cluded in the transaction. Although no mention is made of the effect that the transaction will have upon carrier employees, in accordance with the requirements of section 5(2)(f), our order will be made subject to the same conditions for the protection of railway employees as are contained in article I of appendix II, *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557.

We find that, subject to the aforesaid conditions for the protection of railway employees, the purchase by the Louisville and Nashville Railroad Company of the previously described properties of the Manistee & Repton Railroad Company, is a transaction within the scope of section 5(2) of the Interstate Commerce Act, that the terms and conditions of the transaction are just and reasonable, and that the transaction will be consistent with the public interest.

We further find that the application of the Manistee & Repton Railroad Company for authority to abandon its entire line of railroad should be dismissed.

An appropriate order will be entered.

BOARD MEMBER FORBES, concurring:

I concur in the result, but I would grant the applications for acquisition and for abandonment under section 1(18), as filed.





FINANCE DOCKET NO. 22428

# CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY DISCONTINUANCE OF PASSENGER TRAINS NOS. 15 AND 16 BETWEEN ABERDEEN, S. DAK., AND DEER LODGE, MONT.

*Decided June 18, 1963*

Upon investigation, found that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company failed to meet the prescribed conditions of section 13a(1) of the Interstate Commerce Act prerequisite to invocation of that section in connection with its proposal filed thereunder to discontinue the operation of its passenger trains Nos. 15 and 16 between Aberdeen, S. Dak., and Deer Lodge, Mont., and that the Commission, therefore, is without authority to dispose of the proposed discontinuance on its merits. Investigation discontinued.

*Joseph J. Nagle*, *Raymond K. Merrill*, *Dwight Campbell*, and *J. C. Garlington* for the carrier.

*C. A. Merkle*, *C. A. Carr*, *Herman L. Bode*, *John C. Stewart*, *John M. Agrey*, *William P. Mufich*, and *Paul T. Smith* for State regulatory commissions.

*Douglas W. Bantz*, *Paul H. Schliesser*, *J. F. Bormann*, *Curtis W. Hanks*, *T. L. Secrest*, *Ralph J. Beck*, *William N. Geagan*, *John R. Carr*, *Vic Reinemer*, *Russell L. Culvor*, and *Ronald R. Johnson* for protestants.

*William McDonald*, *R. M. Olson*, *Henry W. Wiedringhaus*, *M. K. Daniels*, *G. H. Russ*, *F. W. Owens*, *Kenneth D. Clark*, and *W. R. Hamilton* for railway labor organizations, protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, MURPHY, AND TUCKER

TUGGLE, *Commissioner:*

On January 18, 1963, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a common carrier by railroad subject to the provisions of part I of the Interstate Commerce Act, hereinafter sometimes referred to as the Milwaukee or as the carrier, filed a notice and supporting statements with the Commission seeking to invoke the provisions of section 13a(1) of the act in connection with a proposal to discontinue on February 22, 1963, that portion of the operation of its passenger trains Nos. 15 and 16 involving service between Aberdeen, S. Dak., and Deer Lodge, Mont.

Numerous protests and complaints against the proposal and requests for an investigation thereof were filed by the Montana, North Dakota, and South Dakota regulatory commissions and by various communities and individuals in the area where the rail passenger service was proposed to be discontinued. Upon consideration thereof, and in reliance upon the statement by the Milwaukee which accompanied the aforesaid notice that it had, in fact, complied with all of the requirements of section 13a(1) which are prerequisite to Commission jurisdiction over the proposal in question, the Commission, division 3, by order entered February 8, 1963, instituted an investigation of the proposed discontinuance of service and ordered operations of the aforesaid trains continued between Minneapolis, Minn., and Deer Lodge, Mont., pending hearing and decision in said investigation, but not for a period longer than 4 months beyond the date when the discontinuance otherwise would have become effective. Because of limitations upon the time available for investigation and decision, the order provided for the omission of an examiner's report and recommended order as part of the decision-making process in this proceeding.

