amended to read as follows:

"§ 11142. Uniform accounting system

"The Interstate Commerce Commission may prescribe a uniform accounting system for classes of carriers providing, and brokers for, transportation subject to the jurisdiction of the Commission under subchapters II, III, and IV of chapter 105 of this title."

SEC. 302. (a) Chapter 111 of title 49, United States Code, is amended by adding at the end thereof the following new subchapter:

#### "SUBCHAPTER IV—RAILROAD COST ACCOUNTING

##### "§ 11161. Railroad Accounting Principles Board

"(a)(1) There is established a Railroad Accounting Principles Board which shall be within and responsible to the legislative branch of the Federal Government.

"(2) The Board shall be composed of the Comptroller General of the United States, who shall serve as chairman, and six members to be appointed by the Comptroller General.

"(3) The Comptroller General shall appoint members of the Board from among persons who are well qualified for such position by virtue of experience in or knowledge of rate regulation, accounting, or cost determinations. Of the members of the Board so appointed—

"(A) one shall be from the accounting profession;

"(B) one shall be from the railroad industry;

"(C) one shall be a representative of major rail shippers;

"(D) one shall be from the Interstate Commerce Commission;

"(E) one shall be a representative of small rail shippers; and

"(F) one shall be from the economics profession.

"(4) The term of office of each appointed member of the Board shall be three years, except that any member appointed to fill a vacancy in the Board shall serve for the remainder of the term for which his predecessor was appointed.

"(5) The Board shall not act in the absence of a quorum, which shall consist of three members.

"(b) Each appointed member of the Board shall receive compensation at a rate equal to  $\frac{1}{2}$  of the rate prescribed for level IV of the Executive Schedule, under section 5315 of title 5, for each day (including traveltime) in which he is engaged in the actual performance of duties vested in the Board.

"(c)(1) The Board may utilize personnel from the Federal Government, with the consent of the head of the appropriate Federal department or agency, or appoint individuals from private life, to serve on advisory committees or to provide the staff services necessary to assist the Board in carrying out its functions and responsibilities under this subchapter.

"(2) Individuals appointed by the Board under this subsection may be appointed without regard to the provisions of title 5 governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates.

"(d) All Federal departments and agencies are authorized to cooperate with the Board and to furnish information, appropriate personnel (with or without reimbursement), and such financial and other assistance as may be agreed upon by the Board and the Federal department or agency involved.

"(e) Members and employees of the Board and all other individuals appointed under this subsection having or having had access to information in the possession of the Board shall be subject to the provisions of section 1905 of title 18.

"(f) The Board shall cease to exist three years after the effective date of the Staggers Rail Act of 1980.

##### "§ 11162. Cost accounting principles

"(a) Within two years after the effective date of the Staggers Rail Act of 1980, the Railroad Accounting Principles Board shall establish, for rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title, principles governing the determination of economically accurate railroad costs directly and indirectly associated with particular movements of goods, including the variable costs associated with particular movements of goods or such other costs as the Board believes most accurately represent the economic costs of such movements. Such principles shall govern the determination of all railroad costs for specific regulatory proceedings under this title.

"(b) In developing cost accounting principles under this section, the Board shall take into account the following considerations:

"(1) The specific regulatory purposes for which railroad costs are required.

"(2) The degree of accuracy of the cost information which is needed to meet regulatory purposes.

"(3) The existing capability and the probable future capability of rail carriers to provide such information and the relative benefits and costs of requiring development of additional capability.

"(4) The means by which the degree of economic accuracy required can be obtained at the least possible expense and with the least possible information reporting.

"(5) The means by which the confidentiality of such costs can best be maintained while meeting the need for such information in regulatory proceedings.

"(c) The cost accounting principles established by the Board shall require that cost information be reported or disclosed only for the essential regulatory purposes defined by the Board.

##### "§ 11163. Implementation of cost accounting principles

"Upon the establishment of cost accounting principles by the Railroad Accounting Principles Board under section 11162 of this title, the Interstate Commerce Commission shall promptly promulgate rules to implement and enforce such principles. Not less than once every five years after the promulgation of the original rules, the Commission shall review the principles of the Board and shall, by rule, make such changes in such principles as are required to achieve the regulatory purposes of this title and the goals of this subchapter. The Commission shall insure that the rules promulgated under this section are the most efficient and least burdensome means by which the required information may be developed for regulatory purposes.

