3415

1. RAILWAY LABOR ACT—SECTIONS 1008 THROUGH 1008-11, 12996 G. C. DO NOT CONFLICT WITH ACT.

2. RAILROADS—INTERSTATE COMMERCE—OHIO—EXISTING CONTRACT WITH REPRESENTATIVE UNION OF EMPLOYES—RAILROADS SUBJECT TO LAWS OF STATE GOVERNING AND REGULATING HOURS OF EMPLOYMENT OF WOMEN AND MINORS.

SYLLABUS:

1. Sections 1008 through 1008-11, and Section 12996, General Code, do not conflict with the Railway Labor Act (U. S. C. A., Title 45, Section 151 et seq.). (1937 Opinions of the Attorney General, page 2184, overruled on the authority of Terminal Railway Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U. S., 1.)

2. Railroads engaged in interstate commerce within the state of Ohio which have existing contracts with representative unions of their employees pursuant to the Railway Labor Act, are subject to the laws of the state of Ohio governing and regulating the hours of employment of women and minors.

Columbus, Ohio, July 13, 1948

Hon. W. J. Rogers, Director, Department of Industrial Relations
Columbus, Ohio

Dear Sir:

I am in receipt of your communication in which you request that I review Opinion No. 3392, issued July 24, 1922, appearing in Volume I, Opinions of the Attorney General for 1922 at page 716, and Opinion No. 1269, issued October 5, 1937, appearing in Volume III, Opinions of the Attorney General for 1937 at page 2184. The syllabus of the 1922 opinion reads:

"Section 1008 of the General Code, and other similar state laws do not apply to the employment of females as telegraph operators on interstate railroads."

The syllabus of the 1937 opinion reads:

"Sections 1008 and 1008-11, inclusive, and Section 12996, General Code, regulating the hours of labor of females and minors, do not apply to employes subject to provisions of the Railway Labor Act when employers pursuant to that act entered into agreements with their employes with respect to working conditions and hours of labor."

Two decisions by the Federal courts are brought to my attention by you in your request. They are: Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen et al., 318 U. S. 1, decided January 18, 1943, by the United States Supreme Court, and In re Chicago North Shore and N. R. Company, 147 F. 2nd 723, decided March 2, 1945, by the 7th Circuit Court of Appeals. In view of the decisions in these cases, you ask this question:

"Your opinion is, therefore, requested as to whether or not railroads engaged in interstate commerce within the State of Ohio, and who have existing contracts with the representative unions of their employes pursuant to the Railway Labor Act, are subject to the laws of the State of Ohio governing and regulating the terms and conditions of the employment of women and minors."

Section 1008 et seq. and Section 12996, General Code, regulate the hours of employment for women and minors.

The Supreme Court of the United States has recognized the right of states to enact legislation for the protection and welfare of women. This court has held that states have this power as a part of their police power. In Muller v. Oregon, 208 U. S. 14, it was held that the regulation of hours of employment of women was within the police power of the state. In West Coast Hotel Company v. Parrish, 300 U. S. 379, which overruled Adkins v. Children's Hospital, 261 U. S. 525, it was held that states could legislate minimum wages as part of the police power.

The Constitution of the United States gives Congress power "to regulate commerce with foreign nations and among the several states." If Congress has not exercised this constitutional power to regulate inter-

state commerce, the state has authority to enact laws in the exercise of its police power for the protection of health and safety of its citizens even though such legislation may affect interstate commerce. Railroad Co. v. New York, 165 U. S. 628. When Congress enacts legislation pursuant to its constitutional power to regulate interstate commerce, the power of the state to regulate ceases, and if there is a conflict between state and federal legislation, the state legislation must yield to the federal. Erie Railroad v. New York, 233 U. S. 671. The question which you present is whether Congress has passed legislation which conflicts with the legislation of the state of Ohio passed to protect women and minors, Section 1008 et seq. and Section 12996, General Code.

To deal adequately with the question presented, two enactments of Congress must be considered; namely, the "Hours of Service of Employees," United States Code Annotated, Title 45, Section 61 through Section 64, and the "Railway Labor Act," United States Code Annotated, Title 45, Section 151 through Section 163.

The Hours of Service of Employees provisions deal with a limited class of "employees." The definition of "employees" as found in Section 61, provides:

> "* * * the term 'employees' as used in Sections 61-64 of this title shall be held to mean *persons actually engaged in or connected with the movement of any train.*"
> (Emphasis added.)