Hearings were held in Butte and Miles City, Mont., and in Aberdeen, at which the regulatory commissions for the States of South Dakota and North Dakota and the Chairman of the Montana Railroad Commission appeared in opposition to the proposed discontinuance. A majority of the Montana Railroad Commission appeared as the interests of the commission might be involved. The proposal was also opposed by a number of communities, organizations, and individuals located in the area between Aberdeen and Deer Lodge.

Prior to 1961, trains Nos. 15 and 16 operated daily in each direction between Chicago, Ill., and Tacoma, Wash. Between Chicago and Minneapolis these trains were consolidated with trains Nos. 3 and 6 and were referred to as the consolidated Twin Cities Hiawatha and Olympian Hiawatha trains. Between Minneapolis and Tacoma, trains 15 and 16 were referred to as the Olympian Hiawatha. The passenger-carrying equipment regularly provided on trains 15 and 16 between Minneapolis and Tacoma consisted of two reclining seat, leg-rest coaches; one full length Super-Dome car with cafe lounge; one 48-seat dining car; one 14-section Touralux pullman sleeping car; one 10-roomette-6-double-bedroom pullman sleeping car; and one 8-double-bedroom Skytop Lounge car. In addition to operating between Minneapolis and Tacoma, all of the cars mentioned were also carried in through service between Minneapolis and Chicago.

On December 6, 1960, the Milwaukee filed notice with the Commission, under the provisions of section 13a(1) of the act, of its intention to discontinue the operation of trains Nos. 15 and 16 between Min-





neapolis and Tacoma. By order entered by the Commission, division 4, on December 23, 1960, in Finance Docket No. 21391, an investigation was instituted to determine whether the public convenience and necessity required the continuance of such service. That proceeding, however, did not involve the proposed discontinuance of any of the operations of trains Nos. 15 and 16 or the elimination of any of the services provided thereon, other than the service and operations west of Minneapolis.

As a result of its investigation, the Commission, division 3, on May 17, 1961, issued a report in which it found that the operation by the Milwaukee of trains 15 and 16 between Butte and Tacoma was not required by public convenience and necessity, but that the continued operation of the trains between Minneapolis and Butte was required by public convenience and necessity and would not unduly burden interstate or foreign commerce. Based upon that finding, an order was entered on May 17, 1961, requiring the Milwaukee "to continue the operation of its passenger trains Nos. 15 and 16 between Minneapolis, Minn., and Butte, Mont., for a period of one year * * *" from the date thereof.

On or about May 22, 1961, the Milwaukee made substantial changes in the service theretofore provided by trains 15 and 16. It discontinued the through service afforded between Chicago and points west of Minneapolis; discontinued operation of the trains west of Deer Lodge (the service being voluntarily continued beyond Butte to Deer Lodge, a distance of 41 miles for operating convenience); and drastically reduced the service that formerly had been afforded on trains 15 and 16, not only west of Minneapolis but also between Chicago and Minneapolis. This included the elimination of the 48-seat dining car and all pullman facilities, with the exception of the 14-section Touralux car, and limitations on the dining facilities provided. Since the change, only limited items of food, such as cold cereals and juices, soups, sandwiches, and processed meats in containers, are available in the cafe lounge car.

Upon discontinuing the handling of the described cars in through service between Chicago and Minneapolis, the carrier simultaneously discontinued the operation of trains 15 and 16 between such points. Since that time, it has operated the trains exclusively between Minneapolis and Deer Lodge and has confined the facilities thereon to the coach, Touralux, and dining services described. Passengers moving between points served by trains 15 and 16 west of Minneapolis, on the one hand, and points east of Minneapolis, on the other, are afforded no through service but are required to change trains at Minneapolis. Also, whereas passengers formerly utilized first-class tickets which were honored in connection with the standard pullman car and Sky-

top Lounge car service then provided, since the elimination of the standard pullman and Skytop Lounge car, no first-class tickets are sold for use on trains 15 and 16. Passengers wishing to utilize Touralux sleeper service may purchase coach tickets to be upgraded by the conductor to a tourist-pullman rate, which is somewhat less expensive than the first-class pullman rate.

