

August 19, 2002

TO: Administrative Law Judge Albers:

Please note that The People of the State of Illinois, by *James E. Ryan*, Attorney General of the State of Illinois have electronically filed through the E-Docket system an **Initial Brief of the People of the State of Illinois** in ICC Docket No. 02-0426. This document will be available on the E-Docket system.

Sincerely,

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**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS COMMERCE COMMISSION)
On its own motion)
) Docket No. 02-0426
Revise of 83 Ill. Adm. Code 732)

NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, August 19, 2002, we filed with the Chief Clerk of Illinois Commerce Commission 527 East Capitol Avenue, Springfield, Illinois 62794-9280 the enclosed "Initial Brief of the People of the State of Illinois."

Janice A. Dale
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Janice A. Dale, Assistant Attorney General, hereby certify that I served the above identified documents upon all active parties of record on the attached service list on August 19, 2002, by electronic mail. Hard copies will be provided upon request.

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The People of the State of Illinois, by James E. Ryan, Attorney General (AG) submit their Initial Brief in the above-entitled docket.

I. INTRODUCTION

The Commission initiated this proceeding to consider the following issue related to the definition of “emergency situation” as used in 83 Ill. Adm. Code Part 732, which was approved on June 19, 2002:

“Whether strikes or work stoppages should be considered emergency situations and, if so, the appropriate length of time during which telecommunications carriers should be exempt from paying customer credits during a strike or work stoppage.”

ICC Docket 02-0426, Initiating Order at 1 (June 19, 2002).

This docket continues the process of resolving issues associated with section 13-712 of the Public Utilities Act, which requires the payment of customer credits when repairs or installations are late or appointments are missed. 220 ILCS § 13-712. A status hearing was held on July 18, 2002 during which the parties were asked to submit briefs on the following questions:

- (1) Is the Commission preempted from having a rule which grants carriers an exemption from that rule in the event of strikes and / or work stoppages?
- (2) Does section 13-712 of the Act preclude the Commission from having a rule which grants carriers an exemption from that rule in the event of strikes and / or work stoppages?

ICC Docket 02-0426, Transcript at 8 (July 18, 2002). As detailed below, the AG answers yes to both questions.

II. SUMMARY OF ATTORNEY GENERAL’S POSITION

Part 732 of the Illinois Administrative Code, the rules established to implement the customer

credits required by section 13-712, is not preempted by federal law. The rule establishes rights and obligations solely related to matters of state interest and is unrelated to labor relations. However, the Commission is preempted by federal law from exempting carriers from that rule in the event of a strike or work stoppage because such an exemption is centrally connected to and has a direct impact on labor relations, an area that has been fully occupied by Congress.

Additionally, the Commission is precluded from adopting a rule which grants carriers an exemption to the section 13-712 obligations in the event of a strike or work stoppage because the General Assembly included such an exemption elsewhere in House Bill 2900, the comprehensive amendment to Illinois telecommunications law adopted in 2001, but did not include it in section 13-712. It is a fundamental canon of statutory interpretation that if the legislature includes a term in one section of an Act and excludes it in another, the exclusion is to be considered intentional. The General Assembly's decision to not include strikes or work stoppages as an exemption for the customer credit provisions of section 13-712 reflects the intent of the General Assembly, and precludes adoption of a rule that grants an exemption to section 13-712 obligations in the event of a strike or work stoppage.

III. THE CUSTOMER CREDITS REQUIREMENTS IN PART 732 DO NOT INTERFERE WITH THE COLLECTIVE BARGAINING PROCESS AND ARE NOT PREEMPTED BY FEDERAL LAW

A state law is preempted by federal law when it directly conflicts with federal law, when it interferes with a federal scheme, or when it is clear that Congress intended to entirely occupy the field.