The women and minor employees of which you inquire, for the most part would not fall within this definition. Women and minors, especially the groups who need protection, would not be "persons *actually* engaged in or connected with the movement of any train." This act is entitled:

> "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon."

The provisions of this enactment carry out this purpose. It is to be noted that the intent of Congress was to regulate hours for the safety of travelers and employees. The Hours of Service Act was passed with the intention of preventing danger arising from inefficiency of employees caused by overwork. This conclusion is set forth in Atchison, Topeka & Santa Fe R. Co. v. United States, 244 U. S. 336 at page 342.

Telegraph operators whose duties are dispatching trains, whether male or female, would be subject to the provisions of the Hours of Service of Employees Act. A telegraph operator and his duties were considered in Erie R. R. Co. v. New York, 233 U. S. 671, decided May 25, 1914, by the Supreme Court of the United States. It was held in this decision that such an operator was an employee included within the provisions of the Hours of Service of Employees Act and that the benefits given by the labor laws of New York could not accrue to him. This decision also stated that there could be no division in the field of regulation of interstate commerce. United States v. New York Central R. R. Co., 64 F. Supp. 499, decided by the Federal District Court of Massachusetts, has been cited as authority for the conclusion that the Hours of Service of Employees Act invalidated the Massachusetts enactment concerning hours of employment for females. Upon examination of the opinion it will be found that Judge Ford did not reach this conclusion. In this case, the New York Central Railroad Company was being prosecuted for violation of the Hours of Service of Employees Act. The defense offered by the Railroad Company was that the male telegraph operator who had worked more than the prescribed number of hours, could not be relieved, as the only person available was a female telegraph operator who had worked the maximum hours allowed by the Massachusetts female hours legislation. Judge Ford stated that this situation should be decided on the emergency provision of the Hours of Service of Employees Act. He also stated that the question of the Massachusetts law was collateral and he would refrain from passing on the question of conflict between the federal and state legislation.

It is hard to conceive how any appreciable number of women and minors could be included in the definition of "employees" as the same is found in Section 61, Title 45, U. S. C. A., "Hours of Service of Employees." I am of the opinion that female telegraph operators directly connected with dispatching of interstate trains are included in this definition of "employees" as the same is found in the Hours of Service of Employees Act. Since there would be a conflict as to legislation by state and federal governments, the federal enactment would prevail. This rule of law is stated in Erie R. R. Co. v. New York, cited above, at page 681:

> "* * * The relative supremacy of the state and national power of interstate commerce need not be commented upon. Where there is conflict the state legislation must give way.

Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the State ceases to exist." (Followed by a number of citations.)

The Railway Labor Act defines "employee" in the fifth subparagraph of Section 151, Title 45, U. S. C. A. This definition is: "The term 'employee' as used herein includes *every person in the service of carrier.*" Section 151a of the Railway Labor Act states the general purposes of the entire act. This section provides:

"The purposes of this chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of interpretation of agreements covering rates of pay, rules, or working conditions."

The purpose of the Railway Labor Act is to provide a means of settling labor disputes. This conclusion is found in the Terminal Railway Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U. S. 1, cited in your request for my opinion. Mr. Justice Jackson, in the course of the opinion states:

"* * * The question is whether the Railway Labor Act, so interpreted, occupied the field to the exclusion of the state action under review. We conclude that it does not, and for the following reasons:

"The Railway Labor Act, like the *National Labor Relations Act, does not undertake governmental regulation of wages, hours and working conditions. Instead, it seeks to provide a means by which agreement may be reached with respect to them.* The national interest expressed by those Acts is not primarily in the working conditions as such. *So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.* The federal interest that is fostered is to see that disagreement about conditions does not reach the

point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. Cf. Pennsylvania R. Co. v. United States R. Labor Bd., 261 U. S. 72, 84, 67 L. Ed. 536, 542, 43 S. Ct. 278.

"State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phase of which would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. *We hold that the enactment by Congress of the Railway Labor Act was not a pre-emption of the field of regulating working conditions themselves,* and did not preclude the State of Illinois from making the order in question." (Emphasis added.)