Notwithstanding the discontinuance of trains 15 and 16 between Minneapolis and Chicago, the carrier's published timetables have continued to list those trains as being operated on a consolidated basis with trains 3 and 6 between such points and to list the same arrival and departure times as before. The carrier asserts, however, that such listing of the combined numbers of the trains 15–3 and 16–6 is merely to apprise passengers of the trains which make connections at Minneapolis with trains 15 and 16 and is not intended as a representation that trains 15 and 16 still operate between Minneapolis and Chicago.

Although the notice of proposed discontinuance which gave rise to the instant proceeding relates solely to the service provided by trains 15 and 16 between Aberdeen and Deer Lodge, it is made clear from the supporting statements which accompanied the notice filed with the Commission that the trains actually operate between Minneapolis and Deer Lodge and afford the described coach, Touralux, and dining services over the entire length of the run between the latter points. It is also made clear that, under the instant proposal, the carrier is not proposing any change in the service that will remain between Minneapolis and Aberdeen in the event the service between Aberdeen and Deer Lodge is discontinued.

Accompanying the statement in support of the notice of the proposed discontinuance here considered were certificates to the effect that the carrier, with respect to such proposal, had complied fully with the notice and posting requirements specified in section 13a(1) of the act. At the outset of the hearing at Aberdeen the examiner, in accordance with his authority under the Commission's General Rules of Practice to regulate the procedure in the hearing and take all measures necessary or proper for the efficient performance of the duties assigned to him, inquired whether any of the parties wished to challenge the carrier's assertions respecting compliance with the aforementioned notice and posting requirements. There being no response to this inquiry, the examiner then announced that he would not thereafter entertain any questions respecting the issue of the carrier's compliance with the notice and posting requirements applicable to the instant proposal.

Notwithstanding this announcement, however, evidence relating to the extent to which the carrier had given notice of its proposal to State authorities and had posted copies of its notice at various sta-





tions served by trains 15 and 16 was presented for the record and near the close of the hearings at Miles City, a motion was made by the North Dakota Public Service Commission, joined in by a number of other protestants, to strike the notice of proposed discontinuance from the records of the Commission on the ground, among others hereinafter discussed, that, because of a failure by the carrier to comply with the notice and posting requirements specified in section 13a(1), the Commission is without jurisdiction over the train discontinuance which is the subject of this proceeding.

Inasmuch as the protestant making the motion and a majority of the protestants joining therein were in attendance at the hearing at the time the examiner's inquiry and ruling were made, the Milwaukee contends that, by failing to press the issue at the time, protestants waived any right thereafter to raise the issue and may not raise the issue through the motion.

Regardless of the circumstances surrounding the ruling of the examiner and the limiting effect it ordinarily might be expected to have on the evidence presented in the proceeding, evidence concerning the extent of the carrier's compliance with the applicable notice and posting requirements was presented for the record subsequent to the ruling and the parties were permitted to develop the record fully on those points. Even if such evidence had not been presented for the record, protestants could not be precluded from raising the issue since it is jurisdictional in nature and may be raised at any stage of the proceedings. Protestants have the right, regardless of the examiner's ruling, to present for consideration the issue of our jurisdiction over the proposal here considered.

The parties to the proceeding stipulated that briefs would be confined to arguments respecting the issues raised by the motion and April 15, 1963, was designated as the due date for filing such briefs. On or before the date indicated, briefs in support of the motion were filed by the North Dakota Public Service Commission, the Aberdeen Chamber of Commerce, and the City of Lemmon, S. Dak. A brief in opposition to the motion was also timely filed by the Milwaukee.

