79C

[redacted]

[redacted]

4 JUL 20 1954

Delivered by Deputy 7/20

4 Mr. Jacob Seidenberg, Executive Director
4 The President's Committee on Government Contracts
4 Washington 25, D. C.

Dear Mr. Seidenberg:

This is in response to your letter dated June 28, 1954. You state that Secretary of Labor Mitchell is interested in more detail concerning the suggestion made in our letter of May 28, 1954 to Vice President Nixon, that conceivably the President's Committee might like to explore with the Interstate Commerce Commission and the Postmaster General the use of their regulatory powers to aid in achieving some of the aims of the government contract program against discrimination in employment.

As you know, this suggestion was a by-product and not the main topic of our study and views, which were concerned with the contractual aspect of the government transactions with the railroads in the transportation of freight, mail, and passengers.

Accordingly, we trust that inquiry into the possibility of collateral regulatory assistance will not become a distraction from the main purpose of the contract program and the efforts of the Committee to assist the government contracting agencies in their duty, as set forth in the letter of May 28, to negotiate and attempt to obtain the nondiscrimination in employment provision in their contract arrangements with rail carriers.

Our thought, in the case of the Interstate Commerce Commission, which does not have or perform any function of approving or supervising government contracts with railroads for the hauling of freight or passengers (the so-called Section 22 transactions), was exploration of the use of the ICC's general regulatory and rule making powers, or its powers of approval of transactions in the conduct of the railroad business as it effects private shippers and passengers or operations generally. Congress in the Act of September 18, 1940, Section 1, 54 Stat. 899, amended the Interstate Commerce Act to provide a "National Transportation Policy". Under this provision, "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and

preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;--all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Underscoring supplied.)

It is clear from the cases that all relevant factors in the National Transportation Policy must at least be considered by the Commission in every proceeding. King v. United States, 344 U.S. 254, 263-264 (1952). So firmly fixed is this principle that an order of the Commission may be annulled because of the absence of any finding or other showing in the record of any investigation or consideration of questions which the National Transportation Policy of necessity brought before the Commission in the proceeding. Cantley and Tannola v. United States, 115 F. Supp. 72, 80, 82 (D.C., S.D. California, 1953).

Clearly the National Transportation Policy is concerned with railroad employee problems as expressed in the direction "to encourage fair wages and equitable working conditions".

In this connection, section 3 (1) of Interstate Commerce Act, 54 Stat. 902, 49 U.S.C. 3 (1), contains the following significant language: "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The provision is clearly applicable to, and prohibitive of, racially discriminatory practices in interstate transportation, Henderson v. United States, 339 U.S. 816 (1950). Whether it would apply, together with the pertinent portion of the National Transportation Policy, to railroad employment practices which discriminate because of race, has probably not been tested.

Without attempting to decide or suggest what would be an appropriate occasion or form of proceeding, or whether it might be the direct dealing with a complaint or complaints of discrimination in employment or ancillary to some other Commission business with a railroad or railroads, it seems to us that the Commission has some significant precedents for concerning itself with employee welfare and employment policies, and for supporting the national policy against racial discrimination.

In United States v. Louisian, 308 U.S. 225 (1939), the Interstate Commerce Commission had before it the application of one railroad to lease the road and properties of another railroad, with consequent large savings in the operating costs of the road. Pursuant to the provision of the statute authorizing carriers to consolidate or lease their properties, the Supreme Court held that the order of the Commission which authorized the lease and took into account the several statutory factors, including "the public interest", could properly attach reasonable conditions for the compensation of railway employees who would be seriously affected, by providing compensation for a limited time for any reduction of salary, partial compensation to dismissed employees for the loss of their employment, and payment of moving and travelling expenses to transferred employees including losses incurred from their being forced to sell their houses. The Court held that, as a matter of law, it could not be said that these conditions would not advance the public interest in the statutory sense by promoting the adequacy and efficiency of the railroad transportation system by preventing interruption of interstate commerce through labor disputes and by their effect on employee morale.

In Interstate Commerce Commission v. Railroad Labor Executives Association, 315 U.S. 373 (1942), the Supreme Court held that the Interstate Commerce Commission, in authorizing the abandonment of a railway line, had authority to attach terms and conditions for the benefit of employees who would be displaced by the abandonment.

On a later occasion, in commenting upon and citing the above cases Mr. Justice Jackson said, in his concurring opinion in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 660 (1944): "It is too late in the day to contend that the authority of a regulatory commission does not extend to a consideration of public interests which it may not directly regulate and a conditioning of its order for their protection."

In that connection it should be observed that there is a national public policy, manifested in the Constitution, treaties, federal statutes, and applicable legal precedents, against racial discrimination effected or supported by government. Hurd v. Hodge, 334 U.S. 24, 35 (1948). Racial discriminations effected or supported by action of the federal government or any agency thereof are prohibited by the due process clause of the Fifth Amendment. Bolling v. Sharpe, ____ U.S. ____ (May 17, 1954); Hurd v. Hodge, supra. In this area of conduct, the Supreme Court has, as a practical matter, equated the guaranties of the Fourteenth and Fifth Amendments. In regard to the protection of the Fourteenth Amendment, long ago the Supreme Court said: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." Truax v. Raich, 239 U.S. 33, 41 (1915). And, bearing in mind the fairly complete control of railroad carrier operations vested by the Interstate Commerce Act in the Interstate Commerce Commission, it is not amiss to point out that numerous cases have held private discriminatory conduct, freely and voluntarily initiated by private individuals, to be violative of the constitutional protections when assisted or rendered effective by an assertion of state power. Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Burrows v. Jackson, 346 U.S. 249 (1953), and others.

It therefore seems to us that there is authority and precedent for the I.C.C. to concern itself by appropriate administrative action with the protection of railway employee interests against racial discrimination.

In the case of the Postmaster General, we had in mind the broad authority conferred upon him by 39 U.S.C. 541, which requires all railway common carriers "to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General"; and the provisions of 39 U.S.C. 539, pursuant to which "the Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed." Refusal to transport mail when required by the Postmaster General shall cause the railroad company to be subject to fines, 39 U.S.C. 539, 563. The question is,

of course, whether the statutory language "in the manner", "under the conditions", or "with the service", together with the surrounding grant of authority, permit the Postmaster General to lay down administratively conditions or requirements concerning nondiscriminatory employment practices by railroads carrying government mail as a condition for carrying the government mail.

The foregoing, and any other related materials we may have overlooked, are the matters we thought worthwhile for the Committee to discuss and explore with the agencies responsible for administering the regulatory statutes, as a supplementary means of achieving the purposes to which the President's Committee is devoted.

Sincerely,

WILLIAM P. ROGERS

William P. Rogers
Deputy Attorney General