In a very well considered opinion on the point in question as to preemption of the field of regulation of working conditions by the passage of the Railway Labor Act, Judge Kerner in In re Chicago N. Shore and N. R. Company, 147 F. 2nd 723 (CCA 7th District) at page 727, states:

"The Act does not undertake governmental regulation of working conditions, Terminal Railway Association v. Brotherhood of Railway Trainmen, 318 U. S. 1, 6, 63 S. Ct., 420, 87 L. Ed. 571, *nor have we been able to find in the Act an intention to exclude a State from exercising its police power* or the right to approve or disapprove the terms and conditions under which one carrier might allow another carrier to use the former's property or facilities. * * *

"* * * The Act does not fix or authorize anyone to fix generally applicable standards for working conditions, and the term 'working conditions' does not include any and all circumstances concerning work required of employees. *It does not ex-*

> *clude a State from exercising its police powers.* Terminal Railway Association v. Brotherhood of Railway Trainmen supra, 318 U. S. 1, 6, 63, S. Ct., 420, 87 L. Ed. 571." (Emphasis added.)

In the case of Missouri Pacific Railway Co. v. Norwood, Attorney General, 283 U. S. 249, statutes of the state of Arkansas which regulated the size of freight trains and switching crews, were claimed by the railroad company to contravene the Railway Labor Act. The Court disposed of this contention in the following manner:

> "No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration."

It is clear by this interpretation placed on the Railway Labor Act by the Supreme Court of the United States and the 7th Circuit Court of Appeals, that the Railway Labor Act did not preempt the field of working conditions on interstate railways. In reaching this conclusion, I am fully aware of the decision rendered in the Northern P. R. R. Co. v. Washington, 222 U. S. 370, which was cited with approval in the 1937 opinion of the Attorney General, supra. However, since these two cases have been decided subsequent to the rendering of the Northtrn P. R. R. Co. v. Washington, I feel that this more recent authority must be followed.

The pronouncements of the principles of law in the early portion of Opinion No. 1269, Opinions of the Attorney General for 1937, supra, are not in dispute, and have been mentioned heretofore in this opinion; however, in the latter portion of this opinion and one of the determining factors upon which the announced conclusion was reached is the case of Long Island R. R. Co. v. The Department of Labor, 256 N. Y. 498. In this case, the court had under consideration the labor laws of New York relating to the elimination of grade crossings and particularly the provisions of that legislation which required that in instances where the state of New York ordered the elimination of certain grade crossings, the work to be performed by the railroad company itself and certain requirements as to hours and wages were to be met. In Opinion No. 1269, Opinions of the Attorney General for 1937, supra, we find the following quotation taken from page 516 of the opinion in the Long Island R. R. Co. case:

> "* * * It provides a method for fixing wages of employees by free contract or adjustment of labor disputes. It includes as an employee subject to its provisions 'every person in the service

> of a carrier * * * who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission.' Its purpose of ending labor disputes may be thwarted by any regulation of the State compelling payment of *wages* to 'employees' at a different rate. It seems to us clear that Congress intended to exclude *any interference by any State in the field of wages of employees of interstate carriers.* The Labor Law of this state may for these reasons not be applied to any 'employee,' as defined in the Federal act, where the carrier is directed to perform work by its own employees."
>
> (Emphasis added.)

Upon examination of this opinion, it is to be found that throughout the entire opinion reference is made continually to wages. The only provision which we have before us here is hours of employment of females and minors. This opinion goes on to state in a portion of the opinion not quoted in the 1937 Opinion of the Attorney General under consideration:

> "There may be doubt whether Congress has regulated the hours of labor of any employees of the railway companies who might be used in grade crossing elimination. The Hours of Service Act applies only to a limited class of employees. *We do not now decide whether the State may not regulate the hours of labor of other employees. Here, as we have pointed out, the regulation of hours of labor is inextricably intertwined with the regulation of rate of wages and they must stand or fall together.*
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> "The Railway Labor Act covers a broader field. It provides a method for fixing *wages* of employees by free contract or adjustment of labor disputes. It includes as an employee subject to its provisions 'every person in the service of a carrier * * * who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission'. Its purpose of ending labor disputes may be thwarted by any regulation of the State compelling payment of *wages* to 'employees' at a different rate. It seems to us clear that Congress intended to exclude any interference by any State in the field of *wages* of employees of interstate carriers. The Labor Law of this State may for these reasons not be applied to any 'employe', as defined in the Federal act, where the carrier is directed to perform work by its own employees." (Emphasis added.)