Although the motion is in the form of a motion to strike the notice of proposed discontinuance from the records of the Commission, its true import is to question whether the Milwaukee has met the conditions prerequisite to the utilization of the provisions of section 13a(1) of the act as the means of discontinuing the operation of trains 15 and 16 between Aberdeen and Deer Lodge. In reaching our conclusion herein, the substance of the motion, rather than its form, will be considered.

Although protestants advance a number of grounds for their contention that the Milwaukee may not appropriately utilize the provi-

sions of section 13a(1) in connection with the instant proposal, because of our ultimate conclusion herein, only those which raise so-called jurisdictional questions will be discussed.

After referring to the previous operations of and services on trains 15 and 16 between Chicago and Tacoma; to the proceeding in Finance Docket No. 21391, including our report and order therein; to the reduction in services immediately following the issuance of our order in Finance Docket No. 21391; and to the statement concerning the present scope of the operations and service of trains 15 and 16 which accompanied the notice of proposed discontinuance in the instant proceeding, all of which are fully discussed in preceding paragraphs of this report, protestants contend (1) that, notwithstanding the carrier's statement that the operation of trains 15 and 16 has been confined, since May 1961, to service between Minneapolis and Deer Lodge, these trains have continued to be operated between Chicago and Deer Lodge; (2) that, by discontinuing the through service and reducing the service and facilities on the trains in the manner described, the carrier has failed to comply with the terms of the order of May 17, 1961, entered in Finance Docket No. 21391 requiring the Milwaukee to continue to provide, for a period of 1 year from the date thereof, the same service and facilities between Chicago and Butte as was provided on the date of such order, and that, by virtue of noncompliance, the 1-year period has not yet expired and that the carrier is not entitled to utilize the provisions of section 13a(1) for any further relief affecting the same trains until it complies for at least 1 year with the provisions of said order; (3) that, by virtue of the carrier's failure to perform the same service and offer the same facilities on trains Nos. 15 and 16 for the year following the issuance of the order in Finance Docket No. 21391 as were being provided thereon at the time of the issuance of said order, the carrier has not performed a condition prerequisite to the creation of Commission jurisdiction over the proposal here considered, and that, in the absence of Commission jurisdiction over the proposal, the notice of proposed discontinuance must be found to be null and void; and (4) that the carrier failed to perform a necessary condition precedent to Commission jurisdiction in that it failed to post a copy of the notice of proposed discontinuance in all stations served by trains Nos. 15 and 16. It is protestants' contention that the carrier is required, under the provisions of section 13a(1), to post such notices at all of the stations served by the trains, i.e., all stations on the Milwaukee's line between Chicago and Deer Lodge, whereas it only posted notices at the stations located in the area where the discontinuance is proposed to take place, and that, by virtue of the failure





to comply with the posting requirements of the act, the carrier has failed to perform a necessary condition precedent to Commission jurisdiction over the proposal here considered; and that the Commission lacks jurisdiction over the instant proposal because of the failure of the carrier to mail a copy of its notice of proposed discontinuance to the Governor of each of the States in which trains Nos. 15 and 16 are operated. Protestants contend that these trains still operate between Chicago and Deer Lodge and pass through or operate in six States. They refer to the Milwaukee's assertion filed in support of the notice of discontinuance to the effect that only the Governors of the States of South Dakota, North Dakota, and Montana were mailed notice of the discontinuance here proposed, and contend that, in the absence of notice to the Governors of the States of Illinois, Wisconsin, and Minnesota, the carrier has not complied with one of the necessary conditions prerequisite to the exercise by the Commission of jurisdiction over the instant proposal, and that the carrier has, therefore, failed to properly invoke the provisions of section 13a(1) in connection with the train discontinuance which is the subject of the instant proceeding.

Protestants urge the Commission not only to assert a lack of jurisdiction over the proposed discontinuance, but also to enter an order requiring the carrier to reinstate the same service and facilities on trains 15 and 16 between Chicago and Butte as were provided thereon prior to the issuance of our order in Finance Docket No. 21391.