Metropolitan Life Ins. Co. v. Massachusetts, 417 U.S. 724 (1985). Congress has occupied the field of labor relations with the National Labor Relations Act (NLRA), and state law that impacts labor

relations can be preempted under the Garmon or Machinists doctrines. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (Garmon); Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976) (Machinists). A state law is preempted under Garmon when it deals with activities arguably subject to the NLRA, unless the law deals with matters that are “merely peripheral” to the concerns of the NLRA, or matters that are “deeply rooted in local concerns.” Garmon at 244. The Machinists doctrine forbids state and local regulation of areas “that Congress intended to be unrestricted by any governmental power to regulate” because those economic activities are “among the permissible economic weapons in reserve” for both labor and management. Machinists at 141

Part 732 customer service credits are not preempted by federal law because they do not impact the rights of parties to collective bargaining processes. Precedent exists for not finding state laws preempted where they do not impact the collective bargaining scheme and where preemption threatens state regulation. See Massachusetts Nurses Association v. Dukakis, 726 F.2d 41 (1st Cir. 1984) (state regulations upheld where they do not impact rights, practices and procedures that constitute collective bargaining system); Colfax v. Illinois State Toll Highway Authority, 79 F.3d 631, 633 (7th Cir. 1996), citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985); (preemption not found unless an action conflicts with federal law or would frustrate the federal scheme, or unless it is clear from the totality of the circumstances that Congress intended to occupy the field); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985), citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971) (Supreme Court recognized that it cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships

between employees, employers and unions).

Part 732 customer credits are not preempted by Garmon because they are “peripheral” to the NLRA and are, “deeply rooted in local concerns.” Part 732 deals with local telecommunication quality of service and associated customer credits. Illinois, like most other states, has a long history of regulating local telephone service, and the impact of poor service quality is a matter of local state interest. The Part 732 customer service credits arise from this local concern and are not linked to or triggered by strikes or labor actions or linked to the employer-employee relationship.

The 8th Circuit resolved a similar preemption question, finding that a rate reduction ordered by the Arkansas Public Services Commission was not preempted. Southwestern Bell Tel. Co. v. Arkansas Public Service Commission, 824 F. 2d 672 (8th Cir. 1987). The carrier in Southwestern Bell argued that the rate reduction ordered by the Public Service Commission was preempted by the NLRA because it affected the company’s ability to pay the wages agreed to in a collective bargaining agreement. The court held that the rate reduction order had, “no relation to the substantive portions of the labor contract...and thus has no relation to the substantive enforcement of the NLRA.” The Southwestern Bell court acknowledged that the rate reduction may have had an indirect effect on labor, but pointed out that this effect is, “part of the myriad of government decisions in a regulated industry that will have an effect on labor relations.” Southwestern Bell, 824 F.2d at 675. The court added that the rate reduction, “while perhaps indirectly affecting future bargaining strategy, does not control the terms of any particular collective bargaining agreement and does not interfere in any impermissible way with the exercise of collective bargaining rights protected by the NLRA.” Id. at 674. Like the rate reduction in Southwestern Bell, the section 13-712 customer credits are a part of the “myriad of

government decisions” that may have an indirect effect on labor relations, but do not deal substantially with labor issues and therefore are not preempted by the NLRA. Id.

Section 13-712 customer credits are also not preempted under the Machinists doctrine because they do not interfere with the use of economic weapons that “Congress intended to be unrestricted by any governmental power to regulate.” Machinists at 141. Unlike the law in question in Cannon v. Edgar, 33 F.3d 880 (7th Cir. 1994), which required grave diggers and cemeteries to agree on a pool of workers who would perform internments during labor disputes or face sanctions, the section 13-712 customer credit provisions do not require parties to a labor dispute to negotiate or to agree with each other about any particular issue. The Cannon court found requirements that parties to a labor dispute agree to a particular term preempted under the Machinists doctrine. The 7th Circuit analyzed the Garmon and Machinists preemption doctrines and held that the NLRA preempted the Burial Rights Act because it imposed specific terms and sanctions on parties involved in labor negotiations.

Unlike the sanctions in Cannon, which could only arise from a labor dispute, the section 13-712 credits are not linked to a labor negotiation process. Instead, the credits apply to carriers whenever a customer service deadline is missed irrespective of the existence of labor negotiations.

IV. THE COMMISSION IS PREEMPTED BY FEDERAL LAW FROM HAVING A RULE WHICH GRANTS CARRIERS AN EXEMPTION IN THE EVENT OF A STRIKE OR WORK STOPPAGE

Unlike the Part 732 customer credit provisions, a definition that grants carriers an exemption from the rule in the event of a strike or work stoppage has a direct impact on labor relations because the strike or work stoppage is a necessary condition for the exemption to take effect. In essence, but

for the strike or work stoppage, the carriers would not be exempt from performing their obligations under the rule. Consequently, such an exemption is directly rather than peripherally related to labor relations under Garmon.