The court in this opinion specifically declined to pass upon the right of a state to regulate hours of labor of other employees. The opinion was based upon the finding of the court that the Railway Labor Act indicated an intent of Congress "to exclude any interference by any state in the field of wages of employees of interstate carriers," and that "the regulation of hours of labor is inextricably intertwined with the regulation of

wages and they must stand or fall together." It is significant that in the question now under consideration, we have no concern with the matter of wages, as Sections 1008 to 1008-11, inclusive, and Section 12996, General Code of Ohio, deal exclusively with hours of employment of females and minors. It is also to be noted that this decision, relied upon by my predecessors, was rendered by the New York Court of Appeals before the Supreme Court of the United States rendered the decision in Terminal Railway Association of St. Louis v. Brotherhood of Railroad Trainmen, cited hereinbefore. This New York decision is of questionable value and certainly not a valid authority in light of the decision reached by the United States Supreme Court in the St. Louis Terminal Association case.

In view of the above, I cannot help but reach the conclusion that the Federal Government by the enactment of the Railway Labor Act has not preempted governmental regulation of hours of employment for females and minors. As was stated by Mr. Justice Jackson, supra, the purpose of the Railway Labor Act was to provide a means of arbitration similar to the provisions of the National Labor Relations Board. The purpose for such an arbitration board is to make certain that interstate commerce would not be interrupted because of labor disputes.

We must consider the principle laid down in Erie R. R. Co. v. New York, cited hereinbefore, to the effect that there is no division in the field of regulation but an exclusive occupation of it when Congress manifests a purpose to enter such field. In view of what has been said hereinbefore in this opinion, I have reached the conclusion that Congress did not intend to enter the field of regulation of hours of employment for women and minors. Further recognizing this principle stated above and laid down in Erie R. R. Co. v. New York, supra, that there is to be no division, it is to be noted that even when Congress manifests a purpose to enter such a field by enacting legislation pursuant to its constitutional authority over interstate commerce, it will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, or unless the state law in terms or in its practical administration conflicts with the act of Congress or plainly and palpably infringes its policies. This rule was stated by the United States Supreme Court in Southern Pacific Co. v. State of Arizona, ex rel. Sullivan decided June 18, 1945, 325 U. S. page 761, at page 766:

> "Congress, in enacting legislation within its constitutional authority over interstate commerce, *will not be deemed to have intended to strike down a State statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested* * * * or unless the State law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly or palpably infringes its policy * * *."
>
> (Emphasis added.)

The opinion of the court continues on page 767:

> "* * * When the regulation of matters of local concern is local in character and effect, and its impact on National commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. * * *"

It may be true that the application of Sections 1008 through 1008-11, and Section 12996, General Code, to persons amenable to the Railway Labor Act would touch in some instances interstate commerce. I do not feel that the impact thereof would seriously interfere with its operation to the extent that it is incumbent upon me to hold such application unwarranted under the commerce clause. In light of these recent pronounced decisions discussed hereinbefore, there would seem to be no basis for holding that regulation of hours of labor of employees of interstate railways has been either expressed or implied by Congress in the enactment of the Railway Labor Act. It is to be conceded that questions concerning hours of labor might arise which would amount to a dispute subject to review under the Railway Labor Act. However, this would not be a basis in light of the foregoing quoted decisions for holding that the provisions in the Ohio law relative to hours of employment of females and minors would not be applicable. In holding that the statutes of Ohio here under consideration do not violate the Railway Labor Act, it must follow that no agreements between carriers and employees may contravene these statutes.

It is my opinion and you are informed:

1. Sections 1008 through 1008-11, and Section 12996, General Code, do not conflict with the Railway Labor Act (U.S.C.A., Title 45, Section 151 et seq.). (1937 Opinions of the Attorney General, page 2184, overruled on the authority of Terminal Railway Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U. S. 1.)

2. Railroads engaged in interstate commerce within the state of Ohio which have existing contracts with representative unions of their employees pursuant to the Railway Labor Act, are subject to the laws of the state of Ohio governing and regulating the hours of employment of women and minors.

Respectfully,

HUGH S. JENKINS,
Attorney General.