While the Milwaukee, in its brief, admits that it made all of the aforementioned changes in operations and service on trains 15 and 16 a few days after the issuance of our order in Finance Docket No. 21391, it contends that all such changes were authorized under the report and order in that proceeding and that, irrespective of the type of service afforded on the trains after the issuance of such order, it complied with the terms of our order and with all legal requirements applicable to the trains merely by continuing to operate trains 15 and 16 between Minneapolis and Deer Lodge. It is the Milwaukee's position that, because our order did not specify the type of service that was to be provided on the trains during the 1-year period, did not state that through service should be continued, contained no specific provisions with respect to service between Chicago and any other point east of Minneapolis, and only specified that continued operation of trains 15 and 16 was required between Minneapolis and Butte, it was lawful for it to make the changes mentioned immediately following the date of issuance of the order, including discontinuance of trains 15 and 16 between Chicago and Minneapolis.

With respect to its alleged failure to comply with our order because of absence of the same service and facilities on the trains after issuance of the order as were provided prior thereto, the Milwaukee contends that our report and order in Finance Docket No. 21391 contemplated a reduction in the dining and other services that would be afforded on the trains upon discontinuance of the service west of Butte and that, so long as it continued to operate the trains between Minneapolis and Butte and provided some type of dining, sleeper, and coach service thereon, it cannot be deemed to have failed to comply with the terms of our order.

In answer to the jurisdictional questions raised by protestants, the Milwaukee contends that the Commission's jurisdiction, or power to act, under the provisions of section 13a(1) is established merely by the filing with the Commission of the notice of proposed discontinuance and that there is no provision for the divestment of Commission jurisdiction because the carrier does not afford a particular type of service on its interstate trains. It asserts that the Commission's jurisdiction over the instant proposal was vested on January 18, 1963, when the carrier filed the notice of discontinuance which is the subject of the instant proceeding, and that our jurisdiction over, or authority to act on, such proposal is not divested by any failure to provide particular types of service on the trains in question.

The carrier maintains that, even assuming that it had violated some outstanding order respecting trains 15 and 16, there is nothing contained in the act which would thereby prohibit it from filing its notice to discontinue operation of the trains under the provisions of section 13a(1). It asserts that it is entitled to have a determination made of its proposal to discontinue that portion of the operations of trains 15 and 16 west of Aberdeen on the basis of the service as it now exists.

On the issue of posting, the carrier argues that the posting of the notice of proposed discontinuance at all of the stations served by trains 15 and 16 is not a necessary condition precedent to Commission jurisdiction, but even assuming that it is a necessary condition precedent, by its posting a copy of the notice of proposed discontinuance at each of the stations or depots located in the area where the trains are to be discontinued, namely, those stations or depots between Aberdeen and Deer Lodge, it has complied with all of the posting requirements specified in section 13a(1) and our rules issued in connection therewith.

With respect to its alleged failure to mail a copy of its notice of proposed discontinuance to the Governor of each State in which trains Nos. 15 and 16 are operated, the carrier first points out that





protestants are mistaken in their contention that such trains still operate between Chicago and Minneapolis and repeats the assertion that these trains now operate only between Minneapolis and Deer Lodge. It then asserts that, on that basis, it was only required to give notice of the proposed discontinuance to the Governors and State regulatory bodies of Minnesota, South Dakota, North Dakota, and Montana. The carrier then makes reference to its representation contained in the statement accompanying the notice of proposed discontinuance filed with this Commission that copies of such notice were mailed only to three States, i.e., North Dakota, South Dakota and Montana, and alleges that the failure to include the State of Minnesota in that list was a mere oversight, since it had, in fact, mailed a copy of such notice to the Governor of Minnesota and to the Minnesota Railroad and Warehouse Commission. The carrier attached to its brief documentary evidence in verification of its statement that copies of the notice were mailed or delivered to the Governor of Minnesota and the Minnesota Railroad and Warehouse Commission.