**"§ 11164. Certification of rail carrier cost accounting systems**

"(a) Within 180 days after the effective date of the Staggers Rail Act of 1980, each rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall file with the Commission a request for preliminary certification of its cost accounting system. The Commission shall grant such preliminary certification if it determines that the cost accounting system of such rail carrier is in compliance with the accounting standards of the Commission in effect on the day prior to the effective date of the Staggers Rail Act of 1980.

"(b)(1) As soon as practicable, but not later than 9 months, after the promulgation of rules by the Commission under section 11163 of this title, each rail carrier described in subsection (a) of this section shall file with the Commission a request for final certification of its cost accounting system developed to comply with this section.

"(2) Within 90 days, or such additional time as the Commission finds necessary, after a rail carrier files its request for final certification under paragraph (1) of this subsection, the Commission shall grant such final certification to such carrier if the Commission determines that the cost accounting system of such carrier is in compliance with the rules promulgated by the Commission under section 11163 of this title. If the Commission denies such final certification, the rail carrier shall revise its cost accounting system and file a new request for certification within 90 days after the date of such denial. The Commission shall thereupon grant final certification if it determines that such cost accounting system, as revised, is in compliance with such rules. If the Commission again denies final certification to the rail carrier, the Commission shall prescribe a cost accounting system which such carrier shall adopt within a reasonable time and which shall be considered a finally certified cost accounting system for purposes of this section.

"(c) Each rail carrier shall have and maintain a cost accounting system that is in compliance with the rules promulgated by the Commission under section 11163 of this title.

"(d)(1) Certification under this section that the cost accounting system of a rail carrier is in compliance with the rules promulgated by the Commission under section 11163 of this title shall be valid until the promulgation of new rules by the Commission.

"(2) After the cost accounting system of a rail carrier is certified under this section, such rail carrier may, after notifying the Commission, make modifications in such system unless, within 60 days after the date of notification, the Commission finds such modifications to be inconsistent with the rules promulgated by the Commission under section 11163 of this title.

"(c) For purposes of determining whether the cost accounting system of a rail carrier is in compliance with the rules promulgated by the Commission, the Commission shall have the right to examine and make copies of any documents, papers, or records of such rail carrier relating to compliance with such rules. Such documents, papers, and records (and any copies thereof) shall not be subject to the mandatory disclosure requirements of section 552 of title 5.

**"§ 11165. Cost availability**

"As required by the rules of the Interstate Commerce Commission governing discovery in Commission proceedings, rail carriers shall make relevant cost data available to shippers, States, ports, communities, and other interested parties that are a party to a Commission proceeding in which such data is required.

**"§ 11166. Accounting and cost reporting**

"(a) To obtain expense and revenue information for regulatory purposes, the Interstate Commerce Commission may promulgate reasonable rules for rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, prescribing expense and revenue accounting and reporting requirements consistent with generally accepted accounting principles uniformly applied to such carriers. Such requirements shall be cost effective and compatible with and not duplicative of the managerial and responsibility accounting requirements of those carriers. To the extent such rules are required solely to provide expense and revenue information necessary for determining railroad costs in regulatory proceedings pursuant to this title, such rules shall be promulgated in accordance with the cost accounting principles established by the Railroad Accounting Principles Board under section 11162 of this title.

"(b) Any reports required by the rules established by the Commission under this section shall include only information considered necessary for disclosure under the cost accounting principles established by the Board or under generally accepted accounting principles or the requirements of the Securities and Exchange Commission.

**"§ 11167. Report**

"The Railroad Accounting Principles Board shall, within 2 years after the effective date of the Staggers Rail Act of 1980, submit to the Congress a report setting forth any recommendations of the Board for appropriate legislative or administrative action in order to integrate the cost accounting principles and the cost accounting system certification process under this subchapter into existing rail carrier rate regulation under this title, including determinations under section 10709 of this title.

**"§ 11168. Authorization of appropriations**

"There are authorized to be appropriated to carry out the provisions of this subchapter not to exceed \$1,000,000 for the fiscal year ending September 30, 1981, not to exceed \$1,000,000 for the fiscal year ending September 30, 1982, and not to exceed \$1,000,000 for the fiscal year ending September 30, 1983."

(b) The analysis of chapter 111 of title 49, United States Code, is amended by adding at the end thereof the following:

**"SUBCHAPTER IV—RAILROAD COST ACCOUNTING**

"11161. Railroad Accounting Principles Board.

"11162. Cost accounting principles.

"11163. Implementation of cost accounting principles.

"11164. Certification of rail carrier cost accounting systems.

"11165. Cost availability.

"11166. Accounting and cost reporting.