The direct connection between this exemption and labor relations is plain. The exemption arises only when employee-employer relations have reached the point where economic weapons, protected by the NLRA, are used. Further, in order to enforce such a rule, the Commission would have to make determinations such as when a strike or work stoppage begins or ends, when employee action is considered a strike or work stoppage for purposes of triggering the exemption, what bargaining units would be covered by this exemption, whether all employee actions would be covered, or only those that somehow affected telecommunications install and repair services, and whether a party's good or bad faith conduct affects the exemption. These are the type of issues with which the NLRB grapples¹ and they fall squarely within the federally occupied field of labor relations.

An exemption triggered by a strike or work stoppage will have a direct affect on the ability of parties in a labor dispute to participate in the collective bargaining process and to use the economic weapons Congress has reserved for such disputes. Such an exemption will lessen the economic impact on carriers should employees choose to strike. Additionally, such an exemption would ease the burden on carriers should they, in the course of a labor dispute, choose to lock out employees. In both cases, the exemption changes the effect of the NLRA sanctioned economic weapons used by the parties, and is therefore preempted under the Machinists doctrine.

¹ See In Re Wilshire at Lakewood, 2002 WL 1723725, (NLRB Div. Of Judges, 2002); In Re New York State Nurses Ass'n, 334 NLRB No. 103 (2001); KNTV Inc., 319 NLRB 447 (1995).

V. LEGISLATIVE HISTORY AND RULES OF STATUTORY CONSTRUCTION PRECLUDE THE COMMISSION FROM HAVING A RULE WHICH GRANTS AN EXEMPTION TO PART 732 IN THE EVENT OF A STRIKE.

The text of section 13-712 combined with an analysis of HB 2900 as a whole demonstrates that the Commission is precluded from adopting an exemption triggered by a strike or work stoppage from the customer credit requirements of Part 732. It is a fundamental canon of statutory construction that, “Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” McNutt v. Board of Trustees of University of Illinois, 141 F.3d 706 at 709, (7th Cir.1998).

The General Assembly included a comprehensive list of situations which exempt a carrier from paying customer credits for service quality lapses. Section 13-712(e)(6) specifies seven exemptions. Work stoppages are not among them. By contrast, section 13-810, which establishes carrier to carrier requirements, does include work stoppages in its list of events to be excluded in evaluating carrier performance. Section 13-801(d)(5) provides:

In measuring the incumbent local exchange carrier's actual performance, the Commission shall ensure that occurrences beyond the control of the incumbent local exchange carrier that adversely affect the incumbent local exchange carrier's performance are excluded when determining actual performance levels. Such occurrences shall be determined by the Commission, but at a minimum must include work stoppage or other labor actions and acts of war.

220 ILCS 5/13-801(d)(5).

Illinois courts have held that the presence of language in one section of an Act and absence of similar language in another section can be used to determine the intent of the General Assembly. For

example, in Freeman United Coal Mining Co. v. Industrial Comm'n, 99 Ill.2d 487 at 497 (Ill. 2d 1984), the Court applied this principle and said that: “Had this been the legislature's intent, it would have been a simple matter to either include language to that effect in the text of that section or to omit the singular wording in section 8(e)(17).” In enacting HB 2900, the General Assembly worked closely with the carriers and other parties to craft obligations and exemptions that were workable. The Commission’s rules must conform to the legislature’s determinations and not upset the balance of rights and obligations incorporated into HB 2900.

The General Assembly included work stoppages as an exemption in section 13-801(d)(5), 220 ILCS 5/13-801(d)(5), but did not include a similar exemption in section 13-712. The omission of work stoppages from the list of exemptions found in section 13-712(e)(6) demonstrates the General Assembly’s intent that such an exemption was not necessary to fairly balance the rights and obligations created by that section. As the General Assembly did not intend that a strike or work stoppage constitute an exemption, the Commission rules should not contradict that intent by defining work stoppages as an emergency situation which rises to the level of an exemption.

VI. CONCLUSION

For the foregoing reasons, the People request that the Commission find that the customer credit provisions in Part 732 are not preempted by federal law, that an exemption to carrier obligations arising under Part 732 triggered by a strike or work stoppage is preempted by federal law, and that such an exemption is contrary to the balance of rights and obligations enacted by the General Assembly as part of HB 2900. Accordingly, the Commission should not include the strike or work stoppage exemption in the definition of emergency situation in Part 732.

Respectfully submitted

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