The Milwaukee further claims that it was authorized by our report and order in Finance Docket No. 21391, and that it acted under such authority on or about May 22, 1961, to discontinue the operation of trains 15 and 16 between Chicago and Minneapolis and to make the described changes in the service provided on those trains, and thus fully complied with all conditions precedent to the invocation of the provisions of section 13a(1) in seeking the discontinuance herein.

Because of the issues presented, some discussion of the effect of our order issued in Finance Docket No. 21391 and of the limitations which are placed upon our power to act under the provisions of section 13a(1) is necessary. In a proceeding under the provisions of section 13a(1), the Commission's authority to require the continuance or restoration of operation or service of a train is limited to the proposal described in the notice filed by a carrier with the Commission. Upon the proper invocation of the provisions of section 13a(1), the authority of the various States involved to act in connection with the trains in question would be superseded for periods specified in the statute only to the extent that the operation or service rendered on such trains is embraced in the proposal specified in the notice filed with the Commission. Furthermore, the Commission's authority to exercise jurisdiction over the operation or service involved in a section 13a(1) proceeding is limited to a period of 1 year from the date an order is entered requiring the operation or service continued, in whole or in part. After the expiration of the 1-year period, the jurisdiction of

any State over the operation or service on such trains is no longer superseded unless the procedure provided by section 13a(1) is again invoked by the carrier.

At the time the Milwaukee filed notice with the Commission which gave rise to the proceeding in Finance Docket No. 21391, trains 15 and 16 were operating between Chicago and Tacoma and all of the types of service hereinbefore described were being provided thereon. The proposal specified in that notice made no mention of an intention to discontinue the operation of the trains east of Minneapolis or to eliminate, modify, or change any of the services provided on the trains, but merely indicated a proposal to discontinue operating trains 15 and 16 west of Minneapolis. While the Commission's power to exercise authority over the trains was restricted by the proposal filed with the notice to the operations performed by such trains in the area west of Minneapolis, it was authorized to consider that the operations performed by the trains in that area embraced service which extended to and from Chicago with specific types of service and facilities being afforded in connection therewith. However, as the proposal did not involve discontinuance of the trains east of Minneapolis or the elimination or change in any service then provided on the trains, our order entered in the proceeding, which required operation of the trains continued between Minneapolis and Butte for a period of 1 year, made no reference to the trains' operation between Chicago and Minneapolis or to the specific services that the carrier would continue to provide on the trains. The real import of our report and order was to permit the trains to be discontinued west of Butte, but to require the carrier, for a period of 1 year, to continue to operate the trains east of Butte in the same manner as they were operated on the day the notice was filed with the Commission.

The circumstances considered, the carrier cannot validly contend, by the order being silent as to matters not involved in the proceeding, that it was thereby authorized to make the changes in operations and service described. Obviously, we could not and did not authorize or sanction, under that proceeding, any change in the operation or service of trains 15 and 16 except in the area west of Butte.

The carrier concedes that it obtained no authority under any of the applicable State statutes to discontinue operation of the trains between Chicago and Minneapolis or to eliminate, modify, or change the services provided on trains 15 and 16. Since it obtained no authority under the provisions of section 13a(1) to discontinue such operations or to eliminate or change such services, its act, on or about May 22, 1961, of discontinuing the through service between Chicago and Butte through Minneapolis and making the changes in service described resulted in the denial to the public of the service and facilities on trains 15 and 16 which we had found were required by the public convenience and necessity and, thereby, placed the carrier in noncompliance with the terms of our order.





While the record does not disclose that the Commission was made aware of the carrier's failure to comply with the terms of its order, it is evident from the files of the Commission that the 1-year period specified in the order was permitted to expire without any action being taken to bring the Milwaukee's operations into full compliance with the terms of the order. However, upon the expiration of the 1-year term, the Commission lost the power it had acquired under the statute to exercise authority over the carrier's operations and the jurisdiction of the various States involved was restored. Having thus lost our authority over the operations, it follows that we are without power to issue an order as requested by protestants which would require the carrier to reinstate the operations and services on trains 15 and 16 which were discontinued, eliminated, or modified on or about May 22, 1961. However, since the expiration of the aforementioned order, the carrier has not been authorized under any section 13a(1) proceeding to discontinue the operation of trains 15 and 16 between any points or to eliminate, modify, or change any of the services afforded thereon between any points served by those trains. In view of the changes in service effected by the carrier without authority question would arise on the merits whether it has deliberately taken steps to discourage travel on these trains. However, in view of our conclusions herein no further consideration of that issue is necessary.

The issue raised by protestants respecting noncompliance by the carrier with the notice and posting requirements specified in section 13a(1) raises the questions of whether the provisions of that section have been effectively invoked in the instant proceeding and also whether we have power to consider the proposal on its merits. The gist of protestants' contentions is that all conditions specified in the statute must be complied with fully before its provisions become effective and that, until the statute is effectively invoked, the powers of the various States involved have not been superseded and the Commission is without authority to act in connection with any of the carrier's operations.

The Milwaukee takes the position, however, that the provisions of section 13a(1) are effectively invoked by the mere filing with the Commission of the notice of proposed discontinuance and that, upon such filing, the Commission acquires full jurisdiction to dispose of the proposal set forth in the notice. In effect, the carrier asserts that the notice and posting requirements specified in the statute are merely



769-159—66——50

procedural matters which have no effect upon the Commission's jurisdiction over the proposal in question. It also contends that, regardless of the merits of the foregoing contention, it has fully complied with all of the notice and posting requirements necessary for the effective invocation of the statute in the instant proceeding by serving notice on the Governors of the States in which trains 15 and 16 presently operate and by posting a copy of the notice at all of the stations, depots, and facilities located in the area where the trains are proposed to be discontinued, i.e., between Aberdeen and Deer Lodge. In effect, the Milwaukee maintains that the posting requirements apply only in the area where the discontinuance is to take place, rather than to all of the stations presently served by the trains in question.

In considering the jurisdictional issue raised by the Milwaukee, we would point out that the legislative history of section 13a(1) reveals an intention by Congress to supersede State jurisdiction in order to afford the railroads a means of obtaining relief which it considered was not otherwise obtainable. The statute being in derogation of State laws, it is encumbent upon those who wish to invoke its provisions to comply strictly with its requirements; for they constitute the safeguards which the Congress intended to assure that the superseding of State authority would be pursuant to due process of law. It follows, therefore, that the failure to comply strictly with the requirements prescribed in section 13a(1) results in neither invoking the provisions of that statute nor in superseding State law.

Although the mere filing of the notice with the Commission gives us authority to institute an investigation under section 13a(1), it is clear from the language of the statute and its legislative history that where, upon investigation, it is disclosed that the provisions of section 13a(1) have not been effectively invoked, we are without power to consider or dispose of the proceeding on its merits. Thus, the mere filing by the Milwaukee of the notice of proposed discontinuance did not, in itself, confer authority upon the Commission to dispose of the proposal on its merits. Such authority continued to be dependent upon the carrier's full compliance with all of the conditions prescribed in the statute.

Whether the Milwaukee has met that portion of the notice requirements of the statute with respect to advising the Governors of the States in which trains 15 and 16 now operate need not be determined herein. However, having notified the Governors in all of the States in which they concede the trains operate, we find it difficult to reconcile the Milwaukee's action in posting a copy of the notice of proposed discontinuance only at the stations or depots between Aberdeen and Deer Lodge. The Milwaukee refers to our rule on the subject (49





CFR 43.5(j)) which states that a copy of the notice must be posted "in a conspicuous place in each station, depot, or other facility *involved*" [italics supplied]. Its reliance upon the word "involved" does not support its position that only stations on the portion of the line to be discontinued are required to be posted. Contrary to the carrier's interpretation the language of section 13a(1) makes it clear that the stations "involved" include every station served by the trains. Section 13a(1) provides that, upon the filing of the notice with the Commission the carrier "shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change * * *." Obviously, Congress, in requiring the posting at every station served by the trains, was providing one of the safeguards to due process previously mentioned. It is clear that the statute requires the carrier, as one of the conditions to the effective invocation of the provisions of section 13a(1), to post a copy of its proposed notice of train discontinuance at every station or depot then being served by the trains "involved" in the proposal, and that such requirement has not been fully met where, as here, the posting is confined to the stations and depots located in the area where the discontinuance is to occur. This seems apparent since passengers at all points on the line may be equally affected by discontinuance of any portion of the trains and, in fact, passengers east of Aberdeen may be more seriously affected by discontinuance of operations between Aberdeen and Deer Lodge than passengers located between the latter points.

In view of the carrier's failure to comply fully with the posting requirements applicable to the instant proceeding, it follows that it has failed to meet the conditions precedent to the effective invocation of the provisions of section 13a(1) in connection with the proposed train discontinuance referred to herein; that the powers of the various States involved with respect to the Milwaukee's operations have not been superseded; and that, therefore, there is no proposal pending over which we have power to act. In view of these conclusions, it follows that our investigation herein appropriately may be discontinued.

All contentions of the parties and arguments in connection therewith not specifically referred to herein have been given consideration but, because of our conclusions herein, need not be discussed herein.

## FINDINGS

We find that, in connection with its proposal, filed under the provisions of section 13a(1) of the Interstate Commerce Act, to discon-

tinue the operation of its passenger trains Nos. 15 and 16 between Aberdeen, S. Dak., and Deer Lodge, Mont., the Chicago, Milwaukee, St. Paul and Pacific Railroad Company has failed to comply with the conditions prescribed in that section prerequisite to the effective invocation of its provisions in connection with the carrier's proposal; and that this Commission is, therefore, without authority to consider the proposal on its merits.

The premises considered, an order will be entered discontinuing the investigation herein.





FINANCE DOCKET NO. 22366

# NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 7 AND 8 BETWEEN BUFFALO, N.Y., AND CHICAGO, ILL.

*Decided May 15, 1963*

Upon investigation, found that the continuance by the New York, Chicago and St. Louis Railroad Company of its passenger trains Nos. 7 and 8 between Buffalo, N.Y., and Chicago, Ill., is not required by public convenience and necessity and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

*Robert G. Boes* and *Thomas O. Broker* for the carrier.

*Marcus E. Woods*, *James L. Harkins, Jr.*, *Alan J. Shapiro*, *Adrian F. Betleski*, *Walter E. Thayer*, *William A. Richards*, *Arthur D. Bourie*, *E. Rex Burks*, *Paul J. Barnum*, *B. L. Dresbach*, *Paul F. Willer*, and *Robert Moellering* for protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, MURPHY, AND TUCKER

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)), The New York, Chicago and St. Louis Railroad Company (Nickel Plate), a common carrier railroad subject to part I of the aforesaid act, on December 3, 1962, filed with this Commission a notice and supporting statements of a proposed discontinuance of the operation of its passenger trains Nos. 7 and 8 between Buffalo, N.Y., and Chicago, Ill., effective January 7, 1963. Copies of the notice of discontinuance were duly served and posted, as required by statute and by the regulations pertaining thereto (49 C.F.R., Part 43).

Protests and complaints against the proposed discontinuance were received from a number of individual users of the train service, and from certain business, civic, and labor organizations. By order dated December 19, 1962, division 3 instituted an investigation of the proposal, and ordered the train service continued for a period not to exceed 4 months beyond the effective date proposed in the notice of discontinuance. Because of the statutory time limitation relating to the required continuance of the service, the order provided for the omission of an examiner's report and recommended order as a part of the decision-making process in this proceeding. Public hearings